

THE  
CARTER CENTER



**Carter Center Statement on the Post-Election Environment and  
Complaints Resolution Process in Myanmar  
Feb. 28, 2016**

**Executive Summary**

This is the Carter Center's first statement on the post-election period, following its preliminary statement issued on Nov. 10, 2015. It is based on monitoring by three teams of Carter Center long-term observers in Kachin, Kayin, Mon, Rakhine and Shan states, Mandalay and Yangon regions, and Nay Pyi Taw Union Territory from November 2015 – February 2016. It also draws on the findings of the Center's short-term observers regarding the tabulation of results throughout Myanmar.

In its preliminary statement on the Nov. 8 elections, The Carter Center congratulated the people of Myanmar for successfully exercising their political rights and noted that additional advances will be needed for future elections to be fully consistent with broadly recognized international standards for democratic elections.<sup>1</sup> Since election day, The Carter Center has observed the tabulation and announcement of results, the ongoing electoral dispute-resolution process, Union Election Commission-led post-election reviews, and the broader post-election environment across the states and regions.

With the important exception of fighting among the Myanmar military and ethnic armed groups, the post-election environment has been peaceful. Most political leaders called for an acceptance of the results and a smooth transition of power. The Union legislatures and state and regional assemblies met for their first sessions and elected their leadership. The Union Election Commission has addressed post-election complaints in a transparent manner, despite significant structural weaknesses in the legal framework. These legal issues include the absence of an appeal mechanism beyond the UEC and the length of the complaints-resolution process. In addition, the legal provisions for campaign finance could benefit from a thorough review. Commendably, the UEC is engaging in a post-election review process with stakeholders with a view towards further improvement in future electoral cycles.

The Carter Center is now in the process of preparing its final report and recommendations for submission to the new government as well as the Union Election Commission, once its new

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<sup>1</sup>*Carter Center Congratulates Myanmar People on Election, Urges Key Democratic Reforms*, [www.cartercenter.org/news/pr/myanmar-111015.html](http://www.cartercenter.org/news/pr/myanmar-111015.html).

commissioners have been appointed. It is important that electoral reform initiatives remain a priority for the incoming legislatures and government.

## **Tabulation and Announcement of Results**

The Carter Center teams observed the aggregation and tabulation process in 22 townships, and the counting and tabulation of out-of-constituency advance votes in three districts.<sup>2</sup> In most of the areas observed, tabulation was conducted in a transparent and professional manner. However, in several instances, observers were denied access to the process or were restricted in their ability to observe effectively. In Kengtung township in eastern Shan State, tabulation took place behind closed doors in the township election sub-commission office, and candidate agents and observers were denied access. Carter Center observers' access to tabulation was restricted to some extent in Tedim in Chin State, Kalaw in Shan State, and Mrauk-U in Rakhine State.

Final constituency results (Form 19) were also not consistently displayed, and in numerous places, not displayed at all.<sup>3</sup> This was in accordance with an instruction issued by the UEC on Nov. 4 that township level results not be publicly displayed before being verified at the Union level. International good practice<sup>4</sup> is for results to be posted publicly as soon as they are determined in order to ensure transparency. In addition, Carter Center observers noted that individual polling stations did not always display Form 16, containing polling-station results, contrary to the UEC's polling station guidelines.<sup>5</sup> This limited the ability of candidates, party agents, and ordinary citizens to independently corroborate polling-station results against the forms produced at the township and district level.

Following verification, the UEC released election results in timely manner, despite some criticism in the media about delayed reporting of results from certain constituencies. The UEC announced results for groups of constituencies multiple times per day, beginning on Nov. 9, with the last results from remote areas announced on Nov. 20.<sup>6</sup> The National League for Democracy (NLD) won over 79 percent of the elected seats in the upper and lower houses, and a majority of seats in 10 of the 14 state and regional assemblies.

## **Post-Election Environment**

The Carter Center continued to observe the post-election environment at state and regional levels through February 2016. Concerns that the decisive victory of the NLD could result in a backlash

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<sup>2</sup> Carter Center observers observed these processes from Nov. 8 – 10.

