JUDGING BURMA’S HUMAN RIGHTS ABUSES: Is there a Role for a Commission of Inquiry?

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Introduction

There is probably no country in Asia which has been the subject of more attention and more criticism for its poor human rights record than Burma. This paper is not a comprehensive examination of that poor human rights record, but is rather a review of some issues that arise when the international community is considering how to judge Burma’s record, and perhaps more importantly, how to “move forward” — if that is possible.

Nowadays, more avenues are available than before in terms of focusing on human rights problems in the world. Not only has the United Nations’ Human Rights Council been re-organised and strengthened in Geneva, but since 2005 the International Criminal Court been established in The Hague to pass judgment on crimes against humanity and war crimes, which it has been doing quite vigorously.

Since 2009, the world has seen a major political campaign seeking to set up an International Commission of Inquiry into Burma’s human rights abuses with the possibility of bringing these to the International Criminal Court. Without specifically supporting or rejecting this proposal, some analysis is needed on whether or not this is feasible and what outcomes it might achieve, if it is successful. For example, it is worth examining the conditions and circumstances under which previous UN Commissions of Inquiry were held and what results they achieved.

 Characteristics of Ongoing Human Rights Abuses in Burma

Generally, the perpetrators human rights abuses in Burma are the army, as well as the police and prison officials, and in this respect Burma’s situation is not particularly different from others in the world over the last half century. In Burma, quite often the specific army units carrying out the abuses, and even their commanding officers, are known and recorded. There is little basis for thinking that human rights abuses occur simply because of poor behaviour by soldiers or police, or that it is anything but government “policy”. There is no serious suggestion that they are committed by “rogue elements” in the Army or the police, for example.

In Burma, as in other controversial settings for human rights abuses, they occur alongside various tensions or differences — either ethnic, or religious, or power politics — often with a virtual state of civil war, in which all parties are heavily armed and where violence is more or less routine. Yet other than in situations in the field of low-level conflict, or medium-level conflict, or the treatment of political prisoners in
gaol, the scale and extent of abuses in Burma is arguably not very great. This does not excuse the abuses, of course, but underlines some differences with other countries where very large numbers have died. Abuses carried out by the Burmese army arouse concern because they demonstrate a pattern of behaviour, but they also often occur in random, isolated incidents rather than on a mass level.

While many human rights abuse incidents in Burma are documented in detail (almost standardized in format), few, if any, have been independently verified. For example, after the “Shan Rape Report” in 2002–03, the US State Department saw the need to try to verify accounts from sources who had fled to Thailand, with limited success, or from independent witnesses. Many organisations producing these reports are NOT independent, and not necessarily objective. Nevertheless, the overall pattern and repeated features of human rights abuse is very clear. But the scale is not like mass abuses that have occurred in some other countries where COIs were set up.¹

**COMPARISON OF MAJOR HUMAN RIGHTS CRISES SINCE 2000**

**INTERNATIONAL COMMISSIONS OF INQUIRY ON HUMAN RIGHTS**

**Table 1: Scale of Major Human Rights Crises**

<table>
<thead>
<tr>
<th>Country Year</th>
<th>Number of deaths</th>
<th>Number internally displaced</th>
<th>Number of refugees</th>
<th>Violations of international law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dafur</strong> 2005</td>
<td>70,000</td>
<td>1.65 million</td>
<td>300,000</td>
<td>Eleven</td>
</tr>
<tr>
<td><strong>Libya</strong> 2011</td>
<td>10,000-15,000 (est.)</td>
<td>200,000 (est)</td>
<td>2,500 (est)</td>
<td>Yes but details uncertain</td>
</tr>
<tr>
<td><strong>Cote d’Ivoire</strong> 2011</td>
<td>3,000</td>
<td>500,000</td>
<td>200,000</td>
<td>At least six</td>
</tr>
<tr>
<td><strong>Burma</strong> Since 2002</td>
<td>Not available</td>
<td>500,000 (est)</td>
<td>1 million (est)</td>
<td>At least six</td>
</tr>
</tbody>
</table>

*Source:* Compiled from relevant UN reports.

*Note:* Official UN reports do not confirm the total number of Burmese killed.

