

The 2008 Constitution Breaches Myanmar/Burma's Binding Obligations under International Law Including the United Nation's Charter

I. The 2008 Constitution Establishes a Civilian Government Without Full Sovereign Powers

Under the 1947 Constitution, in place when Burma applied for United Nation (UN) membership in 1948, Burma was a sovereign state.¹ The Union of the Republic of Myanmar, as established under the 2008 Constitution (the "Constitution")², is not a sovereign state as defined by international law. A "sovereign" state must have supreme power that are applicable to all institutions and citizens of the state "without accountability" to any other body. To be considered a sovereign state, the civilian government must have "paramount control of the constitution and frame of government and its administration" as well as be the person or body of persons which has no political superior.³

The Constitution is unlike any in the world in that it grants the Defense Forces complete autonomy and supremacy over the civilian government.⁴ No branch of the "sovereign" state (consisting of the legislative, executive and judicial branches) may exercise oversight over the military. The Constitution reserves 25% of Parliamentary seats for the military⁵ and Constitutional amendments require more than 75% majority for passage⁶. This essentially reserves a veto over Constitutional amendments for the military. The civilian government under these limitations does not have full sovereign powers as defined by international law.

II. The Constitution's Limitations on the Civilian Government

A. The Civilian Government Lacks the Capacity to Ensure Compliance With International Obligations, including under the UN Charter, Genocide Convention and Security Council Resolutions

The Constitution establishes the Defense Forces as outside the reach of the civilian government, including any civilian courts.⁷ President Thein Sein is legally incapable – even if willing – to enforce any laws, civil or criminal, against the military. This means Burma as a state is unable to comply with its *erga omnes* or absolute obligations under customary international law,⁸ or as a signatory to multilateral treaties such as *inter alia* the UN Charter,⁹ the Geneva Conventions and Genocide Convention¹⁰ or the Treaty on the Non-Proliferation of Nuclear Weapon (NPT).¹¹ The civilian government cannot enforce upon the military the mandates of UN Security Council Resolutions, including those relating to women, peace and security, child soldiers, nuclear non-proliferation, or sanctions against North Korea, as all states are required to do under Article 25 of the UN Charter.¹² The Constitution is therefore a *prima facie* violation of the UN Charter,¹³ an "internationally wrongful act" of a state that is so serious that it arises to the level of being a "serious breach of peremptory norms."¹⁴

Under the Constitution, women are not able to hold certain political positions, a violation of Burma's obligations under the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), which Burma ratified in 1997. Military actions with respect to forced labor and child soldiers directly contravene the 1930 Forced Labour Convention, ratified by Burma in 1955 and the Convention on the Rights of the Child, which Burma acceded to in 1991. Therefore, the limitations on the civilian government imposed by the Constitution violate multiple fundamental obligations under international law and stand in stark contrast to other new constitutions which display an openness and respect for international law, particularly as it relates to universal human rights guarantees.¹⁵

In fact, the Constitution provides only for the recognition of obligations that arise from "treaties or agreements which before the commencement of this Constitution have been in operation between the Government of the Union of Myanmar and the Government of other State."¹⁶ In other words, the Constitution only allows for recognition of obligations arising out of bilateral, rather than multilateral, treaties.

B. The Civilian Government Cannot Ensure Compliance with International Humanitarian Law

The Constitution guarantees the Defense Forces blanket immunity and amnesty for all military actions, including war crimes, crimes against humanity, and genocide, and accords the Commander-in-Chief sole power over administering any legal proceeding.¹⁷ This violates the mandates on states under the Genocide and Geneva Conventions, as well as customary international law.¹⁸

The UN Secretary-General, as recently as January 2012, reminded the Security Council of its obligation to "...reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity or gross violations of human rights and international humanitarian law."¹⁹

The Constitution also precludes compliance with the absolute duties of states under the Geneva Convention's requirement to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed" acts which violate the Conventions. This mandate of Common Article 3 of the Geneva Conventions must include access to "regularly constituted courts" which provide judicial guarantees that are "recognized as indispensable by civilized peoples."²⁰ Although the Parliament of Burma has the power to pass such legislation, there is no power to enforce those, or any, laws on the military. No court in Burma has any jurisdiction over the military or military matters, ensuring that citizens are without access to justice, including reparations, for war crimes committed by the military in violation of the Geneva Conventions.

