

[GA will not consider a commission of inquiry for Myanmar](#)

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This year, the Special Rapporteur on the human rights situation in Myanmar, Mr Tomas Quintana, recommended to both the Human Rights Council and the General Assembly that the UN establish a commission of inquiry to investigate allegations of war crimes and crimes against humanity in Myanmar. However, his proposal was flatly rejected by a number of key States in the GA's Third Committee, including China and the Russian Federation. The EU pointedly avoided mentioning the proposal, reflecting the different views its members have on this matter. Only Argentina, Canada and the UK directly supported the General Assembly taking action to establish a commission of

inquiry.

As a consequence, the annual [EU resolution on Myanmar](#) does *not* call for the establishment of this or any other accountability mechanism by the UN. Instead the resolution 'urges' 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 human rights violations' (OP7). Falling well short of the recommendation of the Special Rapporteur, and the recommendations of international human rights organisations, the text merely advises Myanmar that 'if necessary', it could call on the UN for 'assistance'.

However, during the interactive dialogue with the Special Rapporteur, Myanmar made it clear it has no intention of seeking anyone's assistance to improve justice and accountability. It flatly denied that any war crimes or crimes against humanity had occurred. To back up this statement, Myanmar pointed to the fact that it had set up a body to investigate allegations of such crimes, and it was yet to receive a single complaint.⁽¹⁾ A further concern to international [human rights organisations](#) is the amnesty clause in Myanmar's Constitution, which will come into force after the elections. It grants present and past officials complete impunity for 'any act' done in the course of duty after 1988.

In response, the Special Rapporteur said he was not convinced that the Government was serious in its efforts to establish a domestic investigative mechanism. He warned the Third Committee that "if something is not done promptly along these lines, the democratic process is endangered". His report also reminded States that although it was primarily Myanmar's responsibility to address gross and systematic human rights violations by all parties, 'that responsibility falls to the international community if the Government fails to assume it.'

This reluctance of the General Assembly to take up this responsibility can be explained in part by the fact the first national elections in Myanmar in twenty years will be held on 7 November 2010. Despite having received credible evidence of grave human rights violations in Myanmar for the last 15 years,⁽²⁾ the General Assembly seems to prefer to take a 'wait and see approach'. Another factor weighing on States' minds is the reluctance of neighbouring States, particularly those belonging to ASEAN, to support intervention by the international community. Along with other key power brokers like China, India and the Russian Federation, they would prefer to engage in quiet diplomacy and dialogue with Myanmar.

The General Assembly also appears to be deaf to the increasingly critical statements being issued by the Secretary-General in the weeks leading up to the elections. Most recently he has said that 'conditions in the country do not meet international standards for free and fair polls'.⁽³⁾ Up until about a week prior to the election, both he and the Special Rapporteur were still calling on the Government to release all political prisoners, advising that such a move would signal its commitment to genuinely inclusive elections. However, in the Third Committee, Myanmar protested that there were no political prisoners in the country's gaols, only criminals who had broken the law. It also reminded States that it had released a total of 115,000 prisoners for good behaviour on 15 separate occasions, implying this demonstrated it was not a punitive regime.

Overview of the Third Committee's discussion of human rights in Myanmar

On 20 October 2010, the GA's Third Committee received a briefing from the Secretary-General's Special Adviser on Myanmar, Mr Vijay Nambiar. That afternoon, it held an interactive dialogue with the Special Rapporteur on the human rights situation in Myanmar.

Mr Nambiar introduced the [Secretary-General's report](#) on Myanmar and provided an update on recent events. Although he acknowledged "a degree of political activity unseen since 1990", and welcomed news that Daw Aung San Suu Kyi would be allowed to vote in the elections, his overall conclusion was these positive developments did not outweigh concerns about the nature of the process and the overall political environment. He went on to detail the list of concerns that the Secretary-General had with the electoral process, all of which were repeated by the Special Rapporteur. They included: the continued detention of political prisoners; the absence of any outside observers; the prohibitively high cost of registering candidates; and the cancellation or suspension of polling in several ethnic minority areas. These concerns are also reflected in the draft resolution on Myanmar.

Mr Nambiar went on to express disappointment at Myanmar's failure to "meaningfully engage" with the good offices mandate throughout the year. Not only had he been unable to visit the country, but Myanmar had not taken up the specific proposals repeatedly made by the UN to help enhance the inclusiveness of the electoral process. Key here was the need for genuine dialogue with Daw Aung San Suu Kyi, as well as ethnic ceasefire groups. Although it was "not too late" for these steps to occur, it was clear from Myanmar's response that this was unlikely.

As it had said last year at the General Assembly, Myanmar stressed that cooperation with the UN was the "cornerstone" of its foreign policy. The fact the Special Adviser had not visited was only due to mutual scheduling problems; the previous mandate-holder had visited nine times. The country's democratic process was "on track," and the international community could best help by showing understanding, encouragement and support. The people of Myanmar were the best judge of their own best interests.

In his interactive dialogue with the Third Committee, the Special Rapporteur also referred to his recent difficulties engaging with Myanmar. Although he had conducted three country visits since taking up the mandate in 2008, his request to visit in August had not been granted. He hoped that he would be able to resume a "meaningful dialogue" with the new leadership and other stakeholders immediately after the elections. His statement concluded with an appeal to the international community to "stand by the people of Myanmar at this critical moment".

