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The following remarks were given by Benjamin Zawacki, Amnesty International's Myanmar Researcher, at the Royal Institute of International Affairs (Chatham House) in London, on 11 May 2010.

Myanmar's 2010 Elections: A Human Rights Perspective

Introduction

On the heels of elections in the UK, perhaps interest is piqued for a discussion on elections elsewhere, even if the only obvious similarity between the UK and our subject today, is that the voices of the electorate in both countries deserve to be heard and respected. As you are all aware, later this year Myanmar will hold its first national elections since 1990, when the NLD party led by Daw Aung San Suu Kyi won a resounding victory, but was denied the opportunity to take office. In the two decades since that time, those elections have dogged the government of Myanmar both domestically and internationally. This year's elections thus present an opportunity for the government to place 1990 firmly behind them, pursuant to its self-styled 'Roadmap to Democracy'.

The roadmap has not lived up to its name, thus far essentially leading the country in circles. Recent signposts include the announcements in February 2008 that elections would be held sometime in 2010, and that a new draft constitution had been completed. Three months later, in the wake of devastating Cyclone Nargis, that Constitution was supposedly approved by over 90% of the electorate, in a referendum characterized by voting forced or otherwise manipulated by the authorities. Then, in what can be seen as an elections-related move, one year ago this week Daw Aung San Suu Kyi was arrested for violating the conditions of her house arrest, after an uninvited visitor trespassed on her property. Already detained for nearly 14 of the past 20 years, she was subsequently sentenced to 18 additional months—or just long enough to keep her out of the way on and before election day. This year has seen the promulgation of Electoral Laws—which declare the 1990 polls officially void¹—and the NLD's decision to boycott the elections.

Ethnic minority political opponents

And these are just the most widely reported signposts, to say nothing of a situation that is less well-known but certainly no less critical to human rights in Myanmar and to the elections later this year. That is, the situation for Myanmar's 135 ethnic

¹ See Pyithu Hluttaw Election Law, SPDC Law No. 3/2010, Chapter XVI, Art. 91(b) (unofficial translation).

minorities—and the first of Amnesty International’s three main elections-related concerns.

The coming elections highlight a major challenge that has confronted—and confounded—every Myanmar government since independence more than 60 years ago: ensuring the assent, or at least the compliance, of the country’s ethnic minorities with its political program. For most of the last six decades, Myanmar’s rulers have used a combination of force and negotiation to this end. In the context of the elections, the government has alternately encouraged and warned ethnic minority political organizations to take part, with most remaining undecided or noncommittal. Myanmar’s government is struggling to ensure that those represented by armed groups still fighting with the army are either defeated or “brought back into the legal fold” before the elections.² The army and allied militias have waged offensives against several armed opposition groups—as well as clearly unlawful attacks on civilians—from the Karen, Shan, and Kokang ethnic minorities. As a result, over 45,000 persons from these ethnic minorities were displaced during 2009 and the Kokang’s armed group was defeated.³

The offensive against the Kokang is especially significant in the context of the Myanmar government’s newest strategy of converting the existing armed ethnic groups that have agreed ceasefires into Border Guard Forces (BGF) under army command. Offered pay, perks, and official legal status, roughly half of the groups have agreed, while the others—including the swiftly defeated Kokang—have refused. The elections will further clarify how the aspirations of Myanmar’s ethnic minorities will be represented: by armed insurrection, through non-violent political action, or both.

Indeed, as a February report from Amnesty International reveals—and in contrast to a prevailing international misconception—a significant part of Myanmar’s peaceful political opposition is made up of ethnic minorities. Over the past several years at least, Amnesty’s research shows that ethnic minority political opponents and activists have been systematically repressed by the Myanmar authorities. Among the human rights violations perpetrated against these individuals and groups as means of repressing political activity have been arbitrary arrests, unfair trials resulting in imprisonment, torture, and extrajudicial executions. As elections approach, this reality is not only of concern to Amnesty, but must be both understood and taken into account by the international community.

Observers outside Myanmar often divide opposition to the government between, on the one side, a political struggle led by Daw Aung San Suu Kyi and the NLD, and on the other side, insurgency, carried out by a variety of ethnic minority armed groups. While this perception has increased as the elections have drawn closer, it oversimplifies the situation, understates the work done by peaceful ethnic minority political opponents, and ignores the high price they pay for challenging the government. In terms of party and electoral politics, a substantial portion of the

² Senior General Than Shwe’s speech at the 64th anniversary of Armed Forces Day Parade 2009, *New Light of Myanmar*, 28 March 2009.

