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## Myanmar Update Report

### November 2012 REPORT

This report seeks to provide an overview of the developments in November 2012 that relate to the status of human rights in Myanmar. It also reviews the response of the international community to the Myanmar's current situation, in particular status of sanctions regime.

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## **I. International Community and Sanctions**

Extraordinary democratic reforms have swept across Myanmar since President Thein Sein came to power in March 2011. In response to Myanmar's reform efforts, a wave of nations have relaxed or eliminated sanctions against the impoverished Southeast Asian nation, providing Myanmar an opportunity for greater diplomatic and economic engagement. While the Myanmar government has taken promising steps towards democracy, including the initiation of ceasefire talks with ethnic militias, the release of hundreds of jailed political prisoners, and a dialogue with the National League for Democracy (NLD), recent events demonstrate the fragility of Myanmar's reform process.

### **A. State Visit & U.S. Sanctions Easing**

On November 19<sup>th</sup>, 2012, President Obama and Secretary of State Clinton traveled to Myanmar and met with Burmese President Thein Sein, as well opposition leader and parliament member Aung San Suu Kyi. Substantial sanction-easing actions were taken three days prior to their visit, on November 16<sup>th</sup>, 2012.

The most significant U.S. sanction-easing event was the issuance of General License No. 18 by the Office of Foreign Assets Control ("License 18")<sup>1</sup> and the concomitant waiver by the U.S. Department of State. The U.S. Department of State, acting pursuant to a delegation of authority from President Obama, waived the ban on the importation of products from Myanmar set forth in section 3(a) of the Burmese Freedom and Democracy Act of 2003 (BFDA) and implemented by Executive Order 13310 of July 28<sup>th</sup>, 2003. License 18 broadly allows the importation of Burmese products into the United States, with specific exceptions. It provides that "[t]he importation into the United States of any article that is a product of Myanmar is authorized, subject to the limitations set forth in paragraphs (c) and (e) of this general license. For the purposes of this general license, the term product of Myanmar means goods of Burmese origin pursuant to rules of origin of U.S. Customs and Border Protection."<sup>2</sup>

The license specifically excludes items statutorily proscribed from import (*i.e.*, by Congress). "This general license does not authorize the importation into the United States of jadeite or rubies mined or extracted from Myanmar, or of articles of jewelry containing jadeite or rubies mined or extracted from Myanmar or any other activity prohibited by Section 3A of the Burmese Freedom and Democracy Act of 2003 (Public Law 108-61), as amended by the Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act of 2008 (Public Law 110-286)."<sup>3</sup> Reversing this statutory prohibition against jadeite and rubies would require an act of Congress, a potentially significant hurdle in the present U.S. political environment. More importantly, License 18 maintains the U.S. prohibition against transactions with certain individuals. "This general license does not authorize transactions with, directly or indirectly, any person whose property and interests in property are blocked pursuant to 31 C.F.R. § 537.201(a), Executive Order 13448 of October 18, 2007, Executive Order 13464 of April 30, 2008, or Executive Order 13619 of July 11, 2012."

The U.S. actually added certain entities to the above-referenced “blocked” list (“Specially Designated Nationals” list), notably, entities associated with Tay Za and Steven Law—both of whom associated with the former military regime.<sup>4</sup>

In issuing License 18, the U.S. Department of the Treasury specifically detailed (i) what developments on the ground prompted the specific easing of imports into the U.S. and (ii) what activities and entities were being excluded and monitored.

Today’s joint actions by the Departments of State and Treasury are intended to support the Burmese government’s ongoing reform efforts and to encourage further change, as well as to offer new opportunities for Burmese and American businesses. President Thein Sein’s government has released hundreds of political prisoners,<sup>5</sup> removed pre-publication editorship requirements for the press, and enacted a labor law that permits the formation of labor unions. The government has also passed a new Foreign Investment Law, and is making efforts to join the Extractive Industries Transparency Initiative. It has established ceasefire agreements with ten armed ethnic groups, is pursuing negotiations with the last major ethnic armed group that has not yet signed a ceasefire agreement, and is establishing mechanisms to work toward a sustainable ethnic reconciliation process. Steps have been taken toward democratization; the parliamentary by-elections held in April 2012 were largely free and fair, and 43 opposition party members were elected to Parliament.

In light of these positive changes, the United States is issuing a waiver and general license to ease the ban on imports into the United States of products from Myanmar required by section 3(a) of the [BFDA] and implemented by Executive Order 13310 of July 28, 2003. However, as concerns about some areas of trade with respect to Myanmar remain, this waiver and license do not affect the existing prohibitions and restrictions on the importation of jadeite and rubies mined or extracted from Myanmar, and on articles of jewelry containing them, imposed by the Tom Lantos Block Burmese JADE (Junta’s Anti-Democratic Efforts) Act of 2008, which amended the BFDA. We are committed to working with the Government of Myanmar to address these concerns.

The U.S. government is closely monitoring and supporting Myanmar’s progress on reform, and the core authorities underlying our sanctions remain in place. Despite positive changes, the United States remains concerned about corruption, remaining political prisoners, continued military ties to the Democratic People’s Republic of Korea, and ethnic conflict. U.S. policy remains calibrated, and through the Treasury Department’s Specially Designated Persons (SDN) list, the United States will take steps to exclude those who continue to perpetrate the violence, oppression, and corrupt practices of the past from participating in our countries’ growing bilateral diplomatic and economic ties. U.S. persons are still prohibited from engaging in transactions with persons included on the SDN list, as well as any entity in which such a person owns, directly or indirectly, a 50 percent or greater interest. The [full] SDN list is available at [www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx](http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx).<sup>6</sup>

Again, as noted above, the SDN “blocked” list remains a core and active element of continued sanctions and monitoring. The recent addition of Za and Law to this list provides at least some weight to the above statements regarding a calibrated policy. The U.S. also continues to flag and monitor money laundering, corruption, and other risks in Myanmar through special and general business regulations.

