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# Burma's Nuclear Strategy:

*How Burma's Military Has  
Successfully Hijacked Democracy  
and Made Control over Burma's  
Nuclear Future a Constitutional  
Right of the Military*

**Janet Benshoof**  
*President*  
Global Justice Center

**U Aung Htoo**  
*Secretary General*  
Burma Lawyers' Council



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The BLC is the only organization in the democratic movement of Burma which contributes to the promotion of human rights solely from the legal perspective. It is neither aligned with nor under the authority of any political organization.

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## Introduction

2010 was a phenomenally successful year for Senior General Than Shwe and the military junta ruling Burma. On November 7, 2010, the junta pulled off a carefully staged national “election,” the final step in their so-called “roadmap to democracy.” Using this “roadmap to democracy” as a cover, the military junta has in fact done the opposite by issuing a constitution on May 2, 2008 which ensures permanent military rule and secures the military’s monopoly over Burma’s nuclear future.

Burma’s *sui generis* 2008 Constitution, while paying lip service to a “civilian” government, is premised on embedding the Commander-in-Chief of the Defense Services as the *de facto* ruler of Burma. Under the constitution the military is guaranteed its own “law free zone”; neither the legislative, executive, nor judicial branches of the government have any jurisdiction over the military.

The legal autonomy accorded the military under the 2008 Constitution renders Burma legally incapable of fulfilling its international legal obligations under the Genocide and Geneva Conventions, the UN Charter, and agreements governing nuclear development.<sup>1</sup>

Further, the 2008 Constitution guarantees the military criminal impunity, including for war crimes, crimes against humanity and genocide. This will fuel the military’s rule by terror. This includes violently suppressing perceived political threats, perpetrating systematic war crimes including rapes, killings, forced labor and torture against Burma’s ethnic populations.<sup>2</sup>

This article examines the growing evidence of Burma’s nuclear activities, and connects the dots between the military’s nuclear ambitions and the 2008 Constitution that supports those ambitions. Burma’s military is making concerted efforts to replicate the North Korea model of using nuclear clout to gain legitimacy and bargaining power on the world stage.<sup>3</sup> Further, as seen in the case of North Korea or Iran, possessing nuclear capability is a major tool used by criminal dictators to fend off attempts to hold them individually criminally accountable.

This article demonstrates how the 2008 Constitution, by breaching Burma’s core obligations under international law, is an internationally wrongful act that constitutes a serious breach of peremptory norms of international law. Under the laws of state responsibility, such a breach, in turn, triggers secondary *erga omnes* duties on all states to cooperate to end Burma’s breach. In this situation, states are obligated to ensure that the Security Council mandates all states not recognize the illegal 2008 constitution and 2010 elections, exactly as it did with regard to the constitution of apartheid South Africa in 1984.<sup>4</sup>

This article is divided into five sections:

**Section One** outlines the military’s rule by terror and the growing fears of top military officers of future criminal prosecutions.

**Section Two** sets out the growing evidence of the military’s nuclear ambitions.

**Section Three** analyzes how the 2008 Constitution ensures permanent military rule over Burma and secures the military’s unchecked control over all Burma’s nuclear development.

**Section Four** outlines the peremptory nature of Burma’s breach of international law and the legal consequences

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<sup>1</sup> Burma signed the UN Charter on April 19, 1948. Permanent Mission of the Union of Myanmar to the United Nations, <http://www.un.int/wcm/content/site/myanmar>; Burma ratified the Genocide Convention March 14, 1956; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, <http://untreaty.un.org/cod/avl/ha/cppcg/cppcg.html>; Burma ratified the Geneva Conventions on August 25, 1992, Geneva Conventions of 12 August 1949, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&eps=P>.

<sup>2</sup> Harvard Law School, International Human Rights Clinic, *Crimes in Burma*, May 2009, <http://www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf>.

<sup>3</sup> Andrew Selth, *Burma and North Korea: Smoke or fire?*, 8-9, Australian Strategic Policy Institute, Aug. 24, 2009.

<sup>4</sup> S.C. Res 554, U.N. Doc. S/RES/554 (Aug. 17, 1984).

flowing from this breach both on Burma and on all states to respond to Burma.

**Section Five** demonstrates how the 2008 Constitution precludes Burma's effective compliance with all international laws governing both civilian and weapons related nuclear activities.

## **Section I. The Military's Rule by Terror and Growing Fears of Criminal Accountability**

Burma, with a population of approximately 59 million people,<sup>5</sup> has been under continuous military rule since 1962.<sup>6</sup> The current Commander-in-Chief of Defense Services, Senior General Than Shwe, has been head of the military junta ruling in Burma since 1992.<sup>7</sup>

The extraordinary strength and longevity of the military's control over Burma is due to several factors. The one most often cited is China's protection of Burma's military rule.<sup>8</sup> However, additional factors include the military's deliberate prolongation of the longest running internal armed conflict in the world,<sup>9</sup> the total censorship and repression of democratic voices,<sup>10</sup> and the constant terrorism inflicted on ethnic communities by rape, torture, killing, forced relocation, and forced labor.<sup>11</sup>

The military is financially autonomous and effectively controls all of Burma's land and natural resources.<sup>12</sup> All significant sources of national income go directly into military coffers, including the personal bank accounts of Senior General Than Shwe and other top military officers.<sup>13</sup> Not surprisingly, even after the 2010 elections, this direct pipeline to military coffers remains unchanged. For example, in January 2011, the government announced that the military was exempt from taxes.<sup>14</sup> The military's wealth and control over resources has enabled the military to pit India

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<sup>5</sup> This is based on the World Bank estimate, although official numbers are difficult to come by. See World Bank, Population, Total, <http://data.worldbank.org/indicator/SP.POP.TOTL>.

<sup>6</sup> DONALD M. SEEKING, *THE DISORDER IN ORDER, THE ARMY-STATE IN BURMA SINCE 1962*, 39 (2002).

<sup>7</sup> *Id.* at 283. See also BENEDICT ROGERS, *THAN SHWE: UNMASKING BURMA'S TYRANT* (2010).

<sup>8</sup> Thomas Fuller, *On Myanmar, U.S. and China Worked Closely*, Dec. 11, 2010, N.Y. TIMES, at A9.

<sup>9</sup> See Uppsala Conflict Data Program (Jan. 11, 2010) UCDP Database: [www.ucdp.uu.se/database](http://www.ucdp.uu.se/database), Uppsala University.

<sup>10</sup> Amnesty Int'l, *Amnesty International Report 2007*, 191 (2007) (reporting that "more than 1,185 political prisoners [were] held in deteriorating prison conditions"); Human Rights Watch, *World Report 2007*, 248 (2007) (reporting that "[m]ore than 1,200 people are imprisoned for their political beliefs and activities"); see also International Federation for Human Rights, *Burma's "Saffron Revolution" is Not Over*, (Dec. 2007), <http://www.fidh.org/IMG/pdf/BURMA-DEC2007.pdf>.

<sup>11</sup> See Harvard Law School, *supra* note 4, at 37.

<sup>12</sup> David Scott Mathieson, *Burma's Authoritarian Upgrade: 1990-2010*, (June 2010), <http://www.hrw.org/en/news/2010/06/10/burma-s-authoritarian-upgrade-1990-2010> ("Burma's military government also controls nearly \$5 billion in foreign reserves, accumulated thanks to lucrative natural-gas sales and the use of an accounting trick: for domestic purposes, gas revenues are recorded at the official exchange rate (\$1 to 6 Burmese Kyat) but actual payments are made in US dollars (worth \$1 to 800-1,000 Burmese Kyat at the market rate), the difference being deposited (it is suspected) in offshore bank-accounts.").

<sup>13</sup> See Energy-Insecurity Report, Earth Rights International, July 2010, at 19 ("EarthRights International reported that rather than being used to benefit the people of Burma, portions of the country's natural gas revenue found their way into private bank accounts in two offshore banks in Singapore – the Overseas Chinese Banking Corporation and DBS Group. This revenue and its convenient offshore location would enable the regime to engage in international hard-currency transactions to buy arms and technologies for nefarious purposes.").

