

## Impunity or Reconciliation in Burma's Transition

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December 2010

*The Burmese government cannot change in a meaningful way until it eliminates the culture of impunity for human rights violations that has developed during the past 48 years. The international community can help this effort by establishing a commission of inquiry into the violations.*

Recent efforts in Burma to end the civil war and to introduce democratic rule have fallen short.<sup>1</sup> The November 2010 elections were a sham, and ceasefire agreements between the ruling State Peace and Development Council (SPDC) and armed opposition groups have begun to fail.

However, on November 13, a week after the elections, the government released democracy leader Daw Aung San Suu Kyi from house arrest after she was detained for almost 15 of the last 21 years. Her release introduces new opportunities to support a transition to democracy.

### Burma in Transition

#### Transition from Authoritarian Rule to Democracy?

According to Burma's 2008 Constitution, Parliament's upper house has 224 seats, the lower house has 440 seats, and state/regional legislatures combined have 887 seats.<sup>2</sup> Twenty-five percent of the Parliamentary seats are allocated to the military.

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#### TABLE OF CONTENTS

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Burma in Transition	1
Aung San Suu Kyi	4
Conclusion	6
Recommendations	7

On November 7, the Burmese government held the first elections in 20 years. Burmese political parties, UN agencies, and foreign governments have criticized them widely as neither free nor fair. The election commission cancelled the vote in some areas of the country, claiming that the situation in those areas was not conducive to free and fair elections. As a result, candidates competed for a total of 1,157 seats in this electoral cycle: 168 in the upper house, 326 in the lower house, and 663 in state/regional legislatures.

The big winner in November was the Union Solidarity and Development Party (USDP), which was created only five months before from the Union Solidarity and Development Association (USDA), a social welfare organization that functioned as the military regime's civilian arm. A notorious entity in Burma, the USDA attacked Aung San Suu Kyi's convoy in May 2003 in Depayin, allegedly killing about 70 people and injuring her along with many others. It also carried out a crackdown on monks who led mass demonstrations in August and September 2007.

The 2010 electoral playing field heavily favored the USDP because it inherited the USDA's assets and organizational infrastructure, and a broad range of citizens—including most government employees—were coerced into becoming members. This advantage was

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strengthened by election laws passed in March 2010, which set an extremely high candidate registration fee (\$500) and banned parties whose members were serving prison terms.<sup>3</sup>

The National League for Democracy (NLD), which won the 1990 elections but was never allowed to form a government, boycotted the 2010 elections, citing an undemocratic election process and undemocratic provisions in the 2008 Constitution and 2010 election laws. Of particular concern was the provision that kept those in prison from participating in the elections. In effect this would have forced Aung San Suu Kyi and more than 400 other imprisoned NLD members to resign from the party in order for the NLD to participate. Because the NLD did not take part in the elections, it lost its legal status as a political party, but its leaders mounted a legal challenge against the dissolution.

Election observers reported widespread irregularities on election day, particularly the use of “advance votes”—piles or bags full of votes delivered to polling stations with ballots that state workers cast beforehand. In many cases, observers reported that these turned up when a polling place was closing and opposition parties were poised to win.

Initial results have given the USDP more than 75 percent of the total seats. The National Democratic Force (NDF), which split from the NLD in order to participate in the elections, is claiming fewer than 20 seats, or less than 2 percent.



In September 2007, Buddhist monks led mass demonstrations calling for political reform and reconciliation. Photo by Patrick Pierce.

The NDF has asked other parties not to recognize the results of the elections until the election commission investigates in a credible way the allegations of vote rigging, particularly the issue of advance votes. The NLD has also announced it would investigate complaints about the elections, including vote rigging and intimidation. A total of 37 political parties contested the elections, and most are small regional ones that nominated few candidates.

Experts predict that the military-backed USDP will vote as a bloc with the military-appointed legislators in the new Parliament. The other “establishment” party is the National Unity Party (NUP), the successor of one run by former dictator Ne Win, who ruled from 1962 to 1988. While not a proxy of the military, it is a conservative, nationalist party and can be expected to align itself more closely with the military/USDP than with any other party.

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The combination of military-appointed and USDP seats gives the military approximately 80 percent of the parliamentary seats. The NDF and other nonestablishment parties, including ethnic parties in Shan, Arakan, Chin, and other states, are seen as independent from the military, along with a few other small parties and independent candidates. They will not necessarily vote as an antimilitary bloc, and so Parliament will not provide a forum for any serious challenge to the military's policies.

Parliament must convene in early 2011. It will choose a president, who will appoint national government ministers as well as the chief ministers of the 14 states and regions.