<sup>3</sup> The People's Alliance for Credible Elections (PACE) estimated that by Nov. 9, Form 19s were posted in "slightly more than half" of tabulation center observed, PACE 2015 Elections Observation Report, p. 13, available at <http://pacemyanmar.org/wp-content/uploads/2016/02/PACE-Final-Report-Myanmar-Elections-2015-English.pdf>.

<sup>4</sup> Para. 19 of the United Nations Human Rights Committee General Comment No. 34 to Article 19 of the ICCPR states, "To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest." Further, para. 18 states that Article 19 is to be read in conjunction with Article 25 to ensure access to information on public affairs. See also Section 3.2.xiv of the Code of Good Practice in Electoral Matters of the Venice Commission of the Council of Europe, which states, "results must be transmitted to the higher level in an open manner."

<sup>5</sup> Working Guidelines for the Polling Booth Officer, Deputy Polling Booth Officer and Polling Booth Team Members, Article 5(d)(16). PACE estimated that Form 16 was not posted in 7 percent of polling stations (p.54).

<sup>6</sup> Complete results by constituency (in Burmese) are available at [www.uecmyanmar.org](http://www.uecmyanmar.org).

by Union Solidarity and Development Party (USDP) supporters or Buddhist nationalist groups, or that losses by ethnic parties could substantially increase tension in some ethnic states, did not materialize.<sup>7</sup> National leaders, including Daw Aung San Suu Kyi, President Thein Sein, Acting Chair of the USDP Htay Oo, Commander-in-Chief Min Aung Hlaing, and several ethnic party leaders made strong public statements that they would respect the results and cooperate to ensure a smooth transition to a new parliament and government. The Union legislatures and state and regional assemblies sat for the first time in early February.

At the state and regional level, Carter Center field teams found that an overall atmosphere of calm prevailed, with nearly all local political leaders expressing an intention to respect the results. This appeared to be the case even in areas where pre-election tensions were high. Center observers found little evidence, for instance, that local tensions had been aggravated by a USDP victory in Meikthila, Mandalay Region, or by a strong electoral performance by the NLD in Thandwe in Rakhine State. The lack of transparency in the advance voting process, particularly in areas with a large military presence, remained a major point of criticism by political parties.<sup>8</sup>

An important exception to the overall peacefulness of the post-election atmosphere has been the continued fighting in parts of Shan and Kachin states. In November, the Myanmar army resumed offensives against the Shan State Army-North in central Shan State, though subsequent negotiations appear to have prevented further clashes. Sporadic fighting also took place between the Myanmar army and the Ta'ang National Liberation Army in northern Shan state, the Kachin Independence Army in southern Kachin State, and the Arakan Army in Kyauktaw township in Rakhine State. In February, fighting between the Restoration Council for Shan State/ Shan State Army-South and the Ta'ang National Liberation Army displaced several thousand people in northern Shan State. The inaugural meeting of the Union Peace Conference, attended by signatories of the Nationwide Ceasefire Agreement, took place –Jan. 12-16 in Nay Pyi Taw, but political dialogue is not expected to get fully underway until the appointment of a new government.

During post-election visits to Kachin, Kayin, and Shan states, local ethnic leaders and community members expressed concern and uncertainty about the impact of the election results – including the poor showing of ethnic parties – on the ongoing peace process. Ethnic party leaders, particularly in Rakhine and Shan states, expressed strong opinions that the next chief minister be appointed by the next president from the non-Bamar majority ethnic group in their states.<sup>9</sup>

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<sup>7</sup> With the exception of the Arakan National Party and Shan Nationalities League for Democracy, which won 22 and 15 seats respectively in the national legislatures and a plurality of seats at the state level, ethnic parties fared poorly. Forty-five of the 55 ethnic parties that fielded candidates for the national parliament did not win a single seat, and none won an outright majority at the state level.