## **B. Developments in the Broader Sanctions Community**

Following recent significant easing by the European Union, Australia, and other countries, we have not yet identified material sanctions activity in November 2012 by the broader sanctions community. It is possible that significant activity occurred, but remains latent (*i.e.*, less publicized or occluded by news relating to the U.S. state visit).

## **II. Economic Development**

### **A. Investment Reform Agenda**

As indicated in last month's report, state television announced on November 2<sup>nd</sup>, 2012 that President Thein Sein signed long-awaited and much-revised legislation establishing a foreign investment law ("FIL"). The legislation had been returned to him after it had been sent back to Parliament and revised a final time.

The FIL sets up a more liberal regime for foreign investment but one in which the state, through the Myanmar Investment Commission ("MIC"), continues to play a key role in approving and monitoring the acquisition and disposition of investments, as well as determining the availability of land (which cannot be owned by foreigners) to foreign investors. Key amendments include the following<sup>7</sup>:

- *Foreign ownership restrictions*: Foreign investment is only restricted in a limited number of sectors most notably certain manufacturing and service enterprises that can be run by Myanmar citizens (expected to be detailed in regulations), livestock and fishery, and certain agriculture projects (Art. 4). The MIC has the authority to permit investments in restricted sectors.
- *Minimum capital*: The FIL no longer has a minimum capital requirement, except for joint ventures in restricted sectors. It does set out that individual capitalization requirements can be set by the MIC pursuant to its review of investment proposals. The 35% minimum participation for foreign investors in all joint ventures also no longer exists (Art. 10).
- *Foreign employees*: For investments not requiring "special expertise" only local staff may be used. When enterprises do require "special expertise," investors are required to employ at least 25% local staff during the first two years, at least 50% local staff during the next two years, and at least 75% during the third two years. However, the MIC may amend the time limit for "knowledge-based enterprises" (Art. 24).
- *Tax incentives*: A 5-year tax holiday is made applicable to all investors, plus several additional tax incentive measures may be granted by the MIC which could also be granted under the 1988 FIL. A new addition is an exemption from the Commercial Tax for export activity (Art. 27).

- *Customs duty incentives:* Exemption of customs duties for 3 years on machinery and raw materials may be granted by the MIC. A new addition compared to the 1988 FIL is a possible customs duty exemption in case of the expansion of an existing investment (Art. 27 (j)).
- *Use of land:* Leases of land from private parties is allowed for a period of 50 years, which can be extended twice for additional 10-year periods (Art. 31-32).
- *No obligatory transfer to Myanmar citizens at the end of the investment period:* A controversial clause on the issue of transfer to Myanmar citizens has been deleted from the FIL, which now provides explicitly that a foreign investor has the right to sell his interest to any Myanmar or foreign party. Nevertheless, permission must be sought from the MIC for any share transfer (Art. 17-18).
- *No nationalization:* The FIL now provides that no investment will be expropriated. An earlier draft stated that expropriation with market value compensation (which is allowed in many other countries) is allowed. The law also protects against the termination of an investment operating under a permit without “proper reason” and provides investors with the right to repatriate an investment in their investment’s original currency (Art. 28).
- *Disputes:* The FIL now provides explicitly that dispute settlement clauses of investment contracts will be enforceable (Art. 43).

Reactions to the new law have been generally positive.<sup>8</sup> However, given the extensive powers and discretion afforded to the MIC, members of the international business community appear to be guardedly optimistic but still hesitant regarding its ultimate impact.<sup>9</sup> The continuing uncertainty has contributed to a split of opinion amongst investors. Some investors are preparing to aggressively enter the Myanmar market while others have concerns regarding not only the FIL but also about their ability to exit even successful investments in Myanmar given that the country lacks a corporate bond market, a developed stock exchange, and an advanced banking system.<sup>10</sup>

## **B. Land Reform Agenda**

This section first describes the land reform agenda in Myanmar and the next section discusses the issue of problematic land seizures in the context of foreign investment. Importantly, these concepts are conceptually blurry. Land reform essentially involves seizing land from existing owners and redistributing it to new owners. It is a form of economic expropriation that can be done in various ways, some of which are just (*e.g.*, where the existing distribution is either unfair or inhibits economic growth and can be remediated without unfair expropriation and/or with compensation) and some of which are flagrantly unjust.

Myanmar’s challenges in dealing with land distribution are even more pressing as it is one of the poorest countries in Asia and a very substantial fraction of its population<sup>11</sup> is employed in the agricultural sector. Two laws signed this year—the Farmland Law and the

Vacant, Fallow, and Virgin Land Management Law—will serve as the legal framework for land reform going forward. The impetus behind these laws is the need to increase agricultural productivity. The context of these laws includes the fact that under Myanmar’s military junta an estimated approximately 1.9 million acres (about 3,000 square miles) were illegally transferred to private companies. Over 70% of that transferred land is still farmed by the land’s original owners highlighting the potential arbitrariness of the takings in the first place. As described further in the next section, farmers are concerned about further expropriations as a result of incoming foreign investment.<sup>12</sup>

The new land reform laws indicate that the state remains the ultimate owner of land but nonetheless they allow farmers to transfer or mortgage their land to repay their loans.<sup>13</sup> The new laws also create a Central Farmland Management Body that is largely independent of the judicial system and which can transfer or revoke the right to work land.<sup>14</sup> President Sein outlined his objectives for this body’s work in June, noting that it would allow new setting of towns and wards, allocate farmlands and regulate the use of vacant and virgin lands.<sup>15</sup> Critics contend that the new laws fail to provide land tenure security and leave land subject to the government’s crop prescriptions and quotas.<sup>16</sup> A representative of the Network for Human Rights Documentation – Burma noted: “Far from reducing the prospects of land-grabbing, the Farmland Law opens the door to confiscation of agricultural land on any pretext associated with a state project or the ‘national interest.’”<sup>17</sup> It appears that much like the working of the FIL discussed above, the ultimate efficacy of land reform in Myanmar in promoting just outcomes and remediating past injustices will depend on the quality in practice of the institutional structures that implement it.

