Burma's System of Impunity: A Legal Argument for Why Burma Cannot Find a Domestic Resolution for its Heinous Crimes

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As a variety of international actors, including over a dozen countries and a score of civil-society organizations, increase their calls for a United Nations-mandated Commission of Inquiry to be established for the purpose of investigating the systematic violation of human rights in Burma, the Burmese regime has repeatedly argued that "An independent investigation in international law requires the exhaustion of local remedies."[1] This statement is accurate to the point that, if Burma were both able and willing to impartially and effectively investigate human rights violations through domestic mechanisms and to appropriately act on the results of such investigations, the international community would be obliged to wait for domestic judicial systems to run their course before initiating an international investigation of heinous crimes within Burma. If, however, Burma cannot or will not hold its human rights violators accountable, it becomes both the right and the responsibility of the international community to intervene.

Currently, the existing system of impunity within Burma renders it impossible to obtain an impartial examination of human rights violations within the country—violations for which high-ranking members of the Burmese government bear responsibility. Despite the fact that Burma has a new

government that claims to be both civilian-led and democratic, the system of impunity within the country remains unchanged from its years of formal military rule. In fact, recent events, such as the establishment of the 2008 Constitution and the 2010 elections, have only served to entrench this system, despite their democratic veneer.

The Burmese government, realizing that the acknowledgment of a system of impunity in Burma leads to the complete dismissal of their argument that international action is not needed to advance the cause of justice within Burma, has vigorously denied that such a system exists. Burma's Attorney General, Dr. Tun Shin, declared at the country's Universal Periodic Review earlier this year that:

"*There is no impunity in Myanmar. No one is above the law. The legal maxim* nemo est supra leges[2] *is the accepted principle. Citizens, military and police personnel are not above the law and action will be taken against them when the law is breached.*"[3]

At its Universal Periodic Review, the government delegation also denied the existence of any political prisoners or prisoners of conscience,[4] claimed that allegations of sexual violence were merely attempts to discredit the armed forces,[5] and asserted that government censorship in Burma was consonant with the maintenance of fundamental rights.[6] As numerous international organizations have demonstrated these claims to be patently false, it is clear that the Burmese government's allegations that there is no culture of impunity cannot be taken at face value.

At its Review and within other forums, the Burmese government has advanced several arguments to support its assertion that there is no system of impunity within Burma: First, that the recent Constitution has advanced the rule of law and created a democratic system; second, that the judiciary is sufficiently independent; third, that lawyers within Burma are free from a climate of pressure that would influence their role as officers of the court; and fourth, that the government-created Human Rights Body is an effective tool for judging human rights violations.

All of these assertions are patently false, as this paper will demonstrate. This paper will first explain how the 2008 Constitution has enshrined a system of impunity that makes it impossible to achieve an impartial examination of human rights abuses domestically. In the next section, it will show how the judicial

system is completely dependent on the will of the executive, and has been constructed to serve the interests of the ruling military elite. Third, this paper will illustrate how lawyers within Burma are not free to adequately represent their clients' interests when those interests contravene the will of the ruling regime. Next, it will present the case for how the domestic Human Rights Body within Burma is a completely ineffective tool that is led by the same government officials who are supposed to fall within the Body's scrutiny. And finally, it will show how the legislative system within Burma has been set up to ensure that any reforms to this system of impunity will be blocked by the military.

While this paper does not claim to offer a complete list of the legal mechanisms which constitute a system of domestic impunity within Burma, it seeks to remove any confusion as to this point: The legal system within Burma is completely incapable of bringing high-level perpetrators of human rights violations to account. Therefore, international legal action such as the establishment of a United Nations-mandated Commission of Inquiry to impartially investigate reports of human rights violations is the only way for the international community to honor its responsibilities to the people of Burma and promote the cause of justice and peace throughout the country.

