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# REVEALING BURMA'S SYSTEM OF IMPUNITY:

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A BRIEFER FOR THE COMMISSION OF INQUIRY CAMPAIGN

*PREPARED BY BURMA LAWYERS' COUNCIL*

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## INTRODUCTION: A SYSTEM OF IMPUNITY

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As the campaign builds to have the United Nations establish a Commission of Inquiry to investigate war crimes and crimes against humanity within Burma, members of Burma's military regime and apologists for the regime may argue that the international community should let domestic judicial mechanisms run their course before getting involved. Such an argument is both meaningless and counter-productive when applied to Burma, where the domestic judicial system is so irreparably flawed that it becomes both the right and the responsibility of the international system to investigate crimes against humanity and war crimes.

Within Burma, there is a system of impunity that is geared towards protecting those in power. Structurally, issues such as the lack of an independent judiciary within Burma, the system of military courts that judge all military offenses, and the guarantees of immunity for regime officials all serve to systematically subvert the rule of law in favor of the interests of the powerful. Recent events within Burma have served to entrench this system of impunity and enable continued crimes against humanity and war crimes. The military regime's creation of a "military-Parliamentary complex,"<sup>1</sup> its establishment of domestic human rights bodies, and its fallacious claims at its Universal Periodic Review at the UN Human Rights Council, are all clearly designed to evade international pressure while allowing the regime to maintain the status quo.

With such irreparably flawed judicial mechanisms, the military regime in Burma has proven both unable and unwilling to hold human rights violators to account. An international Commission of Inquiry into crimes committed within Burma would facilitate truth-seeking, protect the people of Burma from ongoing human rights abuses, address the lack of accountability and bring an end to impunity.

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<sup>1</sup> Mathieson, D.S. "Burma's 'Disciplined Democracy' is a Mockery of UN Standards." 4 April 2011.

## BURMA'S CONSTITUTIONAL STRUCTURE: A MANGLED SYSTEM OF JUSTICE

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The next few sections will demonstrate how a system of impunity has been embedded within the constitutional structure of Burma's regime. These following sections, snapshots of a mangled system of justice, demonstrate both how recent "reforms" of the regime have actually maintained the status quo, and how true reform of the domestic judicial system is impossible under the current framework.

### ARTICLE 445: THE IMMUNITY CLAUSE

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Article 445 of the 2008 Constitution 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 Article, also known as the Immunity Clause, grants amnesty for any regime 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; 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 the Immunity Clause. This is in contravention of customary international law, under which there is no amnesty for core international crimes. The Immunity Clause also violates Burma's obligations as a signatory to the Geneva Conventions to prosecute persons who have committed war crimes.

By enshrining immunity for its members, Burma's regime has completely abnegated its responsibility to hold itself to account for the role it has played in the commission of core international crimes against the people of Burma.

### THE JUDICIAL SYSTEM: APPOINTING AND DISMISSING JUDGES

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The Justices of Burma's Supreme Court are all handpicked by the President. Although the 2008 Constitution declares that the President's nomination must be confirmed by Parliament, the Parliament is in fact confined to confirming that the nominee is constitutionally eligible for the position. In essence, Parliament acts as a glorified fact-checker rather than as an equal branch of government. As a result, the Justices of the Supreme Court, as well as the Chief Justices of different regional courts, all owe their appointment to the President. Because the President is similarly handpicked by the ruling generals of the military regime, this arrangement ensures that members of the judiciary are beholden to the military for their appointments.

Justices also can be easily removed if they act against the will of the regime. The charges under which a judge can be impeached are subjective and vague, ranging from “misconduct” to “inefficient discharge of duties assigned by law.” Justices are also required to be “free from party politics,” raising the concern that any judge’s ruling against the regime would be labeled a ‘political’ decision. Under these vague standards, judges have no hope of tenure, and their every adverse decision could be punished by the regime. Both the Justices of the regular court system and the Justices of the Constitutional Tribunal, which acts as the final authority on matters of constitutional interpretation, are dependent on the regime for their continued job security.

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### COURTS-MARTIAL: SOLDIERS JUDGING SOLDIERS

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Even if Burma’s regular court system operated independently, it would not be enough to erase the system of impunity within the country. Burma’s 2008 Constitution establishes a separate set of courts to adjudicate all crimes committed by the military. Many countries have court-martial systems to judge military offenses, but Burma’s court-martial system is notable for its broad jurisdiction and unrestricted power.