<sup>14</sup> See Irrawaddy Online Magazine, *Military Firms Excluded from Tax Evasion Law*, Jan. 7, 2011, available at [http://www.irrawaddy.org/article.php?art\\_id=20488](http://www.irrawaddy.org/article.php?art_id=20488).

against China,<sup>15</sup> enjoy impunity for its heinous crimes,<sup>16</sup> purchase weapons from China,<sup>17</sup> and have the cash available to pursue its nuclear ambitions.<sup>18</sup>

Until recently, the junta appeared to be unfazed by pressure from the global community over military crimes.<sup>19</sup> This is no longer the case. With the advent of the International Criminal Court (ICC) in 2002, global pressure to prosecute Burma's military rulers for their grave crimes has escalated.<sup>20</sup> The UN Special Rapporteur on the Situation of Human Rights in Burma called for a UN Commission of Inquiry (CoI) into the junta's crimes in 2010 and, as of January 2011, thirteen countries including the US support this call.<sup>21</sup> Calls to end impunity are worrying the junta, as evidenced by their hasty insertion of amnesty provisions for military crimes into the final draft of the 2008 Constitution.<sup>22</sup>

The military's ongoing use of rape of ethnic women as a weapon of war has also brought global attention to their crimes.<sup>23</sup> US Secretary of State Hillary Clinton cited to Burma's military rapes in an address to the Security Council.<sup>24</sup> The US Permanent Representative to the United Nations, Susan Rice, echoed this in her Nov. 18, 2010 statement to the General Assembly, in which Burma was listed alongside North Korea and Iran.<sup>25</sup> Most importantly, over the last six years the Security Council has singled out and condemned the military's gross violations of international humanitarian law in resolutions addressing the use of child soldiers<sup>26</sup> and sexual violence against women in armed conflict.<sup>27</sup>

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<sup>15</sup> See Sangeet Dalliwall and Ryan Clarke, *Sino-Indian Competition for Burmese Oil and Natural Gas*, HARV. INT'L REV. (Sep. 2008), available at <http://hir.harvard.edu/sino-indian-competition-for-burmese-oil-and-natural-gas>.

<sup>16</sup> To date no member of the junta has been punished for the crimes documented by the Harvard Law School report, *supra* note 4, or those documented by the Special Rapporteur, *infra* note 23.

<sup>17</sup> Chui-Wei Yap, *Chinese Weapons Maker Signs Myanmar Deal*, WALL ST. J., June 23, 2010. See also *Myanmar: Dirty Dealings*, Economist, May 26, 2007, at 7 (discussing Chinese and Russian arms sales to Burma).

<sup>18</sup> See Mathieson, *supra* note 14.

<sup>19</sup> See Selth, *supra* note 5, at 8.

<sup>20</sup> Rome Statute of the International Criminal Court, July 17, 1998, 37 ILM 1002, 2187 UNTS 90.

<sup>21</sup> Thomas Ojea Quintana, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, U.N. Doc. A/65/368, (Sep. 15, 2010); John Pomfret, *U.S. Supports Creation of U.N. Commission of Inquiry Into War Crimes in Burma*, WASH. POST, Aug. 18, 2010. For information on other countries supporting a Commission of Inquiry, including France and the United Kingdom, see *Countries Supporting a UN-led Commission of Inquiry on Burma*, <http://uscampaignforburma.org/countries-supporting-commission-of-inquiry-on-burma>.

<sup>22</sup> *The Fundamental Principles and Detailed Basic Principles* ("Draft Constitution") was released by the Constitution Drafting Commission, which was the basis for the Constitution "approved" by the National Convention in Nov. 2007. This Draft Constitution, which was released in both Burmese and English, differs substantively from the "adopted" version (which came out only in Burmese) released on Feb. 9, 2008 for the nationwide referendum. The version released in Feb. 2008 contained a newly added amnesty provision in Chapter XIV, *Transitory Provisions*, at §445. The English version of this was only released on Nov. 2, 2009.

<sup>23</sup> See Report of the Secretary-General Pursuant to Security Council Resolution 1820 (2008), U.N. Doc. S/2009/362 at 7, 9, 11-12. See also G.A. Res. 57/231, U.N. Doc. A/Res/57/231 (Feb. 28, 2003) (The U.N. General Assembly adopted a resolution in 2003 "express[ing] grave concern at . . . rapes and other forms of sexual violence carried out by members of the armed forces" in Burma and the "disproportionate suffering of ethnic minorities, women, and children from such violations.").

<sup>24</sup> See Opening Remarks by Secretary of State Hillary Rodham Clinton on the Adoption of a UNSC Resolution to Combat Sexual Violence in Armed Conflict, Sept. 30, 2009. ("Now, reading the headlines, one might think that the use of rape as a tactic of war only happens occasionally, or in a few places, like the Democratic Republic of the Congo or Sudan. That would be bad enough, but the reality is much worse. We've seen rape used as a tactic of war before in Bosnia, Burma, Sri Lanka, and elsewhere. In too many countries and in too many cases, the perpetrators of this violence are not punished, and so this impunity encourages further attacks.").

<sup>25</sup> Susan E. Rice, *Statement by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, on the Burma, Iran and North Korea Human Rights Resolutions in the General Assembly's Third Committee*, <http://usun.state.gov/briefing/statements/2010/151147.htm>.

<sup>26</sup> S.C. Res. 1612. U.N. Doc. S/Res/1612 (July 26, 2005).

<sup>27</sup> Security Council Report, *Cross-Cutting Report Children and Armed Conflict*, Apr. 15, 2010; Report of the Secretary-General Pursuant to Security Council Resolution 1820, U.N. Doc. S/2009/1820 (July 2009); S.C. Res. 1612. U.N. Doc. S/Res/1612 (July 26, 2005).

## Section II. The Nuclear Ambitions and Activities of the Military in Burma

The military understandably views developing Burma's nuclear potential as critical to the military retaining control over Burma. The fact that the constitution removes all domestic legal constraints on the military's acquisition of nuclear technology, underscores why the military's nuclear ambitions must be taken very seriously.

WikiLeaks cables released in December 2010 show that as early as 2005, US officials have been concerned about Burma's military seeking to develop nuclear weapons with the help of North Korea.<sup>28</sup> Although the global community has become more skeptical of claims about "weapons of mass destruction" being developed after the US experience with Iraq, the Institute for Science and International Security [ISIS] notes that given that the world's best intelligence agencies missed North Korea's sale of a nuclear reactor to Syria, "no one is willing to turn a blind eye to the possibility of North Korea selling nuclear equipment, materials, or facilities to Burma."<sup>29</sup>

### *A. Chronology of the Military's Steps towards Developing Nuclear Capacity*

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which Burma signed in 1992, is the major international legal instrument regulating states' nuclear development.<sup>30</sup> The NPT has two classes of state members, those states that acknowledge possessing nuclear weapons and non-nuclear states. Those states that possess nuclear weapons must commit to nuclear disarmament, and non-nuclear states must agree to measurements regulating their use of nuclear energy for peaceful purposes.<sup>31</sup> State Parties to the NPT must comply with International Atomic Energy Agency (IAEA) standards.<sup>32</sup>

Following NPT mandates, Burma signed a Regional Cooperative Agreement with the IAEA in 1994 and an IAEA Safeguards Agreement in 1995.<sup>33</sup> Burma's safeguards agreement includes a Small Quantities Protocol exemption, which exempts those states that have no nuclear capacity, or plans to develop any, from most of IAEA's inspection authority.<sup>34</sup> The NPT requires Burma to inform the IAEA about any nuclear reactor development plans, develop necessary safeguards and permit IAEA inspection and safeguard verification.<sup>35</sup> Burma also signed the Treaty on the Southeast Asia Nuclear Weapon-Free Zone in 1995.<sup>36</sup>

Immediately after India and Pakistan's 1998 nuclear tests, Senior General Than Shwe, determined not to be left out of the nuclear playing field,<sup>37</sup> pronounced Burma's first Atomic Energy Law (AEL) on June 8, 1998.<sup>38</sup>

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<sup>28</sup> Ewan MacAskill, *WikiLeaks Cables Suggest Burma is Building Secret Nuclear Sites*, THE GUARDIAN, Dec. 10, 2010 at 33.

<sup>29</sup> David Albright ET AL., *Burma: A Nuclear Wannabe*, Institute for Science & International Security, (Jan. 28, 2010), <http://www.isis-online.org/isis-reports/detail/burma-a-nuclear-wannabe-suspicious-links-to-north-korea-high-tech-procureme>.

<sup>30</sup> Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161; Signatories and Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *available at* <http://www.fas.org/nuke/control/npt/text/npt3.htm>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Agreement between the Union of Myanmar and the IAEA for the Application of Safeguards in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons (with Protocol). Apr. 20, 1995.

<sup>34</sup> See International Atomic Energy Agency, *Non-Proliferation of Nuclear Weapons and Nuclear Security: Overview of Safeguards Requirements for States with Limited Nuclear Material and Activities* (June 2006), <http://www.iaea.org/Publications/Booklets/Safeguards3/safeguards0806.pdf>.

<sup>35</sup> *Supra* note 32, at art. II, IV(1).

<sup>36</sup> See Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Dec.15, 1995, 35 I.L.M. 635.