It cannot be sufficiently emphasized, however, that the same holds true in other countries like the United States, which allows for “takings” of land if due process constraints are followed and “just compensation” is provided to landowners whose land is seized for a “public use.”<sup>18</sup> The definition of “public use” can be quite broad and can extend not only to economic development but also to more abstract goals such as reducing the concentration of land ownership.

### C. Land Seizures

As suggested above, foreign investment has the potential to exacerbate land disputes. Government elites at various levels may use their power to trample the rights of existing landowners—especially those of low status with little power to resist—when foreign investors desire to use occupied land for new investments or to take actions that negatively affect nearby land.

In the battle over the site of the Monywa copper mine—which is funded by Chinese investors and a Burmese company owned by the nation’s military and which was approved before the initiation of Myanmar’s democratic reforms—there have been long-running protests from civil society regarding the environmental and social impact of the mine.<sup>19</sup> The mine project involved the seizure of 8,000 acres of land which included 26 villages and several mountains. Displaced residents allege that they were inadequately compensated for only three

years of leasing rights while the project's lease is for 60 years.<sup>20</sup> Recently protestors occupied the site of the mine and over 100 Buddhist monks defied an order issued by the government requiring them to leave.<sup>21</sup> Those protestors were dispersed by the police with tear gas and water cannons, and many were arrested.<sup>22</sup> Protestors had taken heart from the government's surprise suspension last year of a Chinese-backed hydroelectric project which was made in response to similar concerns about social and economic consequences; however, government representatives have defended the copper mine in part based on their desire not to irritate China and their desire not to deter further foreign investment.<sup>23</sup>

Similarly, a large number of farmers are continuing to be displaced to make way for the Korean- and Chinese-owned 800-kilometer-long Shwe gas pipelines, allegedly with little or no compensation and after inadequate or discriminatory consultation processes.<sup>24</sup> Some have alleged that the pipeline has taken up more land than the amount for which landowners were actually compensated.<sup>25</sup> The October report detailed how a coalition of 12 civil society groups have joined together to form the Myanmar-China Pipeline Watch Committee in order to ensure transparency in the project's affairs, and to investigate the economic and social impact of the pipeline prior to its completion.

### **III. Political Prisoners**

On November 19<sup>th</sup>, 2012, U.S. President Obama visited Rangoon and held meetings with President Thein Sein and the opposition leader, Aung San Suu Kyi, in the first visit to Myanmar by a sitting U.S. president. Four days before Mr. Obama's visit, the Burmese authorities freed more than 450 detainees in a goodwill gesture.

It is however unclear how many political dissidents were among those released detainees. According to human rights campaigners, the list of released prisoners did not include any political dissidents.<sup>26</sup> According to another source, at least 44 people were political prisoners, including several prominent human rights activists.<sup>27</sup> However Bo Kyi, of the Thailand-based Assistance Association for Political Prisoners (AAPP), said no prisoners of conscience had been freed so far. "All are common criminals or foreign nationals from China, Thailand or neighboring countries. We know of no political prisoners among the 452 freed today."<sup>28</sup> Human Rights Watch also reported that no political prisoners were released among those released detainees.<sup>29</sup>

Myanmar's government has long insisted that all prisoners in the country are criminals and it still does not acknowledge the existence of political detainees. However, Thein Sein's administration has been steadily setting free political detainees, tucked into larger prisoner amnesties, as part of his reform agenda. Earlier prisoner releases helped convince Western nations, including the United States, to ease sanctions they had imposed against the previous military regime. Under the now-defunct junta, rights groups said more than 2,000 activists and government critics were wrongfully imprisoned. The opposition party of Aung San Suu Kyi says at least 330 political prisoners remain incarcerated.<sup>30</sup>

Ahead of Mr. Obama's visit, human rights activists worried that he was bestowing the prize of his prestige too soon and would be left with too little leverage.<sup>31</sup> "Amnesty has been

calling for the immediate release of all prisoners of conscience in Myanmar. The potential for President Obama's trip to leverage change is clear - it is up to him to use his visit to press for the freeing of all prisoners of conscience and urgent steps to uphold the rights of Myanmar's ethnic minorities, including the Rohingya Muslims of Rakhine state, who lack legal status and are subject to gross abuses that have escalated in recent months," said Suzanne Nossel, Executive Director of AIUSA. "As he opens the door to U.S. businesses now able to enter Myanmar due to the lifting of sanctions, the President must also stress the importance of respecting their human rights obligations, and the need to put the human rights of the Burmese people ahead of corporate profits."<sup>32</sup>

In addition to the release of all political prisoners, Amnesty International is calling for independent monitoring of all detention facilities in Myanmar and an independent investigation into reports of torture and other ill treatment. The Myanmar government announced on November 18 that it will hold inter-governmental consultations by December of this year to reconsider charges and punishment of prisoners still in jail. Amnesty has called on authorities for a comprehensive review mechanism to determine who remains in prison and why. Additionally, the human rights organization wants the United Nations and civil society representatives to be involved in the process to guarantee impartiality and credibility.<sup>33</sup>