The Constitution, at Article 319, says only that Courts-martial “shall adjudicate Defence Services personnel.” Under this unrestricted mandate, members of the military never have to appear before civilian courts, regardless of their crime. Article 294 of the Constitution declares that the Courts-martial fall outside the jurisdiction of the Supreme Court, so that the “highest court of the Union” actually has no power over the military justice system.

Instead, the final authority for military justice is the Commander-in-Chief of the Defence Services, an unelected general who is appointed by leading members of the military regime.<sup>2</sup> The Commander-in-Chief’s role as supreme judicial authority allows him to overturn the conviction of any convicted member of the military. His power also puts him above the law: there is no domestic court capable of punishing him for any offense.

The military has perpetrated a host of human rights abuses and violations of the laws of war, with many of these abuses occurring as a direct result of high-level military policies.<sup>3</sup> The infamous “Four Cuts” policy, for example, is a tactic that the military uses to suppress armed ethnic groups by brutalizing the civilian population in ethnic areas. These crimes will never be impartially judged by the military court system.

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<sup>2</sup> “Constitution of the Republic of the Union of Myanmar.” September 2008. Article 343(b).

<sup>3</sup> E.g. The International Human Rights Clinic at Harvard Law School. “Crimes in Burma.” May 2009.

## THE MILITARY'S LEGISLATIVE STRANGLEHOLD

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Burma's 2010 elections were controlled and manipulated by the ruling military regime. Rigged election laws prevented opposition figures from participating in the elections,<sup>4</sup> while the elections themselves were replete with documented instances of vote-rigging and electoral intimidation.<sup>5</sup> The regime ended up creating a "military-parliamentary complex" by filling most Parliamentary seats with members of the Union Solidarity and Development Party, a political party that was formed for the sole purpose of acting as the regime's political arm.<sup>6</sup> Because of this, Burma has a Parliament staffed with military loyalists who will not work to fix Burma's broken judicial system. Even if they wanted to, however, members of Parliament could not fix many of the fundamental problems with Burma's domestic system.

Because the 2008 Constitution guarantees 25% of all seats in Parliament to active military members, the military can single-handedly block any constitutional reforms. Article 436 of the Constitution states that any constitutional amendment requires the approval of more than 75% of Parliament. This means that, in order to repeal the constitutional provisions that create a system of impunity for Burma's military leaders, Parliament would need the approval of the military itself. The military members of Parliament, who are all handpicked by the Commander-in-Chief, will never support such amendments.

## BURMA AND THE INTERNATIONAL SYSTEM: A FARCE OF COOPERATION

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The next few sections demonstrate how Burma's military regime cannot be trusted to act on its promises to halt heinous crimes and create a system of accountability. The regime has undertaken many actions that provide the appearance of change while allowing the regime to maintain the status quo. The regime's constant efforts to mislead the international community make it an unfit partner for any human rights initiative. A truly impartial investigation into human rights abuses must come from an international source, such as the proposed UN-established Commission of Inquiry.

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<sup>4</sup> International Federation for Human Rights & ALTSEAN Burma. "Burma/Myanmar: SPDC Election Laws Set the Stage for Sham Elections." 27 September 2010.

<sup>5</sup> ALTSEAN Burma. "Burma 2010 Elections Recap." 26 November 2010.

<sup>6</sup> Mathieson, D.S. "Burma's 'Disciplined Democracy' is a Mockery of UN Standards." 4 April 2011.

## BURMA'S HUMAN RIGHTS BODIES: A SMOKESCREEN

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During recent discussions with the international community, Burma's military regime touted its "new" Human Rights Body. In its Universal Periodic Review before the UN Human Rights Council, officials of the regime claimed that the Body had received 503 complaints between January and August 2010. Of those complaints, regime officials further claimed that, "action had been taken on 199 complaints, 203 complaints were under investigation and 101 complaints had been found to be false."<sup>7</sup> However, in his March 2011 report to the General Assembly, Special Rapporteur on the situation of human rights in Burma, Tomás Ojea Quintana, pointed out that the Human Rights Body had admitted that, out of the more than 500 complaints, not a single one of these complaints involved crimes against humanity or war crimes.<sup>8</sup>

This Human Rights Body is led by high-level officials of the military regime from departments such as the Ministry of Home Affairs, which controls the country's police force. These same departments have been accused of crimes such as torture, political repression, and crackdowns on peaceful protests. The leaders of the Human Rights Body are essentially being given the task of investigating themselves. Such a configuration violates the guidelines laid down by the international community, known as the Paris Principles, which provide a blueprint for national human rights organizations.