<sup>37</sup> See Norman Robespierre, Nuclear Bond for North Korea and Myanmar, ASIA TIMES, Oct. 4, 2008, [http://www.atimes.com/atimes/Southeast\\_Asia/JJ04Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/JJ04Ae01.html).

<sup>38</sup> The Atomic Energy law, *available at* [http://www.blc-burma.org/html/myanmar%20law/lr\\_e\\_ml98\\_08.html](http://www.blc-burma.org/html/myanmar%20law/lr_e_ml98_08.html). The Burmese language version of the AEL can be found on file at the offices of BLC.

In September 2001, Burma's former Foreign Minister Win Aung informed the IAEA of Burma's agreement to acquire a nuclear research reactor from Russia and requested IAEA assistance.<sup>39</sup> In addition, at a state press conference in 2002, Vice-Chief of Military Intelligence Major-General Kyaw Win explained:

“Myanmar’s consideration of building a nuclear research reactor is based on the peaceful purposes getting modern technologies needed for the country, availability of radioisotopes being used peacefully, training technicians and performing feasibility study for generation of electricity from nuclear power.”<sup>40</sup>

After IAEA inspectors traveled to Burma in December 2001 to evaluate the reactor plans, the IAEA concluded that Burma lacked the requisite safety standards, and when Burma failed to respond to these IAEA findings it raised international concern.<sup>41</sup> Ultimately, Burma's failure to procure the reactor is attributed to cost disputes.<sup>42</sup> However, part of the Burma-Russia 2001 agreement did move forward.<sup>43</sup> Since 2002, Russia has been providing intensive trainings in missile and civilian nuclear technology for Burma's military at six universities in the Russian Federation including the N. E. Bauman Institute and Moscow State Technical University (MSTU).<sup>44</sup>

In 2004, Burma's IAEA report designated the military headed Ministry of Science and Technology as the principle regulatory and enforcement body over Burma's civilian-use nuclear activities, with the Department of Atomic Energy as the licensing agent.<sup>45</sup>

Also in 2004, in reaction to the World Trade Center attacks on September 11, 2001, the Security Council, exercised its Chapter VII powers to pass Resolution 1540, mandating that all states pass effective domestic laws to prevent nuclear proliferation and ensure any nuclear material is secured.<sup>46</sup> Burma's first report to the Resolution 1540 oversight committee in 2004 stated Burma had no nuclear stockpiles and that it had taken all measures necessary to prevent any weapons from falling into the hands of non-state actors.<sup>47</sup> The report cited to Burma's old laws regulating firearms and did not mention any new laws put in place after Security Council Resolution 1540.<sup>48</sup>

Burma renewed its negotiations with Russia in 2007 and signed a contract<sup>49</sup> to have Rosatom, Russia's atomic energy agency, build a nuclear reactor center in Burma and train 300-350 Burmese nuclear specialists at Russian universities.<sup>50</sup> Reportedly, this Nuclear Research Center would include “a pool-type research reactor, and facilities for radioisotope production, neutron activation analysis and silicon doping.”<sup>51</sup> This contract was made contingent on the

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<sup>39</sup> Larry Jagan, Myanmar Drops a Nuclear ‘Bombshell’, ASIA TIMES, May 24, 2007, [http://www.atimes.com/atimes/Southeast\\_Asia/IE24Ae02.html](http://www.atimes.com/atimes/Southeast_Asia/IE24Ae02.html).

<sup>40</sup> Press Conference, Tamadaw Guest House, Inya Road, Yangon, Myanmar, Jan. 21, 2002, <http://www.myanmar.gov.mm/press/Press2002/jan/jan21press.html>.

<sup>41</sup> See e.g., Thomas Crampton, *Burma Seeks Nuclear Research Plant*, INT'L HERALD TRIB., July, 14 2001; Julian Moe, ‘US findings on Burma: An overview’, The Irrawaddy, Nov. 7, 2003, Platts Nuclear Fuel, *IAEA probes Myanmar Data, Discourages New Research Reactors*, Aug. 10, 2009, available at [http://www.carnegieendowment.org/static/npp/pdf/myanmar\\_reprint.pdf](http://www.carnegieendowment.org/static/npp/pdf/myanmar_reprint.pdf).

<sup>42</sup> Maxmilian Wechsler, *Nuclear Claims Deserve Skepticism*, Bangkok Post, Apr. 23, 2006.

<sup>43</sup> The authors of this article have been unable to obtain a copy of the 2001 agreement and discussions of its benefits are largely based on IAEA characterizations.

<sup>44</sup> See *Burma goes nuclear*, Burma News Update, no. 148, 21 February 2002; and ‘Junta officers secretly depart for Pyongyang to study advanced technology’, Democratic Voice of Burma, Nov. 23, 2003.

<sup>45</sup> Myanmar, *Country Report for IAEA / RCA Midterm Review Meeting of National Focal Persons on Radiation Protection*, June 7-11, 2004.

<sup>46</sup> S.C. Res. 1540, U.N. Doc. S/RES/1540 (2004).

<sup>47</sup> Note verbale dated 6 April 2005 from the Permanent Mission of Myanmar to the United Nations addressed to the Chairman of the Committee, U.N. Doc. S/AC.44/2004/(02)/113 at 2.

<sup>48</sup> *Id.* at 7.

<sup>49</sup> Press Service of the Federal Agency for Nuclear Energy, *Russia and Myanmar Sign Inter-governmental Cooperation Agreement*, May 15, 2007, [http://www.minatom.ru/en/news/4674\\_15.05.2007](http://www.minatom.ru/en/news/4674_15.05.2007).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

IAEA's Technical Cooperation Programme assisting in the efforts and, that any nuclear materials, equipment and installation would be kept under IAEA safeguards.<sup>52</sup>

### ***B. Recent Reports and Revelations Regarding Burma's Efforts to Acquire Nuclear Technology***

In September 2009, H.E. U Tin Win reported to the IAEA General Conference that Burma was developing a peaceful nuclear program aimed at “education and human resource development for nuclear technology utilization, human health, food security and safety, agriculture and livestock breeding, water resource management and sustainable energy.”<sup>53</sup> However, even as early as 2005, the US and other states were concerned about Burma acquiring nuclear technology from North Korea, as recent Wiki Leaks cables confirm.<sup>54</sup>

In May 2010, a Burmese army defector turned over secret documents and photographic evidence from military installations inside Burma to the Democratic Voice of Burma (DVB).<sup>55</sup> Robert Kelley, a former senior inspector at the IAEA, analyzed this evidence in a report he co-authored entitled, “Nuclear Related Activities in Burma” [*hereinafter* The Kelley Report]. The report concluded, “The components being developed by the military are rarely used outside of the nuclear weapons industry.”<sup>56</sup>

Although the Kelley Report concludes that it is unlikely that Burma *currently* has the ability to create a successful nuclear weapons program, such a threat is treated seriously and the report notes that, should Burma's military develop nuclear capacity, they would use it defensively like North Korea.<sup>57</sup> This would, among other things, paralyze international efforts to hold Senior General Than Shwe and other top military officers accountable for their crimes. The Kelley Report conclusions have generated debate, most notably by David Albright of the ISIS, who points to possible alternative uses for the nuclear technological equipment being acquired by the military.<sup>58</sup>

Even before the release of the Kelley Report, concerns were raised over Burma's growing partnerships with North Korea. An ISIS report dated January 28, 2010 reported on business deals by Burma's military with Namchongang Trading Corporation, a trading company in North Korea which has procured dual-use nuclear technology for North Korea. The company was also involved in providing nuclear reactor components to Syria.<sup>59</sup> The purchase of “sophisticated dual-use equipment” from North Korea raises serious questions about why Burma would acquire such technology, other than for a nuclear capacity.<sup>60</sup>

The release by WikiLeaks of 2004 – 2005 US cables coming out of Burma confirms the longstanding US concern about Burma and North Korea engaging in a “clandestine joint military program.” For example, one cable expressed concern that North Korea was assembling “surface-to-air missiles and constructing an underground facility at a Burmese military site.”<sup>61</sup> More recently, US Secretary of State Hillary Clinton voiced concerns about Burma acquiring nuclear technology components from North Korea,<sup>62</sup> after a North Korean ship with unknown cargo,

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52 *Id.*

53 Statement by the Leader of Myanmar Delegation H.E. U Tin Win to the 53<sup>rd</sup> Annual Regular Session of the IAEA General Conference, Vienna, Sep. 14-18, 2009, <http://www.iaea.org/About/Policy/GC/GC53/Statements/myanmar.pdf>.