Article 445: The Immunity Clause

Perhaps the gravest example of how impunity is enshrined in the 2008 Constitution is Article 445, commonly known as the Immunity Clause, which states that "No proceeding shall be instituted against the said [previously-ruling] Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties." This provision acts as a guarantee of amnesty for any government official who has committed any crime, as long as the crime was committed as a result of their official duties. The military general who committed war crimes, the chief of intelligence who arrested and tortured political dissidents, the army commander who used forced labor for construction projects and who forcibly recruited child soldiers; all of these characters could find refuge from the consequences of their acts, which are accepted as crimes under international standards, by hiding under the auspices of Article 445. This is in contravention of customary international law, for which there is no amnesty for heinous crimes. It is also, more notably, in contravention of Burma's treaty obligations as a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide[7] and the Geneva Conventions.[8]

The Genocide Convention stipulates that punishment for commission of the act of genocide is independent of whether the offender is a private individual or member of the government.[9] The Geneva Conventions similarly state that signatories have a duty to pass legislation criminalizing grave breaches of the laws of war, to bring perpetrators of these breaches to justice, and to redact domestic law contrary to the provisions of the Conventions.[10] Signatories are also prohibited from absolving themselves or others from liability for these breaches of the laws of war.[11] These international obligations stand in stark contrast to Article 445, which appears to place a complete shield of amnesty over government action. By enshrining such immunity within its Constitution, the Burmese government has completely abnegated its responsibility to hold its members to account for the role they have played in the commission of heinous crimes against the people of Burma.

The Judicial System: Independent in Name Only

Appointing Judges

The President of the Union of Myanmar is given complete power in choosing the head of the Supreme Court, or the Chief Justice of the Union. While the President's nomination must be confirmed by Parliament,[12] the legislature is in fact confined to confirming that the nominee passes a set of Constitutionally-prescribed qualifications. Unless the nominee fails to meet these qualifications, which govern such basic criteria as ensuring that the nominee is a Burmese citizen, the Parliament has no authority to reject the President's nomination.[13] To underscore this lack of legislative autonomy, there is no Constitutional clause allowing the Parliament to vote on whether to approve a presidential nominee; legislative compliance is assumed. As a result, the Chief Justice owes his appointment completely to the President.

Together, the Chief Justice and the President choose the nominees to fill the remaining seats on the Supreme Court. Again, the legislature's role is confined to an examination of the nominee's biography in order to confirm eligibility for the position.[14] Similarly, the President is able to appoint his choice for the Chief Justice of the different Regions and States within Burma, albeit with the "co-ordination" of the Chief Justice of the Union and the Chief Minister of the region or state.[15] The exact level of consent required, by either the Chief Justice of the Union or the relevant Chief Minister, to constitute a threshold level of "co-ordination" may later need to be determined by Burma's Constitutional

Court. Regardless, these provisions demonstrate that the Constitution ties not only the Supreme Court but rather every level of the judiciary within Burma to the President. These connections undercut any hope that the judiciary can operate as an effective check to the power of the ruling regime.

The President himself, under the 2008 Constitutional structure and within the traditional power structure of the ruling junta, is deeply beholden to the military. The military is one of the three groups within Parliament allowed to choose a nominee for President.[16] The military is also guaranteed 25% of the seats within Parliament,[17] providing them with a large voting bloc to ensure that their candidate is selected. This voting bloc is strengthened by the retired military members of Parliament, who are nominally civilians but who can be expected to vote in lockstep with their active-duty counterparts. Beyond this, members of the only major political party within Burma, the Union Solidarity and Development Party, which began as the political wing of the military establishment, can also be expected to cast their votes in support of the military's favored candidate. In fact, the current connection between the Union Solidarity and Development Party and the military junta is so strong that international observers have begun to refer to it as the "military-Parliamentary complex."[18] With this in mind, it becomes clear that the President is chosen not to impartially steer the country but rather to act as a representative for the interests of the junta.

The President shares Executive powers with the powerful National Defence and Security Council, a collection of junta leaders that includes several high-level military members. In an Executive-invoked state of emergency, the President devolves sovereign powers to both the Commander-in-Chief and the National Defence and Security Council, which then operate with no checks against their power[19] and with complete amnesty for any measures taken during the state of emergency.[20] Beyond its perpetuation of a system where the military junta operates above the law, this arrangement of executive power also ensures that the President must work most closely with other members of the junta in order to operate effectively.

As yet another means of manifesting control over the President, the military is single-handedly able to impeach the President, though not to remove him. The necessary number of members of Parliament to impeach the President is "not less than one-fourth" of either House,[21] which happens to be the exact number Constitutionally granted to the military. As a result, the military can trigger a Parliamentary investigation into Presidential "misconduct" at any time, placing

the President in a precarious position if he ever disagrees with the initiatives of his compatriots in the military junta. Presidential appointments to the judiciary are thus a stand-in for the military's preferences, including allowing the appointment of ex-military personnel to top judicial posts. Notably, the foremost judicial post in the Union, that of the Supreme Court's Chief Justice, is held by former deputy chief justice Tun Tun Oo, a former high-ranking officer who began his legal career in the military advocate general office. Such an appointment demonstrates the ease with which the military is able to control the composition of the Burmese judicial system.

