

U.S. Policy toward Burma: Its Impact and Effectiveness
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Chairman Webb, Senator Inhofe, I thank you for the opportunity to testify during this second anniversary of the Saffron Revolution. Chairman Webb, please let me congratulate you on your trip to Southeast Asia. I am grateful that you want to consider the many ways that the US might promote democracy in Burma, beyond just the issue of sanctions. Finally, and on a more personal note, please let me thank you for trying to secure the release of Le Cong Dinh, who is the secretary general of the Democratic Party of Vietnam. I advise the DPV on constitutional reform. Dinh hosted my family for a two week visit in the spring, and on the day we left, he was arrested and remains in prison. We pray for his well-being and thank you for your efforts.

But we are here to talk about Burma, not Vietnam, which is a very different place. And when thinking about US policy toward Burma, it is important to focus on the realities, even when they are uncomfortable. I would like to highlight two realities that I know from personal experience.

Here is the first reality: the SPDC is committing mass atrocities against the ethnic minorities. I know this because I advise many of the ethnic groups on constitutional reform, and I've spent a lot of time with them, witnessing conditions on the ground.

Here is the second reality: even if the 2010 elections are free and fair, which they won't be, they won't bring about civilian rule because the constitution does not provide for it--a partially civilian government, yes, but civilian rule, no. I teach constitutional law, and I consult in a number of countries, and this is one of the worst constitutions I have ever seen. The SPDC has done a good job of disguising what they've done, but underneath the attractive labeling, there is a blueprint for continued military rule.

Regarding the ethnic minorities, when you leave Rangoon and get up into the hills, things seem very different. I work a lot with the Karen, who are the Scots-Irish of Southeast Asia.¹ They are a hill people, musical, clannish, and tough. They have long been dominated by a distant government, which they have learned to distrust. As a group, they are the gentlest and most loving people I know. But all of them were born fighting, because their government is slaughtering them as we speak. And they need our help.

Burma's problems began in ethnic conflict, and they will continue until the underlying issues are addressed. Some people seem to think that Burma's struggle is between one woman, Aung San Suu Kyi, who wants democracy, and one man, Than Shwe, who doesn't. But even if democracy comes to Burma, the troubles will not end until the needs and demands of the minorities have been answered. The resistance groups are not strong enough to overthrow the regime, but the regime is not strong enough to crush the resistance.

Conditions in central Burma are bad, but in the ethnic areas there is suffering on a biblical scale, in every way comparable to Darfur. The military is making war on a

¹ For more on the Scots-Irish, see James Webb, *Born Fighting: How the Scots-Irish Shaped America* (2005).

civilian population, and its actions likely constitute crimes against humanity. The United Nations has found that soldiers routinely commit rape with impunity, and rape appears to be a policy for population control.² By one UN estimate, officers commit 83% of these rapes, and 61% are gang rapes.³ When outsiders try to investigate, officers commonly threaten to cut the tongues and slice the throats of any villager who speaks to them.⁴

But these bald statistics cannot tell the human dimension of the suffering; reading the individual accounts is excruciating. As just one example: “Ms. Naang Khin, aged 22, and her sister, Ms. Naang Lam, aged 19, were reportedly raped by a patrol of SPDC troops . . . when they were reaping rice at their farm . . . Their father was tied to a tree. Afterwards, the two sisters were taken to a forest by the troops. Their dead bodies were found by villagers some days later dumped in a hole.”⁵

The Tatmadaw also uses forced labor⁶ and is probably the greatest conscriptor of child soldiers in the world.⁷ The military does not generally attack the armed resistance forces; instead, it burns or mortars villages, over 3000 villages since 1996.⁸ And this has been going on for years, creating one of the worst refugee crises in the world—one million plus between 1996 and 2006 and one half million still displaced today.⁹ One woman had to run for days through the jungle immediately after giving birth, carrying her baby in her arms. That baby grew up, got an American law degree, and she is now a research fellow in my Center. And she is a miracle of survival.

China cannot ignore the ethnic minorities, because it has had to deal with a wave of refugees, driven there by the SPDC’s attacks. Beijing publicly rebuked the regime for creating regional instability, which of course would be grounds for Security Council intervention. In other words, on this point, China and the US appear to be on the same page with respect to Burma: we all want the attacks to end.

So what policy recommendations follow from this reality?