¹ These include former Yugoslavia, Dafur (Sudan), Lebanon and Ivory Coast.
Table 2: Scope of Human Rights Violations - War crimes allegations

<table>
<thead>
<tr>
<th>Country</th>
<th>Attacks on civilians</th>
<th>Torture</th>
<th>Arbitrary arrests</th>
<th>Systematic rape of women</th>
<th>Extra-judicial killings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dafur</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Cote d’Ivoire</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Libya</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>?</td>
<td>?</td>
</tr>
<tr>
<td>Burma</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

Sources: Compiled from relevant UN reports.

Note: As at early November 2011, UN reports had yet to confirm the extent of crimes that might have been committed in Libya.

In Burma, army discipline reinforces deep-seated secretiveness to make acquiring clear evidence of abuses quite complicated. Generally, there is not much evidence in the form of copies of orders, or independent witnesses; and even photographic “evidence” is not necessarily conclusive. So it is not clear what persuasive evidence might be produced that would convince the ICC. The army’s position of being virtually above the law, is exacerbated by the 2008 Constitution which makes the army answerable only to military courts. Thus the Constitution as well as general practice both reinforce the impression that the army enjoys virtual impunity from prosecution.

Finally, there is a little reluctance in some quarters in Burma to criticize the army, which has never really been subject to “civilian control”, a concept which scarcely exists there. Would a non-military government, or a senior minister or prosecutor ever have the courage to press charges against one of their own? It should be noted, moreover, that it is likely to be very hard to persuade the army and the police to change habits of a lifetime. However, ILO has had some success in Myanmar with forced labour, and UNICEF and others have had some success in Myanmar with child soldiers using an “engagement” approach and the power (?) of international norms.

Core UN Reporting on Burma’s Human Rights Abuses

UN Special Rapporteurs on Human Rights have been appointed for Myanmar since 1992. They have only ever been appointed in relation to 13 countries altogether, so this already demonstrates the relative seriousness with which Burma’s record is viewed. The UN Commission on Human Rights (now the UN Human Rights Council)
renews the mandates for these Special Rapporteurs each year, and the Rapporteurs report annually against the terms of their mandates. Their reports mainly cover activities that are clearly observable as being carried out by the government, but not primarily activities by the Army or in areas of conflict. They contrast with the annual resolutions of the UN General Assembly which are essentially political, rhetorical and are not enforceable.

Only two Rapporteurs have been in the position since the enactment of the ICC Rome Statute in 2002: the Brazilian human rights scholar, Paulo Sergio Pinheiro (from 2000–2008) and the Argentinian diplomat Tomas Ojea Quintana (since 2009). Both have had access to Myanmar/Burma and have reported in some detail, without specially referring to “crimes” against humanity or “war crimes”. However, in his later reports Pinheiro began using language derived from the Rome Statute language to signal his recognition of the possible relevance of the ICC provisions. For example, his 2005 report referred to the “record of widespread and systematic violations of human rights in Myanmar and the consistent failure of the Government to protect the citizens”. In his 2007 report on the “Saffron Revolution” crackdown, Pinheiro noted pointedly: “From 26 to 28 September, the security forces repressed peaceful demonstrators with the use of excessive force including shootings and severe beatings. As a result, people have been killed and thousands of them have been arrested. Many people remain still detained and I continue received alarming reports of death in custody, torture and disappearances.”

Ojea, who has only made four visits since his appointment, has tended to sharpen the tone of UN reporting on human rights abuses in Myanmar. In September 2009, Ojea said in a press statement: “The human rights situation in Myanmar remained alarming, with a pattern of widespread and systematic violations that prevailing impunity allowed to continue...”. In his March 2010 report, Ojea suggested the establishment of a commission of inquiry, “as an option among others” but oddly does not use the terminology “war crimes” or “crimes against humanity” anywhere in the text of this report.2 (Indeed, his statement in support of a COI may be the reason why he was not invited to visit Myanmar between February 2010 and August 2011.) His March 2011 report — prepared without the benefit of a visit to Myanmar beforehand — acknowledges that “… the (Myanmar) Government also reported that the entity had not received any complaints to date regarding crimes against humanity or war crimes.” (SR Report March 2011)

Ojea’s report to the UN General Assembly in September 2011, following his fourth visit to the country — after a gap of 17 months — deliberately toned down his references to a possible COI on Burma.3 In this report, Ojea shifted the emphasis to what he calls “assisting the transition to democracy” (or, building a more positive environment for the protection of human rights); to the situation of the ethnic minorities; and then to the treatment of prisoners of conscience; the fundamental freedoms underpinning civil and political rights; the need to do more to improve

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2 Indeed, Ojea’s statement in support of a COI may be the reason why he was not invited to visit Myanmar between February 2010 and August 2011.