### **Transition from Civil War to Peace?**

Almost immediately after Burma gained independence from Great Britain in 1948, ethnic minorities rebelled against the new government. The central government marginalized these groups and sought to control the rich natural resources, including teak and minerals, in their areas. The Burman-dominated government also sought to "Burmanize" ethnic areas, insisting on Burmese language instruction in schools and barring most non-Burmans from powerful positions in government. In the 1990s, most of the ethnic armed opposition groups agreed to ceasefires, bringing an end to most of the fighting. However, armed conflict continues in parts of Karen, Karenni, and Shan states.

The 2008 constitution requires that Burma have only one national army. After it was approved by a national referendum,<sup>4</sup> the military regime started transforming the ceasefire groups into a border guard force under the authority of the Burmese armed forces.<sup>5</sup> Many of the smaller ceasefire armies agreed to do so. However, the largest and politically most significant groups—the Kachin Independence Organization (KIO), the United Wa State Army (UWSA), and the New Mon State Party—refused. In the Kokang region near China, government troops attacked the Myanmar National Democratic Alliance Army in August 2009 because it refused to join. The battle amplified tensions that the military had with the KIO and the UWSA, both of which control areas that border Kokang; those forces increased troop recruitment efforts and military training.

By the time of the 2010 elections, none of the major ceasefire groups had joined the Burmese military as a border guard force, and as a result, the government implemented measures to punish them. For example, the election commission refused to approve the registration of a major Kachin political party as punishment for the KIO's refusal to transform. In other areas controlled by ceasefire armies, the government cancelled the elections. The UWSA, which controls four townships in Shan State, preempted the government in those townships and announced that it would not allow voting to occur in areas it controlled.

Before the elections, the government warned the ceasefire groups that had not transformed to expect the situation to return to "pre-ceasefire" conditions (i.e. armed conflict). State media began describing the KIO as insurgents, a term that had not appeared in the press in reference to the KIO since the 1994 ceasefire.

New fighting broke out on the Thai border just after election day and since then in the northeast. On November 8, a breakaway faction of the Democratic Karen Buddhist Army (DKBA) attacked government positions in Myawaddy on the Thai border.<sup>6</sup> The violence caused thousands to flee into the Thai town of Mae Sot. The DKBA withdrew within two days, and most of the refugees returned to Burma. However, conflict continued in that vicinity as well as near Three Pagodas Pass farther south. Fighting also broke out in the northeast between the Burmese army and a breakaway faction of the Shan State Army-North (SSA-N), a ceasefire group.

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Renewed conflict is becoming increasingly likely, but this is also increasing pressure on the government to find a political solution to the problems in the ethnic areas. Just before the elections, a group of ceasefire and nonceasefire armies agreed in principle to provide mutual support if the Burmese army attacked any of their battalions, an indication of increasing interethnic unity.

### **Aung San Suu Kyi**

Against the backdrop of elections, disputes over the results, and a sudden escalation of armed conflict, Aung San Suu Kyi's period of house arrest ended. On November 13, the authorities took down the barbed wire from the entrance to her compound in Rangoon and removed the barriers to University Avenue, allowing thousands of people to flood the scene to hear her speak in public for the first time since 2003. Since then, she has addressed crowds at the NLD headquarters and met diplomats, other NLD leaders, journalists, and perhaps most significantly, leaders of major ethnic groups.

From a transitional justice perspective, Aung San Suu Kyi has emphasized three relevant issues: the need for reconciliation; the need for a systematic way for her and other leaders to listen to the people; and her inability to work alone for reconciliation, i.e. the need for support from and participation by others.

### **Reconciliation**

In the Burmese context, reconciliation means tripartite talks with the military, the democratic forces (led by but not limited to the NLD), and the ethnic groups. "National reconciliation" was one of the four official demands that crowds made during the demonstrations Buddhist monks led in 2007. Observers of the events noted that the demonstrators spoke of reconciliation and dialogue interchangeably.

Before Aung San Suu Kyi's release, the NLD and ethnic political leaders signed the Kalay Declaration, calling for a national consultation similar to the 1947 Panglong Conference that prompted major ethnic minorities to join the Union of Burma at the time of independence. Now that she has put such an emphasis on reconciliation, the idea of a second Panglong Conference is likely to gain momentum. The prospect of "Panglong II" was a major topic of discussion when she and NLD leaders met with the ethnic leaders soon after her release. Those consultations, which ideally would also include the military, eventually need to address the issue of impunity for the wide range of human rights violations that have taken place throughout the country.

### **Listening**

Another major point that Aung San Suu Kyi has made in recent speeches and interviews has been her desire to listen to people. There is a precedent to this approach set by the leaders of the 88 Generation Students, who helped lead anti-government demonstrations in 1988. Most of them were in prison soon after the protests; they were released in 2004 before being imprisoned again in 2007. During their release, they conducted the Open Hearts Letter campaign, urging people from all over Burma to write letters to the SPDC about the problems plaguing the country. The 88 Generation Students then analyzed the letters and published the findings, detailing a range of issues related to cost of living, health, education, and human rights.