³ The Kokang’s armed group, which had agreed to a ceasefire, was called the Myanmar National Democratic Alliance Army (MNDAA).

NLD's membership and leadership consists of ethnic minorities, while ethnically-based political parties have proven resilient as well. It is often forgotten that the second-most successful party in the 1990 elections was the Shan NLD, an ethnic minority party with similar aims to those of the NLD. Likewise in terms of political activism: The first monks to march in the 2007 'Saffron Revolution' were ethnic minority Rakhine, while the campaigns against the draft constitution and referendum in 2008 were as vigorous in the ethnic minority states as in Myanmar's central regions and urban centres.

Amnesty's February report establishes that Myanmar's political opposition is widespread geographically and ethnically diverse. It reaches two other conclusions: First, the number of political prisoners in Myanmar is likely to be substantially higher than the 2,200 figure currently in use—and about 10% of which is made up of ethnic minorities. This is because, while we have names for each of those 2,200 prisoners, Amnesty's report reveals that there are certainly many more—anonymous—whose names and cases we don't know. Second, as elections approach, it is not enough that Daw Aung San Suu Kyi and all other political prisoners be released, that the NLD's members and supporters be free to exercise their right to boycott, and that a human rights-friendly resolution be found to the Border Guard Force issue: authorities must also cease their repression of Myanmar's ethnic minority political opponents. While these violations of human rights are unacceptable in any context, anywhere, in the run-up to national elections in Myanmar, attacks against the freedoms of expression, peaceful assembly, and association should be of immediate concern to the international community.

Electoral Laws

This would be a good moment to note—perhaps to your surprise in view of how these remarks were titled—that as a matter of blanket policy Amnesty International does not take a position on elections: neither on whether they should or should not be held, nor on whether they are free and fair or otherwise. Rather, Amnesty assesses what governments do and not how they are formed—in this case, the past and ongoing actions of the government of Myanmar in preparation for elections later this year. One such action, and Amnesty International's second major concern, was the government's promulgation two months ago of five Electoral Laws and four Bylaws. Provisions of these laws are in clear violation of human rights principles and standards, and when viewed as a group, clearly attack the three freedoms of expression, peaceful assembly, and association. These rights are enshrined in the Universal Declaration on Human Rights and are indispensable to elections.

This comes as no surprise, for the 2008 Constitution, upon which the laws are based but which will not come into force until after the elections, itself provides for clear violations of human rights. Indeed one of the Electoral Laws provides that parties must declare that they will "safeguard the Constitution".⁴ Among the more serious human rights aspects and implications of the Constitution—elaborated upon in Amnesty's 2008 Briefing Paper—include the President being effectively above the

⁴ Political Parties Registration Law, SPDC Law No. 2/2010, Chapter II, Art. 6 (unofficial translation).

law; impunity for past crimes by government officials;⁵ and a total suspension of “fundamental rights” during indefinite and undefined states of emergency.⁶

The Electoral Laws continue this trend, being discriminatory on the basis of political opinion, and violating other human rights. At the most basic level, whole segments of Burmese society are arbitrarily excluded. Those the laws disenfranchise include “persons serving a prison term under a sentence passed by any court”, “persons found to be of unsound mind”, “persons who have not been declared free from insolvency”, and “persons prohibited in accordance with the Electoral Laws”.⁷

These categories are so broad in their potential definitions as to make exclusion from the voting lists highly subjective. Presumably it is the newly established Election Commission that is charged with determining who is “of unsound mind” and who is “prohibited in accordance with the Electoral Laws”. As for undischarged insolvents, economic or financial status should be no bar to full political participation. And perhaps of most obvious and central concern to Amnesty International is the provision disenfranchising “persons serving a prison term under a sentence passed by any court”. This includes the more than 2,200 political prisoners in Myanmar, many of whose convictions arose not from any recognizably criminal act, but rather are arbitrary and based on the legitimate exercise of rights. Though again subject to the interpretation of the Election Commission, this provision likely applies to Daw Aung San Suu Kyi as well.

It should be noted that members of religious orders—including Myanmar’s estimated 400,000 Buddhist monks—are also explicitly barred from voting. While such has been the case since Myanmar’s independence, meaning that these new Electoral Laws do not *per se* disenfranchise them, this prohibition perpetuates discrimination based on their religion or status.

All of these provisions apply to standing for election as well, as do several additional ambiguously worded categories of those who cannot run. All are similarly discriminatory, and in addition violate the freedoms of expression, peaceful assembly, and/or association. First, if translation serves, are persons:

- convicted for failing to act in accordance with to the Electoral Laws before or after the promulgation of the Constitution, and who have not yet been declared free from restriction by concerned authorities.⁸

⁵ See Constitution of the Republic of the Union of Myanmar, 2008, Chapter V, Art. 215; and Chapter XIV, Art. 445, respectively.

