



Q & A on an International Commission of Inquiry

August 11, 2010

In March 2010, the United Nations special rapporteur for human rights in Burma, Tomás Ojea Quintana, called on the UN to consider the possibility of establishing a Commission of Inquiry (CoI) into crimes in violation of international law committed in Burma. Human Rights Watch remains concerned that systematic, widespread, and serious violations of international human rights and humanitarian law continue in Burma with impunity. Such abuses include war crimes and possible crimes against humanity by the Burmese armed forces and non-state armed groups.

Human Rights Watch calls on the UN General Assembly to adopt a resolution at its upcoming Autumn session requesting that the UN secretary-general establish a Commission of Inquiry to investigate reports of violations of international human rights and humanitarian law in Burma by all parties since 2002, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.

Related Materials:

Burma: EU Should Endorse
International War Crimes Inquiry
Open Letter to EU Foreign
Ministers Supporting an
International Commission of
Inquiry for Burma

Introduction

Burma remains one of the most repressive countries in the world. Since 1962, Burma has been under the abusive rule of a military junta, now called the State Peace and Development Council (SPDC). State security forces commit arbitrary arrests, torture, enforced disappearances, and extrajudicial killings with impunity. There are severe limits on the rights to freedom of expression, association, and assembly. The intelligence and security services are omnipresent. There is little freedom of the media, with an all-powerful Press Scrutiny Board censoring any critical analysis of the political system. The Burmese judiciary is not independent, and acts as an arm of government repression. More than 2,100 political prisoners suffer in Burma's squalid prisons. These prisoners include many members of the political opposition, monks, nuns, journalists, and activists who face torture and ill-treatment in prison.

At the same time, abuses connected to armed conflicts in ethnic minority areas persist. Burma has endured the world's longest running civil war, with hostilities between the newly independent state and ethnic insurgents starting in 1949. At one point in the 1980s, the central government was fighting approximately 30 non-state armed groups, ethnic and communist insurgents, including some as large as 20,000 fighters, which controlled and administered vast swathes of territory in Burma's hinterlands. Since the late 1980s and early 1990s, the military government reached tentative ceasefire agreements with most of these rebel groups. Three major ethnic insurgent groups continue to fight in eastern Burma, particularly in Karen, Karenni, and Shan states. A low-intensity civil conflict with a major presence of Burmese army soldiers continues in these areas. Over half a million people remain internally displaced as a result of the fighting since 1996, and tens of thousands have become refugees in Thailand.

In western Burma, the Rohingya Muslim minority group has suffered state persecution for decades, and was rendered stateless by discriminatory citizenship laws in 1982. The Rohingya were subject to two wide-scale forced eviction campaigns, in 1978 and 1991 that forced hundreds of thousands into neighbouring Bangladesh. An estimated one million Rohingya live in desperate circumstances in western Burma, with widespread restrictions on movement, freedom of religion, access to basic services such as health and education, and curbs on access to employment and livelihoods. Human rights violations against the Rohingya minority are part of a long-evident state policy to force the population to leave Burma.^[1]

What violations of international humanitarian law have been reported in Burma?

The Burmese government and non-state armed groups involved in Burma's long-running internal armed conflicts are bound by international humanitarian law (the laws of war). The Armed Forces of Burma (called the *Tatmadaw*),^[2] has been responsible for numerous serious laws-of-war violations, including deliberate and indiscriminate attacks on civilians, summary executions of civilians and captured combatants, sexual violence against women and girls, torture, use of child soldiers, attacks on populations' livelihood and food supplies, forced displacement of populations, and use of anti-personnel landmines. Non-state armed groups in Burma also have been implicated in serious abuses, including forced labor, recruitment of child soldiers, and anti-personnel landmine use.

What international law applies to the armed conflicts in Burma?

The internal armed conflicts between the government of Burma, and several non-state armed groups is governed by international treaties and the rules of customary international law. Customary international law, based on established state practices, binds all parties to an armed conflict, whether states such as Burma or non-state armed groups such as the Karen National Liberation Army (KNLA), and concerns the conduct of hostilities. Relevant treaty law includes Common Article 3 to the Geneva Conventions of 1949, which sets forth minimum standards for the proper treatment of persons within a warring party's control, namely civilians and wounded and captured combatants.