The idea of listening to people seems simple, almost a cliché. However, because Aung San Suu Kyi is such a gifted orator so adored by the Burmese, the idea becomes politically charged. Her suggestion that leaders should listen to the people is a wink and a nod toward the frustration that people feel about having a government that is not responsible to them and an acknowledgement of the suffering that has ensued from poor governance.



### The Role of the International Community

Aung San Suu Kyi said that one of her top priorities is to secure the release of the more than 2,000 remaining political prisoners, particularly the ethnic political leaders, and she plans to enlist the international community in that cause.

She has offered her support to the prisoners' families by visiting them and offering encouragement. In a similar vein, she has emphasized the importance of getting services to the neediest, and this sentiment may extend to appeals for increased humanitarian assistance from the international community. While this could be an area where the NLD and SPDC can find some common ground, early signs are not promising. One of the first places Aung San Suu Kyi visited upon her release was a home for AIDS patients; two days later, Burmese authorities threatened to evict the patients, citing registration regulations.



December 8, 2010. Aung San Suu Kyi pays respect to a young monk. Photo courtesy of The Irrawaddy.

In addition to providing humanitarian assistance, the international community may also play a role in addressing human rights violations. NLD leaders have reported that Aung San Suu Kyi agrees with the party's call for a UN commission of inquiry. In his March 2010 report, the UN Special Rapporteur on the situation of human rights in Myanmar (Burma) urged the UN to consider initiating a commission of inquiry into crimes against humanity and war crimes. He reiterated the call in his October 2010 report to the UN General Assembly.

If the recent elections in Burma represented a genuine transition to democracy and an end to civil war, the Burmese government could claim that it would conduct its own investigations into allegations of serious human rights crimes. If the political will existed to combat impunity, the government could even request international assistance for investigating allegations of war crimes and crimes against humanity.

Unfortunately, the SPDC is not interested in addressing—or even acknowledging—these issues. In a September 2010 letter to the special rapporteur, the government stated that there

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is “no occurrence” of crimes against humanity and war crimes in Burma. The 2008 Constitution contains a clause granting immunity for all acts carried out by the current regime and its predecessor. So the possibility of utilizing domestic measures to combat impunity is minuscule, even though substantial, credible evidence shows that war crimes and crimes against humanity have occurred.

In the absence of domestic mechanisms to investigate these allegations, the international community should take steps to gather and review information about allegations of violations of international human rights law and international humanitarian law. It should then recommend measures to provide justice for crimes and to prevent them from continuing. The special rapporteur has outlined a range of options for the scope of a potential commission of inquiry, from a broad analysis over decades to a more narrow focus on particular incidents. Because violations are ongoing and likely to escalate with renewed civil war, the recommendations would likely advise the Burmese government to allow more monitoring and humanitarian aid access. For example, the commission could recommend that Burma allow the International Committee for the Red Cross (ICRC) to see political prisoners or let UN agencies provide relief to the thousands of internally displaced people in eastern Burma.<sup>7</sup>

Unfortunately, no such recommendation appeared in the annual Burma resolution at the UN General Assembly in 2010. Therefore, it should be included in the 2011 resolution. Local human rights organizations collecting data on human rights violations, governments that need to provide political support for the General Assembly to adopt the recommendation, and UN bodies that will contribute technical assistance should be prepared to support the establishment of a commission of inquiry.

A commission of inquiry would also be a step toward sustainable reconciliation, which requires acknowledging the human rights violations that communities and individuals have suffered and making a commitment to end impunity for those violations. While most people calling for reconciliation in Burma are referring to political dialogue, a more robust reconciliation is also needed among ethnic groups, as well as between the citizens and the military.

The international community can support this in several ways. In late November 2010, the Special Adviser to the UN Secretary-General, Vijay Nambiar, visited Burma and met with Aung San Suu Kyi, leaders of parties that participated in the elections, ethnic leaders, and SPDC officials. He called on the government to release political prisoners, which would represent an important benchmark for the regime to demonstrate its political will toward reconciliation. His efforts as a highly placed UN official are positive steps, and the UN could play a mediation role. Similar efforts in the future should continue to include the ethnic leaders and those of nonestablishment parties that participated in the elections.

## Conclusion

The election process and results demonstrate that Burma's leadership is committed to maintaining both a formal role for the military in government, with no real checks on its power, as well as a murkier influence through its proxy party, the USDP. This election scenario was predictable. Less so was the reaction that large ceasefire groups had when pressured to transform into border guards. Ceasefire agreements are already breaking down, and the drums of war beat louder.