Since the civilian government is unable to comply with its obligations to prosecute the military, international law also requires states to prosecute those who commit war crimes, regardless of their nationality. The Geneva Conventions as well as a number of other treaties oblige states to provide for universal jurisdiction over certain crimes, including those that take place during armed conflict. Further, all states are under an existing duty to act both to punish and prevent it.²¹ Recent jurisprudence of the International Court of Justice, the principal legal organ of the UN, indicates a baseline consensus regarding the right to try suspected war criminals in third party states relying upon the concept of

universal jurisdiction²² as well as the positive duty of states to act to prevent genocide once a serious risk of genocide is made known—even prior to any official court or U.N. finding.²³

C. The Civilian Government Lacks the Power to Effectively Control Burma’s Nuclear Energy and Nuclear Weapons Development

President Thein recently agreed to sign the “additional protocol” to the International Atomic Energy Agency’s (“IAEA”) safeguards, which is a laudable and positive step forward. However, it is unclear how the civilian government can enforce the protocol on the military given that the military controls Burma’s energy development projects, including nuclear power. This is also true of any IAEA, Association of Southeast Asian Nations (“ASEAN”) or UN Security Council Resolutions relating to arms and nuclear non-proliferation.²⁴ Therefore, any promises by the executive branch to comply with international legal requirements in this area are purely rhetoric, as the military enjoys complete sovereignty under the Constitution.

III. Utilizing International Law to Challenge the Constitution

A. The Myanmar Constitution (2008) Presents a Challenge to the Global Community

While constitutions are regarded as the province of sovereign states, no act of state, including a constitution, is immune from certain international law mandates, including constitutional or state legislation.²⁵ Given the seriousness of the international law breach, the international community has not only the power but the duty to “take all possible actions” to remedy the breach.²⁶ Opportunities for challenging the civilian government’s lack of sovereign capacity include submissions regarding Burma to international bodies affiliated with the UN, such as the Special Rapporteur on the Human Rights Situation Tomas Ojea Quintana, as well as Committees which review compliance with international treaties, such as CEDAW. As another avenue, Security Council Resolutions such as SCR 1540 and 1874 provide for oversight bodies to enforce measures to prevent the proliferation of Weapons of Mass Destruction. Submissions to such SCR oversight committees should also highlight these limitations.

B. Referral to the International Court of Justice

The international community can express its concern over the Constitution by referring the matter to the ICJ, which was designed to give Advisory Opinions on issues of international law. Requesting an ICJ Advisory Opinion, which is not binding, would have enormous normative value and would support the people of Burma’s determination to have a constitution that is democratic. The UN General Assembly and the Security Council, among other bodies, may request that the ICJ deliver an Advisory Opinion on an international legal question. The process is rapid; opinions implicating contentious disputes over sensitive political issues that require the court to hear from various interested parties can take as little as 18 months. Though non-binding, the Advisory Opinion carries significant legal weight and moral authority and would bolster the argument that the Constitution is the greatest stumbling block to reform.

C. Customary International Law Avenues for Addressing Constitutional Limitations

Under the laws on states' responsibilities, even in the absence of any finding by a court or the Security Council, all states are mandated to reject the validity of an internationally wrongful act that arises to the gravity of being a "serious breach of preemptory norms" under international law.²⁷ Under this body of law, the Security Council mandated states not to recognize South Africa's apartheid constitution, South Rhodesia's governing regime and Namibia's elections.²⁸ The ICJ detailed states' *erga omnes* obligations of non-recognition in its Namibia opinion finding the governing regime invalid, and in an advisory opinion on the Wall in the Occupied Palestinian Territory.²⁹ States are under a duty to take all possible measures to ensure the Burmese civilian government is capable of meeting its obligations under international law.

Conclusion

The civilian government in Burma is not a "sovereign" state since the Constitution precludes any oversight over the military. Therefore, the civilian government lacks the capacity to execute and enforce international treaties and agreements vis-à-vis the military. This lack of capacity must be addressed and removed in order for the civilian government to be able comply with its obligations under international law.