Have there been calls to establish a Commission of Inquiry to investigate alleged international crimes in Burma?

There have been numerous calls for a CoI to investigate serious international crimes in Burma, including by past and present special rapporteurs covering the human rights situation in Burma.

For years, countless UN reports, resolutions, and documents have called for an end to serious human rights abuses and violations of international humanitarian law in Burma. But these calls have strengthened following the report of the special rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, to the UN Human Rights Council in March 2010. Quintana outlined a "pattern of gross and systematic violation of human rights which has been in place for many years." He concluded that:

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.[3]

In 2010, a number of European governments as well as the government of Australia, publically supported the special rapporteur's call for a CoI. In May 2010, the European Parliament passed a resolution on Burma in which it supported a CoI.[4] On July 30, 32 US senators wrote to US Secretary of State Hillary Clinton calling on her "to support the establishment of a United Nations Commission of Inquiry to investigate whether crimes against humanity and war crimes took place in Burma." [5]

A number of nongovernmental organizations and former UN special rapporteurs have reported on serious abuses of international law in Burma and some have called for a Commission of Inquiry. These include the International Committee of the Red Cross, Amnesty International, the Harvard Law School Human Rights Clinic, the International Center for Transitional Justice, as well as Human Rights Watch. Former UN officials include: Paulo Pinheiro and Yozo Yokota. After Quintana's statement at the Human Rights Council, the Burmese military government immediately expressed opposition to the idea. (See appendix).

How can an international Commission of Inquiry be established?

An international CoI can be established through resolutions adopted by the UN Human Rights Council, the UN General Assembly, the UN Security Council or by the UN secretary-general on his own initiative.

Human Rights Watch believes the UN General Assembly should use its upcoming Autumn 2010 session to adopt a resolution requesting the UN secretary-general to establish a Commission of Inquiry.

What would be the mandate of an international Commission of Inquiry?

The proposed Commission of Inquiry should be mandated to investigate reports of violations of international humanitarian law and human rights law in Burma by all parties, and identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable. The CoI should be comprised of eminent persons, including experts in international humanitarian law.

The proposed Commission of Inquiry should elaborate on recommendations for accountability for serious violations and request that the secretary-general submit a report and recommendations in this regard within six months.

What effect will a CoI have on the scheduled 2010 elections in Burma?

Some observers assert that calling for an international CoI and greater accountability could negatively affect the conduct of the 2010 elections, Burma's first since 1990, by driving the Burmese military further into isolation, making it more resistant to pressure for greater democratization. Human Rights Watch believes that international calls for a CoI will not have a direct bearing on the elections or possible democratic reforms, including greater freedoms for opposition parties or the release of political prisoners. That is, calling for a CoI should not be used or misconstrued as a political tactic or a new agenda for international pressure, but as a measure necessary on its own terms.

Officials who seek to pit political stability and justice against each other often do so to escape accountability for serious international crimes. Human Rights Watch's years of reporting in conflict areas has found that while justice for such crimes often can yield short and long-term benefits to achieving a sustainable peace, impunity by contrast can carry a high price.

In Burma, impunity for serious human rights abuses committed by government forces and officials until now risks being further codified and legally recognized when the 2008 constitution comes into force after the 2010 elections. There are three major provisions in the 2008 constitution that grant *Tatmadaw* members, and members of the military ruling councils since 1988, the State Law and Order Restoration Council (SLORC) and the SPDC, immunity from prosecution for past acts, and retain military jurisdiction completely in the hands of the chief of the defense forces.[6] These provisions are contrary to international law prohibitions against immunity for war crimes, crimes against humanity, and torture and perhaps enforced disappearances.

Why is accountability important?

Investigating and prosecuting individuals responsible for serious violations of international human rights and humanitarian law is an obligation under international law. Holding individuals accountable for human rights abuses and war crimes is important because it may deter future violations, promote respect for the rule of law, and provide avenues of redress for the victims of these crimes who have suffered atrocities. It can promote discipline and professionalism by the armed forces and law enforcement officials, maintain responsible command and control, and improve relations with the civilian population. States and non-state armed groups that fail to establish such accountability undermine their standing in conflict areas and globally, and increase the likelihood of international action being taken against them.