⁶ Constitution of the Republic of the Union of Myanmar, 2008, Chapter XI, Art. 414(b).

⁷ Pyithu Hluttaw Election Law, SPDC Law No. 3/2010, Chapter IV, Art. 7(b), (c), (d) and (e), respectively; and Amyotha Hluttaw Election Law, SPDC Law No. 4/2010, Chapter IV, Art. 7(b), (c), (d) and (e), respectively (unofficial translations). The Union legislature’s lower house is the People’s Assembly and the upper house the National Assembly, while there are 14 regional legislatures. Voters will cast three separate ballots: one each for the two houses and another for their relevant regional assembly. According to the 2008 Constitution, certain ethnic minority voters in certain regions/states may also be entitled to elect a separate ethnic representative to the regional/state legislature.

⁸ See Pyithu Hluttaw Election Law, SPDC Law No. 3/2010, Chapter V, Art. 10(b); and Amyotha Hluttaw Election Law, SPDC Law No. 4/2010, Chapter V, Art. 10(b) (unofficial translations).

This would seem to allow a retroactive application of the Electoral Laws, so as to include persons detained or arrested for opposing the 2008 draft constitution or its referendum. In February 2008, the government passed a law prohibiting any criticism of the draft constitution or the process by which it was written.⁹ Amnesty International is aware of at least 55 current political prisoners whom this provision would exclude from standing in the elections, to say nothing of former political prisoners who “have not yet been declared free from restriction”.¹⁰

Next are persons:

- “who owe allegiance to a foreign government ...”;¹¹ or
- who as individuals or as members of an organization, obtain and utilize, directly or indirectly, assistance from a foreign government, religious organization, or any other foreign organization or individual.¹²

These provisions are more restrictive than they may initially appear, as they are drafted in an overly broad fashion and could be subject to interpretations by the authorities that amount to violations of human rights. The Myanmar government routinely accuses its domestic critics of being in the pay or otherwise under the influence of foreign actors, and blames international interference for national discontent and dissent. Nearly any real or perceived contact with foreign organizations—including, as Amnesty’s February report details, with media outlets—is enough to bring legal repercussions: in this case, prohibition from standing in the elections.

The fourth provision—though admittedly drafted prior to the NLD’s decision to boycott the election, but presumably long after the monk-led Saffron Revolution—could be cited in any attempt to prevent boycotts. Persons:

- “who as individuals or as members of an organization, use, abet, incite, or encourage the use of religion as a pretext for delivering speeches or making declarations to vote or not to vote, or for other political purposes”.¹³

And fifth, a classic catch-all provision that could apply to both ethnic minority political and armed groups, as well as to non violent opposition organizations in the central regions and urban centres:

- “members of an organization declared as an unlawful association according to any existing law; organizations and individuals whom the State has declared to have been engaged in terrorist acts; organizations and members in armed revolt against the State; or persons against whom there is sufficient grounds of having links with the said organizations or with its members”.¹⁴

⁹ See Law 5/96, The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention Against Disturbances and Opposition, 7 June 1996, which provides for the imprisonment of any person for up to 20 years or the banning of an organization.

¹⁰ Pyithu Hluttaw Election Law, SPDC Law No. 3/2010, Chapter V, Art. 10(b); and Amyotha Hluttaw Election Law, SPDC Law No. 4/2010, Chapter V, Art. 10(b) (unofficial translations).

¹¹ Ibid. at Art. 10(f) (unofficial translations).

¹² See *ibid.* at Art. 10(h) (unofficial translations).

¹³ Pyithu Hluttaw Election Law, SPDC Law No. 3/2010, Chapter V, Art. 10(i); and Amyotha Hluttaw Election Law, SPDC Law No. 4/2010, Art. 10(i) (unofficial translations).

¹⁴ Ibid. at Art. 10(n) (unofficial translations).

Many of these provisions also apply to barring a person from continuing as a member of the new legislatures, if subsequently found to fall into one or more of these categories. Another, “being declared to cease to be a citizen in accordance with the relevant law”,¹⁵ is particularly concerning as being discriminatory against members of the Rohingya ethnic minority, who are already denied citizenship. In recent months, Rohingyas have been issued temporary identification cards, which as per the Electoral Laws, allow them to vote—but which do not afford them citizenship. This subsequent provision thus suggests, subject to interpretation, that they could not actually serve in the legislatures.

