

Global Advancement in Women's Rights Under International Law

How the 2008 Constitution of Myanmar/Burma Violates International Laws Guaranteeing Women's Rights

The rights of women under international law, including the right to occupy—not just run for—positions of political power, have radically advanced over the last 20 years. Under international law, a democracy based on true political participation requires that women, including ethnic minorities, occupy positions of power. In Burma,¹ the allocation of positions of power should be commensurate with the fact that women are one-half of the population of Burma. International laws binding upon Burma, including Security Council Resolution 1325 and the Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”), require significant numbers of women in all areas of governance, including ceasefire and peace treaty negotiations, constitution drafting committees, political party candidates for office, and executive branch appointments, including diplomats. International humanitarian law (“IHL”)—the corpus of laws governing armed conflict—now recognizes the rights of women victims of armed conflict to accountability for all forms of gender crimes (see 2012 Global Justice Center Report “The Gender Gap and Women’s Political Power in Myanmar/Burma”).² International tribunals for the former Yugoslavia and Rwanda were set up (in 1993 and 1994, respectively) by the United Nations (“UN”), with their statutes requiring the appointment of a significant number of women judges and prosecution for gender crimes.³ Additionally, the Rome Statute establishing the International Criminal Court (“ICC”) explicitly requires prosecution for gender crimes; in fact, the ICC prosecutor is mandated to take affirmative remedial steps to address sexual violence.⁴

Militarization and its Effects on Women's Rights in Burma

The militarization in Burma has perpetuated a gender gap and a long history of inequality in power that has been immune to international law. Women are not admitted into active military service, effectively excluding them (as well as ethnic minorities) from political participation, due to the fact that under the State Peace and Development Council (“SPDC”) top political offices were reserved for the military. The military has also rendered women ineligible for employment, education, business, joint venture and travel opportunities created by military status. The constitution of the Union of the Republic of Myanmar (“Constitution”),⁵ drafted in 2008, retains the Defense Services (“Tatmadaw”) as an integral and permanent part of the machinery that governs Burma and guarantees it complete power and legal autonomy. The Constitution is the main obstacle preventing women in Burma from enjoying the rights guaranteed them by international law.

The 2008 Constitution Establishes a Civilian Government That Cannot Exercise Sovereign Powers

The Constitution violates international law and the rights of the Burmese people, especially women, by establishing a structure in which the civilian government of the Union of the Republic of Myanmar *lacks the sovereign powers of a state under international law*. A sovereign must possess the “supreme, absolute and uncontrollable” power to govern as well as have no political superior.⁶ Because the Constitution provides that the “Defense Services,” ruled solely by the military Commander-in-Chief, is a legally autonomous entity *outside of the sovereign state*, the civilian government, defined as the executive, legislative and judicial branches, is not a true sovereign.

The civilian government does not enjoy the requisite authority to govern and apply laws against the military which is protected by the Constitution from any checks and balances from the civilian government. Therefore, the civilian-elected government has no authority to enforce any domestic law against the Commander-in-Chief or the military. Nor can the civilian government carry out against the military the requirements of any international treaty, including CEDAW, the Genocide or Geneva Conventions, the Treaty on the Non-Proliferation of Nuclear Weapons, or, for that matter, the UN Charter. Therefore, since the civilian government does not have absolute authority, it is not a “sovereign” power as defined by international law.

The Constitution Establishes Gender Apartheid

The Constitution is *sui generis* in modern history for its formal guarantees of women’s inequality, amounting to *de jure* (legal) and *de facto* (actual) gender apartheid.⁷ Women are excluded from the military except in honorary positions and thus are precluded from holding the top offices reserved for active military officers, including Commander-in-Chief, several ministry heads and the twenty-five percent of parliamentary seats reserved for the military.

The President is the constitutionally-responsible head of state under the Constitution with sole executive power. Under the Constitution, the President is required to have a military “vision or outlook.” This vague language could easily be used to require that the President have military experience, which excludes women.⁸

The military, as a privileged class, automatically assumes state powers in the legislature, executive, and judiciary, which is contrary to the major concept of the rule of law which states, *inter alia*, that every person is equal before the law. Given that women are largely excluded from the military in Burma, the 25% of legislative seats reserved for the military are unavailable to women which violates all of CEDAW, to which Burma is a state party.

Unlike the 1947 Constitution,⁹ the 2008 Constitution implicitly limits women’s participation in government; Chapter VIII, article 352, states:

"The Union shall, upon specified qualifications being fulfilled, in appointing or assigning duties to civil service personnel, not discriminate for or against any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, and sex. However, nothing in this Section shall prevent appointment of men to the positions that are suitable for men only."¹⁰

There is no limit to the number of positions the government can deem not suitable for women. The Constitution's legitimization of unequal opportunities for women conflicts with guarantees under CEDAW, UN Security Council Resolution 1325, the International Labor Organization ("ILO") and the 1926 Treaty on Political Rights for Women, as well as the International Covenant on Civil and Political Rights,¹¹ all of which are binding on Burma. The Constitution also reserves three of the most powerful ministries, Defense, Home Affairs, and Borders Affairs, for the military, putting those offices permanently out of reach of women.¹²

The Constitution's Impunity Guarantees for the Military, Including for Rape as a Crime Against Humanity, Violate International Law

The Constitution provides **blanket** amnesties for all crimes committed by the military.¹³ This amnesty provision ensures permanent disrespect for international humanitarian law because it shields the military from accountability for war crimes, genocide and crimes against humanity. Protecting the military from being brought to justice for war crimes is a serious breach of preemptory norms striking at the heart of Burma's intransgressible obligations under the Geneva Conventions (as well as under other international treaties such as the Genocide Convention) which codify international humanitarian law. These tenets are considered sufficiently fundamental as to be part of customary international law; therefore, all states must observe these tenets, even if not party to the Geneva Conventions.