What are the obligations of states generally to ensure respect for the laws of war?

All states, whether or not a party to the conflict, have a responsibility under the Geneva Conventions of 1949 to exert their influence to stop violations of international humanitarian law. Such action can be taken unilaterally or as part of multilateral measures, such as collectively imposed sanctions against a state, an armed group, or certain individuals.

What international law applies to the armed conflicts in Burma?

The internal armed conflicts between the government of Burma, and several non-state armed groups is governed by international treaties and the rules of customary international law. Customary international law, based on established state practices, binds all parties to an armed conflict, whether states such as Burma or non-state armed groups such as the Karen National Liberation Army (KNLA), and concerns the conduct of hostilities. Relevant treaty law includes Common Article 3 to the Geneva Conventions of 1949, which sets forth minimum standards for the proper treatment of persons within a warring party's control, namely civilians and wounded and captured combatants.[7]

Who is primarily responsible for ensuring accountability of individuals who have committed serious human rights and laws-of-war violations?

Ensuring justice for serious violations is, in the first instance, the responsibility of the states whose nationals are implicated in the violations. States have an obligation to investigate serious violations that implicate state officials or other persons under their jurisdiction. The state must ensure that military or domestic courts or other institutions impartially investigate whether serious violations occurred, identifying, and prosecuting the individuals responsible for those

violations in accordance with international fair-trial standards, and imposing punishments on individuals found guilty that are commensurate with their deeds. While non-state armed groups do not have the same legal obligation to prosecute violators of the laws of war within their ranks, they are nonetheless responsible for ensuring compliance with the laws of war and have a responsibility when they do conduct trials to do so in accordance with international fair trial standards.

Is there military jurisdiction for the crimes committed by the Burmese military?

The rules governing the performance of the Burmese armed forces are contained in the Defence Service Act (1958) and the Defence Services Rules (1960). These rules expressly forbid the conduct of serious crimes such as murder and ill-treatment of civilians, and set the minimum recruiting age of military personnel at 18 years. In practice however, serious crimes by Burmese military personnel are rarely investigated and punished, especially those involving senior officers. Many of the non-state armed groups have basic rules of engagement and rudimentary military justice systems, but again serious crimes are rarely investigated and punished according to international fair trial standards.

Who are the other parties to the conflicts in Burma?

Non-state armed groups involved in armed conflict in Burma include:

Karen National Liberation Army, KNLA (armed wing of the Karen National Union), organized in 1949

Shan State Army-South, SSA-S (armed wing of the Restoration Council of Shan State), 1964, 1996

Karen National Army, KNA (armed wing of the Karen National Progressive Party), 1970s

Chin National Army, CNA (armed wing of the Chin National Front), 1970s

Arakan Liberation Army, ALA (armed wing of the Arakan Liberation Party), 1980s

These groups have been implicated in violations of the laws of war, including forcible recruitment and use of child soldiers, forced displacement of the population, torture, ill-treatment and summary executions of captured *Tatmadaw* personnel, sexual violence against women and girls, and widespread use of anti-personnel mines in civilian areas. The recruitment of child soldiers and the use of anti-personnel mines by non-state armed groups in Burma has been well-documented, but allegations of other laws of war violations have received little research.[8]

There are currently more than 17 non-state armed groups with tentative, verbally agreed ceasefire agreements with the Burmese government. These forces are euphemistically classified as having "returned to the legal fold" by Burmese state-controlled media, but many of the groups maintain extensive armed wings, control sizeable areas of territory in a form of ad-hoc, temporary and conditional autonomy, and are involved in semi-legal and illegal trade across Burma's borders with Thailand, Laos, China and India. The main groups are the United Wa State Army (UWSA) with an estimated 20,000-25,000 fighters, the Kachin Independence Organization (KIO) with several thousand regular fighters, the Democratic Karen Buddhist Army (DKBA) with over 5,000 fighters, Pa-O National Organization (PNO) with 1,000-3,000 fighters, and the New Mon State Party (NMSP) with 2,000-4,000 fighters.[9] Many of the other ethnic armed groups are small and confined to isolated parts of Burma's borderlands. The *Tatmadaw* also controls dozens of small paramilitary forces called *Pyithu Sit* (People's Militia) that work in cooperation with state security forces, and whose legal authority has never been clearly defined.