First, the US should supply humanitarian aid not just through Rangoon but also across the borders to the ethnic minority areas. The programs in central Burma cannot get out into the hills, and as a result, the people who are suffering the most are receiving the least.

Second, the State Department has told us that the regime wants closer relations and will appoint an interlocutor. But if we are going to enter dialogue with the junta, we must

² See *Crimes in Burma: A Report by International Human Rights Clinic at Harvard Law School* at 51-64. This definitive report analyzes and synthesizes the United Nations reports documenting human rights abuses in Burma.

³ See *id.* at 59.

⁴ See *id.* at 60.

⁵ See *id.* at 55.

⁶ See *id.* at 15-16.

⁷ See Human Rights Watch, “*My Gun was as Tall as Me*”: *Child Soldiers in Burma* (2002).

⁸ See *Crimes in Burma*, *supra* note 1, at 40.

⁹ See *id.*

first demand an immediate end to the attacks on civilian populations. Otherwise, we will be directly dealing with murderers still in the midst of a killing spree.

Third, Burma will never know peace or justice until there are trilateral talks between the SPDC, the democracy forces, and the ethnic minorities. The international community has long known this truth, but the regime has proved unwilling. If we are going to open dialogue with the regime, we must insist that they engage not just with the NLD but also with the minorities.

My second subject is the 2010 elections. We all would like to hope that they will usher in a new era of possibility. But in fact, they won't bring peace or civilian rule. The run-up to the elections has already brought more violence, not less. Overwhelmingly, the resistance armies have rejected the SPDC's demand that they become border guard units after the elections, and the SPDC has responded by attacking the Kokang. The conflict will only increase when the regime moves against larger groups: we will soon see fighting with the United Wa State Army, the Kachin Independence Army, and others. We know for a fact that the Burmese military is gearing up for offensives around the country and that the resistance groups are getting ready to resist attacks. The mountains will run with blood.

So the elections won't bring peace; they also won't bring civilian rule. Some think that we should try to ensure that the elections are free and fair—but that really matters only if the elections will actually lead to civilian rule, which they won't. The constitution allows the Tatmadaw to keep however much control it likes.

I clerked for Ruth Bader Ginsburg years ago, and she always taught us to read laws very closely. This constitution bears particularly close reading, because it is much worse than is generally reported. A lot of people worry that the Tatmadaw will dominate the government because they will appoint 25% of the various legislative bodies. But there's a much bigger problem: under the constitution, the the Tatmadaw is not subject to civilian government, and it writes its own portfolio. It can do whatever it wants.

The Constitution guarantees the power of the Tatmadaw in its section on "Basic Principles"—a clear sign that the framers thought the role of the Defence Services to be fundamental. Article 20(b) provides that the military will run its own show without being answerable to anyone: "The Defence Services has [sic] the right to independently administer and adjudicate all affairs of the armed forces." The constitution defines the "affairs of the armed forces" so broadly as to encompass anything that the Tatmadaw might want to do. Article 6(f) provides that among the "Union's consistent objectives" is "enabling the Defence Services to participate in the National political leadership role of the State." Article 20(e) further assigns the Tatmadaw primary responsibility for "safeguarding the non-disintegration of the Union, the non-disintegration of National solidarity and the perpetuation of sovereignty." This regime has frequently found a threat to "National solidarity" when people merely disagree with it; it is prepared to slaughter peacefully protesting monks. There is no reason to think that after 2010, the Tatmadaw will think differently.

Because the Tatmadaw's responsibilities are so broadly and vaguely defined, the question of who will have the power to interpret their scope is critical. The constitution answers that question clearly: the Tatmadaw will have the power to determine the powers of the Tatmadaw. Article 20(f) assigns the Tatmadaw primary responsibility "for safeguarding the Constitution." But if the military is the principal protector of the constitution, then the military will presumably have the final authority to determine its meaning, so as to know what to protect. And indeed, Article 46 implicitly confirms this conclusion: it gives the Constitutional Tribunal power to declare legislative and executive actions unconstitutional, but it conspicuously omits the power to declare military actions unconstitutional. In other words, the Tatmadaw has the final authority to interpret the scope of its own constitutional responsibilities. Most first year law students have read a famous portion of Bishop Hoadly's Sermon, preached before the King in 1717: "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them."¹⁰ And under the Burmese constitution, the Tatmadaw will be "truly the lawgiver," not the people elected in 2010.