3 The report was transmitted by the UN Secretary-General as A/66/365
economic, social and cultural rights; and finally to “truth, justice and accountability”.

His conclusion was that:

“…many serious human rights issues encompassing the broad range of civil, political, economic, social and cultural rights remain and they need to be addressed. The new Government should intensify its efforts to implement its own commitments and to fulfil its international human rights obligations.

Under the Human Rights Council’s Special Procedures as many as 33 special rapporteurs focus on specific areas of human rights concern. Very few of these have visited, or even requested a visit to, Myanmar/Burma. Radhika Coomeraswamy, the Secretary-General's Representative on Children and Armed Conflict, made a visit in 2007. According to UN records, none of those who might be regarded as the key “thematic” rapporteurs relevant to Myanmar/Burma has ever visited Myanmar: for example those dealing with Summary Executions, Torture, Displaced Persons, Freedom of Speech.  

It is not clear why this is the case, although the fact that Myanmar/Burma has ratified so few UN human rights conventions presumably influences visits programs. In addition, it could be the case that at various times it would have been obvious that their visits would not be welcome by the Myanmar regime, and that such visits might risk complicating the activities of higher level UN representatives such as the Secretary-General’s Special Envoy of the Special Rapporteur on Human Rights. These rapporteurs do not have as much influence as the country rapporteurs and so more visits by them may not have had much impact, but it is nevertheless odd that a more targeted approach was not taken by the UN system given that elsewhere Burma’s human rights abuses were given such priority.

**UN Human Rights Council Assessment of Human Rights in Burma**

Earlier in 2011, Burma’s human rights performance was for the first time subjected to scrutiny through the Universal Period Review process of the re-structured UN Human Rights Council. It should make sense to dissect this UPR Review first before launching into a criminal case against Burmese military leaders. It might be useful, therefore, to consider Burma’s human rights performance in a comparative way looking at other countries that have already been through the UPR process. The UPR process lends itself to this comparative treatment to a certain extent, by setting standard criteria, but comparing major humanitarian violations is probably of more limited value given differing circumstances and contexts. As I am not a lawyer, I am not really in a position to comment of the many legal questions that spring to mind, but I mention some of the more obvious ones in passing.

Some general observations first: the UPR process is structured and bureaucratic, and this probably tends to dilute the impact of some of the graver human

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4 According to the UN website, only the Special Rapporteurs on Freedom of Assembly, on the Independence of Judges, and on Food (the latter both since 2009) have requested visits to Myanmar.
rights issues raised there. It is probably also affected by the common UN problem of applying the same procedures to all UN members uniformly and evenly; one result seems to be a diluting, “lowest common denominator” effect. By its nature, it is probably better at dealing with systemic and long-term human rights problems, rather than crisis situations where grave human rights violations may be committed.

Table 3
Comparison of Select Country Responses to
UN Human Rights Council
Universal Periodic Review Recommendations

<table>
<thead>
<tr>
<th>Country</th>
<th>Date of Review</th>
<th>Accepted</th>
<th>Rejected</th>
<th>Noted/Under review</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Myanmar</td>
<td>June 2011</td>
<td>74</td>
<td>70</td>
<td>46</td>
<td>190</td>
</tr>
<tr>
<td>China</td>
<td>June 2009</td>
<td>45</td>
<td>50</td>
<td>4</td>
<td>99</td>
</tr>
<tr>
<td>Malaysia</td>
<td>October 2009</td>
<td>62</td>
<td>23</td>
<td>19</td>
<td>104</td>
</tr>
<tr>
<td>Thailand*</td>
<td>October 2011</td>
<td>100</td>
<td>See under review</td>
<td>72</td>
<td>172</td>
</tr>
<tr>
<td>Vietnam</td>
<td>September 2009</td>
<td>93</td>
<td>45</td>
<td>7</td>
<td>145</td>
</tr>
</tbody>
</table>

Source: Compiled from Human Rights Council Special Procedures UPR reports on the UN Human Rights Council website.

