

February 10, 2010

Mr. Bernard Kouchner  
Minister of Foreign and European Affairs  
French Ministry of Foreign Affairs  
37 Quai d'Orsay  
75351 Paris, France

RE: Response to the Ministry's Press Release on Burma, January 27, 2010

Dear Minister Kouchner,

This letter is in response to the public statement by the French Ministry of Foreign Affairs on January 27, 2010, which calls on the military junta in Myanmar/Burma to release political prisoners, including Aung San Sui Kyi, and further to make "concrete gestures" towards reconciliation prior to the junta's planned 2010 elections.

This statement fails to mention that these political imprisonments constitute grave crimes perpetrated at the direction of Senior General Than Shwe. Nor does it mention that the military's upcoming elections are to implement the 2008 constitution, which seriously breaches preemptory norms. The *jus cogens* crimes and serious breaches perpetrated with impunity in Burma impose non-derogable obligations on France and other countries to take measures to end impunity and to treat the constitution and elections as "null and void."

The Ministry's failure to either call for the junta to cease political imprisonments and other grave crimes or to demand that prisoners be accorded their rights to redress and reparations upon release, flouts both the letter and spirit of *jus cogens* principles.

We have long admired France's uncompromising stance, as a permanent member of the Security Council, on the need to end impunity for state-perpetrators of gross violations of international humanitarian law (IHL). We particularly note your personal commitment to these issues as reflected in the January 2009 concept paper

to Security Council members on increasing accountability measures for violations of IHL.<sup>i</sup>

It is within the context of France's historic leadership on ensuring global accountability that we urge you to personally clarify the position of France in regard to the impunity accorded crimes in Burma, including serious breaches of the Geneva Convention. We respectfully urge you to consider the following points:

1. **Impunity for Use of Child Soldiers in Burma:** During the period that France has served as head of the Working Group on Children in Armed Conflict, the Secretary General listed Myanmar as a consistent violator of prohibitions under Security Council Resolution (SCR) 1612 on the criminal use of child soldiers.<sup>ii</sup> Despite commitments to ensure accountability, Burma continues to recruit child soldiers with impunity.
2. **Impunity for Sexual Violence in Burma's Armed Conflict:** France was a strong proponent of the passage of Security Council Resolution 1820 to end impunity for crimes of sexual violence in armed conflict.<sup>iii</sup> The Secretary General's first Report on SCR 1820 to the Security Council, on June 15, 2009, listed Burma as a violator country, detailing the lack of criminal accountability for crimes of sexual violence perpetrated by the military against ethnic women in areas of armed conflict.<sup>iv</sup> No concrete actions have been taken to enforce SCR 1820 and Burma continues its assaults with impunity.
3. **The Geneva Conventions and Burma:** Burma has been in continuous armed conflict for over 50 years and is required to comply with Article 3 of the Geneva Conventions and other precepts of international humanitarian law. Despite ongoing serious breaches of the Conventions by the military, the global community has failed to take action on Burma necessary to "ensure respect" for the Geneva Conventions.<sup>v</sup> The International Committee of the Red Cross (ICRC) issued a "public condemnation" of Burma's violations of the Geneva Conventions on June 27, 2007.<sup>vi</sup> This public call followed a detailed protocol including that all subsidiary measures to protect the victims of armed conflict had failed and that the ICRC had personally observed IHL crimes by the military.<sup>vii</sup> The ICRC described the military's violations of the Geneva Conventions as "major and repeated" and called on the international community to follow through with its commitments "to respect and to ensure respect for the [Geneva] Conventions."<sup>viii</sup>

4. Prevention of Genocide in Burma: The International Court of Justice (ICJ) decision in 2007 clarified that, “separate from the obligation to punish”, the Genocide Convention imposes an obligation on all state parties to “employ all means reasonably available to them, so as to prevent the genocide” once a risk of genocide is made known.<sup>ix</sup> This “obligation of conduct,” regardless of its likelihood of success, has been triggered with regard to Burma including by: the 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 UN Under-Secretary has initiated at least one confidential briefing in which he raised concerns on Burma to the Security Council.<sup>x</sup>

In addition, on February 3, 2010, the Appeals Court of the International Criminal Court clarified that the level of proof on genocidal intent sufficient to support an arrest warrant is lower than proof of intent required at trial.<sup>xi</sup> Given the decades of the military strategically perpetrating crimes against the ethnic people in Burma, we urge France to reconsider its position on Burma in light of this opinion.