Of the five Electoral Laws promulgated thus far, the one which has received the most attention internationally has been the *Political Parties Registration Law*, primarily on account of its effects on Daw Aung San Suu Kyi and the NLD. Its discriminatory nature and violations of the freedoms of expression, peaceful assembly, and association, are clear and reach more deeply into the political process than those relating to voting or running in the elections. Many of those provisions also pertain to joining, remaining in, forming, or maintaining a political party. “Persons serving a prison term under a sentence passed by any court”¹⁶ is one such provision, which applies not only to Daw Suu Kyi but to Myanmar’s other 2,200 political prisoners as well. Moreover, similar to concerns expressed above with respect to ambiguous language, party organizers and members must be free from foreign interference and “influence”, both “direct and indirect”.¹⁷ It has been pointed out by a notable Myanmar observer that “influence” is present neither in the last Electoral Laws of 1988 nor in the 2008 Constitution, and has a very broad meaning in the Burmese expression used.¹⁸

This law also provides that parties having direct or indirect contact with “armed insurgent groups”, “terrorists”, or “unlawful associations” face deregistration.¹⁹ The first two terms would seem to apply primarily—although not exclusively, given the politicized determination of who counts as a terrorist—to Myanmar’s ethnic minorities. As Amnesty’s February report demonstrates, many of Myanmar’s ethnically-specific political parties have an armed wing, and most armed groups observing ceasefires have not agreed to the government’s demand to become Border Guard Forces. While this provision might reasonably apply to such groups, it could also be used to discriminate against—and deregister—an individual or group the government merely accuses or perceives as having “direct or indirect” contact with “terrorists”. Indeed, the third term of this provision concerning “unlawful associations”, brings to mind the many groups both in Myanmar and in exile, both ethnically-specific and otherwise, that work peacefully for change but are routinely deemed unlawful and repressed by the authorities.

¹⁵ Ibid. at Art. 11(e) (unofficial translations).

¹⁶ Political Party Registration Law, SPDC Law No. 2/2010, Chapter 1, Art. 2(l) (unofficial translation).

¹⁷ Ibid. at Chapter II, Art. 6(f) (unofficial translation).

¹⁸ See Richard Horsey, *Preliminary Analysis of Myanmar’s 2010 Electoral Laws*, Conflict Prevention and Peace Forum, 31 March 2010, p. 8.

¹⁹ Political Party Registration Law, SPDC Law No. 2/2010, Chapter III, Art. 12(a)(iii).

As mentioned above, among the Electoral Laws promulgated is one establishing an Election Commission, which in turn has implicit authority—and if history serves as a guide, the political will—to further violate human rights, including freedom from discrimination and freedoms of expression, peaceful assembly, and association. The Commission is empowered to postpone the election in a constituency, or part of a constituency, where election preparation is “not possible due to lack of security”.²⁰ Though again ostensibly a reasonable provision, what constitutes “lack of security” is subject to both very broad interpretation and potentially outright manipulation. Moreover, in these insecure areas, “if 51 percent of all the voters in the electoral roll have cast their votes, a valid election shall be deemed to have been held”.²¹ With the Border Guard Force issue still outstanding in many ethnic constituencies, and with increased mobilization of troops on several fronts in recent months, these provisions could lead to the discriminatory denial of political rights in areas in which opposition to the government is particularly strong. This in turn, could affect the outcome of the elections.

Lastly, the Electoral Laws list a number of offences and penalties, among them—a most blatant violation of freedom of expression—attempting to persuade persons to vote or not to vote in the elections.²² Another provision is almost identical, but adds that doing so “on grounds of race and religion” is specifically prohibited.²³ While of course drafted prior to the NLD’s decision to boycott the elections, these provisions would likely make illegal any public call to their supporters or to other parties to join them in boycotting.

Commission of Inquiry

Amnesty International’s third and final concern in the context of Myanmar’s 2010 elections is not in direct relation to the elections themselves. Rather, consistent with the organization’s focus on the conduct of governments as opposed to their formation or composition, Amnesty is concerned that the new government will not place accountability for grave human rights violations of past governments on its agenda. This is because, in addition to the way in which the elections are shaping up, Article 445 of the 2008 Constitution codifies immunity from prosecution for officials for past human rights violations.²⁴ This provision clearly signals a continued unwillingness to investigate serious human rights violations and bring perpetrators to account.

²⁰ Pyithu Hluttaw Election Law, SPDC Law No. 3/2010, Chapter XI, Art. 50(b); Amyotha Hluttaw Election Law, SPDC Law No. 4/2010, Chapter XI, Art. 50(b); and Union Election Commission Law, SPDC Law No. 1/2010, Chapter III, Art. 8(f) (unofficial translations).