Note: Thailand’s second UPR review will be completed in the March 2012 session of the UN Human Rights Council.

Some other observations can be offered on these generalised comparisons. First, that Myanmar overall attracted a high number of comments (“recommendations”) reflects the relatively regular pattern of human rights problems in the country. However, the authorities have apparently made some effort to accept as many suggestions as they could. Second, the relatively high number of rejections shows that the government has a long way to go in meeting universal norms to a relatively uniform level of satisfaction. Third, the relatively high number of comments still under review (or merely noted) seems to indicate less certainty about the state of human rights policies, which in some cases may still be at a formative stage.

The government of Myanmar was roundly criticized for its performance in the UPR exercise. Several leading human rights organisations issued statements about the inadequacy of the UPR process in dealing with Burma’s human rights record.

5 A good summary of human rights activist criticism is contained in a Burma Partnership report “Regime Denies Violations in Review at UN Human Rights Council Amid Increased Violence on the Ground”. Available at: info@burmapartnership.org, accessed 16 June 2011.
Human Rights Watch Deputy Director for Asia, Elaine Pearson summarized the outcome as follows:

“Burmese authorities only demonstrate perfunctory cooperation, doing the bare minimum to deter international criticism, not genuine efforts to provide for the rights of their citizens.”

In their statement, the Asian Legal Resource Centre in Hong Kong said:

“the (Human Rights) Council need only look at the recommendations that [Burma] has not accepted to understand the challenges that the UPR faces in attempting to be relevant and effective concerning extreme human rights situations.”

Reports of ordinary Burmese citizens dying at the hands of the Burmese authorities — in areas of internal conflict, as a result of forced labour or forced relocation, or in Burmese prisons — are persistent and widespread, but the scale and severity of these situations does not seem to compare with other mass violations in the world. In several well-known major incidents of excessive Burmese army violence its citizens — the “Saffron Revolution” of 2007, the regular military offensives against insurgents (Karen, Shan and now Kachin), the 2003 Depayin attack on Aung San Suu Kyi, and even the uprising of 1988 — the reported numbers of people killed by the army is not high (see Table 4) This is not to say that these actions by the Burmese army can be condoned in any way, but simply to explain why it remains difficult for those opposing such actions to find greater support (internationally or internally) for their calls for further action against Burma, and why the United Nations has not been able to find a satisfactory way of dealing with the chronic occurrence of human rights abuses in Burma/Myanmar. An effective UN response has to be not only well targeted, it has to be proportional as well. But above all, it should encompass forward looking cooperation with the Burmese authorities and not just involve criticism.

Table 4
MAJOR INCIDENTS IN BURMA SINCE 1988
WHERE GOVERNMENT FORCES CAUSED DEATHS AND ARRESTS

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>No. of Deaths</th>
<th>No. of Arrests</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>Anti-government Uprising</td>
<td>More than 3,000</td>
<td>6,000</td>
</tr>
<tr>
<td>2003</td>
<td>Attack on Aung San Suu Kyi at Depayin</td>
<td>More than 70</td>
<td>Up to 300</td>
</tr>
<tr>
<td>2007</td>
<td>“Saffron Revolution”</td>
<td>More than 100</td>
<td>Up to 4,000</td>
</tr>
</tbody>
</table>

Sources: UN reports where available, otherwise commonly accepted figures by independent organisations.
Note: The 1988 figures relate only to the period after the September 1988 crackdown by the army. They do not refer to the numbers who have been arrested or fled the country in subsequent years. More than 10,000 protesters, students and supporters fled across the borders to Thailand and India after the September 1988 crackdown.

**Political Context of a Commission of Inquiry in Burma**

Although the new government of Myanmar seems genuinely committed to introduce changes generally, there is as yet no sign and no promise of the badly needed reforms in the area of human rights. There was not even an amnesty for a substantial release of political prisoners after the elections or when the new government took over, although an amnesty (of only just over 200 prisoners of conscience) was finally announced in October 2011. Furthermore, there have been no specific undertakings for improvements in prisons, courts, police behaviour, etc.