5. Burma’s Constitution and the Duty of Non-Recognition: The 2008 Burma constitution embodies serious breaches of peremptory norms. First, by providing the military junta with amnesties for all ICC-covered crimes, the constitution precludes any accountability in violation of treaty law and *jus cogens* principles.<sup>xii</sup> Second, by removing all military courts from any civilian oversight, including by the President, Parliament or Supreme Court, the constitution violates Article 3 of the Geneva Conventions.<sup>xiii</sup> The International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts is clear that in response to these breaches France has a duty of non-recognition and must treat both the constitution and elections as null and void. The Security Council applied these precepts in SCR 554, mandating that states regard the 1983 South African apartheid constitution and elections as null and void.<sup>xiv</sup>
6. The Ministry’s statement on January 27 calling for “concrete gestures,” without further action, is inappropriate in the context of addressing a situation arising out of serious breaches of peremptory norms. The Ministry’s statement fails to address Burma’s ongoing violations of Security Council mandates, including under SCRs 1325, 1820, 1888, and 1889, which not only prohibit amnesties but call for lustration and vetting. The constitution, however, turns the concept of vetting on its head by ensuring that key

positions in any new government will be occupied by men who are potentially criminally culpable for committing war crimes, crimes against humanity, or genocide.<sup>xv</sup> If the French Ministry decides to cooperate in these elections, it could present complications for the government, particularly, since French law, under universal jurisdiction principles, acknowledges the gravity of torture and provides an avenue for prosecuting office holders from Burma who present on French territory.<sup>xvi</sup> Prosecutions for torture could encompass rape used as a weapon of war. [See attachment on French legal obligations].

7. The Ministry's January 27, 2010 statement should take into account the May 22, 2008 Resolution of the European Parliament on Burma. This Resolution called for members to reject the "the sham constitution, and... the implausible outcome" and urged EU members to press for a Security Council referral of Burma to the International Criminal Court.<sup>xvii</sup>

We call upon France to take leadership on the issue of Burma at the Security Council and to call for a Chapter VII resolution declaring the 2008 constitution and elections null and void and referring Burma to the ICC. Such action would demonstrate the vitality of France's commitments as expressed on November 11, 2009 by Gerard Araud, Permanent Representative of France to the UN:

"... States must prosecute and punish those responsible for violations of human rights and international humanitarian law. That requires carrying out impartial and independent investigations. Should there be a failure to do so, international criminal justice systems must try the most serious crimes. France calls upon all States to accede to the Rome Statute and to cooperate with the International Criminal Court. Without real punishment there can be no prevention or discouragement of such crimes...."<sup>xviii</sup>

Burma's continuing impunity for crimes of concern to the global community encourages dictators everywhere, threatens the fundamental precepts of our world order, and perpetuates the suffering of the people of Burma who have known no life other than being prisoners in their own country.

We urge France to act now.

If not France, then who?

Sincerely,



Janet Benshoof  
President  
Global Justice Center

Attachment: Chart of France's International Law Obligations

CC: Mr. Gerard Araud  
Permanent Representative  
Permanent Mission of France to the United Nations  
245 E. 47<sup>th</sup> Street, 44<sup>th</sup> Floor  
New York, NY 10017

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<sup>i</sup> *Maintenance of international peace and security: respect for international humanitarian law*, French Concept Paper, Jan. 26, 2009. On January 14, 2009 the President of the Security Council issued a statement on behalf of the Council, recalling “the obligation of all States to ensure respect for international humanitarian law” and to “comply with their obligations to end impunity and to prosecute those responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law.” Statement by the President of the Security Council, U.N. Doc. S/PRST/2009/1\* (Jan. 14, 2009).

<sup>ii</sup> See 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 notes 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 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.

<sup>iii</sup> At the Security Council Open Debate on Resolution 1820, the French representative made the following statements:

In the first place...the fight against impunity must be intensified, more than ever. This is the way to stop the scourge, bring peace and reparation to the victims, and protect the victims against their torturers... There will be no prevention, no deterrence without real sanctions...sexual violence and more particularly rape, is unacceptable, now and in the future, regardless of the perpetrator or the continent on which it takes place...For

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France, the debate has been decided: one does not re-establish peace while remaining silent about the rape of women and the violence done to them....There is no peace without justice. We must welcome in this regard the progress of international justice which has made sexual violence a crime against humanity and in some cases a crime of genocide. Intentions and progress in law are not enough, however. The law must also be supported by action. Those who have committed such acts of violence must be sought and brought to justice.

