



## ***STRICT OBSTRUCTION:*** **HOW BURMA'S CONSTITUTION BLOCKS THE BURMESE GOVERNMENT FROM ESTABLISHING DEMOCRACY AND THE RULE OF LAW**

### **I. Burma's Constitution Establishes A Framework Limiting The Civilian Government's Ability to Effect Democratic Change**

The Burmese civilian government's tentative steps toward democratic reform are undermined by structural barriers to the achievement of a stable and peaceful democracy. The biggest obstacle to democracy, as identified by Daw Aung San Suu Kyi and others, are provisions of the 2008 military-drafted constitution (the "Constitution") which deny any branch of the "sovereign" state (consisting of the legislative, executive and judicial branches) oversight over the military (the *Tatmadaw* or "Defense Forces"). While change must come from within Burma, the civilian government cannot succeed in establishing true democratic reforms given the limitations imposed by the Constitution without the support of the international community.

#### ***What are these structural barriers?***

- Burma's Constitution is unlike any in the world in that it establishes the military as a separate and autonomous legal entity *outside of and supreme over the civilian "sovereign" state*, yet with the specific "objective" of allowing the Defense Forces to participate in the "National political leadership" role of the state;<sup>1</sup>
- The President, designated as "Head of State," has no sovereign power over the military or military-controlled territories;<sup>2</sup>
- The Commander-in-Chief is exempt from all legal constraints (including prosecution for genocide and war crimes), is unanswerable to any representative of the legislative or judiciary and has the sole right to administer and adjudicate all affairs of the Defense Forces;<sup>3</sup>
- No qualifications for appointing the Commander-in-Chief are set out in the Constitution, no parliamentary approval of his appointment is required and no means are set forth for his removal;
- The National Defence and Security Council, the most powerful non-elected body under the Constitution, consists of 11 officials, 6 of whom must be active-duty military personnel;<sup>4</sup>
- The President must obtain the approval of the Commander-in-Chief for some of his actions yet the Commander-in-Chief cannot be removed by the President and has the right to "take over and exercise State sovereign power" by declaring a state of emergency.<sup>5</sup>

#### ***Can the civilian government dismantle these barriers?***

The civilian government is unable to alter the limitations of the Constitution without military consent. The Constitution guarantees that 25% of Parliamentary seats be reserved for the military, and that Constitutional amendments require more than 75% of Parliamentarians to vote in favor of an amendment.<sup>6</sup> This structure essentially reserves for the military a veto over Constitutional amendments, thereby ensuring that the civilian government will only be able to implement “democracy” to the extent and as approved by the military. UN Special Rapporteur on the situation of human rights in Myanmar, Tomas Quintana, has noted recently that “if the military continues to exercise unchecked powers and occupy centre stage, civilian rule and the overall democratic process will be undermined.”<sup>7</sup>

### ***Can the judiciary be a catalyst for change?***

No. Daw Aung San Suu Kyi recently lamented that the current judiciary system in Burma is “practically non-existent” and therefore not a viable force for ensuring democracy and establishing the rule of law.<sup>8</sup> Jurisdiction over military matters is removed from civilian courts, with the decision of the Commander-in-Chief being final and conclusive. Furthermore, in setting forth the qualifications for the Supreme Court, the Constitution requires at least ten years of judicial experience.<sup>9</sup> The only judges capable of fulfilling such a requirement are judges who were in “power” under the military junta and who were complicit in ordering the false arrest and imprisonment of innocent Burmese citizens, including Daw Aung San Suu Kyi.<sup>10</sup> Additionally, the President has no power to appoint or dismiss Supreme Court justices. For these reasons, establishing accountability, transparency and the rule of law in Burma via the judiciary is structurally impossible under the Constitution.

## **II. Burma’s Civilian Government Cannot Comply with its Obligations Under International Law**

The system of bifurcated sovereignty established by the Constitution, with the military operating outside of the sovereign “civilian” state, means that Burma is incapable of fully complying with its obligations under international law. The civilian government, whether under President Thein Sein or another president, is unable to enforce on the military Burma’s legal obligations under customary international law, or as a signatory to multilateral treaties such as *inter alia* the United Nations (“UN”) Charter, the Geneva Conventions and the Genocide Convention. Further, the civilian government cannot enforce upon the military the strictures of Security Council Resolutions relating to peace and security or nuclear non-proliferation, as it is required to do under Article 25 of the UN Charter. Therefore, Burma is a state without the full sovereign powers necessary to comply with its duties and obligations under international law. We urge the UN to request that the International Court of Justice (“ICJ”) issue an advisory opinion to determine whether the Constitution is in accordance with international law (*see* Section V below).