The “new” Myanmar government is putting forward a program of reform in many other areas, more or less along the lines of what the international community (and their own people) would want. Some changes are taking a while to be finalised, but this is not surprising, and is not necessarily deception or deceit by the government. At the same time, no sanctions have been lifted yet (apart from some minor EU restrictions), because lifting sanctions depends on human rights improvements, but also because of doubts that persist in the West about whether real change will occur. Pro-democracy activists continue to oppose further international engagement (as well as relaxation of sanctions) even when the de facto opposition leader Aung San Suu Kyi requests international assistance to help make reform irreversible.6

It would seem counter-productive to punish the current government now for the actions of its predecessor, some of which go back several years, and after most of the people directly responsible are no longer in positions of responsibility. Convening a UN Commission of Inquiry at this time would be tantamount to imposing new sanctions on Burma at the very time when it is making serious efforts to introduce change, which stakeholders from Aung San Suu Kyi to the US Government believe should be accepted as genuine. Regime leaders already see Myanmar as being a target of discriminatory policies (sanctions) which it is clear are not about to be eased, although other forms of “engagement” with the government of Myanmar can be pursued. How would the international community’s insisting on a Commission of Inquiry right now affect the Myanmar government’s ongoing commitment to reforms?

Technically, until this year any substantial abuses against civilians in Myanmar have occurred under a previous government (though this is definitely a “successor” government in Myanmar). Members of the previous government could be held personally responsible, but this would require some cooperation on the part of the current government, which is probably unlikely. However, it has to be acknowledged that abuses committed in a conflict environment in Myanmar seem to be occurring in much the same way as before. It is the same army, operating with the same tactics (“Four Cuts”) which target any people who might provide any support to anti-government forces. So the issues associated with military impunity remain. Since

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6 Interview with Wall Street Journal, 19 October 2011.
the new government is not directly run by the Burmese Army now, “impunity” may be even more of a problem, as there is no tradition or practice or recognition of the concept of “civilian control of the military”.

**Myanmar National Human Rights Commission Established**

Apart from an irregular pattern of amnesties for political prisoners since the 2010 elections, which have reduced the numbers of political prisoners from more than 2,200 to “more than 1,000” by the end of 2011, the only measure by the new government in the area of human rights is the established of a Myanmar National Human Rights Commission, announced on 6 September 2011. The membership of the Commission is made up mainly of retired officials and academics with some relevant experience, but its mandate seems to be limited to receiving and dealing with complaints about human rights abuses.

 Critics questioned the Commission’s compliance with the Paris Principles for national human rights institutions, and are skeptical about its ability to be independent of the government and about the adequacy of its resources to allow it to function effectively. They also point out that the formal promulgation of its establishment by the government is no substitute for creation by separate legislation or constitutional provision. However, accusations that the members are “led by former military officers” are wrong.

 The first act of the new Commission, on 13 October 2011, was to publicly call for an early release of “prisoners of conscience”, a significant step although arguably part of an orchestrated government effort to be given credit for moving ahead with further releases of prisoners in response to persistent international pressure.

**Why a Commission of Inquiry on Burma**

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7 There is no agreement on the actual number of political prisoners still in gaol. Organisations such as Amnesty International or the (expatriate Burmese-run) Assistance Association of Political Prisoners (Burma) have not published the results of any review of the figures and cite definitional problems as one reason. Terminology is also an issue: for example, the Myanmar Government denies that it holds any “political prisoners” but has admitted that there may be between 600 and 900 “prisoners of conscience” in its gaols. Many reports still use higher numbers knowing they may be wrong and cannot be verified.

8 Several members of the commission participated in the Australian Government’s human right workshops held during 2000–02 specifically for the purpose of transferring relevant expertise to enable the formation of a national human rights commission in Burma/Myanmar.

9 This was stated by Human Rights Watch in “Burma’s Continuing Human Rights Challenges” 7 November 2011. However, the chairman and vice chairman of the Commission are former Ambassadors to the United Nations; most of the members are retired bureaucrats, with only one former military officer.
Originally, the idea of setting up a United Nations Commission of Inquiry on Human Rights Crimes in Burma emerged in the report of the International Human Rights Clinic at Harvard University in May 2009.\(^\text{10}\) The report mentioned forced displacement, sexual violence, extrajudicial killings and torture as examples of acts which have very likely been committed in Myanmar (referred to as Burma in the report), and which are criminalized under international law. The report concluded that a Commission of Inquiry to investigate crimes committed in Burma should be set up. It even went a step further by suggesting that “the Security Council should be prepared to act upon findings and recommendations made by such a Commission, including a potential referral to the International Criminal Court…” The idea was picked up by the UN Special Rapporteur, Tomás Ojea Quintana, in his periodic report to the UN Human rights Council in March 2010.\(^\text{11}\) This was quickly seized upon by the international pro-democracy movement, which claimed Ojea endorsed a COI, and some pro-democracy advocates even misrepresented it as Ojea’s proposal. The idea was eventually also supported by International Bar Association (again with the support of George Soros’s Open Society Institute) — July 2011