In the often heated debate about the election process, several of the nonestablishment actors encouraged participation in the process as the only pragmatic, albeit severely flawed, path toward democratic transition. Before Aung San Suu Kyi's release, no viable alternative to this military-dominated road map seemed to be available, and disengaging from the process equated to not doing anything.

Her release has breathed new life into the many low-profile efforts to develop alternatives to the terms of the military's tightly controlled transition. Tripartite dialogue may suddenly be back on the table. In one recent interview, the NLD leader stated, "It's no use saying that you can choose freely between a rock and a hard place. We want meaningful choice."<sup>8</sup>

Aung San Suu Kyi is not the only legitimate voice providing a vision for change. But because of her support from the Burmese people and her high profile internationally, she is the only one who seems capable of offering an alternative to the military's road map. She has captured the imagination of the Burmese and the international community. Because of her legitimacy, her release provides the opportunity to imagine an alternative to the strict terms of transition that the military has insisted on since 1988.

### Recommendations

If the SPDC aims to restore trust, bring about national reconciliation, and demonstrate to Burmese citizens and the international community its political will toward achieving these goals, these initial steps are essential:

- Allow Aung San Suu Kyi to travel freely throughout the country, do not impose restrictions on her freedom of speech or assembly, and guarantee her safety.
- Release all of the remaining political prisoners to demonstrate the government's willingness to include all parties in the process of national reconciliation.
- Conduct a review of the 2008 Constitution through an inclusive process involving all political parties, and remove the provisions that maintain impunity for human rights violations, particularly Article 445.
- Engage in a genuine dialogue with the NLD and other winners of the 1990 elections, as well as ethnic leaders and all stakeholders who could play important roles in fostering national reconciliation.

To the UN:

- The Secretary-General should continue to use his good offices through a strengthened role of his special adviser to mediate the conflicts in Burma by bringing all key stakeholders to the negotiating table to foster national reconciliation and address impunity.
- Through the General Assembly, the UN should establish a commission of inquiry into gross human rights violations, following the recommendation of the special rapporteur on the situation of human rights in Myanmar.

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### Acknowledgment

ICTJ gratefully acknowledges its funder, Not On Our Watch, whose support made this briefing paper possible.

### ENDNOTES

- 1 Since 1948, more than 20 armed opposition groups have fought against the Burma Army. Many have agreed to ceasefires, but armed conflict continues in parts of Karen, Karenni, and Shan states.
- 2 Burma is divided into 14 administrative areas: seven ethnic areas called states, each bearing the name of the largest ethnic group (Chin State, Kachin State, etc.), and seven regions that were previously called divisions. In addition, the Constitution designates the capital, Nay Pyi Taw, as a union territory under the direct administration of the president and carves out some special zones for large minority ethnic groups within the states or regions dominated by another ethnic group. The Naga in Sagaing Region and the Danu, Pa-O, Palaung, and Kokang in Shan State all have self-administered zones, each composed of two or three townships; the Wa have a self-administered division of six townships in Shan State.
- 3 The registration fee was nearly the equivalent of the average Burmese person's annual income. (Gross national income per capita is U.S. \$578.)
- 4 The referendum process was marred by massive irregularities and lack of transparency in the vote count. The regime claimed that 92 percent of eligible voters approved the constitution.
- 5 In April 2009, the SPDC formally directed the ethnic armies that agreed to ceasefires to transform into a border guard force, which would function as a militia under government control. Officers older than 50 had to retire, and 30 Burma Army soldiers would join each battalion that had more than 300 soldiers. In addition, a Burma Army officer would be one of the three commanding officers for each battalion.
- 6 The DKBA itself is a breakaway faction of the Karen National Union (KNU), which continues to fight against the SPDC. The DKBA split from the KNU in 1994 and agreed to a ceasefire with the SPDC (then called the State Law and Order Restoration Council, or SLORC), but has also endured ongoing internal splits and shifting alliances.
- 7 Burmese authorities have not permitted the ICRC to visit detainees in prisons and labor camps since 2006.
- 8 Finch, Steve, and John Pomfret, "Democracy leader Suu Kyi urges 'real genuine talks' in Burma," *Washington Post*, Nov. 16, 2010.

### About the Author

Patrick J. Pierce is a specialist on human rights in Burma with a particular focus on conducting interviews with victims and witnesses, human rights databases, and analysis of human rights data. Pierce was the Transitional Justice Program Director of the Human Rights Education Institute of Burma (HREIB), based in Thailand, from 2001 to 2007. At HREIB, he initiated and managed projects on documentation of human rights violations, transitional justice trainings, and research among people affected by human rights violations in Burma.

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He holds a B.A. in Spanish from Butler University (1990) and an M.A. in Applied Anthropology from American University (1997).