Since immunity clauses are in direct violation of treaty obligations and customary international law, the United Nations is prohibited from recognizing the legitimacy of such amnesty provisions.¹⁴ On January 19, 2012, the UN Secretary-General himself 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 law."¹⁵ The UN has also made clear that it cannot endorse peace agreements that include a blanket amnesty for international crimes, such as war crimes covered by the Rome Statute of the International Criminal Court.¹⁶

This blanket immunity clause also provides amnesty for sexual violence against women, in particular ethnic women in conflict areas. UN Security Council Resolutions relating to "Women, Peace and Security" mandate accountability for perpetrators of sexual violence in conflict; specifically, Security Council Resolutions 1325, 1820 and 1960 detail requirements for protecting women from sexual violence.¹⁷ Therefore, the Constitution's guarantee of amnesty for the military is a direct violation of international law.

The Constitution Precludes Judicial Oversight of the Military's Actions

Under the Constitution, civilian courts have no legal capacity to prosecute the perpetrators of *jus cogens* crimes including genocide, war crimes, crimes against humanity or sexual violence. Jurisdiction over military matters is removed from all civilian courts, with the Commander-in-Chief's decisions deemed final and conclusive.¹⁸ Victims of crimes committed by the military cannot access civilian courts nor can women victims sexually assaulted during conflict ever sue for civil damages. All crimes committed by the military are adjudicated by special military courts where there is no ultimate appeal to the Supreme Court.¹⁹

These restrictions run counter to 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 Geneva Conventions.²⁰ The right to a fair trial for alleged perpetrators of crimes includes access to "regularly constituted courts," which provide judicial guarantees that are "recognized as indispensable by civilized peoples."²¹ Therefore, victims are without access to justice via civilian courts in violation of the Geneva Conventions. Women subject to sexual violence also must also be provided access to justice as per Security Council Resolutions, such as SCR 1325 and 1830, designed to end impunity for sexual violence in conflict settings.²²

Conclusion

Women's voices must be heard as a collective political bloc and women's political influence must be proportionate to their numbers in the population. Women have been unable to participate in formal governing structures throughout Burmese history, and the Constitution formally legalizes women's disengagement from the political process. The Constitution thereby guarantees that the voices of women in Burma can never be heard. For a full discussion of remedies available to challenge the inequalities embedded in the Constitution, including requesting that the International Court of Justice deliver an Advisory Opinion on whether the Constitution is in accordance with international law, see the 2012 Global Justice Center Report "The 2008 Constitution Breaches Myanmar/Burma's Binding Obligations Under International Law Including the United Nation's Charter."

¹ Hereinafter "Myanmar/Burma" shall be referred to as "Burma"

² The four Geneva Conventions of 1949 govern the treatment of certain groups during armed conflict and constitute "international humanitarian law," along with additional international norms and customs. *See generally* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; collectively, the "1949 Geneva Conventions." Three articles are common to all four Conventions: common Article 1, common Article 2 and common Article 3.

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- ³See Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 5, 13 *ter*(b), U.N. Doc. S/RES/827(May 25, 1993)(subsequently amended, citations omitted); Statute of the International Criminal Tribunal for Rwanda arts. 3-4, 12 *ter* (b), U.N. Doc. S/RES/955 (Nov. 8, 1994)(subsequently amended, citations omitted).
- ⁴Janet Benshoof, *Global Justice and Legal Issues*, 700, 707 (2012) *Encyclopedia of Global Studies*. Santa Barbara, CA: Sage.
- ⁵MYANMAR CONST. (2008).
- ⁶BLACK'S LAW DICTIONARY, Sovereignty, (6th ed. 1990).
- ⁷Committee 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).
- ⁸MYANMAR CONST. at ch. IV, art. 190.
- ⁹See BURMA CONST. art. 13-15 (1947) (Article 13 – “All citizens irrespective of birth, religion, sex or race are equal before the law’ that is to say, there shall not be any arbitrary discrimination between one citizen or class of citizens and another”; Article 14 – “There shall be equality of opportunity for all citizens in matters of public employment and in the exercise or carrying on of any occupation, trade, business or profession”; Article 15 – “Women shall be entitled to the same pay as that received by men in respect of similar work”).
- ¹⁰ MYANMAR CONST. at ch. VIII, art. 352.
- ¹¹See Global Justice Center Report, “Myanmar/Burma’s Binding Obligations Under International Law.”
- ¹²MYANMAR CONST. at ch. V, art.232(ii)-(iii).
- ¹³MYANMAR CONST. at ch. XIV, art.445.
- ¹⁴See 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.”).
- ¹⁵ UN SCOR, 67th Sess., 6705th mtg. at 3, UN Doc. S/PV.6705 (Jan. 19, 2012).
- ¹⁶ Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, at 2. UN Doc HR/PUB/09/1 (2009) available at: http://www.ohchr.org/Documents/Publications/amnesties_en.pdf.
- ¹⁷See S.C. Res.1325, ¶11, U.N. Doc. S/RES/1325 (Oct. 30, 2000) [hereinafter SCR 1325]; SCR 1820, ¶4, U.N. Doc. S/RES/1820 (June 19, 2008) [hereinafter SCR 1820].
- ¹⁸MYANMAR CONST. at ch. VII, art.343(b).
- ¹⁹MYANMAR CONST. at ch. VII, art.343(b).
- ²⁰First Geneva Convention at art. 49.
- ²¹ Geneva Conventions, common art. 3.
- ²²See SCR 1325; SCR 1820.