

FACT SHEET | OCTOBER 2018

Structural Barriers To Accountability For Human Rights Abuses In Burma

Recent reports detailing the heinous human rights abuses committed in Rakhine State in Burma have triggered calls for perpetrators to be held accountable, both domestically and internationally. The Office of the Prosecutor of the International Criminal Court (“ICC”) has opened a preliminary examination¹ and the UN Human Rights Council has established an investigative mechanism to collect, preserve, and analyze evidence of crimes.² International action is not only justified but absolutely necessary given the impossibility of holding perpetrators to account using domestic justice mechanisms. Decades of unchecked human rights abuses against ethnic groups in other areas of Burma and deeply-entrenched domestic structural barriers preventing accountability have emboldened the military and contributed to the current crisis. Without international action to address and tackle Burma’s culture of impunity and the structural barriers that underpin them, this pattern will likely continue unabated.

This Fact Sheet details the domestic structural barriers that impede accountability for perpetrators and preclude justice for victims of human rights abuses in Burma. These obstacles, formalized with the “adoption” by a spurious referendum of a new Constitution of the Republic of the Union of Myanmar (the “Constitution”) in 2008, prevent any full accounting for human rights violations committed by the military (the “*Tatmadaw*” or “Defense Forces”) in Burma. Obstacles outlined in this Fact Sheet include: (1) constitutional supremacy and autonomy of the military; (2) constitutional guarantees of impunity; (3) military emergency powers; and (4) lack of an independent and accountable judicial system.

Understanding the domestic structural impediments to accountability for the military is crucial to understanding the circumstances that give rise to these offenses and lead to the inevitable conclusion that unless these barriers are dismantled, human rights abuses will go unpunished and a true democracy will not take hold in Burma. Moreover, a situation of national unrest gives the military great powers under the Constitution capable of emboldening and further empowering the military.

While the increasingly volatile situation and humanitarian crisis in Rakhine State highlight military abuses and impunity, the *Tatmadaw* has for decades engaged in armed conflict with multiple ethnic groups in Burma. These long-running conflicts are characterized by human rights abuses perpetrated by the military that have gone unpunished and continue today in multiple regions, including Shan and Kachin states. The situation in Rakhine State must be understood not in isolation but as part of a continuum, and as another example of how impunity for human rights abuses committed by the military is the rule, not the exception, in Burma.

The Constitution Formalizes Military Autonomy and Impunity

Despite overtures of a transition toward democracy, Burma’s political landscape remains tightly controlled by the same military regime that has systematically abused and discriminated against ethnic groups for decades. This control is embedded in the Constitution, which gives the military complete autonomy without civilian control and oversight, protects military and governmental actors from accountability for human rights abuses, and grants the military extraordinary powers during “states of emergency.”

► Military supremacy and autonomy

- While the military is an autonomous legal entity that participates in the “[n]ational political leadership” role of the state, the Constitution does not give any branch of the “sovereign” state (consisting of the

legislative, executive, and judicial branches) oversight over the military.³ The civilian government, including the President and State Counsellor, cannot check the actions of the military or its members because the Constitution simply does not give it any power over the military or military-controlled territories, and the role of the Defense Services is defined broadly as, *inter alia*, “safeguarding the non-discrimination of the Union, the non-disintegration of National solidarity and the perpetuation of sovereignty.”⁴ Therefore, with its extensive powers and without checks and balances, the military has complete sovereignty. This includes the power to ignore Burma’s legal obligations under international law, international humanitarian law, and customary international law.

