

International Law Applies to Drafting New Constitutions

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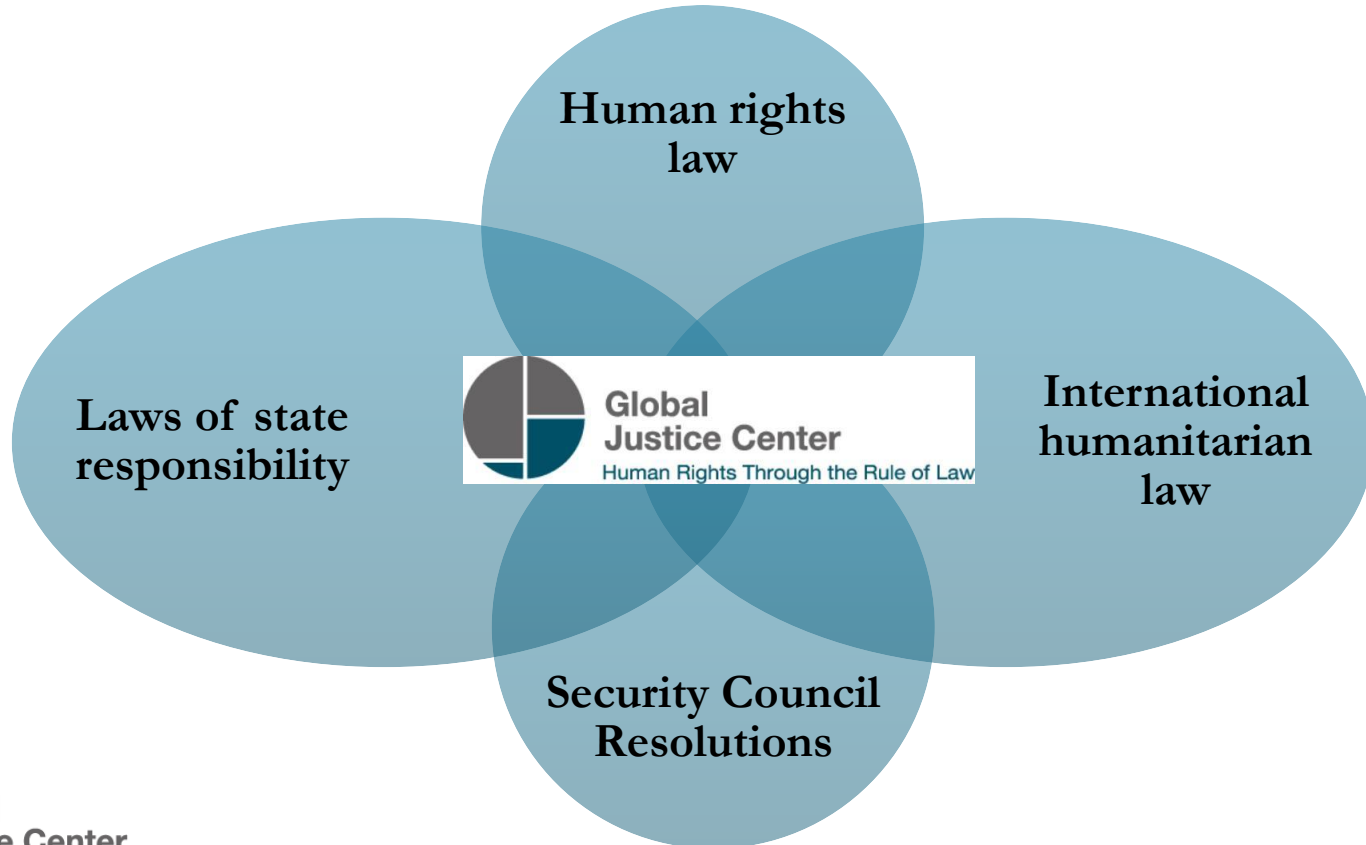
**Global
Justice Center**

Human Rights Through the Rule of Law

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About the Global Justice Center

Enforcing International Law for Radical Change



Constitutions and Domestic Legislation Can Be Invalid Under International Law

- ❖ **States must comply with obligations under international law** & domestic law cannot be used as a defense for failure to comply
- ❖ State acts which constitute **“Serious breaches of peremptory norms of International law”**
 - Examples:
 - ✓ ICJ decision on the construction of the Israeli wall as contrary to international law – Israel must **“forthwith repeal or render ineffective all legislative and regulatory acts** adopted with a view to construction of the wall and establishment of its associated régime”
 - ✓ Security Council Resolution 554 – declaring South Africa’s Apartheid Constitution as contrary to the UN Charter – and as such **null and**



Examples of Positive Legal Obligations in Constitutions shaping democracy

South Africa

Founding Provisions, Chapter 1: The Republic of South Africa is one, sovereign, democratic state founded on the following values:

a) Human dignity, **the achievement of equality** and the advancement of human rights and freedoms.

