Global
Justice Center
Human Rights Through the Rule of Law

October 21, 2008

The Committee on the Elimination of all Forms of Discrimination against Women (CEDAW Committee)

Re: Supplementary Legal Points of Order: Security Council Resolutions 1325 and 1820 and their Application to the CEDAW Committee's Review of Myanmar/Burma during the 42nd Session.

Dear Committee Members:

This letter is written to supplement the submissions to this Committee on Myanmar/Burma, which is scheduled to be reviewed by this Committee during its 42nd session. The Global Justice Center is a non-governmental human rights legal organization with a long-standing interest in Burma. The Global Justice Center is currently working in partnership with the Burma Lawyer's Council, the legal arm of the democracy movement, to end the impunity afforded Senior General Than Shwe and other regime officers for serious crimes against the people of Burma. This letter seeks to assist this Committee by raising some international law points missing from other submissions.

I. The military junta representing Myanmar/Burma before this CEDAW Committee is an illegitimate and criminal regime

The military junta led by Senior General Than Shwe seeks to legitimate itself as a member of the nation of states by appearing before this Committee while simultaneously ignoring some 30 General Assembly/Human Rights Council Resolutions and Reports by eight UN Special Rapporteurs documenting violations of the Geneva Conventions and other crimes by the ruling junta and other officials of the military government. We strongly believe that Senior General Than Shwe and other top officers, along with such criminal co-conspirators as Chief Justice Aung Toe, are criminal perpetrators of those most serious crimes of concern to the international community and thus are both "incapable and unwilling" to ever comply with any of the Committee's recommendations.

II. The CEDAW Committee's mandate is broadened by United Nations Security Council Resolutions 1325 and 1820 (SCR 1325 AND SCR 1820)

As a human rights treaty body, the CEDAW Committee is legally bound by SCR 1325 and SCR 1820 which mandate gender equality measures during all stages of conflict resolution and transition including cease-fires, peacekeeping, constitutional committees and transitional justice measures. This Committee is critical to exposing the military junta's noncompliance with SCR

1325 and 1820 since the Security Council has yet to put in place a clear mechanism for monitoring, or enforcing these Resolutions. Although clearly bound by the strictures of SC 1325 and SC 1820, the Myanmar/Burma report does not mention them much less address how the state plans to comply with the Resolutions' obligations.

III. The junta "draft" Constitution differs in legally significant ways from the Burmese version of the "adopted" Constitution put to referendum on May 10, 2008

Chief Justice Aung Toe, Chairman of the military-appointed drafting commission, announced on April 9, 2008, that the Commission approved "draft" Constitution would be put to referendum on May 10, 2008.[i] However, the "adopted" Constitution of May 10, 2008 differs significantly from the approved "draft" Constitution released to the public.[ii] The "adopted" Constitution included the proviso that in the case of any conflicting language with the precursor to the Constitution, the "draft" Constitution, the "adopted" version prevails.[iii] This proviso was not included in the "draft" Constitution and is not a mere cautionary statement; there are some deliberate and key differences between the junta's "draft" Constitution" and the "adopted" Constitution.[iv] Therefore, this Committee should proceed with caution both in relying on the state's references to "the Constitution" and in making any independent Committee review relying solely on the February 2008 junta-translated English version of the "draft" Constitution. Further, this Committee should strike the Myanmar/Burma report where it cites to the 1974 Constitution.[v] Such references contradict the state's claim that the April 2008 Constitution, was "adopted" by a "92.8%" vote.[vi] For ease of reference, in this letter when we refer to the "adopted" Constitution we are citing to the official April 2008 Burmese Language version.[vii]

IV. Women's right to political participation and equality under Articles 2(a), (c) and 7 are violated by the roadmap for gender apartheid in the military-drafted Constitution

In 2000, this Committee, in its Concluding Observations on Myanmar/Burma "expresses *'hope'* that the "… new Constitution being drafted [would] guarantee gender equality and include a definition of sex discrimination"[viii] This *'hope'* was misplaced from day one.