In four amnesties in the past year, the government has released hundreds of political prisoners, leaving an undetermined number behind bars. Human Rights Watch and others have called for independent international monitors to be given unfettered access to Myanmar's prisons to provide an accounting of all remaining political prisoners. Many released political prisoners face travel and other restrictions.<sup>34</sup>

#### **IV. Ethnic Violence**

##### **A. Developments and Domestic Response**

The security situation in Myanmar's Rakhine province is still tense after a recent wave of violence between Rakhine Buddhists and Rohingya Muslims which began in October, with more than 110,000 displaced people in urgent need of food, shelter and health care assistance. At least 89 people have been killed and 35,000 displaced since the upsurge of inter-communal violence a couple of weeks ago, and more than 5,300 houses and religious buildings have been destroyed, according to the U.N. Office for the Coordination of Humanitarian Affairs (OCHA).<sup>35</sup>

A Muslim enclave in the port town of Sittwe on the Bay of Bengal is quickly turning into a prison-like ghetto, highlighting the risk that Myanmar's dramatic democratic revival could unleash centuries-old ethnic hatreds that had partly been held in check by nearly 50 years of military rule. Sittwe, a town of around 250,000 people, is supposed to be one of Myanmar's new boomtowns. But a couple of hundred meters back from where the river empties into the ocean, 7,000 Muslim Rohingyas are crammed into a steadily shrinking neighborhood called Aung Min Glar. Just a few months ago the Rohingyas in Sittwe moved around freely and often traded with the area's majority Buddhist Rakhine population. Now, the Rohingyas homes are ring-fenced by burnt-out buildings and military checkpoints, which, while protecting them from attack, also restrict their movements. An hour's drive from Sittwe, up to 100,000 more Rohingyas displaced



by the clashes are living in a series of sweltering refugee camps where malnourishment and disease are rife and where security forces and local Rakhine activists impede aid workers from operating freely.<sup>36</sup>

The conflict is also threatening important foreign investments. The fishing port of Kyaukpyu is also the starting point of an oil-and-gas pipeline from the Bay of Bengal to China. Asked about the Rohingya situation last month, China's Foreign Ministry spokesman Hong Lei said China hoped that Myanmar can remain stable, according to Chinese state media. Essar Group, the Indian company constructing the new Sittwe port project, meanwhile describes the situation in Rakhine state as "critical." The project envisions building a deep-water port at Sittwe and dredging 225 kilometers upriver to the town of Paletwa, where cargo will be transferred to trucks plying a planned 140-kilometer highway to the Indian border, and, in theory, opening up an alternative route to the rest of the India by sea and bypassing the difficult land crossing squeezing past Bhutan and Bangladesh. So far, there has been no serious impact on construction, an Essar spokesman said, but "we hope that normalcy is quickly resumed."<sup>37</sup>

Authorities in Rakhine State have initiated a survey to determine how many Rohingya families in the restive region have temporary national registration cards and which are considered illegal immigrants, according to a report by The Associated Press (AP) on November 30<sup>th</sup>, 2012. "Guarded by rifle-toting police, immigration authorities in western Myanmar have launched a major operation aimed at settling an explosive question at the heart of the biggest crisis the government has faced since beginning its nascent transition to democracy last year." Thailand-based advocacy group, the Arakan Project, is quoted in the report as warning that "the results could be used to definitively rule out citizenship for the Rohingya."<sup>38</sup>

Though she has called the conflict a "huge international tragedy," Aung San Suu Kyi said this month she won't take sides in escalating violence between Buddhists and Muslims in Rakhine state. The Nobel laureate said she was under pressure to take sides, but wouldn't. "Both sides are displeased because I will not take a stand with them, but my stand is that first let us establish rule of law," she said.<sup>39</sup> Earlier this year, Ms. Suu Kyi said she "didn't know" if Rohingyas should be considered Myanmar citizens.<sup>40</sup> Ms. Suu Kyi has been criticized for not speaking out. The Economist stated that "the one person in Myanmar with genuine moral authority, Miss Suu Kyi, has confined herself to calling for respect for the rule of law. When the law is unjust and unfairly applied—as it long was against her—that is a betrayal of the high moral principles she has always espoused."<sup>41</sup>

President Thein Sein told reporters on November 21<sup>st</sup>, 2012 that the government will pursue a four-point plan aimed at resolving the bitter divisions between Muslim and Buddhist communities in Rakhine State. He said the plan will involve changing people's prejudices, promoting education, creating jobs—and introducing a program of birth control. Thein Sein noted that some 110,000 people were displaced due to the recent violence in the Rakhine State. He said the government is spending about U.S. \$1 million per month providing food to refugees, and that it now requires about U.S. \$65 million for rehabilitation.<sup>42</sup>

## B. International Response

Human Rights Watch (HRW) accused Myanmar's government and security of being complicit in attacks on Rohingya Muslims in October that forced 35,000 people from their homes. Based on satellite imagery of Muslim communities in Myanmar's Arakan State, HRW claimed that in some cases, Myanmar soldiers destroyed Rohingya homes and committed violence against civilians.<sup>43</sup>