When are violations of international human rights and international humanitarian law considered crimes against humanity?

Crimes against humanity are prohibited acts committed in a widespread or systematic manner against a civilian population either in war or in peacetime. Crimes against humanity are established through the widespread or systematic nature of the offenses of which the individual act such as torture, forced displacement of the population or murder must be a part.

When are violations of international humanitarian law considered war crimes?

Individuals who commit serious violations of international humanitarian law with criminal intent - that is, intentionally or recklessly - are responsible for war crimes. War crimes include a wide array of offenses, among them deliberate, indiscriminate, and disproportionate attacks against civilians, using child soldiers, and committing torture, enforced disappearances and summary executions. Individuals also may be held criminally liable for attempting to commit a war crime, as well as assisting in, facilitating, or aiding and abetting a war crime.

Responsibility also may fall on persons who plan or instigate the commission of war crime. Commanders and civilian leaders may be prosecuted for war crimes as a matter of command responsibility when they knew or should have known about the commission of war crimes and took insufficient measures to prevent them or punish those responsible.

Is the Burmese government meeting its obligation to investigate alleged laws-of-war violations?

The Burmese government has never adequately investigated allegations of serious crimes perpetrated by its armed forces or law enforcement officials. To the contrary, abuses as well as the impunity associated with serious atrocities are seen as being directed, carried out and condoned by Burma's military rulers. Following the 2002 report "Licence to Rape" by the Shan Women's Action Network (SWAN), on the widespread use of sexual violence by Burmese troops against ethnic Shan women and girls, the SPDC conducted a purported investigation led by military officials and members of the government-backed Myanmar Women's Affairs Federation (MWAF) and released it under the title "Licence to Lie." The SPDC report did not seriously address any of the SWAN report's findings, but mostly attacked the report's authors.^[10]

In 2004, the military government formed the Committee to Prevent the Recruitment of Minors, a *Tatmadaw*-controlled body that ostensibly sought to end the forced recruitment of child soldiers. The government cooperates to some extent with the United Nations Children's Fund (UNICEF) and the International Labour Organization (ILO) in investigating complaints of forced recruitment and taking action to demobilize boys in the armed forces. Recruitment of boys under 18 into the *Tatmadaw* is illegal under Burmese civil and military law. This body reports regularly to the UN special representative on children and armed conflict, and the ILO is the responsible agency for monitoring and reporting on Security Council Resolution 1612 (2005) on children and armed conflict.^[11]

There are very few known cases of military personnel being punished for violations of the laws of war. Low-ranking soldiers are on occasion punished for crimes such as unlawful killings, sexual violence, or theft, but this is *ad hoc* and at the discretion of the local commander. In 2010, three junior officers were sentenced to prison terms for child soldier recruitment. There has never been a major investigation into the operational practices of the *Tatmadaw* during its counterinsurgency campaigns, despite the numerous abuses reported.

Non-state armed groups rarely admit investigating or punishing their members for serious crimes they may have committed. Two groups, the KNLA and KA have signed Deeds of Commitment with the United Nations to end the use of child soldiers.

Can victims, civil society, and media in Burma press the government to investigate allegations of abuses?

The victims of government abuses and their families have few mechanisms to press the government to investigate allegations of serious crimes by the security forces. Because of likely repercussions, not many Burmese would be willing to complain directly to officials about rights abuses. Because the judiciary is not independent, bringing such matters before the courts is unrealistic. The International Labour Organization maintains a mechanism to permit reporting of forced labour in Burma, and cases of child soldier recruitment are included in this. The media in Burma is under strict censorship provisions, and reporting on sensitive political, human rights and security issues is not allowed. Journalists are routinely imprisoned for reporting on or investigating such topics. The state-controlled media provides extensive coverage of purported crimes committed by non-state armed groups, including killings of civilians in conflict areas and recruitment of child soldiers, but these allegations are never independently verified or investigated by an impartial body.

What other mechanisms are available when states fail to investigate these violations?

Historically, states that failed to conduct investigations into serious violations of the law compounded the problem of impunity by invoking the principles of sovereignty when any other authority sought to examine the matter. However, significant and important advances over the past two decades in international criminal law have made the prospect of accountability more of a reality, even in the absence of willingness on the part of states to ensure such accountability.