Dismissing Judges

While the Constitution appears at first glance to provide some protection against a justice's summary removal from office, in reality the charges upon which a judge can be removed are subjective and vague. Sufficient charges include "misconduct" or "inefficient discharge of duties assigned by law."[22] Justices are also required to be "free from party politics";[23] breach of this provision also would constitute cause for dismissal.[24] The requirement that judges be free from party politics is similar to the Constitutional provisions prohibiting the abuse of religion for political purposes.[25] The provisions against "abuse of religion" provide the government with a tool to use against members of the Buddhist clergy who protest the regime and against leaders in ethnic communities with large Christian or Muslim constituencies. Similarly, the prohibition against members of the judicial branch engaging in party politics can be easily abused by the regime. And although the actual dismissal of a Justice requires two-thirds of the legislature, the President is allowed to impeach any Justice on his own initiative.[26]

The members of the Constitutional Tribunal of the Union, which serves as the final authority on Constitutional matters, are more isolated from the Executive during the appointment process than members of the Supreme Court of the Union. The President only appoints three of the members of the Constitutional Tribunal, including the Chairperson, with the Speakers of both houses of Parliament also allowed to appoint three members each.[27] However, the President is similarly allowed to impeach members of the Tribunal for such violations as "misconduct,"[28] "inefficient discharge of duties assigned by law,"[29] or involvement in the activities of a political party.[30] This provides the President with a significant measure of power over the job security of those who decide how to interpret Constitutional provisions.

Impeachment is not the only way for a member of the judiciary to leave office, however. He is also allowed to resign, and while the Constitution mentions that this resignation must be of the justice's "own volition,"[31] the ruling junta has previously used forced resignations as a tactic for controlling the Supreme Court. In 1998, the State Peace and Development Council (the junta's previous incarnation), "permitted the retirement" of five out of the six judges of Burma's previous Supreme Court.[32] No reasons for their mass resignations were provided.

Finally, the Constitution provides another avenue for executive control over the will of the judiciary by allowing a range of acceptable numbers of judges to sit on both the national Supreme Court and the regional High Courts. For the Supreme Court, the President is allowed to appoint between seven and eleven Justices,[33] while for the High Court of a state or region the President is allowed to appoint between three and seven Justices.[34] These malleable figures allow the President to counteract the will of resistant Justices by placing additional Justices, more pliant to his will, on the bench. Thus, even if the President is unable to dismiss a Justice or compel his resignation through non-legal means, he can counteract the effect of a noncompliant Justice through additional appointments. The regime has proven more than willing to use court-packing tactics in the past: Although the 2000 Judiciary Law restricted the pre-Constitutional Supreme Court's numbers to twelve, the military regime did not hesitate to appoint justices to the Court in excess of this number in order to help ensure a compliant judiciary.[35] With the new Constitution, the junta will be able to similarly manipulate the membership of the judiciary while remaining within the letter of the law.

Impeachment, enforced resignations, and court-packing are all tactics the military-led "civilian" government have at their disposal to control the behavior of high-level judges, even after the Justices have been appointed to their positions. Combined, these tactics provide the regime with a powerful level of control over the judiciary, further ensuring that the judicial branch will not operate independently and that their actions will not be impartial.

Lawyers: Controlled through Punishment and Intimidation

While judges follow the orders of the regime, there is another class of "officers of the court" who are controlled by the regime through a system of punishment and intimidation. The Burmese legal system has a long record of putting lawyers who advocate for causes contrary to those of the regime, most commonly

defense lawyers for clients arrested on politically-motivated charges, at a serious disadvantage within the courtroom. The court may label their questions or evidence inadmissible, or deny them access to necessary files or evidence. Lawyers have been prevented from speaking with their clients in public or even from meeting with them at all. In several cases, defense lawyers have been arrested for contempt of court or other trumped-up charges, and sent to prison during their clients' case.[36] The persecution of lawyers who attempt to represent a legal counterpoint to the wishes of the government stands in stark contrast to the promises of the 2008 Constitution that the government would enhance the principles of Justice, Liberty and Equality.