- The civilian government is unable to alter the limitations of the Constitution without military consent. The Constitution guarantees that 25% of Parliamentary seats are reserved for the military and requires that Constitutional amendments be passed with more than 75% of Parliamentarians voting in favor of an amendment. This ensures a military veto over any attempts to limit its power.⁵
- The National Defence and Security Council (“NDSC”), the most powerful non-elected body under the Constitution, consists of eleven officials, six of whom are selected by the Defense Services and are answerable to the Commander-in-Chief.⁶ The powers of the NDSC include formulating policy with respect to security issues.
- The military appoints the Ministers of Home Affairs, Border Affairs, and Defense, and can co-ordinate with the President on the appointment of all other ministers.⁷ There is no requirement that members of the military appointed as ministers retire or resign from the military; thus, they remain answerable to the Commander-in-Chief.⁸
- The Minister of Home Affairs, who is appointed by the military, is the head of the General Administration Department (the “GAD”) which is the “bureaucratic backbone” of the country.⁹ The GAD controls all the essential functions of state administration and decision-making down to the local level, including collection of taxes, land management and registration, and certification procedures, and has authority to “coordinate, communicate among and convene other government actors.”¹⁰ This system puts the military in charge of all the most important state functions and makes all members of the GAD accountable, by extension, to the Commander-in-Chief. Moreover, any directive from the civilian government, including instructions regarding accountability for human rights abuses, is implemented through the police and the GAD, both of which are headed by military appointees.
- The Constitution does not set forth any qualifications for the Commander-in-Chief, nor does it allow for parliamentary approval of his appointment or procedures for his removal. The Commander-in-Chief can, however, prompt impeachment proceedings against the President through his control of over 25% of the members of each legislature.¹¹

► **Protection from criminal accountability**

- The Commander-in-Chief of the *Tatmadaw* is exempt from all legal constraints (including prosecution for war crimes and genocide) within Burma and has the sole right to administer and adjudicate all affairs of the Defense Forces; his judgment is “final and conclusive.”¹² This means that any legal proceeding relating to any military matter or committed by a member of the military is adjudicated by the military, without any input from the civilian government, including the judiciary. Therefore, establishing accountability, transparency, or the rule of law via the civilian government, including the judiciary, is impossible under the Constitution.
- The Constitution grants the military amnesty for any and all crimes, including sexual violence against women. According to the Constitution, no “proceeding” can be instituted against any member of the

military with respect to “any act done in the execution of their respective duties.”¹³ The President can also grant amnesty “in accord with the recommendations of the National Defense and Security Council,” which is under the control of the military.¹⁴ These provisions prevent the civilian government from holding the military or its members accountable for human rights abuses or sexual violence and prevent any civilian from bringing a proceeding in civilian court to hold a member of the military accountable for human rights abuses or violence.

► **Emergency powers**

- The Commander-in-Chief has the right to “take over and exercise State sovereign power” if there is “a state of emergency that could cause the disintegration of the Union, disintegration of national solidarity and loss of sovereign power or attempts therefore by wrongful forcible means such as insurgency or violence.” This grants the military a unilateral right to assert power in a wide range of circumstances, including if there should be “insurgency or violence.”¹⁵ This power is in addition to the state of emergency detailed in Chapter XI of the Constitution, which is initiated by the President in coordination with the NDSC. In a Chapter XI state of emergency, the Commander-in-Chief assumes all sovereign power, including the right to exercise the powers of the legislature, executive, and judiciary.¹⁶

Lack of an Independent and Accountable Judicial System

Administration of justice is particularly weak in Burma.¹⁷ Burma’s judiciary is seen as “inactive and subordinate to the military,” with “allegations of judicial corruption, inefficiency, and susceptibility to executive influence [that are] so widespread that they cannot be sensibly discounted.”¹⁸ State actors, including the executive and the military, have been known to apply improper pressure on the judiciary and prosecutors in cases related to gross violations of human rights, as well as political and civil cases.¹⁹ As a result, even if cases were transferred from military court to civilian court, those proceedings would not be free from the military’s power and influence.