Although regime officials claim that the Body has not yet become compliant with the Paris Principles because it is still in its initial stages, in actuality the regime has had over a decade to form the Body into an impartial organization. The regime first created a Human Rights Committee in April 2000; this "new" human rights body is simply a reconfiguration of the original organization.<sup>9</sup> Today, the Human Rights Body remains in the control of regime officials who have no motivation to implicate their own departments in human rights violations. In addition, the Body's mandate is vague and unclear: it is authorized to take "proper actions" upon investigating human rights abuses, but there is no explanation of what these actions are.<sup>10</sup>

Even more recently, in September 2011, the regime established yet another government human rights organization, the national Human Rights Commission, ostensibly to safeguard the rights of citizens under the 2008 Constitution. The scope and mandate of the Commission are still not clear. The Commission is comprised of 15 bureaucrats and academics, many of whom are former state officials and diplomats who have defended

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<sup>7</sup> "Report of the Working Group on the Universal Periodic Review: Myanmar." A/HRC/17/9 at ¶88.

<sup>8</sup> UN Human Rights Council. "Progress Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana." 7 March 2011. A/HRC/16/59. ¶25.

<sup>9</sup> Roughneen, S. "Junta's Human Rights Body Simply a Smokescreen." Irrawaddy. 15 March 2011.

<sup>10</sup> "National Report Submitted in Accordance With Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1: Myanmar." A/HRC/WG.6/10/MMR/1 at ¶23

the regime's human rights record in the past.<sup>11</sup> Given the past ineffectiveness of the Human Rights Body and the prior record of the Commission's members in failing to speak out against human rights abuses, it is doubtful that the new Human Rights Commission has either the will or the ability to objectively report on human rights violations or to hold actors accountable. Even if there were political will to ensure that this new Human Rights Commission protects the rights of civilians, the commission would probably be precluded from investigating crimes committed by the military, as the Courts-martial system is the exclusive adjudicator of military crimes.

The vagueness of the mandates of both human rights bodies, their lack of jurisdiction over military crimes, and the questionable willingness and ability among its members to investigate human rights abuses render it obvious that these organizations exist not to promote justice and reconciliation for the country, but instead to distract the international community from taking action.

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### ILO: NOT ENOUGH

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One of the few notable examples of Burma's regime engaging constructively with the international community is the presence of the International Labour Organization (ILO) in the country. The ILO, a specialized UN body, launched a Commission of Inquiry into allegations of forced labor in 1997. The Commission's findings greatly increased international awareness of rights violations in Burma. As a result of the ILO's report, the regime issued rulings in 1999 and 2000 that outlawed forced labor.<sup>12</sup> In 2002, the ILO formalized its presence in Burma by appointing a liaison officer to the country, with the permission of the regime. In 2007, the ILO signed a Supplementary Understanding with the regime, to better empower the ILO liaison to act on allegations of forced labor.

Just as the ILO's Commission of Inquiry serves as an example of how such a Commission may galvanize reform in Burma, the ILO's current activity in Burma illustrates how international involvement in safeguarding rights within the country can benefit the people of Burma. Although it is a Government Ministerial Working Group that investigates alleged abuses, the ILO Liaison Officer is able to follow the enquiry process and act as a victims' advocate. Since 2010, the number of complaints to the ILO has risen, and ILO officials believe that this is due to increased awareness within the country of the illegality of forced labor.<sup>13</sup>

A July 2011 report by Human Rights Watch highlighted the ILO's efforts, but declared that, "[d]espite the hard-won accomplishments of the ILO, the most egregious forms of forced labor persist in Burma, including the continuing use of convict porters in armed

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<sup>11</sup>Htwe, Ko. "Human Rights Commission Met with Skepticism." *The Irawaddy*. 6 September 2011.

<sup>12</sup> Human Rights Watch. "Dead Men Walking." 12 July 2011.