The new Constitution goes further than any other constitution in modern times in setting forth formal guarantees of inequality, constitutionalizing gender apartheid. The Constitution requires military experience for all major government offices, including the Presidency, Vice-Presidency, key ministries and from participating in the block of military-only legislative seats.[ix] Further, the most powerful position is the Commander-in-Chief not the President, an office that is solely for the active military. The Constitution is a flagrant dismissal of democracy, enshrining military rule by giving 25% of parliamentary seats to the military,[x] allowing military leaders veto power over decisions made by Parliament and making the military and police exempt from any civilian courts.[xi] In effect, the Constitution makes it constitutionally impossible for Myanmar/Burma ever to accomplish CEDAW objectives: "to achieve broad representation in public life, women must have full equality in the exercise of political and economic power; they must be fully and equally involved in the decision-making at all levels both nationally and internationally, so that they make their contribution to the goals of equality development and the achievement of peace."[xii]

V. The Constitution embeds military rule as a constitutional mandate, requires amnesty for all junta inflicted crimes, and removes any rights to a civilian court for all military and police crimes

The Myanmar/ Burma judiciary is the right hand of the ruling junta with Chief Justice Aung Toe directly responsible for ensuring that all junta directives requiring a judicial order are carried out. Significant evidence exists that the judiciary is not only unwilling to prosecute state perpetrators of heinous crimes, but that the judiciary itself systematically facilitates or executes crimes against humanity. By using the legal system as a tool to effectuate junta crimes, certain judges, Justice Aung Toe at the top of the list, are themselves criminally culpable.

Any review of the new Constitution by this Committee must include consideration of the fact that its chair, Chief Justice Aung Toe regularly employs the prestige of his office and the façade of a rule of law to directly facilitate junta crimes. Similar cases, such as in Nazi Germany, where top judges have worked hand in hand with Hitler's criminal regime resulted in judges being convicted as co-conspirators of crimes against humanity . (See *United States of America v. Alstotter et al* 'Justice Trial' 1948, 6L.R.T. W.C.1, p.62). In the recent *Dujail* [xiii] decision, 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 façade of "judicial authority and law" to "try"" and then "execute" civilians. Fully aware of his exposure, as Chair of the Constitution Drafting Committee Chief Justice Aung Toe was able to covertly insert, at the last minute, a general amnesty for himself, Senior General Than Shwe and his cohorts.

> **Chapter XIV "Transitory Provisions," Provision No. 445 states, "No legal action shall be taken against those (either individuals or groups who are members of SLORC and SPDC) who officially carried out their duties according to their responsibilities."[xiv] (This amnesty provision only appears in the junta's Burmese version)**

This provision is a bald attempt to deny justice in face of the ample evidence that the military regime has committed war crimes, crimes against humanity and potentially even genocide through forced relocation, torture, rape, enforced disappearances and extermination. Rape reports published by ethnic women in Burma including the Shan, Mon, Karen, Palaung, and Chin, as well as by Refugees International, document sexual and other forms of violence against women systematically perpetrated by the junta and even identify perpetrators, give relevant dates and the battalion numbers of the rapists. The Shadow Report by the Women's League of Burma to this Committee provides detailed evidence that the sexual violence continues and is fueled by impunity. The junta has never released any information on how the law deals with punishment for members of the armed forces nor ensured effective access to justice and reparations. Further, UN Special Rapporteur Sérgio Pinheiro confirmed this lack of legal protection for women in his report on the situation of human rights in Myanmar/Burma. He stated that he "deeply regrets that the Government has not agreed to an independent investigation into the allegations of systematic sexual violence in Shan State. Such a culture of impunity which continues to pervade Myanmar, whereby State agents who perpetrate serious crimes are rarely prosecuted, is of grave concern."[xv] The military has enjoyed impunity for such

crimes against its own people for over 40 years and now seeks to make such impunity legal forever under its constitution.