The U.N. Special Rapporteur for Human Rights in Burma, Tomás Ojea Quintana, has told he is "disgusted" by the way the Rohingya community has been treated. "My assessment after five years holding this mandate ... is that there is a pattern of endemic discrimination against the Rohingya," he said. He says he hopes regional leaders will take action to end the "national sentiment" of prejudice against the community. "It's also clear for me there are a group of hardliners in the government trying to apply directly this policy of discrimination through concentrated measures on the ground against the Rohingya," he said. "My concern is that it is not clear where President Thein Sein is standing in this respect." During his last visit to Myanmar in August, Mr Quintana says he was informed the Burmese government had been developing a policy to gradually integrate the Rohingya into the wider community. "[But] these are only statements," he said. He says there needs to be a clearer indication of what measures will be taken on the ground to end the conflict.<sup>44</sup>

On November 20<sup>th</sup>, 2012, the U.N. General Assembly's Third Committee, which focuses on rights issues, approved by consensus a non-binding resolution "expressing particular concern about the situation of the Rohingya minority in Rakhine state, and urging the government to take action to bring about an improvement in their situation and to protect all their human rights, including their right to a nationality." The Myanmar mission to the United Nations told the Third Committee that while it accepted the resolution, it objected to the Rohingya being referred to as a minority. "There has been no such ethnic group as Rohingya among the ethnic groups of Myanmar," a representative of Myanmar's U.N. mission said. "Despite this fact, the right to citizenship for any member or community has been and will never be denied if they are in line with the law of the land."<sup>45</sup>

Myanmar and the European Union vowed to cooperate closely in their joint efforts to build peace in Myanmar. The pledge was made in a joint declaration signed by Myanmar Minister at the President's Office U Aung Min and visiting E.U. Commission President Jose Manuel Barroso at the Myanmar Peace Center (MPC) in Yangon. The MPC, established by Presidential Decree, is to serve as a platform for inclusive and non-partisan dialogue among all involved in Myanmar's ethnic peace process including international and national, governmental and non-governmental groups, individuals and organizations at both regional and central levels, the declaration said. In support of the MPC, the E.U. said it will fund its start-up with 700,000 euros, to be followed by a sizable package later this year. In 2013, the E.U. will continue to contribute a total of 30 million euros to Myanmar's ethnic peace process.<sup>46</sup>

On his historic trip to Myanmar on November 19<sup>th</sup>, U.S. President Barack Obama urged an end to sectarian clashes in Rakhine state, telling an audience that "for too long the people of this state, including ethnic Rakhine, have faced crushing poverty and persecution, but there's no

excuse for violence against innocent people, and the Rohingya hold within themselves the same dignity as you do, and I do.”<sup>47</sup> Mr. Obama took time during his visit to Myanmar to visit with an advocate of the Rohingya community.<sup>48</sup>

In an article published in *The Economist*, the situation has been described as “a vicious and bloody campaign of ethnic cleansing by the Rakhines that is intended to drive Rohingyas out.” The Rohingyas need the help of the Burmese government, Aung San Suu Kyi and the outside world. For once, the army really does need to be firmer—but in stopping violence, detaining perpetrators, and helping Rohingyas survive the unofficial commercial boycott that is leaving many hungry and thirsty. Parliament and the government, for their part, need to revise the Citizenship Act of 1982, which has been used as the tool to render most Rohingyas stateless. Rohingyas with a good claim to citizenship should have it. And their claims should be examined generously: it is not easy to prove your lineage when everything you have has been reduced to ashes.<sup>49</sup> Calls for Myanmar to allow the Rohingyas to become citizens have been echoed among others by U.N. High Commissioner for Human Rights Navi Pillay. “This should include a review of the citizenship law to ensure that Rohingyas have equal access to citizenship,” Pillay said.<sup>50</sup>

### **C. Kachin State**

The armed conflict between the Kachin Independence Army (KIA) and the government’s armed forces, which has been ongoing since fighting erupted in June 2011, continued to draw headlines over the past month. The KIA claims it killed a major and seven lower-ranking soldiers from the Burmese army on November 7<sup>th</sup>, 2012 during clashes at Dung Waw in northern Shan State, according to Kachin News, quoting a Kachin commander at the frontline.<sup>51</sup>

The Myanmar army raided the Hpaikawng Kachin refugee camp and burned at least 50 temporary tents on November 28<sup>th</sup>, 2012, according to a report in Kachinland News. The soldiers have currently detained about 20 men, but have released all the women and children, locals say. The refugee camp, which is located between Muse and Mungkoe in northern Shan state, was demolished and burned down on Wednesday by a group of Myanmar army soldiers, the report said, citing local sources. Earlier the same morning, a combined force of the KIA and the Kachin Peoples Militia reportedly exchanged gunfire with Myanmar’s army nearby Hpaikawng.<sup>52</sup>

### **D. Shan State**

A three-day meeting officially called the “Trust-building for Peace Conference” was held on November 26<sup>th</sup>-28<sup>th</sup> in Yangon and involved some 170 Shan representatives from across the country. The 170 delegates represented interests as diverse as: three Shan political parties; four Shan armies; 11 domestic or foreign-based Shan organizations; community leaders from 42 townships; and 17 experts, academics or special guests. According to an official statement at the conclusion of the conference: “To settle the conflicts, we must seriously cooperate as opposed to participate. We therefore encourage each other to implement the issues of the ongoing peace process in each sector.” “Trust-building is the most important thing in achieving peace in the country,” said Hkun Htun Oo, the chairman of the Shan Nationalities League for Democracy. Twenty-three separate issues and proposals were discussed over the three days, including the peace process, Shan political issues, economy, social issues, literature, natural resources, and environmental issues.<sup>53</sup>

## V. Governance and Rule of Law

During President Obama's visit to Myanmar, he spoke about the need to continue reforms in governance and judicial administration, among other challenges. The President spoke about the importance of "building credible government institutions, establishing rule of law, ending ethnic conflicts and insuring that the people of this country have access to greater education, health care and economic opportunity."<sup>54</sup> While the concepts of "credible governance" and "rule of law" are theoretically slippery, it is nevertheless possible to posit some procedural aspects of both of these notions, touching on the concepts of representativeness, neutrality, generality, and certainty.<sup>55</sup> Are laws written, executed, and enforced by legislators, magistrates, and judges that are accountable to the people? Are they applied to individuals without bias? Are they applied universally, including to officeholders? Is it possible for a citizen seeking to follow the law to know what the law actually is? Are the participants in the legal system properly trained at their jobs? Unfortunately, there is little evidence of concrete measures to improve either governance or the judiciary in Myanmar; the most that can be said is that the problems with both appear to be well-recognized and that steps to investigate them more closely have begun.