Attempts to utilize formal court or accountability proceedings are often met with reprisals. The case of Brang Shuang, the father of a fourteen-year-old girl who was killed by the military, is a case in point.²⁰ While he never saw accountability for his daughter’s killing, he himself was prosecuted for filing false charges and was embroiled in legal proceedings for over eighteen months. Fear of reprisals, along with widespread corruption and generally low levels of judicial competence, have resulted in a lack of public trust in the legal system.²¹

Conclusion

The turbulence in Rakhine State is part of a pattern and practice of human rights abuses committed by the military that, due to structural barriers embedded in laws and the Constitution, cannot be adequately addressed using national justice mechanisms. The civilian government is unable to exert any controls on the military or to hold the military accountable for its actions, including human rights abuses that contravene international law. These barriers do not excuse the civilian government for its failure to take action to curb or punish military violations. The current government has shown that when political will exists, it has the ability to creatively interpret constitutional limits and executive powers. For example, when Aung San Suu Kyi was prevented by the Constitution from taking up the role of President after the 2015 elections, the role of “State Counsellor” was created, which has allowed her to become the de facto head of government and skirt these constitutional limits. As yet, the civilian government has not shown the same political will to act in order to facilitate and open the door for justice and accountability.

These structural barriers are compounded by other inadequacies in Burma’s justice system, including the lack of provisions domesticating international crimes, problematic and discriminatory laws, such as the Penal Code provisions on rape and sexual violence,²² and the 1982 Citizenship Act. In addition, the justice system does not adequately take gender considerations into account, both in the language of the law, as well as its application

and enforcement.²³ Neither Burma's domestic courts, nor its National Human Rights Institution, have the capacity, impartiality, and independence required to deliver justice. Without justice and accountability, Burma cannot achieve peace, nor a successful transition to democracy. Accordingly, holistically addressing Burma's culture of impunity must be a priority for the international community.

Recommendations

► To the International Community:

- Refer the situation in Burma to the ICC.
- Support efforts at the United Nations, including the Security Council, General Assembly, and the Human Rights Council, to monitor the human rights situation in Burma and hold the state, as well as civilian and military leaders and other responsible individuals, accountable for violations of international law and human rights.
- Use bilateral and multilateral engagement and sanctions to urge the Burmese government and military to cease human rights violations, ensure justice and reparations for victims, and support legislative and constitutional reform.
- Utilize universal jurisdiction to prosecute responsible individuals for international crimes, war crimes, genocide, and crimes against humanity in third-party states.
- Urge Burmese authorities to cooperate with and allow access to international human rights experts and monitors, including the Independent International Fact-Finding Mission on Myanmar (IFFM), the UN independent investigative mechanism, the Special Rapporteur on the situation of human rights in Myanmar, and the ICC.

► To the Burmese Government:

- Cooperate with and facilitate access for all international human rights and accountability efforts, including the IFFM, the UN independent investigative mechanism, the Special Rapporteur on the situation of human rights in Myanmar and other UN special procedures, the ICC, and international human rights organizations.
- Ratify the Rome Statute of the ICC and provide retroactive jurisdiction to the entry into force of the Statute (July 1, 2002).
- Amend the Constitution to bring the military and security forces under civilian oversight and repeal provisions granting military actors impunity for human rights abuses, including Article 445.
- Expediently pass the Prevention (and Protection) of Violence Against Women Law in line with international human rights standards, eliminate contradictory Penal Code provisions including the definition of rape and marital rape exceptions, and ensure jurisdiction over the military for crimes of violence against women in civilian courts.
- Amend the 1982 Citizenship Act to repeal discriminatory provisions based on national origin, religion, and ethnicity and restore citizenship to those whose citizenship was stripped under the law.

The Global Justice Center (GJC) is an international human rights organization dedicated to advancing gender equality through the rule of law. We combine advocacy with legal analysis, working to expose and root out the patriarchy inscribed in so many international laws. Our projects forge legal precedents in venues that have the greatest potential for global impact, such as the United Nations Security Council, and in places with the most potential for systemic change, like conflict and post-conflict situations and transitional democracies. We believe that enforcing treaties and international human rights laws can be a catalyst for radical change, moving these hard-won rights from paper to practice. To learn more about our work, visit www.globaljusticecenter.net.

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