54 MacAskill, *supra* note 30.

55 Robert E. Kelley and Ali Fowle, *Nuclear Related Activities in Burma*, May 25, 2010, Democratic Voice of Burma.

56 *Id.*

57 *Id.*

58 Albright ET AL., *supra* note 31. See also Bertil Lintner, US Double Talk on Myanmar Nukes, Asia Times Online, Dec. 16, 2010, [http://www.atimes.com/atimes/Southeast\\_Asia/LL16Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/LL16Ae01.html).

59 Albright, *supra* note 31.

60 Albright, *supra* note 31.

61 Cameron Stewart, *Burma's Nuclear Plans Exposed by WikiLeaks*, THE AUSTRALIAN, Dec. 11, 2010.

62 Glenn Kessler, *Clinton: U.S. Wary of Growing Burmese, North Korean Military Cooperation*, WASH. POST, July 21, 2009.

believed to be traveling to Burma, turned back after being followed by American warships.<sup>63</sup>

In addition to North Korea, the military's growing relationship with Iran is also raising concern.<sup>64</sup> Iran is currently subject to several Security Council sanctions because of its nuclear activities, the last of which was imposed on June 9, 2010.<sup>65</sup> Recent evidence of ties between Burma and Iran include a three day trip by Iranian deputy foreign minister Deputy Foreign Minister Mohammad Ali Fathollahi to Naypyidaw for undisclosed discussions with high-level military officers.<sup>66</sup> Burma's military officers made a comparable visit to Iran in March 2010.<sup>67</sup>

### **Section III. The 2008 Constitution and the Military Council's Function to Ensure Permanent Military Rule in Burma**

The 2008 Constitution sets out a government structure unlike any in the world today. A full detailing of its repudiation of democratic precepts and the rule of law, including by legitimating ethnic, gender and religious discrimination, is beyond the scope of this article.<sup>68</sup> What is singular about the design of the 2008 Constitution is the military's complete legal autonomy, which precludes Burma from being able to comply with most, if not all, of its international obligations, including those relating to nuclear activities.

The 2008 Constitution puts power over Burma's executive and legislative branches under the National Defense and Security Council (*hereinafter* the military council), a military council under the control of the Commander-in-Chief of Defense Services, Senior General Than Shwe. The powers of the military council largely duplicate the pre-election military government of Burma, the State Peace and Development Council (SPDC).<sup>69</sup>

The constitution provides that the President act in conjunction with the military council, and the Commander-in-Chief controls the council. The Commander-in-Chief has the direct power to appoint the six of the eleven members of the council who are active military officers and remain under his military command.<sup>70</sup> The remaining five members may be active military officers and, in all likelihood, will be "former" military officers like those who resigned in October 2010 to claim "civilian" status while remaining, in all but name, part of the military.<sup>71</sup>

#### **A. Military Control of the Executive**

The President is the constitutionally responsible head of state under the 2008 Constitution with sole executive power.<sup>72</sup> Under the 2008 Constitution the president is required to have a military "vision or outlook". This vague,

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<sup>63</sup> Malcolm Moore and Thomas Bell, *North Korea 'weapons to Burma' ship tracked by US*, TELEGRAPH, July 1, 2009.

<sup>64</sup> Francis Wade, *Top-Level Iranian Officials in Burma*, Democratic Voice of Burma, June 17, 2010, <http://www.dvb.no/news/top-level-iranian-officials-in-burma/10323>.

<sup>65</sup> S.C. Res. 1929, U.N. Doc. S/RES/1929 (2010). *See also*, S.C. Res. 1696, U.N. Doc. S/RES/1696 (2006); S.C. Res. 1737, U.N. Doc. S/RES/1737 (2006); S.C. Res. 1747, U.N. Doc. S/RES/1747 (2007); S.C. Res. 1803, U.N. Doc. S/RES/1803 (2008), S.C. Res. 1835, U.N. Doc. S/RES/1835 (2008); S.C. Res. 1887, U.N. Doc. S/RES/1887 (2009).

<sup>66</sup> *Supra* note 66.

<sup>67</sup> *Id.*

<sup>68</sup> One example of discrimination in the constitution is that women are precluded from holding the top offices reserved for active military including Commander-in-Chief, several ministries, and 25% of all parliamentary seats Constitution. *See* Section III, A-B *infra*.

<sup>69</sup> *See* Constitution of the Republic of the Union of Myanmar (2008), ch. V, § 201, 340.

<sup>70</sup> Constitution of the Republic of the Union of Myanmar (2008), ch. V, §232 (b) (ii).

<sup>71</sup> General Thein Sein, General Shwe Mahn, Deputy General Tin Aung Myin Oo, and many other high ranking military officials have already turned "civilian". Recently they participated in the 2010 election through the Union Solidarity and Development Association Party (USDA) and all won seats. As of Nov. 9, 2010, the USDA won 80% of electoral seats, *'Pro-military party 'wins' Burmese election'*, available at <http://www.bbc.co.uk/news/world-asia-pacific-11715956>.

<sup>72</sup> *See* Constitution of the Republic of the Union of Myanmar (2008), ch. V, § 217.

euphemistic, language could easily be used to require that the President have military experience.<sup>73</sup> The President's executive power is limited, including over his own ministers. Four key ministers are to be appointed and remain under the control of the Commander-in-Chief: the Ministers of Defense; Foreign Affairs; Home Affairs; and Border Affairs.<sup>74</sup>

The position of Commander-in-Chief under the 2008 Constitution is similar to that of a king. It is the only top position in Burma for which there are no qualifications set out in the constitution, no parliamentary approval is required,<sup>75</sup> no means are set forth to remove the Commander-in-Chief and he is exempt from all legal constraints including prosecutions for genocide or war crimes.<sup>76</sup>

That Burma's new "civilian" government is a farce headed by a "puppet" President is best illustrated by comparing the powers of the president with those of the Commander-in-Chief:

1. The President has a relatively minor role in the appointment of the Commander-in-Chief, while the Commander-in-Chief can have significant influence in the election of the President.<sup>77</sup>
2. The Commander-in-Chief has a major role in the cabinet, namely by being able to appoint and control four key ministries. The President, however, is prohibited from having any effective say over military matters or even decisions about which of the active military officers will sit in the legislature.<sup>78</sup>
3. The President must obtain the approval of the Commander-in-Chief for some of his actions, but not the reverse.<sup>79</sup>
4. The President cannot remove the Commander-in-Chief, while the Commander-in-Chief can prompt impeachment proceedings against the President through his control over at least a quarter of the members of each house.<sup>80</sup>
5. The Commander-in-Chief personally is outside the reach of any law, and he makes and enforces all laws applying to the military. All crimes committed by the military, including crimes perpetrated by active military officers serving as parliamentarians or civil servants, can only be tried in military courts at the discretion of the Commander-in-Chief.<sup>81</sup> The President, on the other hand, is subject to the limits set by the constitution, impeachment procedures, and all national laws.
6. The Commander-in-Chief can declare a "state of emergency" and, with the military council,

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<sup>73</sup> *Id.* at ch. III, § 59(d).

<sup>74</sup> *Id.* at ch. V, § 201, 232 (b)(ii)(iii),340.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at ch. III, § 60 (the Presidential Electoral College which elects the President shall be formed by three groups of representatives, including one group of Defence Services personnel nominated by the Commander-in-Chief); *See also* Constitution of the Republic of the Union of Myanmar (2008), ch. VII, § 342 (the President shall appoint the Commander-in-Chief with the proposal and approval of the National Defence and Security Council).

<sup>78</sup> *See*, Constitution of the Republic of the Union of Myanmar (2008), ch. I § 20(b)-(c), § 232(b)(iii) & § 235 (c)(ii). Pursuant to ch. VII, §§ 340, 341, and 342, of the 2008 constitution, most of the powers of and in relation to the Tatmadaw are vested in the Defence Services Commander-in-Chief (he is defined as the "Supreme Commander of all armed forces"). The constitution provides that President's powers are to be exercised in conjunction with the NDSC; however, the NDSC is in fact under the authority of the Commander-in-Chief who controls the appointment of a majority of the 11 positions of the NDSC. So while the constitution portends that the NDSC is "led" by the President, in reality, the Commander-in-Chief has a much more direct control of the NDSC.

<sup>79</sup> *Id.* at ch. I, § 20(b)-(c), ch. V § 232(b)(ii)-(iii) & § 235(c)(ii).

<sup>80</sup> *Id.* at ch. III, § 71(b).

<sup>81</sup> *See*, Constitution of the Republic of the Union of Myanmar (2008) ch. VII, § 343.

take over all legislative, executive, and judicial powers.<sup>82</sup> The President has no such power.