This month Bill Richardson, the former U.S. ambassador to the United Nations, wrote in the *New York Times* that although Myanmar's "government lacks basic capacity and knowledge on how to govern properly" they are "eager to learn the standards and procedures of good governance" including "basic skills such as drafting laws and budgets, constituent outreach, and how to work across party lines and deal with the business community."<sup>56</sup> He urged democracy-building organizations and the U.S. government to do more to assist in the governance-building process.<sup>57</sup> While President Sein has released political prisoners and reached out to Suu Kyi (whose party competed for and won legislative seats, including her own)—political reforms which may ultimately lay the foundation for better governance by increasing pressure on government institutions to be responsive to people's needs—there is less evidence of concrete governance-building steps.

On the legal side, too, there is clearly recognition of the need for concrete reforms but few actual reforms have taken place so far. Indeed some see a threat to the potential for judicial independence to emerge based on the impeachment of the justices on Myanmar's Constitutional Court following that court's decision denying Union status to parliamentary commissions and committees.<sup>58</sup> Legal reform is nevertheless a primary focus of the opposition and its presence or absence will potentially be a sign of whether the reforms initiated in Myanmar are set to deepen or whether reformist momentum is stagnating. Aung San Suu Kyi has emphasized the urgent need for judicial reform and, in perhaps the most promising move so far, was named to head a parliamentary "rule of law" committee, which has received 1,700 complaints as of October, worked with ministries to address them and inspected courts, among other activities.<sup>59</sup>

There can be no doubt regarding Suu Kyi's focus on legal reform. In June, she told international business leaders that "[g]ood laws already exist in Myanmar but we do not have a clean and independent judicial system" and that without such a system "it is no use having the best laws in the world." In September, she spoke to an audience at Yale and emphasized that establishment of the rule of law was the first priority for the country in her party's platform,

preceding even ending ethnic conflict because the end to ethnic conflict depends on the rule of law.<sup>60</sup> Of particular importance was ending the practice of arbitrary detentions without trial and prohibiting arrests allegedly designed to protect society “against destructive elements.”<sup>61</sup> Suu Kyi noted that in the past members of the military have handed orders to judges with the sentences to be imposed on dissidents.<sup>62</sup> Future reports will continue to provide updates on the substance of the activities and findings of the Suu Kyi’s Rule of Law Committee.

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<sup>1</sup> General License No. 18, <http://www.treasury.gov/resource-center/sanctions/programs/pages/burma.aspx>.

<sup>2</sup> License 18, subsections (a)-(b).

<sup>3</sup> Id., subsection (c).

<sup>4</sup> Specially Designated Nationals, <http://www.treasury.gov/resource-center/sanctions/programs/pages/burma.aspx>. The following corporate entities were designated as “front companies” of these individuals. “Gold Ocean Pte Ltd., Great Success Pte. Ltd., Green Luck Trading Company, and Gold Energy Co. Ltd. are front companies controlled by Steven Law, a crony of the former regime designated on February 25, 2008. Gold Ocean Pte Ltd is the primary front company used to transfer money between Steven Law’s companies, foreign companies, and Burmese state-run organizations. China Focus Development Ltd. is the new name for Golden Aaron Pte. Ltd., a company identified as blocked property on February 25, 2008 and owned by Cecilia Ng, the wife of Steven Law.” (<http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20121116.aspx>) In addition: “Asia Pioneer Impex Pte. Ltd., Terrestrial Pte. Ltd., and Asia Green Development Bank are companies owned or controlled by Tay Za, a crony of the former regime who was sanctioned on October 18, 2007. Tay Za uses his Singapore-based companies, Asia Pioneer Impex Pte. Ltd. and Terrestrial Pte. Ltd., to conduct business transactions. He began trading under the name Terrestrial Pte. Ltd. following financial sanctions against Pavo Trading in 2008.” Id. Additional entities are also provided. Id.

<sup>5</sup> The true extent of the contemporaneous prisoner releases is unclear. See <http://www.dvb.no/news/obama-calls-for-national-reconciliation-during-burma-visit/24894>. “To coincide with the visit, Burma’s government officials announced plans to release 66 prisoners on Monday, 45 of which were political dissidents and ethnic minorities from rebel armies. The move follows the release of more than 400 prisoners last week, but according to rights groups none of the freed inmates were political dissidents. ‘It is very worrisome that the November 15 prisoner release apparently did not include a single political prisoner – the message the leaders in Naypidaw are sending is they think they can play political games with human rights and Obama and the international community will look the other way,’ said Phil Robertson, Deputy Director of Human Rights Watch’s Asia Division.” Id.

<sup>6</sup> <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20121116.aspx> (emphases added).

<sup>7</sup> VDB on Tax: <http://www.vdbontax.com/myanmar/new-2012-myanmar-foreign-investment-law-now-in-force-full-text-english-translation/>.