However, fifteen months later in his report to the UN General Assembly in September 2011, Ojea barely mentioned the idea of a Commission of Inquiry and substantially downplayed the priority he now gives to this option. He described a Commission of Inquiry as “only one option for ensuring that justice is dispensed, accountability is established, and impunity is averted”. This change would seem to directly reflect the general lack of sufficient sustained support for the idea, outside Western pro-democracy advocates. But it also recognizes that without the cooperation of the Myanmar Government, a COI would have limited value, and that if the Myanmar Government actively opposed a COI, it would have little prospect of being held or of achieving useful outcomes. By November 2011, when the “annual” resolution on Myanmar was prepared for the Third Committee of the UN General Assembly, any reference to calls for a Commission of Inquiry had disappeared, replaced by wording calling on the government of Myanmar “to undertake without further delay a full, transparent, effective, impartial and independent investigation into all reports of human rights violations and to bring to justice those responsible in order to end impunity for violations of human rights”.\(^\text{12}\)


\(^\text{11}\) Ojea’s report said: “There is an indication that those human rights violations are the result of a state policy that involves authorities in the executive, military and judiciary at all levels. According to consistent reports, the possibility exists that some of these human rights violations may entail categories of crimes against humanity or war crimes under the terms of the Statute of the International Criminal Court. The mere existence of this possibility obliges the Government of Myanmar to take prompt and effective measures to investigate these facts. There have clearly been cases where it has been necessary to establish responsibility, but this has not been done. Given this lack of accountability, UN institutions may consider the possibility to establish a commission of inquiry with a specific fact finding mandate to address the question of international crimes”.

\(^\text{12}\) I am indebted to Derek Tonkin for his meticulous research on this and other aspects of the United Nations’ handling of Burma/Myanmar.
Likely Outcomes of a UN Commission of Inquiry on Burma

The record of previous COIs is somewhat mixed. The high-profile inquiries that preceded the criminal tribunals of former Yugoslavia, Rwanda and Darfur before the International Criminal Court (ICC) clearly played an important role, but what was critical was the cooperation and support from the incoming governments in those countries who were keen to bring powerful perpetrators to account. A notable exception is the 2006 Commission of Inquiry on Lebanon which failed because its mandate was biased by being limited to Israeli actions.13

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With the ICC, it is noticeable that cooperation of the country concerned makes a big difference. In some cases, such as the Ivory Coast, a change of government made it feasible for the Ivory Coast to launch its own national investigation as well, complimenting the ICC. The other extreme is Darfur or, later Libya, where the COI process is overtaken or overwhelmed by events and cannot make headway. In the middle, would be cases where the country concerned offers no, or limited or even token cooperation, and so again the court process effectively lapses.

Meeting legal requirements for a criminal case to the ICC could prove very difficult. It could call for evidence of orders for abuses, identification of perpetrators of any abuses, concrete details of any abuses carried out. It would also require evidence of on whose authority any orders were issued. Such information is usually closely guarded in the very secretive Burmese army, and may not be readily accessible. Any orders may have been vague, rather than specific, for example. Whether adequate independent verification could be obtained could be another problem. While numerous reports of carefully documented abuses by the Burmese army exist, almost all of them are assembled by organisations associated with the pro-democracy movement, which are advocates rather than objective observers. Having these reports verified by an independent source may not be a straight-forward matter.

In addition, it might be difficult to assemble factual data of abuses over such a long time period, over such a variety of locations and circumstances. Producing any

13 Despite its findings of “excessive, indiscriminate and disproportionate use of force by the Israeli Defence Force” and breaches in international humanitarian law in regard to cluster weapons, no substantive action arose from this COI.