Chapter 2, Section 9(2): *“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be take.”*

Rwanda

Article 9: The State of Rwanda commits itself to conform to the following fundamental principles and to promote and enforce the respect thereof: **equitable sharing of power;** building a state governed by the rule of law, a pluralistic democratic government, **equality of all Rwandans and between women and men reflected by ensuring that women are granted at least thirty per cent of posts in decision making organs;**

Rwanda's Constitution: Restructuring Political Parties

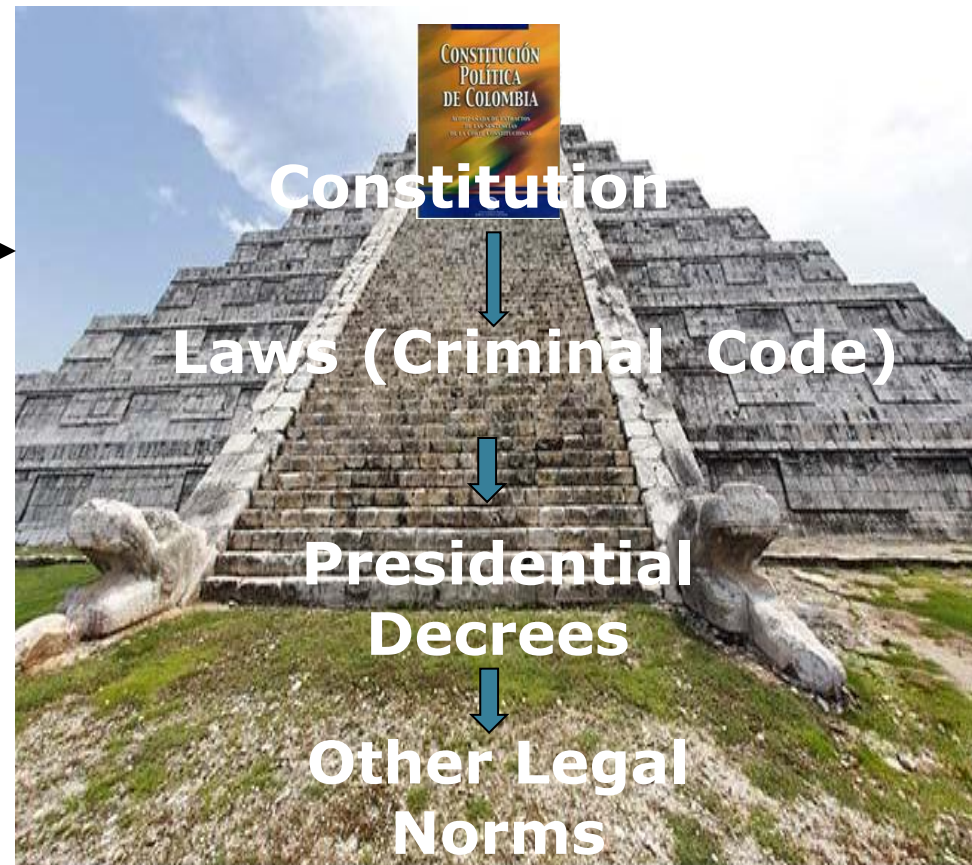
❖ Article 54

- Political organizations are prohibited from basing themselves on race, ethnic group, tribe, clan, region, sex, religion or any other division which may give rise to discrimination.
- Political organizations must constantly reflect the unity of the people of Rwanda and gender equality and complementarity whether in the recruitment of members, putting in place organs of leadership and in their operations and activities.



The Colombia Constitution's “Pyramid of Rights”

International human rights instruments ratified by Colombia.



Using International Law to Change Domestic Law: Colombia & CEDAW

- ❖ 2006 Colombia Constitutional Court historic decision changing Colombia's abortion law using CEDAW

CEDAW has emphasized that laws criminalizing medical interventions that specifically affect women constitute a barrier to women's access to needed medical care, compromising women's right to gender equality in the area of health, and amounting to a violation of states' international obligations to respect those internationally recognized rights."



Implications of International Law for Myanmar/Burma

- ❖ Myanmar/Burma's Constitution (2008) renders the “Republic of Myanmar” **incapable of complying with its “*erga omnes*” obligations under international law**
- ❖ UN Charter art. 2 requires **sovereign equality of all members**



2008 Constitution: Is the Republic of Myanmar a Sovereign State?

Constitution Establishes a Civilian Government Without Sovereign Powers

- ❖ Sovereign State of Myanmar: Executive, Judiciary & Legislature
- ❖ International law defines “sovereign” **as having control over constitution and making laws applicable to all institutions** “without accountability” to another body
- ❖ **Civilian Government has no sovereign power** to regulate and prosecute the military as required by UNSC Ch. VII Resolutions, Genocide Convention, and Geneva Conventions.

