

SUBMISSION TO THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON MYANMAR

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This submission to the Independent International Fact-Finding Mission on Myanmar (“FFMM”) details the structural barriers that impede accountability for perpetrators and preclude justice for victims of human rights abuses in Myanmar. 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 Myanmar. Obstacles outlined in this submission 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 these structural impediments 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 Myanmar. 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 Myanmar. 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, therefore, as another example of how impunity for human rights abuses committed by the military is the rule, not the exception in Myanmar.

Since the FFMM’s mandate requires that the “facts and circumstances of alleged human rights violations” be established with “a view to ensuring full accountability for perpetrators and full justice for victims,” we submit that it is essential that the FFMM grapple with these structural barriers and the established lack of accountability in making recommendations to the United Nations, the Government of Myanmar and the international community.

The Constitution Formalizes Military Autonomy and Impunity

Despite overtures of a transition toward democracy, Myanmar’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 2008 Constitution, which puts the military entirely outside 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.¹ 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.”² Therefore, with its extensive powers and without checks and balances, the military has complete sovereignty. This includes the power to ignore Myanmar’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 be 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.³
- The National Defence and Security Council (“NDSC”), the most powerful non-elected body under the Constitution, consists of 11 officials, six of whom are selected by the Defense Services and are answerable to the Commander-in-Chief.⁴ 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.⁵ 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.⁶
- 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.⁷ 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.”⁸ 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.⁹

- **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 Myanmar and has the sole right to administer and adjudicate all affairs of the Defense Forces; his judgment is “final and conclusive.”¹⁰ 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.”¹¹ The President can also grant amnesty “in accord with the recommendations of the National Defence and Security Council”, which is under the control of the military.¹² 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.”¹³ This grants the military a unilateral right to assert power in a wide range of circumstances, including if there should be “insurgency or violence.” 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.¹⁴

Lack of an Independent and Accountable Judicial System

- Administration of justice is particularly weak in Myanmar.¹⁵ Myanmar’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.”¹⁶ 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.¹⁷ 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 Shawng, the father of a 14-year old girl who was killed by the military, is a case in point.¹⁸ 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 18 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.¹⁹

Conclusion

The analysis above, detailing the Constitutional basis for military autonomy, makes clear that the turbulence in Rakhine State has potentially far-reaching consequences for continued peace and security in Myanmar. 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. However, 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 where political will exists, it has the ability to creatively interpret constitutional limits and executive powers—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 would allow her to become the *de facto* head of government and skirt these constitutional limits. Accordingly, the civilian government should take all steps within its power to facilitate and open the door for justice and accountability. For example, the civilian government could cooperate with and facilitate access to independent human rights experts, including the FFMM and human rights mandate holders. Furthermore, the civilian government could take measures at the legislative level that do not require constitutional amendments to put in place a legal framework that would enable and foster accountability, including the adoption of legislation criminalizing international crimes (war crimes, crimes against humanity and genocide), as well as other domestic legislation, such as the long-postponed Protection and Prevention of Violence against Women Law.

The extensive powers granted by the Constitution to the military in times of peace are extended even further in times of turmoil. Therefore, the Constitutional system makes it possible that the military might have incentive to perpetuate a situation of unrest, or at least not to take actions to defuse it. In fact, the military has used the turbulence to advocate for a convening of the NDSC, and the military-backed Union Solidarity and Development Party has pointed to the unrest to advocate for an assertion of military power, including by a declaration of martial law.²⁰ Therefore, it is crucial to pressure all parties, including the civilian government, to use all available resources to defuse not only the situation in Rakhine State but the unrest in other parts of Myanmar as well.

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¹ Constitution of the Republic of the Union of Myanmar (2008) [hereinafter the “Const.”], at ch.I, art. 6(f).