### ***B. Military Control of the Legislature***

Under the 2008 Constitution, 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.<sup>83</sup> Since military parliamentarians remain under the command of Senior General Than Shwe, this will be one “bloc” vote. Senior General Than Shwe and his appointees will lead the military council, and the speakers of the People’s Assembly and the National Assembly are also members of the military council, thus ensuring that the military council in fact dominates all law making processes.<sup>84</sup>

### ***C. Military Control of the Judiciary***

The President has the power to appoint and dismiss Supreme Court Justices and there is no judicial tenure.<sup>85</sup> However, this power is circumscribed by the qualifications for the highest judicial officers, namely for the Supreme Court and the new Constitutional Court, which both require at least ten years of judicial experience.<sup>86</sup> This means that all or most of the top judges serving, such as Chief Justice Aung Toe, had at least ten years experience as criminal perpetrators carrying out deadly orders of the junta by means of court orders.<sup>87</sup>

The judges’ crimes, which include those falling under the broad category of crimes against humanity or war crimes, include crimes of false arrest and imprisonment, resulting in murder, rape, torture, and forced labor in prison.<sup>88</sup> The judges in Burma who perpetrate these crimes are guilty of crimes against humanity and war crimes,<sup>89</sup> as were the Nazi judges convicted in Nuremberg, Saddam Hussein’s top judge, and Japanese judges convicted after World War II.<sup>90</sup>

The pervasive criminality which will dominate this “civilian judiciary” dictated by the 2008 Constitution is

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<sup>82</sup> *Id.* at ch. XI, § 419: “The Commander-in-Chief of the Defense Services to whom the sovereign power has been transferred shall have the right to exercise the powers of legislature, executive and judiciary”. This is a divergence even from Myanmar’s previous constitutions.

<sup>83</sup> *Id.* at Ch. III, § 71(b), Ch. IV, §141 (b).

<sup>84</sup> *Id.* at (2008) ch. V § 201 (d)(e), The National Defense and Security Council, described in article 201 of the Constitution, is made up of individuals at the highest level of government including the President, Vice-President, Parliamentary speakers, and Commanders in Chief and Deputy Commander-in Chief, Ministers of Defense Service—individuals with a military background and 6 out of 11 members are selected by Commander-in-Chief. The Council will support the executive in the discharging of the Constitution and other laws, thereby ensuring the military has control over how laws are executed.

<sup>85</sup> See Appointment of judges, Constitution of the Republic of the Union of Myanmar (2008) ch. VI, § 299, 308, 327 and Removal of judges, Constitution of the Republic of the Union of Myanmar (2008) ch. VI, § 302, 311, 334. See also Mr. Tomas Ojea Quintana, UN Special Rapporteur on Human Rights Situation in Burma, “*Fourth Core Human Rights Element: Judiciary*”, Human Rights Situation in Myanmar, Special 5, 2008; P. 21.

<sup>86</sup> Constitution of the Republic of the Union of Myanmar (2008) ch. VI, § 301 (d)(ii).

<sup>87</sup> Statement by the Global Justice Center and Burma Lawyer Council, *Certain Judges in Burma are Themselves Criminally Liable as Co-conspirators*, Nov. 20, 2008 available at <http://burmadigest.info/2008/11/20/certain-judges-in-burma-are-themselves-criminally-liable-as-co-conspirators>.

<sup>88</sup> See generally Assistance Ass’n for Pol. Prisoners (Burma), *The Darkness We See: Torture in Burma’s Interrogation Centers and Prisons* (2005) (detailing torture in Burmese prisons with accounts from political prisoners).

<sup>89</sup> See *supra* note 89.

<sup>90</sup> See The Justice Case, 3 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 (1951) [hereinafter The Justice Case] (finding Nazi judges guilty of crimes against humanity, and war crimes). See also Trial of Lieutenant General Harukei Isayama and Seven Others, 5 Law Reports of Trials of War Criminals (1948); Trial of General Tanaka Hisakasu and Five Others, 5 Law Reports of Trials of War Criminals (1948)(finding the Japanese military tribunal judges guilty using fraudulent evidence and denying prisoners of war fair hearings); A1-Mahkama al-jina’iya al-Iraqiya al-Uliya [The Iraqi High Criminal Court], al-Dujail Opinion, Unofficial English Translation, (Dec.26, 2006), [www.law.case.edu/saddamtrial/documents/20070103dujailappellatechamberopinion.pdf](http://www.law.case.edu/saddamtrial/documents/20070103dujailappellatechamberopinion.pdf); Cassation Panel, Iraqi High Tribunal, Al-Dujail Final Opinion, available at <http://www.iraq-ihc.org/ar/doc/ihcno.pdf> and <http://law.case.edu/saddamtrial/content.asp?t=1&id=88> (unofficial English translation) [hereinafter al-Dujail Opinion].

matched only by the fact that the Commander-in-Chief controls over all military courts, judges and decisions. All military personnel and police are outside the jurisdiction of the civilian courts.<sup>91</sup>

Further, the entire country is becoming more and more militarized. On, December 17, 2010, as allowed for under the 2008 Constitution, Senior General Than Shwe announced that “every citizen should undergo military training and to serve in the armed forces to defend the State.” This Public Military Service Law requires all people in Burma, with few exceptions (most notably monks and “housewives”), to serve two or three years in the military.<sup>92</sup>

This law serves three purposes. First, it ensures the military a huge body of forced labor, particularly people with technical skills needed by the military. Second it means that at any one time a large segment of younger people will be in the military and therefore precluded from trying to fight for democracy. Third, it ensures that at any one time over a million citizens, as “public military servants”, fall outside any civilian laws or courts.

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<sup>91</sup> See Constitution of the Republic of the Union of Myanmar (2008) ch. I, § 20(b). The Defence Services has the right to independently administer and adjudicate all affairs of the armed forces; *See also* Constitution of the Republic of the Union of Myanmar (2008) ch. VII § 343 (“In the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive.”).

<sup>92</sup> People’s Military Service Law, SPDC Law No. 27/ 2010 (Nov. 4, 2010), *available at* <http://democracyforburma.wordpress.com/2011/01/12/spdc-s-military-conscription-law-english-burmese>. This law will conscript an estimated 8 million men and 5 million women into military service, based on data from the U.S. Census International Database, *available at* <http://www.census.gov/ipc/www/idb/country.php>. This does not include any members conscripted as experts, and may overestimate based on the number of exceptions.

## Section IV. The 2008 Constitution is an Act of State Which Breaches Burma's Erga Omnes Obligations to the Global Community

The president, as the constitutionally responsible head of state, must ensure Burma's compliance with its non-derogable obligations under international law, including treaties and Security Council resolutions. However, given the 2008 Constitution's guarantees of military autonomy, the President is unable to enforce most, if not all, of Burma's international legal obligations.

Thus, the 2008 Constitution breaches Burma's erga omnes<sup>93</sup> duties under the UN Charter, the Genocide and Geneva Conventions, and customary international law (CIL).<sup>94</sup> Although the legislature is free to pass laws implementing the Genocide and Geneva Conventions, which it has been obligated to do for the last 55 years in the case of the Genocide treaty, and Security Council Resolutions, these laws will be meaningless since they cannot be enforced against the military. This inability to comply with treaty obligations violates the Vienna Convention on the Law of Treaties (VCLT), which requires states "good faith" performance of treaty obligations.<sup>95</sup>

Further, the fact that the 2008 Constitution was issued in 2008 evidences Burma's invidious intent to flout international law. Burma, as a country engaged in an ongoing internal armed conflict, is required to comply with international humanitarian law (IHL), which governs situations of armed conflict.<sup>96</sup> Reports of the military's criminal violations of IHL include a rare public denunciation in 2007 by the International Committee for the Red Cross (ICRC).<sup>97</sup> Additionally, the last-minute insertion of amnesty provisions was a clear attempt by the military to avoid prosecutions for war crimes, crimes against humanity and potentially genocide. However, despite these provisions, the 2008 Constitution cannot serve to protect the military; under the VCLT states are prohibited from invoking the provisions of its "internal law"—in Burma's case, the 2008 Constitution—as justification for its failure to comply with treaty obligations.<sup>98</sup>

### ***A. The 2008 Constitution's Breach of the UN Charter Constitutes a Serious Breach of Peremptory Norms of International Law***

The 2008 Constitution is an "internationally wrongful act" which breaches Burma's intransgressible obligations to the global community; including its obligation under the UN Charter to comply with binding Security Council resolutions. This violation reaches the level of a "serious breach of a peremptory norm of international law" under the customary laws of state responsibility, codified in the Draft Articles on the Responsibilities of States for

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<sup>93</sup> The *erga omnes* doctrine, refers to the absolute legal obligations of states towards the international community as a whole, as recognized by the ICJ. See Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain), 1970, I.C.J. 23, at 33 (Feb. 5, 1970). *Erga omnes* duties are not limited to ensuring individual criminal accountability; indeed, the prosecutions of top state officials does not absolve the state itself of responsibility for the wrongful acts. The ILC Articles on State Responsibility supplement the criminal accountability mandates by focusing on states' *erga omnes* obligations to respond to serious breaches of international law by altering their relationship with a violator state. U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter ILC Draft Articles], arts. 41, 46.