## **III. Burma’s Constitution Grants Permanent Impunity to the Military for Crimes Against Humanity and War Crimes, Including Rape**

The Constitution accords the military amnesty for any and all of their crimes, including sexual violence against women. This allows the military to operate in a “law-free zone.”<sup>11</sup> Neither the President nor any branch of the civilian government can fire the Commander-in-Chief nor in any

way hold the military accountable for its actions. This renders the civilian government unable to fulfill its obligations under international law, such as prosecuting all persons suspected of war crimes.

The UN Security Council has identified Burma as being “credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict.”<sup>12</sup> The Burmese military has also been cited repeatedly for its recruitment and use of child soldiers.<sup>13</sup> However, because of the amnesty guarantee in the Constitution, no citizen who is a victim of these crimes has access to justice as no civilian court has jurisdiction to try any actions of the military.<sup>14</sup>

On January 19, 2012, the UN Secretary-General called on the Security Council to “... reject any endorsement of amnesty for genocide, war crimes, or crimes against humanity or gross violations of human rights and international humanitarian law.”<sup>15</sup> In addition, the Security Council mandates accountability in Resolution 1820 for sexual violence in armed conflict.<sup>16</sup> Nevertheless, the Secretary-General’s January 2012 report to the Security Council discussing war rape in Burma<sup>17</sup> fails to inform the Council about the amnesty provision, although the issue of blanket amnesty for crimes of Burma’s military has been repeatedly brought to the attention of the UN.<sup>18</sup> Further, the ability of the United Nations to assist ethnic groups involved in armed conflict, or be involved in peace processes is limited. The UN has made clear it cannot endorse peace agreements which include a blanket amnesty for international crimes<sup>19</sup> such as those covered by the Rome Statute for the International Criminal Court. Thus the broad impunity accorded the military violates fundamental strictures established by the international community and international laws.

#### **IV. Burma’s Constitution Establishes Permanent Gender Apartheid**

Burma’s Constitution is *sui generis* in modern history for its formal guarantees of gender inequality, amounting to *de jure* and *de facto* gender apartheid.<sup>20</sup> The Constitution reserves top offices, such as Commander-in-Chief, several ministry positions, and 25% of all parliamentary seats, for active military officers.<sup>21</sup> Since women may not enlist in the military, they are essentially barred from filling these offices. The Constitution thus ensures that women are not equal under the law, which is in direct opposition to Burma’s obligations under international law, including those under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Security Council Resolution 1325 and the International Covenant on Civil and Political Rights.

#### **V. Burma’s Constitution: A Threat to Peace? Let the International Court of Justice Decide**

The Burmese Constitution raises serious questions under international law since it establishes a framework in which the sovereign state cannot meet its obligations as a member state of the UN and as a signatory of international treaties. In order for the global community to address this contravention, the Global Justice Center recommends that states do what the UN Charter calls for in this situation: Refer the question to the ICJ for an Advisory Opinion.

The General Assembly and Security Council have the authority to refer ‘legal questions’ to the ICJ for clarification and the court has said that “the fact that a question has political aspects does not suffice to deprive it of its character as a legal question.”<sup>22</sup> This for example was done to determine the legality of Kosovo’s declaration of independence under international law.<sup>23</sup>

The advisory process is different from a state-to-state complaint and can be accomplished via an expedited judicial process. The Kosovo case took approximately a year and a half from the passage of the General Assembly resolution to the date of the opinion. GJC believes that it is imperative for the global community to confront head-on the illegality of the Constitution by seeking counsel from the ICJ, which was established exactly for this purpose, in order to support and assist the work of Burmese democracy activists on the ground.

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<sup>1</sup> Constitution of the Republic of the Union of Myanmar (2008) [hereinafter Myanmar Const.], at ch. I, art. 6(f).