Burmese law contains many vague and arbitrary laws subject to subjective determinations, which can be used by both the police and judges to punish lawyers advocating causes that contravene the will of the regime. One such example is the Law Relating to forming of Organizations, which contains clauses criminalizing organizations that commit acts that "may effect [sic] or disrupt the regularity of state machinery".[37] This law, which criminalizes even the potential for disruption and offers no criteria for judging what constitutes disruption, has even been used against individuals, such as lawyer Pho Phyu during his defense, in early 2009, of farmworkers whose land had been confiscated by the government.[38]

Burmese law also contains provisions that appear tailored to provide judges with tools to arbitrarily punish lawyers who challenge court proceedings. The Contempt of Courts Act,[39] which has remained unaltered since 1926, provides a penalty for up to six months in prison, along with a fine, for lawyers found to be in contempt of court. The Act makes no effort to define the characteristics of contempt, making any determination of contempt completely dependent on the will of the judge. Human rights groups have pointed out that this dangerous lack of definition for 'contempt' has led to systematic abuse of the provision on the part of judges. For example, in 2008, lawyers U Aung Thein and U Khin Maung Shein withdrew from representing detained democracy activists as part of an agreement with their clients to protest the unfairness of the trial. The lawyers pointed out that they were being prevented from meeting with their clients and preparing an adequate defense, and that the family members of the accused were not allowed to enter the courtroom. In response, the court found both lawyers in contempt of court and sentenced them to several months in prison.[40]

Besides the Contempt of Courts Act, the Burmese Penal Code contains a provision (Article 228) declaring that "Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sifting [sic] in any state of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."[41] The provision is similarly open for abuse by the courts; "any interruption" is a broad category that essentially allows the judge to punish a lawyer for any disagreement with the course of court proceedings. Although this provision attempts to penalize the same behavior as the Contempt of Courts Act, the fact that Article 228 is apart from the Contempt of Courts Act means that there is no impediment to a court finding a lawyer guilty of contempt under both bodies of law, essentially doubling the sentence to a maximum of one year in prison.

Beyond imprisoning defense lawyers, the regime has also found it fit to simply suspend or disbar lawyers with whom they disagree, preventing them from practicing law. For example, U Aung Thein, while serving as the legal advisor to Daw Aung San Suu Kyi in May 2009, had his license revoked on the charge that he was not abiding by legal ethics.[42] This is not an isolated example of the regime disbarring a lawyer for political reasons; the Asian Law Resource Center has compiled a list of over 200 Burmese lawyers who have recently been suspended or deregistered, and reports that many such suspensions or disbarments are a result of actions "that the authorities found inimical to their interests."[43] The Center also points out that:

"*In a country with lawyers numbering in the thousands, this is a large percentage that speaks to the attempts to contain and coerce the profession as a whole. The ALRC has followed a number of cases of deregistration closely and is aware that the lawyers who have suffered this penalty have been informed by written communication of what has happened to them and have been denied the opportunity to present a defence, although the law allows for this."*[44]

The Burmese government's willingness to use both procedural and substantive legal rules to prevent defense lawyers from providing their clients an adequate defense within the domestic legal system are far from acceptable by international standards. For example, the indictment of defense lawyers for attempting to defend their clients against the government appears to be in violation of Articles 7 and 10 of the Universal Declaration of Human Rights, both of which aim to safeguard the principle of equal protection before the law.

Similarly, Burma's castigatory attitude towards activist lawyers violates several provisions of the Basic Principles on the Role of Lawyers, a set of guidelines released by the United Nations in 1990 to govern the safeguarding of the proper role of lawyers.
Among other requirements, the guidelines include basic principles regarding access to lawyers, such as the prohibition against making access to lawyers dependent on political stance or other opinions;[45] the assurance of a defendant's prompt access to a lawyer;[46] and the necessity of providing adequate access to a lawyer without censorship or interception of lawyer-client information by authorities.[47] Governments are similarly tasked with ensuring that lawyers are not prevented from pursuing legal practice due to political views or other opinions.[48] The Burmese government, through its interference with the legal rights of political arrestees and its punitive actions against lawyers who dare to take such cases, fails to meet this basic threshold of safeguards intended to ensure an adequate role for lawyers within Burma's domestic judicial system.

With the vagueness of certain laws, and with other laws seemingly having no *raison d'etre* other than to punish those seeking to defend their clients against the assertions of the regime, the Burmese legal system is currently incapable of ensuring that lawyers who seek to speak out against power will be respected and protected from government excess. As long as lawyers remain unprotected from punitive action as a consequence of their legal advocacy against the will of the regime, a system of impunity remains in place.