<sup>8</sup> Military voters who were outside of their constituency on election day could vote in advance. Such voting was not open to observation by political party agents or by international and domestic observers. Concerns about out-of-constituency advance voting were particularly acute in constituencies where the USDP won by a small margin, for instance, Hpa-pun district in Kayin State. However, advance voting appears to have been a decisive factor in only a small number of constituencies.

<sup>9</sup> The ANP leadership demanded that the chief minister of Rakhine State be appointed by the ANP or it would act as an opposition party in the state assembly. In Rakhine State, ANP members were elected to both speaker and deputy speaker positions in the state assembly. In Shan State, the SNLD was unable to secure either position, both of which went to the USDP with the support of military assembly members.

Commendably, the UEC has conducted a series of meetings throughout the country to review the election process in order to identify areas for further improvement. The two-day meetings, which The Carter Center has observed in Kayin, Mon and Shan states, Yangon and Nay Pyi Taw, have included both internal sub-commission discussions, and consultations with civil society and political parties. This process will culminate in a Union-level review conference on Feb. 29 and Mar. 1, at which international and national observer groups have been invited to present recommendations. The outcome of this consultation process has the potential to be an important resource for electoral reform efforts by the incoming legislatures and election commission.

## **Election Dispute Resolution**

A challenge to election results on the basis of a violation of the election law can be filed by a candidate or a voter within 45 days of the official announcement of results for the constituency in question. Complainants and those wishing to file a counter-claim must pay a 500,000 kyat filing fee (approximately \$US500). For the adjudication of post-election disputes, tribunals are established by the UEC and can be comprised of three election commissioners or one commissioner and two independent experts. Decisions of the tribunal can be appealed to the UEC, whose decisions are final and not subject to judicial appeal, a practice that is not in accordance with international standards guaranteeing the right to an effective remedy.<sup>10</sup>

The effectiveness of the dispute-resolution process is further impacted by the length of the process and the absence of a timeline for review. As a result of complainants having 45 days to file and the lack of deadlines for review, successful challenges could result in the removal from office of a candidate after the new assembly has convened, contrary to good practice.<sup>11</sup> As of mid-February, judgments had been rendered in only two cases.<sup>12</sup> New election commission members are also expected to be appointed after the new president takes office, which could create further delays if the tribunals on which they sit have not yet finished their work.

In total, 45 official complaints were submitted to the UEC (one case was subsequently withdrawn). The complaints were submitted by candidates from a variety of parties, with the

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<sup>10</sup> The Universal Declaration of Human Rights states, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." (Article 8). It also says, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." (Article 10). The ICCPR, Article 2, states, "... any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...." Article 14.1 of the ICCPR states, "... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

<sup>11</sup> Election disputes that are not reviewed in a timely manner so as to allow the protection of the rights of the parties may not provide for effective remedy in accordance with the ICCPR, Article 2. For example, the Venice Commission notes that time limits for lodging and deciding appeals must be short, suggesting three to five days for each process in the first instance. Code of Good Practice in Electoral Matters, para 95. [www.venice.coe.int/webforms/documents/CDL-AD\(2002\)023rev-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2002)023rev-e.aspx).

<sup>12</sup> On Feb. 11, a UEC tribunal found that there was insufficient evidence to support the allegation of an irregular number of invalid votes and dismissed the complaint filed by U Win Ko from the Pa-O National Organization against Dr. Daw Than Nwe from NLD (Pyithu Hluttaw, Taunggyi constituency, Shan State). On Feb. 23, a tribunal dismissed a second case for lack of evidence. The complaint, filed by an SNLD candidate, alleged that an NLD candidate for a Shan ethnic seat in the Mandalay regional assembly was ineligible because he was not of the Shan ethnicity.

largest number submitted by the USDP and NLD.<sup>13</sup> Complaints involved elections for 14 lower house seats, six upper house seats and 25 state or region assembly constituencies, with the largest number coming from Shan and Kachin.<sup>14</sup> They allege a wide variety of violations of electoral and criminal laws. A single complaint often makes multiple allegations, and in some cases, the same or similar allegations are the subject of multiple complaints. The allegations range from threats and intimidation during the pre-election period to violations of polling procedures on election day and irregularities in the counting and tabulation processes.<sup>15</sup> In accordance with the law, complaints were publicly posted for the required 15-day display period. Complaints were generally inaccessible to the public because they were only posted at the UEC office in Nay Pyi Taw, although respondents were notified by letter.