<sup>8</sup> Wall Street Journal, November 1, 2012: <http://online.wsj.com/article/SB10001424052970204707104578092810103878402.html>; AsiaOne, November 7, 2012: <http://www.asiaone.com/News/AsiaOne%2BNews/Asia/Story/A1Story20121107-382000.html>.

<sup>9</sup> Wall Street Journal, November 1, 2012: <http://online.wsj.com/article/SB10001424052970204707104578092810103878402.html>.

<sup>10</sup> Wall Street Journal, November 28, 2012, 2012: <http://online.wsj.com/article/SB10001424127887324784404578144944078046734.html>.

<sup>11</sup> 70% according to the CIA World Factbook: <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html>.

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- <sup>12</sup> Center for Strategic and International Studies, November 8, 2012: [http://csis.org/files/publication/121108\\_SoutheastAsia\\_Vol\\_3\\_Issue\\_21.pdf](http://csis.org/files/publication/121108_SoutheastAsia_Vol_3_Issue_21.pdf).
- <sup>13</sup> Center for Strategic and International Studies, November 8, 2012: [http://csis.org/files/publication/121108\\_SoutheastAsia\\_Vol\\_3\\_Issue\\_21.pdf](http://csis.org/files/publication/121108_SoutheastAsia_Vol_3_Issue_21.pdf).
- <sup>14</sup> Center for Strategic and International Studies, November 8, 2012: [http://csis.org/files/publication/121108\\_SoutheastAsia\\_Vol\\_3\\_Issue\\_21.pdf](http://csis.org/files/publication/121108_SoutheastAsia_Vol_3_Issue_21.pdf).
- <sup>15</sup> The Nation (Thailand), June 22, 2012: <http://www.nationmultimedia.com/aec/Thein-Sein-to-push-land-reform-30184700.html>.
- <sup>16</sup> Center for Strategic and International Studies, November 8, 2012: [http://csis.org/files/publication/121108\\_SoutheastAsia\\_Vol\\_3\\_Issue\\_21.pdf](http://csis.org/files/publication/121108_SoutheastAsia_Vol_3_Issue_21.pdf).
- <sup>17</sup> Mizzima, November 1, 2012: <http://www.mizzima.com/news/regional/8336-abuses-land-grabs-ongoing-in-burma-says-ngo.html>.
- <sup>18</sup> These words are found in the Fifth Amendment to the Constitution of the United States.
- <sup>19</sup> Associated Press, November 28, 2012: <http://www.startribune.com/business/181004291.html?refer=y>.
- <sup>20</sup> Businessweek, September 12, 2012: <http://www.businessweek.com/ap/2012-09-12/myanmar-students-swell-ranks-of-land-grab-protest>.
- <sup>21</sup> Associated Press, November 28, 2012: <http://www.startribune.com/business/181004291.html?refer=y>.
- <sup>22</sup> Radio Australia, November 29, 2012. <http://www.radioaustralia.net.au/international/radio/program/asia-pacific/burma-mine-protest-broken-up-by-by-police/1053878>.
- <sup>23</sup> Associated Press, November 28, 2012: <http://www.startribune.com/business/181004291.html?refer=y>.
- <sup>24</sup> EarthRights International, “Comment of EarthRights International on the Paperwork Reduction Act Review for Proposed Reporting Requirements on Responsible Investment in Burma”, October 2, 2012, link to PDF report on <http://www.earthrights.org/campaigns/us-state-department-must-hold-us-companies-burma-international-standards>
- <sup>25</sup> The Irrawaddy, November 7, 2012: <http://www.irrawaddy.org/archives/18259>.
- <sup>26</sup> The Guardian, November 15, 2012: <http://www.guardian.co.uk/world/2012/nov/15/burma-frees-prisoners-barack-obama>
- <sup>27</sup> AP News, November 19, 2012: <http://www.businessweek.com/ap/2012-11-19/myanmar-frees-political-prisoners-in-new-amnesty>
- <sup>28</sup> The Guardian, November 15, 2012: <http://www.guardian.co.uk/world/2012/nov/15/burma-frees-prisoners-barack-obama>
- <sup>29</sup> Human Rights Watch, November 16, 2012: <http://www.unhcr.org/refworld/country,,,MMR,,50ab45512,0.html>
- <sup>30</sup> AP News, November 19, 2012: <http://www.businessweek.com/ap/2012-11-19/myanmar-frees-political-prisoners-in-new-amnesty>
- <sup>31</sup> Washington Post, November 19, 2012: [http://www.washingtonpost.com/opinions/striking-a-balance-in-burma/2012/11/19/16929aa2-3286-11e2-bfd5-e202b6d7b501\\_story.html](http://www.washingtonpost.com/opinions/striking-a-balance-in-burma/2012/11/19/16929aa2-3286-11e2-bfd5-e202b6d7b501_story.html)
- <sup>32</sup> Amnesty International, November 15, 2012: <http://www.amnestyusa.org/news/press-releases/amnesty-international-responds-to-reports-that-myanmar-to-release-political-prisoners-on-eve-of-hist>