<sup>13</sup> Linn, Z. "ILO Strives to Eliminate Forced Labour in Burma." *AsianCorrespondent.Com*. 8 June 2011.

conflict. And the Tatmadaw [Burma Army] remains the Burmese institution most resistant to reform or independent investigation of alleged abuses.”<sup>14</sup> Besides forced portering, the recruitment of child soldiers continues in Burma. In fact, in the Secretary-General’s 2011 Annual Report on Children and Armed Conflict, the UN detailed a “list of shame” of parties that still recruit child soldiers, a list that prominently included the Burma Army and other ethnic armed groups.

ILO’s presence in Burma, while helpful, has not caused a change in the basic attitudes of the Army and the regime that encourage widespread labor abuses. In fact, many people who file complaints continue to be threatened by regime officials for doing so.<sup>15</sup> Beyond this, the ILO’s mandate is restricted to that of labor rights: increased international action is needed to deal with the many categories of human rights violations which fall outside the ILO’s purview.

### BURMA’S ATTORNEY GENERAL: PART OF THE PROBLEM

The newly appointed Attorney General is Dr. Tun Shin, a former Deputy Attorney General handpicked by President Thein Sein for the position. His nomination was approved by a legislature that was constitutionally precluded from seriously evaluating his credentials or positions, in a parliamentary joint session that lasted only 15 minutes.<sup>16</sup> Dr. Tun Shin is also in charge of the Human Rights Body, and was the leader of the regime’s delegation at Burma’s Universal Periodic Review.<sup>17</sup> Dr. Tun Shin has been on the European Union visa ban list since April 2008, when he was serving as Deputy Attorney General.<sup>18</sup>

While Dr. Tun Shin has made some statements promising reform, he is also the head of the delegation that massively rejected 70 recommendations made during Burma’s Universal Periodic Review. The rejected recommendations include:

107.38. Initiate a review and reform of the judiciary to assure its independence and impartiality, and that specific measures are taken to ensure that military and police personnel respect international human rights and humanitarian law (Ireland);

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<sup>14</sup> “Dead Men Walking.” 12 July 2011.

<sup>15</sup> International Labour Office. “Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29).” November 2009. GB.306/6. See also United States Department of State. “2011 Trafficking in Persons Report – Burma.” 27 June 2011.

<sup>16</sup> Thant, M. “Lun Maung Nominated as Auditor General; Tun Shin is new Attorney General.” Mizzima. 21 February 2011.

<sup>17</sup> Roughneen, S. “Junta’s Human Rights Body Simply a Smokescreen.”

<sup>18</sup> Commission Regulation (EC) No 385/2008 of 29 April 2008 amending Council Regulation (EC) No 194/2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar and repealing Regulation (EC) No 817/2006. 30/04/2008.

107.39. Ensure that all acts violating international human rights and humanitarian law are subject to prompt, independent and impartial investigation, and that suspected perpetrators, including those suspected of ordering these acts, regardless of rank, are brought to justice in proceedings which meet international standards of fairness, and without the imposition of the death penalty (Sweden);

107.43. Allow a full and independent investigation into all reports of human rights violations, including crimes against humanity and war crimes and hold accountable those found responsible for these crimes (Italy).

It is hard to take Dr. Tun Shin's claims of Burma's commitment to accountability seriously, when he and other representatives of the regime simultaneously reject calls for accountability from the international community.

## REFUTING BURMA'S CLAIMS IN ITS UNIVERSAL PERIODIC REVIEW

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Burma's military regime is completely unwilling to acknowledge the truth about human rights violations within the country. In different international forums, the regime has made public statements that are completely disconnected from the reality of the situation. A review of only a few of these statements, taken from the comments of regime officials during Burma's Universal Periodic Review, helps demonstrate how the military regime is both incapable of and unwilling to investigate abuses within the country.

*THE REGIME:* "Those referred to as 'political prisoners' and 'prisoners of conscience' are in prison because they had breached the prevailing laws and not because of their political beliefs."<sup>19</sup>

*THE TRUTH:* There are currently almost 2,000 political prisoners in Burma.<sup>20</sup> This list includes leaders of previous demonstrations against the regime, including student leaders from the nationwide uprising of 1988 and leaders of the 2007 Saffron Revolution, and more than 400 members of the National League for Democracy, Burma's banned opposition party led by Aung San Suu Kyi. Political prisoners are often convicted of such crimes as creating unlawful associations,<sup>21</sup> circulating information without the permission of the regime,<sup>22</sup> inciting offenses against the State or public tranquility,<sup>23</sup> or

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<sup>19</sup> UN Human Rights Council. "Report of the Working Group on the Universal Periodic Review: Myanmar." 24 March 2011. A/HRC/17/9. ¶51.