¹Constitution of the Union of Burma (1947), available at <http://www.scribd.com/doc/25420681/1947-Constitution-of-Burma-English-Version>.

²The Constitution of the Republic of the Union of Myanmar (2008) [hereinafter Myanmar Const.] available at <http://www.scribd.com/doc/7694880/Myanmar-Constitution-2008-English-version>.

³Black's Law Dictionary (6th ed. 1991). The definition of sovereignty:

The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.

The power to do everything in a state without accountability, to make laws, to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like.

Sovereignty in government is that public authority which directs or orders what is to be done by each member associated in relation to the end of the association. It is the supreme power by which any citizen is governed and is the person or body of persons in the state to whom there is politically no superior. The necessary existence of the state and that right and power which necessarily follow is "sovereignty." By "sovereignty" in its largest sense is meant supreme, absolute, uncontrollable power, the absolute right to govern. The word which by itself comes nearest to being the definition of "sovereignty" is will or volition as applied to political affairs.

⁴Myanmar. Const. Ch. VII, art. 340, 341, 342 [hereinafter Myan. Const.]. Pursuant to the Myan. Const., power over the military is vested in the Commander-in-Chief ("Supreme Commander of all Armed Forces"). The President's power is to be exercised in conjunction with the National Defense and Security Council (the "NDSC") which is controlled by the Commander-in-Chief who appoints the majority of the seats and four key ministers are appointed and remain under the control of the Commander-in-Chief: the Ministers of Defense; Foreign Affairs; Home Affairs; and Border Affairs. See also ch. III, art. 71(b) and ch. IV, art. 141(b) (one-fourth of the total number of representatives in each legislative body must be active members of the military chosen by the Commander-in-Chief). Pursuant to ch. I, art. 20(b) "The Defense service has the right to independently administer and adjudicate all affairs of the armed forces."

⁵Myan. Const. at Ch. IV, art. 109 (b), 141(b).

⁶Myan. Const. at Ch. XII, art. 436.

⁷See Myan. Const. at Ch. I, art. 20(b), states that "[t]he Defense services has the right to independently administer and adjudicate all affairs of the armed forces." See also Myan. Const. at Ch. VII, art. 343, which states that "[i]n the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive."

⁸ The *erga omnes* doctrine refers to the absolute legal obligations of states towards the international community. See Case Concerning the Barcelona Traction, Light and Power Co. (Belg. v. Sp.) (2d Phase), 1970 I.C.J. 23, at 33 (Feb. 5).

⁹See Security Council Report, *Special Research Report Security Council Action Under Chapter VII: Myths and Realities*, Jun. 23, 2008, available at http://www.securitycouncilreport.org/site/c.gKWLeMTIsG/b.4202671/k.3A9D/Special_Research_ReportbrSecurity_Council_Action_Under_Chapter_VII_Myths_and_Realitiesbr23_June_2008.htm [hereinafter "Special Research Report"].

¹⁰Convention on the Prevention of the Crime of Genocide, art. V, Dec. 9, 1948, G.A. Res. 260(A) (III) A, U.N.Doc A/Res/260(III) [hereinafter "Genocide Convention"]; Burma ratified the Genocide Convention on March 14, 1956. Geneva Conventions Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Burma ratified the Geneva Conventions on August 25, 1992. "As a party to the Genocide Convention and the Geneva Conventions, Myanmar is required to punish perpetrators of genocide and grave breaches of the Geneva Conventions in national courts or

tribunals, regardless of the perpetrators' political affiliation or military status. Furthermore, recent developments in customary international law indicate that national laws cannot provide amnesty for crimes against humanity or other serious violations of international humanitarian law." International Center for Transitional Justice, *Submission to the Universal Periodic Review of the UN Human Rights Council*, at 4 (Jan. 2011), available at <http://ictj.org/sites/default/files/ICTJ-Myanmar-Periodic-Review-2010-English.pdf>.

¹¹Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161.