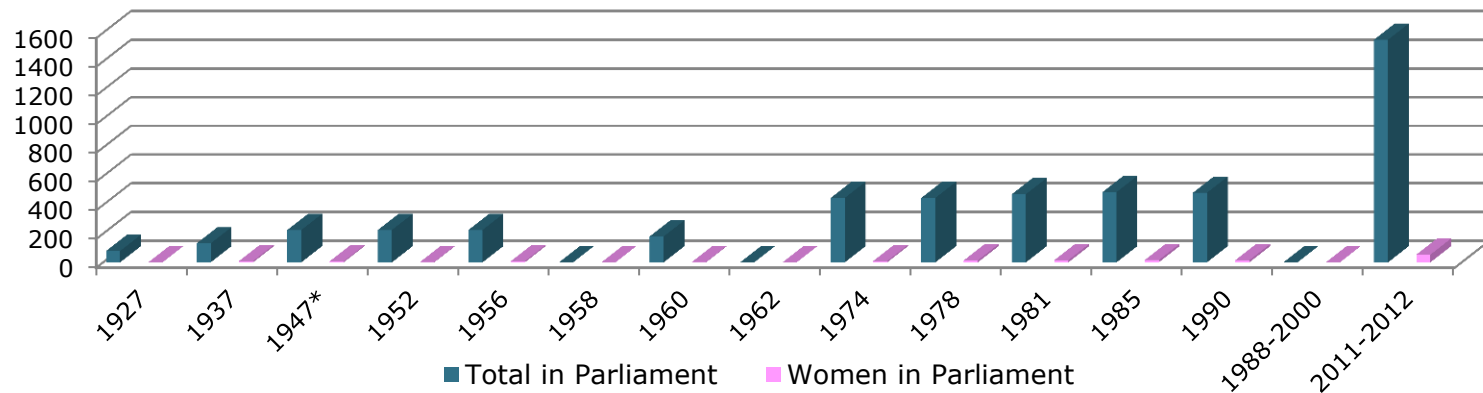


2008 Constitution: Myanmar's Civilian Government Cannot Ensure Compliance With International Humanitarian Law

- ❖ No **domestic legislation to implement IHL** as required by Geneva and Genocide Conventions
- ❖ **“Grave breaches”** under Geneva Conventions & Genocide are not criminalized
 - ❖ Constitutional amnesty contrary to accountability requirement
 - ❖ UN policy rejects endorsement of amnesty for gross human rights violations
 - ❖ No citizen has right to civil or criminal adjudication of war crimes against military in violation of IHL
- ❖ Court system/system of military justice does not comply with Geneva Conventions common Article 3



2008 Constitution: Gender Apartheid



	1927	1937	1947	1952	1956	1958 - 1960	1960	1962 - 1974	1974	1978	1981	1985	1990	1988-2010	2011 - 2012
Total in Parliament	79	132	225	225	225	CARETAKER GOVERNMENT	180	MILITARY RULE	449	449	475	489	485	MILITARY RULE	1551
Women in Parliament	1	9	7	3	8		3		9	13	15	16	15		54
Percentage	1.27	6.82	3.11	1.33	3.56		1.67		2.00	2.90	3.16	3.27	3.09		3.48



Utilizing International Law to Challenge the Constitution

❖ Provisions of Burma/Myanmar Constitution (2008) are contrary to international law

- Use international law to challenge the civilian government's lack of sovereign capacity
 - ❖ Submissions to international bodies: Special Rapporteur on Human Rights in Myanmar, CEDAW committee, UNSC Resolutions 1540 and 1874 oversight bodies, Special Representatives on Sexual Violence in Conflict & Children in Armed Conflict
 - ❖ Advisory Opinion from the International Court of Justice



How can the ICJ Rule on Burma's constitution?

- ❖ **Advisory opinions on international law critical to the functioning of the United Nations :** authorized UN Organs or Agencies (e.g. General Assembly or International Labour Organization) can request an “advisory opinion” on a legal question
 - **Example: Kosovo**
 - ✦ “Accordance with international law of the unilateral declaration of independence in respect to Kosovo”



How the International Community Can Help Change the Constitution

- ❖ **Advisory Opinion by the International Court of Justice**
 - UN General Assembly and UN Security Council may request the ICJ deliver an Advisory Opinion on the implications of the Constitution under international law - **apolitical**
 - Non-binding, but carries significant **legal weight and moral authority**
 - Bolster the argument **that Constitution is the greatest stumbling block to reform**
 - Provide **support to on the ground actors** looking to amend Constitution