<sup>20</sup> Assistance Association for Political Prisoners – Burma. "Monthly Summary: June 2011."

<sup>21</sup> Unlawful Associations Act

<sup>22</sup> 1962 Printers and Publishers Registration Act

<sup>23</sup> Section 505(b) of the Penal Code

using electronics in a way that is detrimental to the State.<sup>24</sup> Criminal charges like these are designed specifically to allow the ruling military regime to arrest and imprison dissidents and activists. Many of the laws are in contravention of internationally recognized human rights standards, and the laws are vaguely defined so that the regime can broadly apply them.

*THE REGIME:* “The Ministry of Information takes preventive action with regard to the media only if they report, print or publish contents inciting hatred among individuals, communities, ethnic or religious groups, or seriously impair the intellectual, mental, moral or physical development of minors. The Constitution guarantees that all citizens shall enjoy fundamental rights.”<sup>25</sup>

*THE TRUTH:* Burma employs a strict censorship system designed to keep the people of Burma ignorant of what is happening in the country. Global watchdog Freedom House has declared in its 2011 Country Report that, “The junta drastically restricts press freedom and owns or controls all newspapers and broadcast media . . . The authorities surveil internet cafes, slow or shut down internet connections during periods of internal strife, maintain a rigid firewall, and regularly jail bloggers. Possession or use of a modem without official permission can draw a 15-year prison sentence.”

Similarly, Reporters without Borders ranked Burma 174th out of 178 countries in the category of press freedom in 2010. The group reported that Burma is a country “marked by persecution of the media and a complete lack of news and information.”<sup>26</sup>

*THE REGIME:* “The allegations of sexual violence against ethnic women and children are baseless and merely aimed at discrediting the Myanmar Armed Forces.”<sup>27</sup>

*THE TRUTH:* The military uses sexual violence as part of their strategy of subjugation of ethnic areas. Concerned women’s groups have interviewed hundreds of victims of sexual violence, revealing a pattern of sexual abuse committed by the military. One theme of their reports is that many of these crimes are committed with the active participation or the complicity of high-ranking military officers.<sup>28</sup> The regime’s unwillingness to acknowledge this pattern of violence leads to a culture of impunity within the Army, promoting further human rights abuses. Women’s groups have further explained how authorities will intimidate and punish victims and their families to keep them from speaking out.<sup>29</sup>

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<sup>24</sup> Electronic Transactions Law

<sup>25</sup> A/HRC/17/9 at ¶56.

<sup>26</sup> Reporters Without Borders. “Press Freedom Index 2010.”

<sup>27</sup> *Id.* at ¶94.

<sup>28</sup> “In the Shadow of the Junta.” CEDAW Shadow Report by Women of Burma. 2008.

<sup>29</sup> E.g. Women’s League of Burma. “System of Impunity: Nationwide Patterns of Sexual Violence by the Military Regime’s Army and Authorities in Burma.” September 2004.

It is impossible to believe that the heinous crime of sexual violence, which constitutes both a crime against humanity and a war crime, will ever be successfully prosecuted by a regime that goes to such lengths to cover up the fact that this crime is being committed.

## CONCLUSION: NO RULE OF LAW

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Burma's military regime has no desire to create a judicial system capable of upholding the rule of law. In fact, the regime has worked to undermine effective rule of law within the country and to ensure impunity for crimes committed by those in power. Members of the regime have been given amnesty for their crimes, the military is responsible only to itself, and there is no independent judiciary. Moreover, the regime's Human Rights Body is led by the same people who have the most to lose from an independent examination of human rights abuses, and Burma's legal officials constantly deny that their system is in any way flawed.

Accountability will never come from such a broken system of justice. It is only through international action that human rights violations can be impartially examined and adjudicated. Similarly, the commission of heinous crimes within Burma will not stop as long as the perpetrators believe that they can act with impunity and without their crimes even being acknowledged. The international community, accordingly, has both the right and the responsibility to act to establish a Commission of Inquiry into core international crimes committed within Burma. This is the only way that the truth can be revealed about the extent of human rights abuses perpetrated against the people of Burma.