



The Honorable Hillary Rodham Clinton  
Secretary of State  
U.S. Department of State 2201 C Street NW  
Washington, D.C. 20520

April 6, 2012

By e-mail and U.S. mail

**RE: US Security Council Presidency and Next Steps on Myanmar/Burma**

Dear Secretary Clinton:

As President of the Global Justice Center (GJC) and an international law expert on Burma, I note with respect and admiration your acuity and the adroitness of your work on Burma over the past months, including the lifting of certain financial sanctions on April 4, 2012. Newly-elected Daw Aung San Suu Kyi and the National League for Democracy Party have rightfully made reforming the 2008 constitution and advancing the rule of law their top priorities. The US is now well-poised to support this process.

Under your stewardship the US has managed a nearly impossible task; encouraging steps toward democracy while keeping the entire picture in view. In particular the facts that Burma is engaged in an ongoing armed conflict against several ethnic armies, and that the Burmese military has committed war crimes with impunity, including the use of rape as a weapon of war against ethnic women.

The 2008 Burmese constitution, fully implemented in January 2011, provides the legal framework for a most singular form of government; Burma's military, the Defence Services, is an autonomous legal entity outside of the civilian government, which is designated as the sovereign state. At the same time, the Defence Services dominates the civilian government, including by the constitution's guarantee of a 25% minimum quota for the military in the Parliament. Further, the 25% guarantee can be "legally" manipulated upwards (see GJC's explanation of the military quota, attached). This is particularly important considering that the constitution can only be amended with the approval of over 75% of the Parliament; guaranteeing the military a veto over any amendments. In fact, the Commander-in-Chief of the Defence Services, Chief General Min Aung Hlaing has vowed recently (a week before the April 1, 2012 elections), to protect the constitutional guarantees of the military's "political leadership role."

The US lifting certain sanctions (the "carrot") opens up the space for the US to use a "stick" - or at least a twig, and the US holding the Presidency of the Security Council this month offers an opportunity: the April 10, 2012 Security Council consultation on Myanmar. The US should also seek to make the constitution's limits on Burma's ability to comply with SCR 1540 a part of the forthcoming report of the 1540 Committee to the Security Council.

The United States could raise the following points at the April 10, 2012 Security Council consultation on Myanmar:

- Raise the issue of the ongoing conflict in the ethnic areas and that the constitution unlawfully provides for impunity for crimes perpetrated by the Burmese military, including the use of rape as a weapon of war. Secretary-General Ban Ki-moon repeatedly ignores the amnesty provisions in the constitution despite explicit “no impunity” language in all the Security Council Resolutions (SCR) on women, peace, and security. For example, SCR 1888, which you introduced in 2009, contains the word “impunity” six times.

This failure by the UN to address the constitutional impunity issue head on is not due to lack of knowledge. The 2008 constitution’s unlawful provisions for impunity, including for military rape, were objected to in a letter dated April 9, 2009 from the US Senate Women’s Caucus on Burma (attached). It has also been mentioned in report of the Special Rapporteur on the situation of human rights in Myanmar in September 2010. Further, due to the omission of the constitutional guarantee of impunity from Secretary-General Ban Ki-moon January 13, 2012 SCR 1960 report, the GJC brought the issue to his attention (attached). It’s time the Security Council addressed this issue directly.

- SCR 1820 underscores that addressing sexual violence is critical to international peace and security and expressed “its readiness” to “adopt appropriate steps to address widespread or systematic sexual violence” when considering situations on the Council’s agenda. Since Burma is in fact on the agenda, and considering the fact that no civilian or military courts have any jurisdiction over these crimes; the International Criminal Court is the only currently available venue for justice. Accordingly, the Council should suggest that President Thein Sein sign the Rome Statute (which he can do), or absent such an action, the Security Council should refer the situation to the Court.
- Suggest Security Council members consider asking Burma to consent to a referral to the International Court of Justice (ICJ) for an advisory opinion on whether the 2008 constitution comports with international law. This would reinforce the mandate in SCR 1888 that the UN “work closely with national legal and judicial officials and other personnel in the relevant Governments’ civilian and military justice systems to address impunity.” The UN Special Rapporteur on the situation on human rights in Myanmar already called for a review of the constitution under international law in his report to the UN General Assembly on September 2011.

Absent Burma’s consent to such a request, the United States should suggest that the UN Security Council or UN General Assembly request that the ICJ issue an advisory opinion on whether the constitution comports with international law. This is a relatively quick process (at least compared to a contentious proceeding) and was done, for example, with the issue of whether Kosovo’s declaration of independence complied with international law. Such action would put the US ahead of the game on the rule of law by utilizing a UN

forum for these issues, and would support Daw Aung San Suu Kyi's constitutional reform efforts.

- SCR 1977 (2011) extended the mandates of SCR 1540 (2004) calling for strong national measures to ensure states' compliance with obligations regarding WMDs, including nuclear weapons. SCR 1977 and SCR 1540 rely on states taking all appropriate national measures "consistent with international law" to strengthen export controls and prevent unlawful access to nuclear technology, etc. However, due to the constitutional guarantees of military autonomy under the 2008 constitution, Burma does not have the capacity to comply with the mandates in 1540 and 1977.

The SCR 1540 Committee is scheduled to submit an annual programme of work (POW) to the Security Council before the end of May, and the US should ensure that the committee squarely addresses the implications of the 2008 Burmese constitution given that the military cannot be subject to the requirements of SCR 1540 (or any other Chapter VII resolutions for that matter) by the civilian government.

I respectfully urge that you consider these points when moving forward on Burma and I would be happy to provide any further details about the issues raised in the letter.

Sincerely,



Janet Benshoof  
President, Global Justice Center

**CC:**

Michael Posner, Assistant Secretary of State for Democracy, Human Rights and Labor (DRL)

Ambassador Derek Mitchell, U.S. Special Representative for Burma.

Attachments

1. GJC brief: "Election of Deflection?" on the April 1, 2012 By-Election in Burma
2. April 9, 2009 letter to the Secretary-General Ban-ki Moon from US Senate Women's Caucus on Burma
3. February 17, 2012 GJC letter to Secretary-General Ban-ki Moon regarding Report on SCR 1960