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credible verification or witnesses of crimes could be equally difficult (existing documentation is voluminous, but may not meet these tests). Such evidentiary problems would certainly not be trivial factors in considering any approach to accounting for and remedying past abuses.

If charges can be brought against some perpetrators — who might, for example, be serving members of the Burmese Army — how would they be brought to trial if the Myanmar Government will not cooperate with the process? If charges cannot be realistically brought, what alternative measures might advance the pursuit of justice? Are there any other outcomes that could be achieved to give satisfaction? If they were deemed to be carrying out orders, or to have given vague orders (short of ordering killings) would it be feasible to charge them with committing “crimes”?

On the basis of experience elsewhere, the readiness of the government of Burma/Myanmar to try to deal with this accountability issue is critical, as Special Rapporteur Ojea noted in his 2011 report to the UN General Assembly. Yet a COI as a means to move purposefully towards “truth and justice” could be worthy of support if other means of achieving all-important accountability for past acts are unattainable. In this context, Special Rapporteur Ojea noted, in his September 2011 report:

“The Special Rapporteur holds the view that justice and accountability measures, as well as measures to ensure access to the truth, are fundamental for Myanmar to face its past and current human rights challenges, and to move forward towards national reconciliation and democratization. In this context, the Special Rapporteur reiterates that it is essential for investigations of human rights violations to be conducted in an independent, impartial and credible manner, without delay.” (United Nations 2011).

Related to this is the larger problem of the perceived impunity accorded the army in general. Were the new government of Myanmar to decide to change its approach to allegations of human rights abuses by the army, some of the unrelenting pressure for further measures against Burma might be avoided, and the way opened for remaining Western sanctions to be lifted. But if this does not happen — perhaps partly because President Thein Sein is not confident of how much his high-ranking military colleagues will support him — an initiative like a Commission of Inquiry could have merits as a catalyst to force change. Any changes will have to include much greater transparency and scrutiny of military behaviour; increased objectivity and impartiality by the government when faced with breeches of military laws; and a readiness to thoroughly investigate allegations of misdeeds by the army. Some investigations and a very small number of prosecutions against mid-level military officers have taken place, but they are a relatively insignificant compared with the number of allegations made regularly against army unit

Conclusions

As at the end of 2011, the momentum behind the proposal for a UN Commission of Inquiry seems to have been overtaken by events within Burma as well as by events
such as US Secretary of State Hillary Clinton’s remarkable visit at the end of November 2011. Yet progress so far on addressing longstanding human abuses in Burma has been negligible. And, inevitably, with insurgency and low-level conflict continuing, reports of human rights abuses are increasing. These will quickly pose a challenge for the new Myanmar National Human Rights Commission. But they also demonstrate that it would be unrealistic to expect human rights abuses to stop quickly.

Most importantly, there is still no sign of any attempts by the government of Myanmar to bring perpetrators of human rights abuses to account. Significantly, there is no active consideration being given to an internal “Truth and Reconciliation Commission”, as happened in Indonesia after its transition to “democracy. It may not be impossible for the new government of Myanmar to entertain such a proposal, as long as it could provide some protection to soldiers who had not directly committed “crimes”. Indeed, such a Truth and Reconciliation Commission may be a politically acceptable, practical way forward.

As for international scrutiny of Burma’s human rights abuses, official attempts to monitor and assess Burma’s human rights performance — for example by UN agencies and bodies — are still somewhat uncoordinated, often inconsistent, and frequently stop at rhetorical and symbolic gestures in what are essentially politically driven actions. Yet many specialized agencies working methodically and quietly on technical issues within their formal mandates inside Burma/Myanmar — such as the ILO and UNICEF — are able to demonstrate progress. Although it is possible that issues affecting access and unimpeded public reporting may reduce in the future as part and parcel of Burma/Myanmar’s political transition, and might make it possible for more intrusive measures to be pursued where graver abuses have occurred, a more forceful catalyst may be needed to achieve real progress on the more fundamental issues where the interests of the military power holders are affected.

References

Key generic reports


Tonkin, Derek. Myanmar Briefing Note No. 11, Network Myanmar. Available at: www.networkmyanmar.org (Accessed 29 November 2011)

Official reports


United States State Department, Bureau of Democracy, Human Rights & Labor (Annually) 2010 Human Rights Report: Burma


Ethnic Crises