The relatively small number of submitted complaints reflects the decision by most parties, in particular NLD and USDP, not to challenge the results on a significant scale. Parties were public about this decision, despite media reports of election-related violations in some areas. The number of incidents that resulted in complaints was also affected by the associated costs and the overlapping jurisdiction between the UEC and the police on a number of these matters. There is no cost to file a criminal complaint. The Carter Center also noted that mediation committees established in the campaign period played a role in addressing a number of post-election disputes in Mandalay and Shan State, though the effectiveness of these interventions is unclear.

Access to the dispute-resolution mechanism has been limited by the filing fees associated with making a complaint and the choice of the UEC to hold most hearings to date in Nay Pyi Taw.<sup>16</sup> Numerous potential complainants told Carter Center observers that the high filing fee played a significant role in their decision not to file a complaint. Complainants also bear all costs related to travel to Nay Pyi Taw for themselves, their lawyers, and any witnesses they choose to call – a hardship compounded by the uncertainty in the length and timing of hearings, and the frequent number of adjournments on procedural issues. In four cases, the UEC has scheduled hearings at the Shan state level, three to take place in Lashio and one in Taunggyi in March.

Hearings have been open to media, domestic and international observers, and interested members of the public. The Carter Center has observed hearings in 18 cases. The proceedings have been run in an orderly and professional manner, with the assistance of the Office of the Attorney General on technical issues, although there is a general lack of understanding about the rules of

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<sup>13</sup> USDP (26); NLD (8); Wa National Unity Party (3); SNLD (2); independent candidates (2) Pa-O National Organization (1); Arakan National Party (1). Two complaints were also filed by voters.

<sup>14</sup> Shan (9); Kachin (8); Sagaing (7); Rakhine (6); Yangon (6); Magway (3); Mandalay (3); Bago (1); Chin (1); Kayin (1).

<sup>15</sup> Allegations made in the complaints include violation of polling procedures by electoral staff; illegal campaigning during the day of silence or election day; threats and intimidation of candidates; the misuse of religion (primarily in anti-NLD campaign materials); the presence of unauthorized persons in polling stations; irregularities in the counting of advance votes; defamatory statements or materials; undue influence of military commanders on the votes of military personnel; mishandling of invalid votes; challenges to the citizenship of candidates; use of village development funds on behalf of a candidate, fraudulent candidate registration; and voting by unregistered voters.

<sup>16</sup> The U.N. Human Rights Committee General Comment No. 32 to Article 14 of the ICCPR states that “the availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.... Similarly, the imposition of fees on the parties to proceedings that would *de facto* prevent their access to justice might give rise to issues under Article 14, para. 1” (paras. 10 and 11).

the process by both complainants and respondents. Some rules appeared to be applied inconsistently— such as deadlines for the submission of counter-complaints. Despite a degree of confusion about the applicable rules and procedures, tribunal members made an effort to ensure that the hearings were conducted in a fair manner. In some cases, hearings were adjourned to allow time for a complainant to find legal representation, or for respondents to prepare counter-claims. In substantive hearings, lawyers for the complainants and respondents were given an opportunity to question witnesses brought before the tribunal.

Although the law allows for the use of independent legal experts as tribunal members, all of the tribunals are composed only of UEC commissioners.<sup>17</sup> The use of independent legal experts, particularly for cases involving alleged misconduct by election officials, could increase the capacity, credibility, and independence of the tribunals in view of the absence of any appeal mechanism beyond the UEC.