In its response to the [Special Rapporteur's report](#), Myanmar argued a commission of inquiry was "totally unacceptable". Myanmar used terminology from international criminal law to refute the reasons why the Special Rapporteur believed a commission of inquiry was imperative.⁽⁴⁾ It also criticised the Special Rapporteur for his reliance on information from "remnant insurgents and expatriate groups," which in its opinion, resulted in numerous factual inaccuracies in the report. Myanmar was preparing for democratic national elections on 7 November 2010, and its first universal periodic review in January 2011. It stood ready to cooperate with the UN.

During the interactive dialogue, Asian States praised Myanmar for its cooperation with the UN and its progress towards democracy.⁽⁵⁾ China went a step further, warning that it firmly opposed a commission of inquiry because it could constitute a threat to regional stability and set back the democratic process in Myanmar. If it were to go ahead, the commission would be a "bad precedent for developing countries." Malaysia thought talk of a commission of inquiry was premature, especially as it was yet to be discussed within ASEAN.

The Russian Federation echoed China's concerns, adding that a commission of inquiry would be a disproportionate response that would only worsen relations with the Government of Myanmar. It could only be justified if there was "a war or humanitarian catastrophe." Both the Russian Federation and India questioned the wisdom of calling for a commission of inquiry on the eve of national elections. However, India went on to point out that although the Special Rapporteur's report laid out the case for a commission of inquiry, the Secretary-General's report did not mention it. India questioned how the international community should

reconcile this inconsistency.

Some States avoided taking any position on a commission of inquiry, preferring to raise concerns about the electoral process. The EU asked the Special Rapporteur to elaborate on how the process fell short of international standards for free and fair elections. The Maldives was disappointed that political prisoners had not been released to allow their participation in the elections. It asked what States could do to assist Myanmar to hold free and fair elections, and to further the national reconciliation process after the elections.

States that expressed unconditional support for the commission of inquiry were Argentina, Canada and the UK. The Czech Republic and the US preferred to just ask questions about the commission of inquiry, even though they are on the public record as supporting it.(6)

Other States asked about the potential for renewed cooperation between the Special Rapporteur and the Government after the elections (Australia, Japan, Singapore, Swaziland). Canada and the Maldives asked about the prospects for dialogue between the Government and opposition parties after the elections. Argentina, EU, US and Swaziland regretted the SR had not been able to carry out a follow-up visit in August.

Looking forward

It is clear that the international community and the Secretary-General are now looking to the immediate post-election period in Myanmar.(7) They appear to have accepted the point made repeatedly by Myanmar during the interactive dialogue, that the elections are just one step in the country's transition to democracy, rather than an end in itself. Regardless of the election outcome, both the Secretary-General and the Special Rapporteur look set to continue to push for constructive engagement with Myanmar, and for ways to improve the human rights for the people of Myanmar. It remains to be seen how their outreach will be received by the elected leaders.

The resolution on Myanmar was introduced into the Third Committee on 4 November. Adoption by the Third Committee is not expected until later in November (most likely between 16-19 November), with adoption by the General Assembly plenary likely to follow in mid-December. The resolution will go to a vote in both bodies. It remains to be seen if it will be subject to a no-action motion in the Third Committee.

Footnotes

(1) Paragraph 69 of the Special Rapporteur's report noted that the Government had set up a Human Rights Body under the control of the Minister for of Home Affairs.

(2) A recent Harvard Law School study reviewed official UN documents over the last 15 years and concluded that in relation to Myanmar, 'the UN has been on notice of severe, indeed widespread and systemic abuses that appear to rise to the level of state policy. ...[T]here is a *prima facie* case of international criminal law violations occurring that demands UN action to establish a Commission of Inquiry.' *Crimes in Burma: A report by the International Human Rights Clinic at Harvard Law School*, May 2009, p.iv and 3. UN documents since 2002 were the focus of the study, as the *Rome Statute* limits the jurisdiction of the International Criminal Court to crimes committed after 1 July 2002. The documents reviewed included Human Rights Commission, Human Rights Council and General Assembly resolutions; and reports of the Special Rapporteur on Myanmar. The report pointed out that in the former Yugoslavia, Rwanda and Darfur, where the severity of the problem was comparable to Myanmar, the UN Security Council established a commission of inquiry. In the case of Darfur, the investigations resulted in the Security Council referring the situation to the ICC.

(3) *Myanmar: top UN officials call for credible democratic transition*; UN News, 29 October 2010. Burmese organisations and international human rights organisations have argued for some time that the elections are a sham and will not bring about an end to military rule in Myanmar. See joint report by Alternative ASEAN Network on Burma (ALTSEAN - Burma) and the International Federation for Human Rights (FIDH), available at <http://bit.ly/ag5Kox>

(4) For example, in the last ten years, Myanmar had taken action against 210 military personnel regarding human rights violations, which in its view, proved there was no impunity for these crimes. It also argued the casualty figures due to armed conflict were less than one percent, and this proved there was no internal

conflict.

(5) China, Japan, Laos, Thailand, Vietnam.

(6) The Czech Republic called for a debate on a commission of inquiry. The US asked whether it could advance human rights.

(7) During his recent meeting with heads of State and governments of ASEAN, the Secretary-General said the period after the elections will be the time for the authorities in Myanmar "to signal that they are ready to depart from the status quo." See *Myanmar: top UN officials call for credible democratic transition*; UN News, 29 October 2010, available at <http://bit.ly/aRdyoF>

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