<sup>94</sup> *Supra* note 3. Burma ratified the Vienna Convention on the Law of Treaties in 1998. *Law of Treaties*, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf>.

<sup>95</sup> Vienna Convention on the Law of Treaties, art. 26, U.N.T.S. 1155 (1960) (hereinafter VCLT). The VCLT codifies the customary law of treaties. See Alina Kaczorwska, PUBLIC INTERNATIONAL LAW, 89 (2004).

<sup>96</sup> International Committee of the Red Cross, *What is International Humanitarian Law?*, available at: [http://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf).

<sup>97</sup> See International Committee of the Red Cross, *Myanmar: ICRC Denounces Major and Repeated Violations of International Humanitarian Law* (June 29, 2007) (on file with the ICRC), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/myanmar-news-290607> (noting ongoing serious crimes by Burma's military, the ICRC reminds all State Parties to the Geneva Conventions of "their obligation, under Article 1, to respect and to ensure respect for the Conventions.").

<sup>98</sup> VCLT, *supra* note 97, at art. 27.

Internationally Wrongful Acts (hereinafter the Draft Articles).<sup>99</sup>

State's wrongful acts that strike the heart of the global legal order and threaten global security are peremptory, as are the international crimes listed in the commentary to Draft Articles 40 and 41. Burma's inability to fulfill its obligations under Article 25 falls in the first category because it violates "those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat [they present] to the survival of States and their peoples and the most basic human values."<sup>100</sup> The characterization of an international norm as peremptory requires the "recognition by international practice, international jurisprudence of international and national courts and tribunals and in legal doctrine."<sup>101</sup>

The 2008 Constitution is a "serious" breach as defined under Article 40 of the Draft Articles. The Draft Articles provide that in order for a breach of a peremptory norm to be serious, it must be either "gross" or "systematic, which is defined as "organized and deliberate."<sup>102</sup> As the 2008 Constitution sets forth the fundamental legal framework for the government, it is inherently systematic and therefore a serious breach as defined by Article 40. Such a breach imposes absolute obligations and consequences on Burma and triggers the obligations of all states to respond to the breach.<sup>103</sup>

### *i. The UN Charter*

The UN Charter was passed unanimously in 1945 and acceded to by Burma in 1948.<sup>104</sup> Its drafters, in the wake of World War II, were determined to set up an international organization with binding powers, unlike the failed League of Nations.<sup>105</sup> The UN Charter addressed this problem by designating the Security Council as the branch of the United Nations with the authority to pass binding measures to address situations involving "threats to peace," "breaches of peace" or "acts of aggression."<sup>106</sup> Article 24 of the Charter provides that "[members] confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."<sup>107</sup>

The corollary to Article 24 is Article 25 of the Charter, which obliges the Member States to comply with mandatory resolutions.<sup>108</sup> Similarly, Article 48 of the Charter obliges member states to implement the decisions of the Security Council for the maintenance of international peace and security according to the Security Council's determination.<sup>109</sup>

States' compliance with Article 25 is central to the purposes of the UN,<sup>110</sup> a fact underscored by the International Court of Justice (ICJ) in the *Namibia* case:

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<sup>99</sup> ILC Draft Articles, *supra* note 95, at art. 40.

<sup>100</sup> ILC Draft Articles, *supra* note 95, at cmt. art. 40, ¶ 3, 4.

<sup>101</sup> ILC Draft Articles, *supra* note 95, at cmt. art. 40, ¶ 6.

<sup>102</sup> ILC Draft Articles, *supra* note 95, at cmt. art. 40, ¶ 8.

<sup>103</sup> These state obligations are separate and distinct from obligations for individual criminal accountability which arise from gross violations of international humanitarian law.

<sup>104</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://www.unhcr.org/refworld/docid/3ae6b3930.html> [accessed 18 January 2011]. [Hereinafter Charter of the United Nations].

<sup>105</sup> Leland M. Goodrich, *From League of Nations to United Nations*, 1 Int'l Org. 3, 18 (1947). See also Russell S. Sobel, *The League of Nations Covenant and the United Nations Charter: An Analysis of Two International Constitutions*, 5 Const. Pol. Econ. 173 (1994).

<sup>106</sup> Charter of the United Nations, *supra* note 106, at arts. 41, 42 (1945).

<sup>107</sup> Charter of the United Nations, *supra* note 106, at art. 24.

<sup>108</sup> Charter of the United Nations, *supra* note 106, at art. 25.

<sup>109</sup> Charter of the United Nations, *supra* note 106, at art. 48. The text of Article 48 reads: "1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members."

<sup>110</sup> Charter of the United Nations, *supra* note 106, at Preamble.

...when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member states to comply with that decision, including those members of the Security Council, which voted against it, and those Members of the United Nations who are not members of the Council. To hold otherwise would be to deprive this principal organ of its essential functions and powers under the Charter.<sup>111</sup> (emphasis added)

The UN Charter presupposes that all Member States have the capacity to fulfill their Article 25 duties.<sup>112</sup> Indeed, Burma had such capacity under the 1947 Constitution, which was in place when Burma signed the UN Charter in 1948.<sup>113</sup> However, under the 2008 Constitution, Burma does not have the capacity to comply with Security Council resolutions, due to the guarantees of military autonomy. For example, under Security Council Resolution 1540, states are required to secure its nuclear materials.<sup>114</sup> However, under the 2008 Constitution, the Burmese civilian government does not have the ability to compel the military to do so.

## ***ii. The Legal Consequences of a Serious Breach of Peremptory Norms***

The Draft Articles sets out the mandatory legal consequences of a serious breach of peremptory norms.<sup>115</sup> Burma, as the responsible state has the obligation to cease its illegal activities and remedy the breach.<sup>116</sup> To comply with its cessation requirements, Burma must invalidate the 2008 Constitution and the results of the subsequent 2010 elections.

Critically, such a breach also triggers the duties of all states to respond to Burma's breach.<sup>117</sup> These are duties to: not recognize the illegal situation created by the breach as lawful, to not aid or assist in maintaining the breach, and to cooperate with other states to bring the breach to an end.<sup>118</sup> Thus, under the clear precepts of this body of law, the "referendum" on May 10, 2008 "adopting" the 2008 Constitution, triggered secondary obligations on all states and the UN to ensure that no legitimacy is given to the illegal acts of the responsible state – including through non-recognition.<sup>119</sup>

The principle of non-recognition, which is also grounded in customary international law, was reaffirmed by the ICJ in the Namibia case.<sup>120</sup> Further, the Security Council passed resolutions mandating non-recognition of the illegal situations in Zimbabwe, Namibia, Cyprus, the Middle East, and South Africa.<sup>121</sup> The commentary to Article 41 of the Draft Articles, in discussing Security Council calls for non-recognition in Zimbabwe and South Africa, states that:

[t]hese examples reflect the principle that where a serious breach in the sense of article 40 has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld. Collective

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<sup>111</sup> Advisory Opinion on Namibia, 1971 I.C.J., at 54.

<sup>112</sup> Charter of the United Nations, *supra* note 106.

<sup>113</sup> The 1947 and the later 1974 constitutions gave the Parliament or President respectively, the right to appoint and dismiss the Commander-in-Chief of the Armed Forces. Under these previous constitutions, the President along with the Legislature had full control over the military and the judiciary had full jurisdiction over military and civilian courts. Therefore, in 1947, there were no formal legal obstacles preventing the President from pledging Burma's compliance with UN Charter Article 25 mandating that states comply with Security Council Resolutions.

<sup>114</sup> See discussion in Section V *infra*.

<sup>115</sup> ILC Draft Articles, *supra* note 95, at art. 41.

<sup>116</sup> ILC Draft Articles, *supra* note 95, at art.

<sup>117</sup> ILC Draft Articles, *supra* note 95, at art. 41 ("States shall cooperate to bring to an end through lawful means any serious breach of a peremptory norm of general international law.").

<sup>118</sup> ILC Draft Articles, *supra* note 95, at art. 41.

<sup>119</sup> ILC Draft Articles, *supra* note 95, at art. 41.

<sup>120</sup> Advisory Opinion on Namibia, 1971 I.C.J.