In addition to challenges filed with the UEC, over 400 complaints alleging violations of the election law and election-related criminal activities were filed with law enforcement throughout the election period. Investigations are underway, including into high-profile cases involving physical attacks upon campaigners and the alleged misuse of religion during the campaign period. Violations of the election law are punishable by up to a one-year imprisonment, and up to a 100,000 kyat fine. The imprisonment of an elected parliamentarian could result in a vacant seat, necessitating a by-election. To date, there has been only one case in which a conviction may result in a seat becoming vacant.<sup>18</sup>

### **Campaign Finance Disclosure**

Candidates that contested in the elections had 30 days from the announcement of the election results to submit campaign finance reports to the sub-commission that registered their candidacy. In total, 175 candidates (none of whom were elected) failed to meet that deadline, risking disqualification in future elections.<sup>19</sup> The UEC convened special tribunals to review the cases and determine what sanction, if any, is warranted. To date, the tribunals have opened 147 cases and, as of mid-February, issued judgments disqualifying more than 60 candidates. Less than a quarter of those failing to submit on time were present at their scheduled hearing. Of those who did attend the hearings, most explained that they were unable to make a timely submission because of medical issues, travel commitments, mistakenly submitting the documentation to the wrong office, or a general lack of awareness about the requirement. The tribunal members for the

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<sup>17</sup> The law allows up to two of the three seats on a tribunal to be filled by citizen legal experts. The UEC informed The Carter Center that outside legal experts were not readily available and expressed concern that outside experts could delay the process because of a lack of familiarity with election laws and procedures.

<sup>18</sup> On Jan. 28, U Hla Aung Nyunt (ANP), the elected candidate for the Rakhine State assembly seat of Minbya-2, was given a six-month jail sentence by the Myebon township court for threatening a woman and her family for allegedly assisting the USDP candidate. The decision is subject to an appeal to the district court.

<sup>19</sup> On Jan. 18, the parliament amended the law to reduce the sanction for failure to disclose from disqualification for the current and subsequent election period to disqualification for the current period only. The practical consequence of the change is that those failing to disclose will only be barred from running in elections for seats contested in by-elections prior to 2020.

most part appeared open to consider any properly documented justification for the failure to submit, or to minimize costs associated with submitting further evidence (offering evidence by letter or telephone, for instance). The UEC informed The Carter Center that the mandate of campaign finance tribunals is limited to assessing the timely and adequate submission of the relevant documents. It is not conducting an audit of the content of the submissions.

## **Recommendations**

### *Union Election Commission*

- As possible, minimize additional costs for complainants, including the relocation of hearings to states and regions where appropriate.
- Ensure that cases are heard without delay to minimize the impact on the rights of the complainants and defendants.
- Make decisions available on the UEC website for public review in a timely manner.
- For future elections, the tabulation process should provide for the public availability of all results forms as soon as they are completed to ensure independent verification of results. The process of tabulating results should be fully accessible to accredited observers.

### *Union Legislatures*

- Place reform of the election laws, including improvement of the post-election dispute system and campaign finance regulation, on the 2016 legislative agenda.

## **Background**

Following visits by President Carter in April and September 2013, The Carter Center established an office in Yangon in October 2013 at the invitation of the government of Myanmar. Between December 2014 and July 2015, the Center conducted a political transition monitoring mission to make a preliminary assessment of the pre-election environment. The Center began its election observation mission in August 2015 and observed the election process in all states and regions of Myanmar. The Center released four pre-election public reports with recommendations (March, August, September, and October 2015), as well as a preliminary statement two days after election day, on Nov. 10, 2015. A comprehensive final report will be issued following the conclusion of the electoral process.

The Carter Center is assessing Myanmar's electoral process against the domestic electoral legal framework and against international obligations derived from international treaties and international election standards. The Center's observation work is conducted in accordance with the Declaration of Principles for International Election Observation.

The Center thanks the Myanmar election officials, government officials, political party members, civil society members, individuals, and representatives of the international community who have facilitated the Center's efforts to observe the election process.

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