In addition to the amnesty provision for junta actions, the Constitution also removes any rights for victims of crimes committed by the military and police to access civilian courts. All crimes of military or police go to special military courts, there is no ultimate recourse to the Supreme Court, and "The decision of the Commander-in-Chief of the Defense Services is final in military justice".[xvi]

Both the amnesty and military court provisions violate CEDAW which requires states "to prosecute and punish those who violate the human rights of women, including military personnel."[xvii] They also flout SCR 1325 and SCR 1820, which are binding law on all member states and the United Nations. SCR 1325 emphasizes, "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, and in this regard, stresses the need to exclude these crimes, where feasible from amnesty provisions."[xviii] Similarly, SCR 1820 stresses, "the need 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."[xix]

We hope that the Committee will consider addressing the following questions to the government of Myanmar/Burma:

1. It has been reported that there is more than one version of the Constitution presented to this Committee. We understand that there are differences, the most consequential concerning the granting of general amnesty to the military for past and ongoing crimes. Please explain the differences and similarities among the following:
    - The "*Fundamental Principles and Detailed Basic Principles"* ("Draft-Constitution of February 2008 published by the state in English and Burmese)
    - The "Commission-approved" Constitution in April 2008, which was put up for the referendum vote on May 10th, 2008. (Published only in Burmese)
2. In his report to the Human Rights Council dated June 3, 2008, Special Rapporteur Tomas Ojea Quintana, expressed concerns about provisions in the Constitution that, "could compromise the enjoyment of the human rights recognized under the Universal Declaration of Human Right." In his report, he requests that the Myanmar/Burma government provide him with a copy of an official English-language translation of the draft. Has the state complied with this request?
3. Where does the newly "adopted" Constitution include a definition of "discrimination" in accordance with Article 1 of the CEDAW Convention? (As recommended by this Committee in its previous concluding observations)

4. Where does the Constitution make reference to fair judicial proceedings for redress and reparations to individuals and groups? Specifically, where does it assure legal protection of the rights of women on equal basis with men?
5. Describe mechanisms and remedies available to victims of sexual violence, including rape committed against women and girls by law enforcement and military personnel and measures to bring perpetrators to justice.
6. What is the representation by percentage of persons by gender within the present bureaucracy and military organizations of Myanmar/Burma? This information is required to access progress in fulfilling Resolution 1325 (2000) which "Urges Member States to increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management and resolution of conflict." [Section 1]
7. What is the representation by percentage of persons by gender within higher public office? (Defined as the top 1000 civil, military and elected offices at all levels of government).
8. What is the representation by percentage of persons by gender with military rank of sergeant and above?
9. Please explain in detail what you mean by the phrase "naturally suited for men only" in the following section of the newly "adopted" Constitution.

> ***Chapter VIII Citizenship, Fundamental Rights and Duties of Citizens***
> Provision 352. The State shall, in appointing or assigning duties, not discriminate against or in favour of any citizen with qualifications set for posts or duties based on race, birth, religion, and sex.
> However, [nothing] in this section shall prevent appointment of men to the positions that are naturally suitable for me only.

We applaud this Committee for its strong commitment to women's rights and to international law and justice. The reality of women's lives in Burma is that violations of women's human rights must be addressed in the context of unaddressed criminal violations of international humanitarian law. The Myanmar/Burma report argues to this Committee that the new constitution, a document drafted by a Criminal Perpetrator and ensuring amnesty for the most heinous gender crimes, fulfills CEDAW's mandate for legal guarantees of equality for women. This Committee should not enable Myanmar/Burma's attempt to gain any global legitimacy by appearing before this committee and reject its report in no uncertain terms.

We hope this information is useful during the Committee's review of Myanmar/Burma's report. If you have any questions, or would like further information, please do not hesitate to contact the undersigned.

Sincerely,

Janet Benshoof
President

Zulma Miranda
Special Counsel

[i] AFP News: *Myanmar sets constitutional referendum for May 10*, Wed 9 Apr 2008

[ii] [*The Fundamental Principles and Detailed Basic Principles* ("Draft-Constitution") was released by the Commission on February 9, 2008 and was the basis for the Constitution "approved" by the National Convention in the May 10, 2008 referendum. The regime released the "Draft-Constitution" in Burmese and English – this version differs substantively from the "adopted" version put to referendum on May 10, 2008. Not unsurprisingly, most legal analysis are based on the "draft" Constitution]

[iii] Myanmar Constitution [April 2008]. Chapter (XV), *General Provisions* 452: Interpretation of the preamble, articles, clauses, words and expression contained in this constitution shall be based on Myanmar text.