<sup>121</sup> S.C. Res. 554, U.N. Doc. S/RES/554 (1984) (declaring South Africa's apartheid constitution null and void); S.C. Res. 445, U.N. Doc. S/RES/445 (1979) (declaring the elections of Southern Rhodesia illegal); S.C. Res. 439, U.N. Doc. S/RES/439 (1978) (declaring the elections in Namibia null and void).

non-recognition would seem to be a prerequisite for any concerted community response against such breaches and marks the minimum necessary response by States to the serious breaches referred to in article 40.<sup>122</sup>

Accordingly, states must, at a minimum, act to ensure that the Security Council declares the 2008 Constitution and 2010 election results “null and void”<sup>123</sup> in order to comply with their obligations of collective non-recognition in response to breaches of peremptory norms.

## **B. The 2008 Constitution Breaches Burma’s Fundamental Obligations Under The Genocide and Geneva Conventions**

The 2008 Constitution also precludes Burma from being able to comply with its duties as a party to the Genocide and Geneva Conventions,<sup>124</sup> both of which contain provisions that constitute intransgressible obligations under international law. The threat or use of nuclear weapons likewise violates the Geneva Conventions, and will be discussed in Section V.

### ***i. The 2008 Constitution Precludes Compliance with Common Article 3 and Provisions Relating to Individual Criminal Accountability of the Geneva Conventions***

Burma ratified the Geneva Conventions in 1992.<sup>125</sup> The Conventions, as the “laws of war”, are part of IHL. The fundamentality of IHL to the international legal order was affirmed by the ICJ, which characterizes certain rules of IHL as “fundamental rules to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”<sup>126</sup> The 2008 Constitution violates some of these fundamental and intransgressible norms of the Geneva Conventions.

First, the Geneva Conventions mandate that parties enact domestic legislation in order to ensure criminal accountability for grave breaches of the Conventions.<sup>127</sup> This means that States Parties must prosecute, extradite, or surrender for the purpose of prosecution, those individuals present in their territory who are accused of violations constituting serious breaches.<sup>128</sup> The 2008 Constitution, which provides blanket amnesties for the military covering all crimes, including war crimes, crimes against humanity and genocide, is “domestic legislation” which repudiates, not implements the Conventions.<sup>129</sup> By absolving these parties of liability for all crimes, including those crimes that are grave breaches of the Geneva Conventions, the 2008 Constitution violates this *erga omnes* obligation.

Second, common Article 3 of the Conventions prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>130</sup> The Constitutional provision that the Defence Services can independently administer and adjudicate all affairs of the armed forces without legal constraints is contrary to CIL principles of access to courts and the right of people to claim justice before civilian courts. Furthermore, the

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<sup>122</sup> ILC Draft Articles, *supra* note 95, at Article 41, cmt. ¶. 8.

<sup>123</sup> See S.C. Res. 556, U.N. Doc. S/RES/556 (1984) (*recalling* Security Council Resolution 554 as having declared the 1983 Constitution as contrary to the principles of the UN Charter).

<sup>124</sup> Burma is party to both conventions, *supra*, note 3.

<sup>125</sup> *Id.*

<sup>126</sup> Legality of the Threat or Use of Nuclear Weapons Advisory Opinion. I.C.J. 1996, ¶ 79.

<sup>127</sup> Geneva Conventions of 1949, Art. 49-51 of the First Geneva Convention, Art. 50-52 of the Second Geneva Convention, Art. 129-131 of the Third Geneva Convention and Art. 146-148 of the Fourth Geneva Convention.

<sup>128</sup> *Id.*

<sup>129</sup> See Constitution of the Republic of the Union of Myanmar (2008) ch. V, § 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.”); *Id.* at §343. (“The constitution states that “In the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive.”)

<sup>130</sup> Geneva Conventions of 1949, common Article 3.

removal by the 2008 Constitution of the Commander-in-Chief from all judicial oversight violates Article 3(1)(d) of the Geneva Conventions. Finally, the provision that the Commander-in-Chief's decisions over all legal matters involving military justice are final and conclusive, over which civilian courts do not have any control whatsoever, violates the fundamental CIL principle of access to court and administration of justice at all times.<sup>131</sup>

## ***ii. The Burmese Constitution Precludes Compliance with the Genocide Convention***

The Genocide Convention, ratified by Burma in 1956, was drafted pursuant to the 1946 General Assembly Resolution (96 (1)), which affirmed genocide as a crime under international law, and called for a treaty to be drafted detailing states parties' duties to prevent and punish the crime. The Convention was drafted by the UN Secretariat's Human Rights Division, and went through several rounds of comments by the UN General Assembly.<sup>132</sup> The final draft of the Convention, detailing states' affirmative duties regarding the new international crime of genocide, was radical in the defining the broad scope of states' obligations at the time and remains so today.

Article V of the Convention requires that "Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the...Convention and...to provide effective penalties for persons guilty of genocide..."<sup>133</sup> This obligation extends further than the provision of punishment for the act of genocide. In fact, the ICJ has stated that "the rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*,"<sup>134</sup> that a core obligation of states is the "duty to prevent" genocide, and that the state is responsible if it "failed to take all measures to prevent genocide within its power."<sup>135</sup>

Burma has failed since 1956 to pass any legislation implementing the Convention, as required by Article V and VI.<sup>136</sup> Now, Burma's 2008 Constitution affirmatively flouts the Conventions by depriving civilian courts of any jurisdiction over crimes of genocide by the military, and provides amnesties for such crimes that extend to both civilian and military courts. Thus, the 2008 Constitution is a *prima facie* breach of Burma's obligations under Articles V and VI of the Genocide Convention.

Under Article IX, given the 2008 Constitution's violation of Article V, all states have an absolute duty to refer Burma's noncompliance issue to the ICJ.<sup>137</sup> Article IX is one of the most important parts of the Genocide Convention as it establishes compulsory jurisdiction in the ICJ on all state parties on all cases relating to the Convention<sup>138</sup> (this is in contradistinction to Article 36 of ICJ which provides for jurisdiction only when both state parties agree). The

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<sup>131</sup> Chapter VI, Section 293(b) of the 2008 Constitution makes provision for the creation of "courts martial". Further, Section 319 stipulates that "According to Sub-Section (b) of Section 293, the Courts-Martial shall be constituted in accord with the Constitution and the other law and shall adjudicate Defence Services personnel."

<sup>132</sup> The history of the drafting of the Convention by the UN Secretariat's Human Rights Division was compiled and analyzed by Nehemiah Robinson, "The Genocide Convention: A Commentary," Institute of Jewish Affairs, World Jewish Congress, 1960. With extensive commentaries on the drafting of Article V as requiring states "undertake" (this word is given special proactive significance), Robinson concludes, based on intent of drafters, that although states need not enact uniform legislation, parties are not free to provide any legislation or penalty they want and "insufficient" legislation may well be a core violation under Article IX.

<sup>133</sup> Convention on the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

<sup>134</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ, Preliminary Obligations, 1996, at ¶31.

<sup>135</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), ¶ 430. (2007).

<sup>136</sup> Although the Convention contains no time frame for enacting such legislation except "good faith", Robinson states that, "should a Party procrastinate, however, another Party to the Convention may invoke Article IX." Robinson, *supra* note 134, at 78.

<sup>137</sup> Parties' obligation to refer under Article IX is broad and encompasses cases such as Burma where states fail to pass necessary legislation (or where they pass inadequate legislation) under Article V.

<sup>138</sup> Genocide Convention, *supra* note 135, at art. IX.

ICJ deals with disputes between states, and cannot pronounce judgments on persons. The Genocide Convention is clear that states have civil responsibilities that will be enforced by the ICJ. The ICJ can decide on whether the 2008 Constitution violates Article V, what Burma must do and what, if any, penalties Burma must pay for the violation. Burma, as a state party to the Convention, is under ICJ jurisdiction, and Burma's violations place an obligation on states to refer Burma to the ICJ.

## **Section V. The 2008 Constitution Renders Burma Unable to Comply with International Laws Governing States' Nuclear Activity**

The structure of the 2008 Constitution makes it so that Burma is unable to comply with the various multilateral and regional treaties, binding resolutions of the UN Security Council, and the jurisprudence of the International Court of Justice (ICJ) that address atomic energy or nuclear weapon development. Yet none of the UN oversight or monitoring bodies, including the IAEA and the UN Security Council Resolution 1540 oversight committee, have noted this radical change,<sup>139</sup> or discuss its implications on Burma's ability to comply with the IAEA Safeguards Agreement.<sup>140</sup> Reassessment of the enforceability of Burma's international law obligations in light of the 2008 Constitution is vital as a matter of global peace and security.