²¹ Pyithu Hluttaw Election Law, SPDC Law No. 3/2010, Chapter XI, Art. 50(c); and Amyotha Hluttaw Election Law, SPDC Law No. 4/2010, Chapter XI, Art. 50(c) (unofficial translations).

²² See *ibid.* at Chapter XIII, Art. 58(b) (unofficial translations).

²³ Pyithu Hluttaw Election Law, SPDC Law No. 3/2010, Chapter XIII, Art. 58(c); and Amyotha Hluttaw Election Law, SPDC Law No. 4/2010, Chapter XIII, Art. 58(c) (unofficial translations).

²⁴ Article 445 states that “All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council, shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties”.

In view of this commitment to impunity, Amnesty International takes the opportunity of this forum at Chatham House to add its voice to the growing call internationally for a Commission of Inquiry into crimes against humanity and possible war crimes in Myanmar.

As many of you are aware, in his most recent report to the UN Human Rights Council in March, the UN Special Rapporteur for the situation of human rights in Myanmar, Tomas Ojea Quintana, called for consideration of such a Commission. And since then, Australia, the UK, and the Czech Republic have all signaled their support.

Commissions of Inquiry are not new either to Myanmar or to Amnesty International. In 1997, the International Labour Organisation (ILO) formed a Commission to investigate forced labour in Myanmar, and called upon Amnesty International and several other organizations to provide expert testimony. Using terminology that was only then being developed to characterize crimes against humanity, the ILO concluded in their report the following year that forced labour in Myanmar was “widespread and systematic”. It also concluded that, as Myanmar had ratified ILO Convention No. 29, the government was in breach of its international legal obligations regarding forced labour. Although the government refused from the start to cooperate with the Commission, including denying it access to the country, it did pass in 1999 a law explicitly banning forced labour.²⁵

Unfortunately, that law has not been enforced, as was made clear in a June 2008 report from Amnesty International, entitled *Crimes against humanity in eastern Myanmar*. In addition to forced labour, Amnesty documented other widespread and systematic violations of human rights of the ethnic minority Karen population through unlawful killings, torture and other ill-treatment, enforced disappearances, arbitrary arrests, and various forms of collective punishment. At that time, partly in view of political realities militating against the likelihood of seeing a Commission of Inquiry established, Amnesty recommended that the UN Security Council “consider visiting the country, including eastern Myanmar, to obtain first-hand information on the situation on the ground”.²⁶ While many of those realities still exist—China and Russia being unlikely to support the idea on the UN Security Council, and the utter failure of the UN Human Rights Council a year ago to address allegations of similar crimes in Sri Lanka—Amnesty believes that the political tide is slowly turning. Should a Commission confirm that crimes against humanity and other crimes under international law have been committed since 1 July 2002, the Security Council should refer the situation to the Prosecutor of the International Criminal Court to determine whether to open an investigation. Alternatively, the United Nations or other body could establish an *ad hoc* international or internationalized criminal tribunal to investigate and prosecute crimes under international law.

²⁵ Order No. 1/99 and Order Supplementing 1/00 made the practice of forced labour illegal and provided for punishment for both military and civilian officials found responsible.

²⁶ Amnesty International, *Crimes against humanity in eastern Myanmar*, ASA 16/011/2008, June 2008, p. 54.

It should also be noted that all states have a duty to exercise universal jurisdiction over such crimes.²⁷ Should suspects from Myanmar decide to travel, the potential role of national authorities of other states that could investigate and prosecute them should not be undermined.

At present, the prospect of international justice for victims from Myanmar appears to be a long way off—and despite its report, Amnesty would not wish to prejudice the findings of a Commission. It does, however, support the statement of the UN Special Rapporteur: “Given the gross and systematic nature of human rights violations in Myanmar over a period of many years, and the lack of accountability, there is an indication that those human rights violations are the result of a State policy”.

Even as the government of Myanmar prepares to hold its first national elections in 20 years, it is taking no steps toward accountability for its past human rights violations, and in fact is sending clear signals that it has no intention of doing so. More importantly, it continues its perpetration of crimes against humanity and possible war crimes against its people. 2010 must see an international community prepared to promote and protect human rights in the context of Myanmar’s elections, and to work for the establishment of a Commission of Inquiry into crimes that no government—elected or otherwise—should be permitted to commit with impunity.

END/

²⁷ Amnesty International, *Universal jurisdiction: The duty of states to enact and implement legislation*, ASA 53/002/2001, September 2001.