[iv] *See* Special Rapporteur Tomas Ojea Quintana, *Report of the Situation of Human Rights in Myanmar*, U.N Doc.A/HRC/8/12 (3 June 2008) para.19.

[v] *Consideration of the Reports submitted by States Parties under Articles 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined second and third periodic report of States parties, Myanmar*, Art.7, para 87 , U.N.Doc.No.CEDAW/C/MMR/3 (2008)

[vi] Statement by H. E. U Wunna Maung Lwin, Ambassador/Permanent Representative of the Union of Myanmar, the 8th Session of the Human Rights Council, Geneva, 18 June 2008.

[vii] We would like to note that the Women's League of Burma "Shadow Report" of (2008) under the review of this Committee cites to the "Draft Constitution" of February 2008 in their report. Although they note that the "Draft-Constitution" and the Constitution of May 2008 only differ in format, we would like to point out that there are substantive differences, one being the Amnesty Provision under Chapter XIV of the new Constitution.

[viii] Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee),Gen. Recommendation No.23 *Political and Public Life*, 16th Session para 17, 1997.

[ix] Myanmar Constitution [April 2008]. Chapter III. The Head of the State, Provision 59 (d): The President of the Union shall be well acquainted with affairs of State such as political, administrative, economic and military affairs

[x] Myanmar Constitution [April 2008]. Chapter (IV). Legislature, Provision 109: In connection with formation of Pyithu Hluttaw, "Pyithu Hluttaw shall be formed with a maximum of 440 Hluttaw representatives as follows:(a) Not more than 330 Hluttaw representatives elected on the basis of township as well as on the basis of population from constituencies designated in accord with the law after combining a newly formed township with one of the suitable townships adjacent to it if the total number of townships exceeds 330; (b) Not more than 110 Tatmadaw member Hluttaw representatives nominated in accord with law by the Commander-in-Chief of the Defense Services.

[xi] Myanmar Constitution [April 2008]. Chapter (VII). *The Tatmadaw*, Provision 343 (a) Military justice for members of the Tatmadaw may be administered according to law by a panel or by a judge. (b) The decision of the Commander-in-Chief of the Defence Services is final in military justice.

[xii] Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), *Conclusion Observation, Principle Area of Concern and Recommendation,* Myanmar*,* 22nd Session , para 133, U.N.Doc. CEDAW/C/SR.450,451 and 457 (2000) [thereafter CEDAW Committee Rec. 22]

[xiii] n10 A1-Mahkama al-jina'iya al-'Iraqiya al-Uliya [The Iraqi High Criminal Court], al-Dujail Opinion, available at http://www.iraq-iht.org/ar/doc/finalcour.pdf, translated in Grotain Moment: The Saddam Hussein Trial Blog, English Translation of Dujail Judgment, Dec. 2006, http://www.law.case.edu/saddamtrial/dujail/opinion.asp. Unofficial English Translation of the Dujail Trial IHT Appellate Chamber Opinion, (Dec.26, 2006), www.law.case.edu/saddamtrial/documents/20070103dujailappellatechamberopinion.pdf

[xiv] Myanmar Constitution [April 2008]. Chapter XIV. *Transitory Provisions*, Provision No. 445

[xv] Special Rapporteur Sérgio Pinheiro, *Report of the Situation of Human Rights in Myanmar*, U.N Doc. A/CN.4/2006/34 (February 7, 2006).

[xvi] Myanmar Constitution [April 2008]. Chapter (VII). *The Tatmadaw*. Provision 343. (a). Military justice for members of the Tatmadaw may be administered according to law by a panel or by a judge. (b). The decision of the Commander-in-Chief of the Defense Services is final in military justice.

[xvii] CEDAW Committee Rec. 22, para 118

[xviii] UNSC. Res.1325,U.N. Doc.S/RES/1325 (31 October 2000). Para 11

[xix] UNSC. Res.1820, U.N. Doc. S/RES/1820 (19 June 2008). Para 4