<sup>2</sup> See Global Justice Center, Putting Democracy Out of Reach: How Burma's New Government Violates the Law of Nations and Threatens Global Peace and Security (Jan. 2012), available at: <http://www.globaljusticecenter.net/news-events/news/2011/BurmaWhitePaper.pdf>

<sup>3</sup> Myanmar Const., *supra* note 1, at ch. I, art. 20(b).

<sup>4</sup> Myanmar Const., *supra* note 1, at ch. V, art. 20.

<sup>5</sup> Myanmar Const., *supra* note 1, at ch. I, art. 40(c).

<sup>6</sup> Myanmar Const., *supra* note 1, at ch. XII, art. 436 (a) (“[Important provisions] of the Constitution shall be amended with the prior approval of more than seventy-five percent of all the representatives.”)

<sup>7</sup> UN Special Rapporteur on Burma Tomas Quintana, 2012 Special Report to the Human Rights Council (A/HR/19/67).

<sup>8</sup> [www.irrawaddy.org/archives/15172](http://www.irrawaddy.org/archives/15172).

<sup>9</sup> Myanmar Const., *supra* note 1, at ch. 6, art. 301.

<sup>10</sup> See Mr. Tomas Ojea Quintana, U.N. Special Rapporteur on Human Rights Situation in Burma, Fourth Core Human Rights Element: Judiciary, Human Rights Situation in Myanmar, Sept. 5, 2008, at 21; Ko Wild, *President changes his chief justice nominee* (Feb. 17, 2011) available at <http://www.mizzima.com/news/inside-burma/4895-president-changes-his-chief-justice-nominee.html>.

<sup>11</sup> Myanmar Const. *supra* note 1, at 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.”)

<sup>12</sup> U.N. Security Council, 6453rd Meeting, "Resolution 1960 (2010)" (S/RES/1960), 16 December 2010.

<sup>13</sup> Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/HRC/21/38 (Jun. 28, 2012). The United Nations, and other organizations, signed with Burma a Joint Action Plan to End Recruitment of Child Soldiers on June 27, 2012. It should be noted that this Joint Action Plan was signed on behalf of Burma not only by a representative of Burma's Ministry of Defence but also by a representative of the Tatmadaw. See *Press Conference on Action Plan to End Recruitment of Child Soldiers in Myanmar*, [www.irrawaddy.org/archives/7955](http://www.irrawaddy.org/archives/7955).

<sup>14</sup> Myanmar Const., *supra* note 1, at art. 343 (stating that “[i]n the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive.”)

<sup>15</sup> U.N. SCOR, 67th Sess., 6705th mtg. at 3, U.N. Doc. S/PV.6705 (Jan. 19, 2012).

<sup>16</sup> S/RES/1820 (2008).

<sup>17</sup> The Secretary-General, Report of the Secretary-General on Conflict-related sexual violence, ¶¶ 39-41, delivered to the Security Council and the General Assembly, U.N. Doc. S/2012/33, A/66/657 (Jan. 13, 2012) (“SG 2012 1960 Report”).

<sup>18</sup> Letter to Ban-ki Moon, Secretary General, United Nations, from U.S. Senate Women's Caucus on Burma, (Apr. 9, 2009) (“The constitution...attempts to give amnesty to the military junta and thus deny access to justice for the victims of the military regime's systematic sexual violence against ethnic minority women.”); Special Rapporteur on the situation of human rights in Myanmar, Report of the Special Rapporteur on the situation of human rights in Myanmar, ¶ 68, U.N. Doc. A/65/368 (Sept. 15, 2010) (“If the Government fails to assume this responsibility, then the responsibility falls to the international community. In this respect, of particular concern is article 445 of the 2008 Constitution, which may impede the Government from effectively addressing justice and accountability in the future.”).

<sup>19</sup> Office of the High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Amnesties at 2, U.N. Doc. HR/PUB/09/1 (2009), available at: [http://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf).

<sup>20</sup> 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) (“[t]o 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.”)

<sup>21</sup> Myanmar Const., *supra* note 1, at arts. 141, 161(d), 201, 232.

<sup>22</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory

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Opinion, 2010 I.C.J. 141 (July 22).

<sup>23</sup> *See* United Nations General Assembly Resolution 63/3 requesting an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence by Kosovo is in accordance with international law (A/RES/63/3).