The Military Courts-Martial: Live by the Sword, be Judged by the Sword

Even if the regular court system operated independently from the ruling government, a large portion of the junta's crimes would remain protected by the Burmese system. The Constitution establishes a separate set of military Courts-martial, not beholden to the Supreme Court, that adjudicate all crimes committed by the Burmese military. While many countries possess their own courts-martial systems, there are normally restrictions on the jurisdictional reach of these courts, as well as institutional checks on the power they wield. Not so in Burma, where the government remains within the power of the military establishment.

The jurisdiction of Burma's Courts-martial has little in the way of limitations; the Constitution says only that the Courts-martial "shall adjudicate Defence

Services personnel."[49] With such an unrestricted mandate for the Courts-martial, it appears unlikely that a member of the military will ever fall within the jurisdiction of a civilian court, regardless of the alleged crime. To underscore the point that the military is outside of the traditional court system, the Constitution also goes on to explicitly declare in a separate provision that the Courts-martial fall outside the jurisdiction of the Supreme Court of the Union.[50]

Human rights groups have amassed a comprehensive amount of information pointing to the Burmese military as the perpetrator of a large range of crimes. The Harvard Law report "Crimes In Burma" declared in 2009 that past "numerous military campaigns against ethnic nationality groups led to a litany of human rights violations."[51] International observers state that these crimes continue on to the present day. In his 2010 report to the Human Rights Council,[52] Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, described some of these crimes reported to have been committed by the Burmese military, including forced displacement,[53] forced labor,[54] recruitment of child soldiers,[55] rape and sexual violence,[56] pillage and destruction of villagers' livelihoods,[57] extrajudicial killings,[58] indiscriminate attacks upon civilian populations,[59] and the use of anti-personnel landmines.[60] All of these categories constitute serious violations of international law, and similarly constitute actionable offenses under the Rome Statute of the International Criminal Court.

It is fundamental to underscore the fact that these crimes are not simply isolated incidents committed by low-level soldiers without direction; instead, they are part of a comprehensive campaign to break ethnic resistance to the Burmese military junta, initiated by high-ranking military commanders and enforced by military order throughout the chain-of-command. For decades, the Burmese military has utilized a "Four Cuts" policy that aims to weaken ethnic militias by cutting them off from access to resources within ethnic areas.[61] This policy, which equates the widespread victimization of ethnic civilian populations with official military strategy, has had the direct consequence of officially validating and in fact mandating the above-listed human rights abuses. Similarly, other systematic abuses such as forced portering and the recruitment of child soldiers can be directly traced to military strategies promoted at a high-level within the military. With the courts-martial serving as the only means to judge Defence Services members, the Burmese legal system has created a situation where the military is in charge of investigating human rights abuses that directly result from its own high-level policies.

In addition to the jurisdiction, the composition of the military judiciary underscores the low likelihood of receiving an impartial trial for military members accused of heinous crimes. Judges for Burmese Courts-martial are typically composed of medium-level military officers, hardly a credible source for impartially determining whether the Burmese military regime has committed systematic war crimes or other heinous crimes. Any credible examination of the military's role in these crimes has to be investigated and presided over by a body other than the military, and this will not happen under the current system in Burma.

The Constitution further declares that "the decision of the Commander-in-Chief of the Defence Services is final and conclusive" in regards to the adjudication of military justice,[62] a provision which grants the Commander-in-Chief appellate power over the decisions of the Courts-martial. Were the Courts-martial to return a guilty verdict against a soldier accused of heinous crimes, the Commander-in-Chief could simply overturn it. This renders the entire Courts-martial system dependent on the will of the Commander-in-Chief, who can prevent his subordinates from being held to account for enforcing military policies that led directly to systematic human rights violations. It also renders the Commander-in-Chief above the law; there is no domestic court capable of punishing him for any offense.