The Constitution further ensures that the Tatmadaw will have the power to control the citizenry on a day-to-day basis. Under Article 232(b)(ii), the Commander-in-Chief will appoint the Ministers for Defence, Home Affairs, and Border Affairs. The military's control over home affairs is especially ominous because it gives the Defence Services broad power over the lives of ordinary citizens in their daily lives.

The military's control over Home Affairs (as well as Defence and Border Affairs) will constitute a military fiefdom, not part of the civilian government in any meaningful sense. The Commander-in-Chief will have power to name the ministers without interference from any civilian official. The President may not reject the Commander-in-Chief's names; he must submit the list to the legislature. See Article 232(c). The legislature may reject those names only if they do not meet the formal qualifications for being a minister, such as age and residence. See Article 232(d). Theoretically, the legislature could impeach those ministers under Article 233, but the Commander-in-Chief would merely re-appoint a new minister acceptable to him.

In addition, these ministers will continue to serve in the military, so they will be under orders from the Commander-in-Chief, not from the President. See Article 232(j)(ii). In other words, the Commander-in-Chief will be administering home affairs, immune from interference by the civilian government. Theoretically—again—the legislature might try to pass statutes controlling the Tatmadaw, but recall—again—that under Article 20(b), the Tatmadaw has the "right to independently administer and adjudicate all affairs of the armed forces."

The independent power of the Tatmadaw over ordinary citizens includes the power to impose military discipline on the entire population. Article 20 provides: "The Defence

¹⁰ See Choper, Fallon, Kamisar, and Shiffrin, *Constitutional Law: Cases—Comments—Questions*, page 1 (Ninth Edition 2001).

Services has the right to administer for participation of the entire people in Union security and defence.” In other words, the military may forcibly enlist the whole citizenry into a militia so as to maintain internal “security.” And, again, the civilian government has no control over the military’s operations. After the elections, Burma will be a military dictatorship just as much as now.

In short, during normal times, the Tatmadaw has constitutional power to do anything it wants without interference from the civilian government. But if it ever tires of the civilian government, it can declare a state of emergency and send everyone else home. On this subject, the constitution uses a bait and switch approach: in one section, it creates a process for declaring a state of emergency in which the civilian government will have a role; but in another section, it specifies that the military may re-take power entirely on its own initiative. Thus, in Chapter XI, the constitution provides for the declaration of a state of emergency in which the military would assume all powers of government, see Article 419, but it would require presidential agreement before the fact, see Article 417, as well as legislative ratification afterwards, see Article 421. But in Chapter I on Basic Principles, Article 40(c) provides for a very different, alternative process in which the Commander-in-Chief can act at his own discretion: “If there arises a state of emergency that could cause disintegration of the Union, disintegration of national solidarity and loss of sovereign power or attempts therefore by wrongful forcible means such as insurgency or violence, *the Commander-in-Chief of the Defence Services has the right to take over and exercise State sovereign power in accord with the provisions of this Constitution.*” (emphasis supplied). To be sure, the Tatmadaw may seize power only if “national solidarity” is threatened, but as already shown, the military has unreviewable authority to decide whether such a threat exists.

In other words, the Tatmadaw can seize control just as it did in 1962, and this time it will be legal. The whole constitution is based on a “wait and see” strategy: if the civilian government does what the Tatmadaw wants, then it will be allowed to rule; if not, then not. This constitution is not a good faith gesture toward democracy; it’s a cynical attempt to buy off international pressure.

So what policy recommendations follow from this reality? We should certainly try to ensure that the elections are free and fair, unlike the referendum on the constitution, if the regime will permit us. But our greatest focus should be on constitutional change, so that someday Burma might witness civilian rule. That change should occur before the elections, but if it must wait until after, then we should hold the SPDC to its word: it has always claimed that it could not negotiate with the opposition because it was only a transitional government—for twenty years. After the elections, that excuse will be gone.

If the US opens dialogue with the regime, it must demand that the regime simultaneously open dialogue with its own citizens. But in order to make demands, we must be able to give the regime something. If we relax sanctions now, rather than in response to real progress, then we will have that much less to offer—as Secretary Clinton and the sixty-six co-sponsors of the sanctions have recognized. And let us speak plainly: if we try to compete with China for influence over a military autocracy, we will always be at a

disadvantage because there are some things we just won't do. We win only if we can shift the game, only if through multilateral diplomacy we can get the regime to stop killing its people and to allow civilian rule. Making premature concessions won't shift the game; it will only give the game away.