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- 33 Amnesty International, November 19, 2012: <http://www.amnestyusa.org/news/press-releases/myanmar-s-release-of-political-prisoners-a-step-in-right-direction-for-human-rights>
- 34 Id. 27
- 35 UN News Centre, November 5, 2012: <http://www.un.org/apps/news/story.asp?NewsID=43414&Cr=&Cr1=>
- 36 WSJ, November 2, 2012: <http://online.wsj.com/article/SB10001424052970204707104578094500930170258.html>
- 37 WSJ, November 2, 2012: <http://online.wsj.com/article/SB10001424052970204707104578094500930170258.html>
- 38 Mizzima, November 30 2012: <http://www.mizzima.com/news/inside-burma/8480-rakhine-authorities-conducting-rohingya-census-ap.html>
- 39 UPI, November 4, 2012: [http://www.upi.com/Top\\_News/World-News/2012/11/04/Suu-Kyi-neutral-on-Myanmar-violence/UPI-83611352041291/](http://www.upi.com/Top_News/World-News/2012/11/04/Suu-Kyi-neutral-on-Myanmar-violence/UPI-83611352041291/)
- 40 WSJ, November 2, 2012: <http://online.wsj.com/article/SB10001424052970204707104578094500930170258.html>
- 41 The Economist, November 3, 2012: <http://www.economist.com/news/leaders/21565624-rohingyas-need-help-burmese-government-aung-san-suu-kyi-and-outside-world-no>
- 42 Mizzima, November 22, 2012: <http://www.mizzima.com/news/inside-burma/8442-president-announces-four-point-plan-for-rakhine-state.html>
- 43 Paper Chase, November 18, 2012: <http://jurist.org/paperchase/2012/11/hrw-accuses-myanmar-military-of-supporting-anti-muslim-violence.php>
- 44 ABC, November 5, 2012: <http://au.news.yahoo.com/latest/a/-/latest/15298388/un-envoy-disgusted-by-discrimination-against-burmas-rohingyas/>
- 45 Reuters, November 26, 2012: <http://www.reuters.com/article/2012/11/26/us-myanmar-un-idUSBRE8AP16Y20121126>
- 46 Xinhua, November 4, 2012: <http://www.globaltimes.cn/NEWS/tabid/99/ID/742102/Myanmar-EU-vow-to-work-for-peace-in-Myanmar.aspx>
- 47 The Star, November 20, 2012: <http://www.thestar.com/news/world/article/1290689--burma-s-rohingya-minority-get-attention-from-obama-s-visit>
- 48 Huffington Post, November 20, 2012: [http://www.huffingtonpost.com/kristin-wright/rohingya-muslims-obama-myanmar-visit\\_b\\_2165993.html](http://www.huffingtonpost.com/kristin-wright/rohingya-muslims-obama-myanmar-visit_b_2165993.html)
- 49 The Economist, November 3, 2012: <http://www.economist.com/news/leaders/21565624-rohingyas-need-help-burmese-government-aung-san-suu-kyi-and-outside-world-no>
- 50 Agence France-Presse, November 9, 2012: <http://www.ndtv.com/article/world/united-nations-calls-on-myanmar-to-offer-citizenship-to-rohingya-290808>
- 51 Mizzima, November 7, 2012: <http://www.mizzima.com/news/inside-burma/8362-kia-claims-upper-hand-in-shan-state-clashes-.html>
- 52 Mizimma, November 30 2012: <http://www.mizzima.com/news/inside-burma/8476-burma-army-raids-kachin-refugee-camp-detains-20-villagers.html>
- 53 Mizimma, November 29, 2012: <http://www.mizzima.com/news/inside-burma/8474-shan-delegates-call-for-an-end-to-conflict.html>

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- 54 Voice of America, November 19, 2012: <http://blogs.voanews.com/breaking-news/2012/11/19/obama-tells-burma-reforms-have-much-further-to-go/>
- 55 Substantive aspects such as the extent of freedom of speech and the press are more controversial and raise difficult questions in light of the different values and beliefs prevalent in different societies. The difficulty of arriving at satisfying substantive notions of what is meant by the “rule of law” is demonstrated by the fact that the police who routed the camp of protestors at the Monywa copper mine reportedly unfurled a banner that read “the rule of law is the key to attract and protect the foreign investors.” Australian Financial Review, November 29, 2012: [http://www.afr.com/p/business/companies/myanmar\\_police\\_break\\_up\\_mine\\_protest\\_OUC1ATIhmYUAInpZW23CzK](http://www.afr.com/p/business/companies/myanmar_police_break_up_mine_protest_OUC1ATIhmYUAInpZW23CzK)
- 56 New York Times, November 14, 2012: <http://www.nytimes.com/2012/11/15/opinion/a-rare-moment-for-myanmar-and-america.html>.
- 57 New York Times, November 14, 2012: <http://www.nytimes.com/2012/11/15/opinion/a-rare-moment-for-myanmar-and-america.html>.
- 58 Democratic Voice of Burma, October 2, 2012: <http://www.dvb.no/analysis/rule-of-law-and-reality-in-burma/24042>.
- 59 Democratic Voice of Burma, October 8, 2012: <http://www.dvb.no/news/suu-kyi-to-head-%E2%80%98rule-of-law%E2%80%99-committee/23217>; Eleven Myanmar, November 7, 2012: <http://www.elevenmyanmar.com/national/1221-myanmar-parliament-s-rule-of-law-committee-inspects-courts-in-mandalay>; Eleven Myanmar, October 21, 2012: <http://elevenmyanmar.com/politics/1020-rule-of-law-committee-handling-1-700-complaints>. The Rule of Law Committee has also issued statements regarding the violence in Rakhine state, urging all parties to “respect human rights.” Radio Free Asia, November 8, 2012: <http://www.rfa.org/english/news/burma/security-11082012150802.html>.
- 60 Yale News, September 27, 2012: <http://news.yale.edu/2012/09/27/establishing-rule-law-first-step-toward-democratic-burma-says-nobel-laureate>.
- 61 Yale News, September 27, 2012: <http://news.yale.edu/2012/09/27/establishing-rule-law-first-step-toward-democratic-burma-says-nobel-laureate>.
- 62 Yale News, September 27, 2012: <http://news.yale.edu/2012/09/27/establishing-rule-law-first-step-toward-democratic-burma-says-nobel-laureate>.