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- ² Const., *supra* note 1, at ch. I, art. 20(e).
- ³ Const., *supra* note 1, at ch. IV, arts. 74, 109 (b), 141 (b) [for 25% military appointees] and ch.XII, art. 436(a) [for amendments to the Constitution].
- ⁴ Const., *supra* note 1, at ch.I,art.20,ch.III, art. 60(iii),ch.V, art. 201, and ch. VII, art. 340.
- ⁵ Const., *supra* note 1, at ch.V, art. 201, 232(b)(ii) and (iii), and ch.VII, art. 340.
- ⁶ Const., *supra* note 1, at ch.V, art. 232(b)(ii) and (iii).
- ⁷ Kyi Pyar Chit Saw & Matthew Arnold, Administering the State in Myanmar: An Overview of the General Administration Department, Discussion Paper No. 6, Myanmar Development Resource Institute’s Centre for Economic and Social Development & The Asia Foundation, Oct. 2014, at iii [hereinafter “GAD Report”].
- ⁸ GAD report, *supra* note xii, at 1, 2; “Myanmar’s all-powerful “GAD” a challenge to new government” July 2, 2016.
- ⁹ Const., *supra* note 1, at ch.III, art. 71(b).
- ¹⁰ Const., *supra* note 1, at ch.I, art.20(b) and ch.VII 343(b).
- ¹¹ Const., *supra* note 1, at art. 445.
- ¹² Const., *supra* note 1, at ch.V, art. 204(b).
- ¹³ Const., *supra* note 1, at ch.I, art. 40(c).
- ¹⁴ Const., *supra* note 1, at ch.XI, art. 419.
- ¹⁵ Crouch, Melissa, The Judiciary in Myanmar (March 3, 2016). UNSW Law Research Paper No. 2016-10. Available at SSRN: <https://ssrn.com/abstract=2747149> or <http://dx.doi.org/10.2139/ssrn.2747149>. Progress Rep. of the Special Rapporteur on the situation of human rights in Myanmar to the Human Rights Council (Tomás Ojea Quintana), ¶ 12, U.N. Doc. A/HRC/19/67 (March 7, 2012); Nick Cheesman & Kyaw Min San, *Not Just Defending: Advocating for Law in Myanmar*, 31 WIS. INT’L L.J. 714, available at http://www.Myanmarlibrary.org/docs19/Cheesman_KMS_Not_just_defending-ocr-tpo.pdf; International Bar Association’s Human Rights Institute, *The Rule of Law in Myanmar: Challenges and Prospects*, (December 2012) AT 58, [Hereinafter IBA 2012 Report], available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=DE0EE11D-9878-4685-A20F-9A0AAF6C3F3E>.
- ¹⁶ Report of the Special Rapporteur on the situation of human rights in Myanmar, Human Rights Council Thirty-first session, ¶ 20, 21, U.N. Doc. A/HRC/34/67 (March 1, 2017) Report of the Special Rapporteur on the situation of human rights in Myanmar, Human Rights Council, Thirty-first session, ¶ 15, 16, U.N. Doc. A/HRC/31/71 (March 18, 2016). IBA 2012 Report at 59. See also International Commission of Jurists, *Country Profile: Myanmar*, (June 2014) 11 available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/CIJL-Country-Profile-Myanmar-June-2014.pdf>; see also International Commission of Jurists, *Right to Counsel: the Independence of Lawyers in Myanmar*, (June 2014) at 40 available at <http://www.burmalibrary.org/docs16/ICJ-MYANMAR-Right-to-Counsel-en-red.pdf>.
- ¹⁷ International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar: Baseline Study* at 19 (Jan. 2018), available at <https://www.icj.org/wp-content/uploads/2018/01/Myanmar-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2018-ENG.pdf>.
- ¹⁸ International Commission of Jurists, *Achieving Justice for Gross Human Rights Violations in Myanmar: Baseline Study* at 33 (Jan. 2018), available at <https://www.icj.org/wp-content/uploads/2018/01/Myanmar-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2018-ENG.pdf>.
- ¹⁹ Justice Base, *Behind Closed Doors: Obstacles and Opportunities for Public Access to Myanmar’s Courts* (May 25, 2017), available at <http://myjusticemyanmar.org/sites/default/files/Justice-Base-Behind-Closed-Doors.compressed-1.pdf>.
- ²⁰ Htoo Thant, “NDSC meeting may be called if violence in Rakhine worsens,” Myanmar Times, Aug. 30, 2017; San Yamin Aung, “USDP and Allies Take Concerns to Military Chief,” The Irrawaddy, July 20, 2017; “USDP and Allies Call on Security Council to Intervene,” The Irrawaddy, Jan. 25, 2017; NDSC meeting may be called if violence in Rakhine worsens.