The Burmese Human Rights Body: A Smokescreen

Outside of the traditional court system is Burma's Human Rights Body, which has existed in some form since 2000 but which was re-launched by the regime after the events of the 2007 Saffron Revolution in an attempt to forestall international criticism. The government has pointed to its Human Rights Body as proof that it is willing and able to handle human rights violations domestically. The government junta explained in its Universal Periodic Review that the Body, as part of the Ministry of Home Affairs, received 503 complaints between January and August 2010. Of those complaints, "action had been taken on 199 complaints, 203 complaints were under investigation and 101 complaints had been found to be false."[63] However, in his March 2011 report to the General Assembly, Professor Quintana pointed out that the Human Rights Body had admitted that, out of these more than 500 complaints, not a single one of these complaints involved crimes against humanity or war crimes.[64]

Even were the Human Rights Body to investigate these crimes, any attempt to indict or even investigate the actions of military members in connection to war

crimes or crimes against humanity may fall afoul of the Constitutional provisions designating Courts-martial as the exclusive judicial body for crimes committed by the military. In fact, although the Body is mandated to accept "complaints and communications from those whose human rights are reportedly being violated, carrying out necessary investigations and taking proper actions although they are not included in the mandate of the Body,"[65] it is unclear what these proper actions would be. Without specified "proper actions" within the mandate of the Body, the power of the Body to compensate victims, punish perpetrators or even announce their findings remains unclear.

The debate over where the Human Rights Body's limits are drawn is eclipsed by the fact that, even if the Body's mandate were construed to allow a full range of power to investigate crimes and act upon their findings, the Body would still contribute to a domestic climate of impunity. Significant structural problems render the Body completely incapable of acting as a truly independent guardian of human rights in Burma.

Human rights observers like David Mathieson at Human Rights Watch have pointed out that the Human Rights Body is far from compliant with the international principles that govern such institutions.[66] The Principles Relating to the Status of National Institutions, or the Paris Principles, drafted in 1993, are intended to provide a blueprint for an adequately impartial national human rights institution. Within this blueprint are requirements that civil society be represented[67] and that government representatives serve only in an advisory capacity.[68]

The Myanmar Human Rights Body, in contrast, is part the government apparatus. In its Universal Periodic Review, the government admitted that the Body was not yet in line with the Paris Principles, but argued that the Body was "still in its initial stages."[69] The claim the Human Rights Body is in its nascence is less convincing upon the recollection that the Body is actually the renewal of a former human right body. The Myanmar Human rights Committee was initially formed in April 2000, and it was reformed as the Human Rights Body in November 2007, when the international community was considering a response to the regime's crackdown on protestors in the Saffron Revolution.[70] The Human Rights Body has thus existed in some form for over a decade, making it clear that it is not the immaturity of the organization, but rather the motivations of the government that created it, which prevents the Body from being in line with the Paris Principles.

The government's claim to eventually transform the Body into a Paris Principles-compliant organization is even less convincing when considering the fact that, weeks after its Universal Periodic Review, the government announced an order to "reform" the Human Rights Body. Within the order was the announcement that the Body would continue to be led by Government ministers.[71]

These Government ministers, in order to adequately fulfill the mandate of the Human Rights Body, would have to investigate themselves and their departments for violations such as excessive force in repressing protests, politically-motivated arrests, torture, and other abuses of power. Such investigations would include, for example, inquiries into systematic abuses of political prisoners in prisons controlled by the Home Affairs Ministry, even though it is this Ministry that also controls the Human Rights Body. The resulting conflict-of-interest renders it obvious that the government's Human Rights Body exists for a purpose other than that of promoting justice and reconciliation for the country.

The Military's Legislative Stranglehold

As the leaders of Burma's military junta have ensured both control of the judiciary and a Constitutionally-granted amnesty, they have taken similar steps to guarantee that the system cannot reform itself without their consent. The fact that the Constitution guarantees that 25% of all seats within Parliament go to serving members of the military who are all handpicked by the Commander-in-Chief, ensures that the legislature will be hard-pressed to ever act against the military's interests. But the Constitutionally-mandated composition of the Parliament actually renders it impossible to remove the foundations of the governmental system which ensure a climate of impunity for the military and other members of the regime.

In order to amend the Constitution, the Parliament must have the approval of more than seventy-five percent of its members,[72] providing the military with *de facto* veto power over any proposed Constitutional amendment. This fact undercuts the argument advanced by some international observers that the 2008 Constitution, although fundamentally flawed, nevertheless provides the foundation for gradual reform.[73] Such an argument presupposes the idea that anti-democratic provisions within the Constitution can be gradually corrected so that Burmese society eventually ascends to a more democratic level. But such a transformation is impossible within a system where the military can single-handedly block Constitutional reforms.