### ***A. Burma's Nuclear Activities and Treaty Law Regulating Nuclear Development***

As discussed in Section II, Burma has obligations under the NPT including monitoring the use of any "fissionable materials" that could be used for peaceful or weapons purposes.<sup>141</sup> Since the 2008 Constitution precludes Burma's "civilian" government from monitoring or even entering military facilities,<sup>142</sup> and it is only the military that would possess "fissionable materials," the IAEA's ability to monitor is completely at the discretion of the military. Additionally, under Article 18 of the NPT, which sets out the enforcement measures related to verification, the IAEA Board may call upon Burma to "take required action."<sup>143</sup> However, this is also impossible given that the military is not subject to any laws except by decree of the Commander-in-Chief.

Burma appears to be in violation of the NPT "Small Quantities Protocol," which was accepted by Burma in its IAEA agreement in 1994.<sup>144</sup> If the allegations of the military's pursuit of a nuclear weapons program are true, Burma is in "automatic" violation of their obligations under this protocol.<sup>145</sup> Further, given the military's control over any nuclear technology, including that used for peaceful purposes, makes any bilateral civilian use treaties unenforceable. For example, Burma would be unable to sign a "Section 123" agreement as the United States has done.<sup>146</sup>

### ***B. The 2008 Constitution Renders Burma Unable to Comply with Security Council Resolutions on Nuclear Weapons***

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<sup>139</sup> The IAEA has said that it is looking into reports of Burma's nuclear activity, but never mention the difficulty of compliance with their obligations in light of the 2008 Constitution. *See, e.g.* Ashish Kumar Sen, *IAEA Seeks Permission from Myanmar for Nuke Inspectors to Visit*, WASH. TIMES, Jan. 13, 2011.

<sup>140</sup> *See, e.g.*, 1540 Committee, <http://www.un.org/sc/1540/nationalreports.shtml>.

<sup>141</sup> *Supra* note 32.

<sup>142</sup> *Supra* Section III.

<sup>143</sup> *Supra* note 32 at art. 18.

<sup>144</sup> *Supra* note 35.

<sup>145</sup> Robert Kelley, *Burma's Vanunu*, <http://www.independentworldreport.com/2010/09/burmas-vanunu>.

<sup>146</sup> Steve Gutterman, *U.S. Lauds Civilian Nuclear Deal with Russia*, Reuters, Dec. 10, 2010.

As discussed in Section IV, due to its inability to comply with Security Council resolutions, Burma is in violation of the UN Charter. The Security Council has passed a number of resolutions regulating nuclear development.<sup>147</sup> Security Council Resolution 1540 requires domestic measures that clearly prevent the proliferation of nuclear weapons.<sup>148</sup> Under the 2008 Constitution, however, such measures, even if passed, cannot be practically enforced, because the military is not subject to any oversight.<sup>149</sup>

The constitution also makes it impossible to comply with Security Council resolutions prohibiting the transfer of nuclear materials to countries such as Iran and North Korea. For example, Security Council Resolutions 1718, 1874, 1887 and 1928 call upon all members states to implement stricter national controls for the export of sensitive goods and technologies of the nuclear fuel cycle, and prohibit trading, shipping, and transfer of money to North Korea's missile or Weapons of Mass Destruction (WMD) program.<sup>150</sup> States are also prohibited from the procurement of missiles or missile related-items, materials, goods and technology from the North Korea.<sup>151</sup>

Burma may also be directly violating the resolutions regarding North Korea, given reports of weapons deals between the two countries, as discussed in Section II. North Korea is involved with "the surreptitious transfer of nuclear-related and ballistic missile-related equipment, know-how and technology" to countries including Iran, Syria and Burma. A UN sanctions committee panel of experts called for heightened vigilance to stop the nuclear trade and for more detailed investigation into the sophisticated means used by North Korea to circumvent sanctions.<sup>152</sup>

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<sup>147</sup> See, *infra*, notes 150 and 152.

<sup>148</sup> S.C. Res. 1540, U.N. Doc. S/RES/1540 (2004).

<sup>149</sup> See Section III *supra*. Moreover, the Atomic Energy Law contains an exception which allows the Energy Minister (then a military officer under Senior General Than Shwe), to "exempt any Government Department or Organization from compliance with any provision contained in this Law." Finally, under the 2008 constitution it is not clear that there will even be a Minister of Science & Technology, and in any case no Minister under control of the President has power over the military.

<sup>150</sup> See *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).

<sup>151</sup> S. C. Res. 1695, U.N. Doc. S/RES/1695 (2006).

<sup>152</sup> Report of the Panel of Experts Established Pursuant to Resolution 1874 (2009), U.N. Doc. S/2010/571.

### ***C. Customary International Law***

Additional Protocol I of the Geneva Conventions covers the threat and use of nuclear weapons in their codification of general IHL on weapons.<sup>153</sup> Though Burma has not ratified Additional Protocol I, the provision regulating weapons constitutes CIL and is thus binding on non-signatory states. Key to the legality of a weapon is whether it accords with the principles of humanity and the dictates of public conscience.<sup>154</sup> In 1996, the ICJ stated that this rule constitutes one of the “intransgressible principles of international customary law and is a fundamental rule to be observed by all States.”<sup>155</sup>

The ICJ held that the threat or use of nuclear weapons is prohibited in most cases, citing IHL.<sup>156</sup> The ICJ found the use of nuclear weapons “scarcely reconcilable” with requirements of IHL, including the distinction between civilian and military targets and the need to refrain from the use of weapons that cause unnecessary suffering.<sup>157</sup>

The opinion urged states to pursue effective nuclear disarmament in good faith.<sup>158</sup> Further, while initial weapons prohibitions were targeted at international conflict, customary law has rapidly evolved and the general principles prohibiting the use of weapons have been found to be customary law in both international and internal armed conflicts.<sup>159</sup>

Since the 2008 Constitution effectively removes the Burmese military and its nuclear activities from the purview of the judiciary, it violates the mandates of CIL that regulate the use of weapons.

## **Conclusion: Burma’s Constitution Violates Its *Erga Omnes* Obligations under International Law and Peremptory Norms of International Law and Constitutes a Threat to Global**

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<sup>153</sup> See International Committee of the Red Cross (ICRC), A Guide to the Legal Review of the New Weapons, Means and Method of Warfare, Measure to Implement Article 36 of Additional Protocol I of 1977, January 2006. (For a list of the general and specific treaty and customary IHL rules applicable to weapons, means and methods of warfare, and in conducting reviews, a State must also consider the prohibitions or restrictions on the use of specific weapons, means and methods of warfare pursuant to customary International Humanitarian Law.).

<sup>154</sup> *Id.* at 2-3. This refers to the so-called “Martens Clause”, which Article 1(2) of Additional Protocol I formulates as follows: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.”

<sup>155</sup> International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, General List No. 95, ¶ 105(2)E.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at ¶ 95.

<sup>158</sup> *Id.* at ¶ 105(2)(F).

<sup>159</sup> See Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, 2 Volumes, Volume I. Rules, Vol. II. Practice (2 Parts), Cambridge University Press, 2005. (The ICRC concludes that State practice has prohibited the use (or certain types of use) of a number of specific weapons under customary international law: poison or poisoned weapons; biological weapons; chemical weapons; riot- control agents as a method of warfare; herbicides as a method of warfare; bullets which expand or flatten easily in the human body; anti-personnel use of bullets which explode within the human body; weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body; booby-traps which are in any way attached to or associated with objects.).

## Peace and Security

The 2008 Constitution, guaranteeing the military's absolute legal autonomy, is a serious threat to our international legal order. The 2008 Constitution breaches Burma's intransgressible obligations under international law, including the UN Charter and the Genocide and Geneva Conventions. In addition, as Burma is a country in armed conflict where there are ongoing crimes against humanity, the constitutional guarantees of impunity have an elevated gravity.

The 2008 Constitution renders Burma incapable of complying with its international treaty obligations in violation of international law. This violation requires that all states respond using cooperative means. This can be done through a Security Council resolution declaring the Constitution "null and void" as a form of collective non-recognition. Security Council resolutions mandating collective non-recognition are a form of sanctions which the Council has imposed since 1965, including in situations involving Zimbabwe, Zambia, Cyprus, Israel, and South Africa, thereby providing a compelling precedent for Burma.<sup>160</sup>

The grave truth is that unless the Security Council first addresses the illegality of the 2008 Constitution by declaring it null and void, takes action to end impunity for military crimes, and reviews the military's increased nuclear activities in the context of its special constitutional status, the hazard that Burma poses to global peace and security will continue to escalate.

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<sup>160</sup> See Janet Benshoof and U Aung Htoo, *The Junta's Criminal Constitution*, Far East Econ. Rev., May 5, 2008.