Rama Yade, Secretary of State for Foreign Affairs and Human Rights in France, Statement to the Security Council on Women, Peace and Security (June 19, 2008).

<sup>iv</sup> The Secretary-General, Report of the Secretary-General Pursuant to Security Council Resolution 1820 (2008), ¶26, U.N. Doc. S/2009/363 (Aug. 20, 2009) (“[I]n 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.”).

<sup>v</sup> See M. Bernard Kouchner, The Savaging of Humanitarian Law, INTERNATIONAL HERALD TRIBUNE, Jan. 29, 2009 (“While the International Committee of the Red Cross is the statutory guardian of those standards, all states parties to the conventions must not only obey them but also ensure that they are obeyed by the parties in an armed conflict. What that means is that the international community has a special responsibility in ensuring compliance with international humanitarian law.”)

<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).

<sup>vii</sup> For a detailed explanation of the ICRC protocol for addressing states’ violations see International Committee for the Red Cross, *Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence*, 397-98, Vol. 7, No. 858, June 2005.

<sup>viii</sup> ICRC Press Release, *supra* note 6.

<sup>ix</sup> See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, 155 (Feb. 26).

<sup>x</sup> See Genocide Prevention Project, Mass Atrocity Red Alert, <http://www.preventorprotect.org/overview/watch-list.html> (last visited Oct. 21, 2009). It has been reported that in a private briefing by Ibrahim Gambari to the Security Council on December 16, 2005, the Council was informed that the Special Advisor on the Prevention of Genocide was concerned 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.” Jared Genser, *The Question of Genocide in Burma*, Burma Digest, March 20, 2006, available at <http://burmadigest.info/2006/03/20/the-question-of-genocide-in-burma-2/>. See UN Report from the Special Advisor on Genocide Prevention, Feb. 16, 2006, <http://www.usmmm.org/genocide/analysis/details.php?content=2006-02-16> (“I can say that I am following the situations in various countries and...in [certain] 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....”).

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*See also* 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) (“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.aegitrust.org/index2.php?option=com\\_content&do\\_pdf=1&id=94](http://www.aegitrust.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 ....”).

<sup>xi</sup> *See* Situation in Darfur Sudan (Prosecutor v. Bashir), Case No. ICC-02/05-01/09-OA, Appeals Chamber Judgment (Feb. 3, 2010).

<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.”).

<sup>xiii</sup> 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.

<sup>xiv</sup> In 1984, the Security Council 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. S.C. Res.554, ¶ 5, U.N.Doc. S/RES/556 (Aug. 17, 1984) [hereinafter SCR 554].

<sup>xv</sup> The report of the International Crisis Group on the elections in Burma lists four military generals as most likely to be the new President and Commander-in-Chief in 2010: General Thura Shwe Mahn, Major General Htay Oo, Lt. General Myint Swe and ex-General Aung Thaung. International Crisis Group, Asia Report N° 174, Myanmar: Towards the Elections, Aug. 20, 2009, 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 Common Position (EC) No. 2009/351/CFSP of 27 April 2009, 2009 O.J. (L 108) 54.

<sup>xvi</sup> Article 689 of the French Criminal Code provides, “Perpetrators of or accomplices to offences committed outside the territory of the Republic may be prosecuted and tried by French courts either when French law is applicable under the provisions of Book 1 of the Criminal Code or any other statute, or when an international Convention gives jurisdiction to French courts to deal with the offense.” C. PR. PÉN 689. Additionally, it provides, “a person guilty of committing [torture as defined in article 1 of the Convention against Torture] outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts.” *Id.*

<sup>xvii</sup> Resolution on the Tragic Situation in Burma, ¶11, EUR. PARL. DOC. P6\_TA (2008) 0231 (2008) (“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....”)

<sup>xviii</sup> Gérard Araud, Permanent Representative of France to the United Nations, Statement to the Security Council - Protection of Civilians in Armed Conflict, Nov. 11, 2009.

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