¹²See e.g., S. C. Res. 1695, U.N. Doc. S/RES/1695 (2006); S. C. Res. 1718, U.N. Doc. S/RES/1718 (2006); S. C. Res. 1874, U.N. Doc. S/RES/1874 (2009); S. C. Res. 1887, U.N. Doc. S/RES/1887 (2009); S. C. Res. 1928, U.N. Doc. S/RES/1928 (2010). See also U.N. Doc. S/Res 1325 (2000), 1612 (2005), 1674 (2006), 1820 (2008), 1882 (2009), 1888 (2009), 1889 (2009) and 1960 (2010); See also Doc. S/RES/1612 (2005), 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003) and 1539 (2004).

¹³U. N. Charter art. 24-25, 41, available at www.unhcr.org/refworld/docid/3ae6b3930.html [hereinafter U.N. Charter].

¹⁴ "A peremptory norm of general international law is a norm accepted and recognized by the international legal community of States as a whole as a norm from which no derogation is permitted..." Vienna Convention on the Law of Treaties, art.53, May 23, 1969, 1155 U.N.T.S. 331.

¹⁵Vereshchetin, Vladlen S., *New Constitutions and the Old Problem of the Relationship between International Law and National Law*, 7 EJIL 29 (1996).

¹⁶Myan. Const. at Ch. XV, art. 456.

¹⁷See, Myan. Const., at Ch. XIV, art. 445. ("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.")

¹⁸ See Opening Statement of Patricia O'Brien, UN Under-Secretary-General for Legal Affairs, at the 36th Meeting of the Committee of Legal Advisers on Public International Law (Oct. 7, 2008) ("The UN does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international Humanitarian law."). See also Statement by the President of the Security Council. U.N. Doc. S/PRST/2009/1* (Jan. 14, 2009) ("Stress the need for the exclusion of, and reject any form of, or endorsement of, amnesty for genocide, crimes against humanity, war crimes or other serious violations of human rights in conflict resolution processes and ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court.")

¹⁹ U.N.S.C. Rep. of the Security Council, 67th Sess., 6705th mtg. at 3, UN Doc. S/PV.6705 (Jan. 19, 2012).

²⁰Geneva Convention (III) Relative to Treatment of Prisoners of War, art. 3(1)(d), Aug. 12, 1949, 75 U.N.T.S. 135.

²¹ See Juan E. Mendez, Special Adviser to the U.N. Secretary-General on the Prevention of Genocide, Lecture at the Nuremberg Human Rights Center: Prosecution and Prevention of Genocide: Current Developments and Historical Experience (Oct. 6, 2006), at 2, available at http://www.responsibilitytoprotect.org/files/60_Nuremberg.pdf ("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, Declaration by the Stockholm International Forum, (Jan. 28, 2004), available at http://www.aegistrust.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 . . .").

²² Case concerning the Arrest Warrant issued against the Minister for Foreign Affairs of the Democratic Republic of the Congo by a Belgian Court (Democratic Republic of the Congo v. Belgium), 2002 ICJ Reports (Feb. 14).

²³ 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).

²⁴ For a full description of the constitution and the military's nuclear monopoly, see generally Global Justice Center's Burma Nuclear Strategy, available at <http://globaljusticecenter.net/publications/Reports/Burma's-Nuke-Strategy.pdf>, pp. 7-10, 16-18.

²⁵Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports, at p.136 (July 9).

²⁶Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts art.40-41, U.N. Doc.A/56/10 (2001) [hereinafter Draft Articles on State Responsibility].

²⁷ Draft Articles on Responsibility of States for Internationally Wrongful Acts, at arts. 29-30, 40-41, UN GAOR, 56th Sess. Supp. No. 10, UN Doc. A/56/10 (2001), available at <http://www.un.org/law/ilc>. For a general discussion of cessation requirements, see Shelton, Dinah, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L LAW 833 (2002), at 839.

²⁸ S.C. Res. 554, U.N. Doc. / S/RES/554 (Aug. 17, 1984) (the Security Council in regards to South Africa's apartheid constitution "strongly rejects and declares as null and void the so-called "new constitution" and the "elections"); S.C. Res. 216, U.N. Doc. S/RES/216 (Nov. 12, 1965) (mandating non-recognition of regime in South Rhodesia); S.C. Res. 439, U.N. Doc. S/RES/439 (Nov. 13, 1978) (declaring elections in Namibia "null and void").

²⁹Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Reports, at 12 (June 21); Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, at p.136 (July 9).