The International Centre for Transitional Justice, in its September 2009 paper *Impunity Prolonged*, underscores this point by using the example of Indonesia's transition from military rule to democracy:

"One of the fundamental reasons Indonesia has been able to move forward in its transition from military dictatorship to democracy is that the previous guarantee that 30 percent of seats in parliament go to military officers was not entrenched in the constitution. Therefore, those laws could be amended. The quota gradually decreased over seven years and now no longer applies."[74]

However, in Burma's new "civilian" government it is impossible to repeal the provisions guaranteeing the military 25% of all Parliamentary seats, because this amendment would ironically require the acceptance of the military itself in order to pass. Similarly, amendments to strengthen the role of the judiciary, to limit emergency powers or to provide the legislature with more autonomy in confirming nominees cannot pass without the acceptance of the ruling powers. Even the Immunity Clause cannot be removed without the consent of those who have the most to gain from the Clause's existence. This Constitutional framework paralyzes any prospective transition from a system of impunity to a system of accountability, placing the prospects for justice exclusively outside the ambit of Burma's current legal system.

Conclusion: An Entrenched System of Impunity

The new Constitution has created a system where the judicial branch functions as an extension of the executive, the legislative branch is unable to act without the consent of the military, and government members are given amnesty for their crimes. In short, it has perpetuated the system of impunity upon which the military junta has relied for decades. Judges owe both their appointment and their continued job security to the regime, while lawyers are similarly vulnerable to punishment if they act against the government. The military is responsible only to itself, in the form of military courts-martial which constitute the Constitutionally-approved vehicle for judging crimes of which Defence Service members were a part. Similarly, Burma's Human Rights Body is led by the same ministries of the government that have a vested interest in dismissing or burying human rights complaints.

As a set of legal institutions that aim to promote justice and enhance the rule of law, Burma's domestic system is untenable. As a legal system that aims to protect those in power from the consequences of their heinous crimes, it is quite effective. Burma's legal processes entrench a system of impunity and render victims of human rights within Burma voiceless. The responsibility falls upon the international community to rectify these injustices and prevent the continued commission of heinous crimes. As this paper is being written, the Burmese military has been waging a new series of offensives in ethnic states within Northern and Eastern Burma. This new set of offensives is just one of the long line of abuses committed by the Burmese military, which will not be resolved if the international community continues to believe that Burma has any interest in reforming its behavior without international pressure. The increasing calls for a Commission of Inquiry, an international and impartial investigation into crimes committed in Burma, should be heeded. Burma is incapable of handling such a Commission on its own; instead, the international community must act to promote justice, accountability, and peace for the people of Burma.

(Endnotes)

[1] UN Human Rights Council. "Report of the Working Group on the Universal Periodic Review: Myanmar." 24 March 2011. A/HRC/17/9. ¶ 103(c).
[2] "No one is above the law"
[3] A/HRC/17/9, at ¶ 103(g).
[4] *Id*. at ¶ 51.
[5] *Id*. at ¶94.
[6] *Id*. at ¶56.
[7] Burma became a signatory to the Convention on December 20, 1949, and ratified the Convention on March 14, 1956.
[8] Ratification and accession on August 25, 1992.
[9] "Convention on the Prevention and Punishment of the Crime of Genocide." Adopted by the General Assembly on 9 December 1948. Article IV
[10] "First Geneva Convention, 1949."Article 49.
[11] *Id*. at Article 51.
[12] Known as the Pyidaungsu Hluttaw.
[13] "Constitution of the Republic of the Union of Myanmar." September 2008. Article 299(d)(ii)
[14] *Id*.
[15] *Id*. at Article 308(b)(i).
[16] Article 60(b)(iii).
[17] Articles 141(b) and 109(b).
[18] Mathieson, D.S. "Burma's 'Disciplined Democracy is a Mockery of U.N. Standards." 4 April 2011.
[19] Article 427.
[20] Article 432.
[21] Article 71(b)
[22] Articles 302(a) and 311(a)

[23] Articles 300(a) and 309(a)
[24] Articles 302(a)(ii) and 311(a)(ii)
[25] *e.g.* Article 364.
[26] Articles 302(a) and 311(b).
[27] Article 333.
[28] Article 334(a)(iii).
[29] Article 334(a)(v).
[30] Articles 333(e) and 334(a)(ii).
[31] e.g. Article 312(a).
[32] "A Brief Analysis on the Judiciary of Burma." *Legal Issues on Burma Journal*, no. 18, 2004. Pages 2-32.
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