The treaty creating the International Criminal Court (ICC), which was adopted in 1998 and went into effect in 2002, empowers the court to investigate and prosecute individuals alleged to be responsible for war crimes, crimes against humanity, and genocide when states are unwilling or are unable to do so. The ICC can undertake a criminal investigation and prosecution if the suspected perpetrators are citizens of a state that is party to the ICC treaty, if the alleged violations are committed in the territory of a state that is party to the ICC treaty, or if a state that is not a party to the treaty asks the ICC to become involved in violations committed on its territory. Burma is not a party to the ICC. However, the ICC can assume jurisdiction if the UN Security Council refers a situation to the court, as it did in 2005 when it referred the situation of Darfur to the court even though Sudan had not ratified the ICC treaty. Security Council action, as in all cases, depends on a positive vote by nine of the fifteen council members and no negative vote, or veto, by any of the five permanent members.

Certain categories of grave crimes in violation of international law, such as war crimes and torture, are also subject to "universal jurisdiction," a concept that refers to the ability of the domestic judicial system of a state to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals or against one of its nationals. Certain treaties, such as the Geneva Conventions and the Convention against Torture, oblige states parties to extradite or prosecute suspected offenders who are under that state's jurisdiction. Under international customary law, it is also generally agreed that states are allowed to try those responsible for other crimes, such as genocide or crimes against humanity.

Can the UN investigate alleged serious human rights and laws-of-war violations committed in Burma?

The United Nations has established many commissions of inquiries in the past to investigate violations of international law, but never with respect to Burma.

The United Nations has issued highly critical human rights reports on Burma annually for nearly two decades, and these

reports frequently demonstrate that serious crimes by government security forces are widespread and systematic. Human Rights Watch believes that it is not enough to simply continue to document and publish reports on the human rights situation in Burma. Instead, the UN should use its existing reports as a basis for establishing an impartial international commission of inquiry that can investigate and determine the extent to which international crimes have been committed, with a view bringing justice to the victims and holding perpetrators to account.

Human Rights Watch urges the UN General Assembly to adopt a resolution in which it requests the UN secretary-general to establish such a Commission of Inquiry.

How effective would a CoI be if its members were not permitted inside Burma?

The Burmese government has routinely blocked investigators from UN agencies to work in the country, haphazardly permitting UN human rights special rapporteur's to visit and then tightly controlling their travel, itinerary and whom they meet. Nevertheless, a CoI facing Burmese government non-cooperation could still accomplish a great deal. First, the CoI could interview victims and witnesses of abuses outside of Burma. Second, the CoI would have access to thousands of pages of UN reports and other information documenting violations in recent years. Third, a CoI could undertake a legal mapping exercise of possible war crimes and crimes against humanity. Finally, a CoI without access to Burma could still provide recommendations regarding accountability avenues for serious international crimes.

In 1997, the ILO formed a commission of inquiry to investigate Burma's breaches of the Forced Labour Convention, and the commission released a major report in 1998 that still stands as one of the most detailed and incisive human rights-related investigations on Burma.^[12] This report demonstrates that a major investigation can be undertaken even without the active cooperation of the government of Burma.

Since the mid-1990s, the human rights situation in Burma has been documented by the United Nations, Human Rights Watch, Amnesty International, Earthrights International, several humanitarian organizations such as Medecins Sans Frontieres, and a wide range of Burmese human rights groups and the media. Extensive human rights documentation, which entails great personnel risk for Burmese investigators, can and is being conducted inside Burma on a regular basis, and published outside of the country. There are also numerous areas where investigations into abuses perpetrated by non-state armed groups could also be investigated. While not an ideal situation if the CoI is not permitted into the country, it would not present insurmountable challenges to conducting a valuable and needed inquiry. There are still sizeable gaps in reporting and documentation of abuses in isolated parts of Burma, particularly Shan State and other areas of eastern Burma.

Can persons suspected of serious laws-of-war violations in Burma be prosecuted in other countries?

As explained above, the International Criminal Court is currently unable to investigate and prosecute crimes committed in Burma, because Burma is not a party to the Statute of the ICC nor has the UN Security Council referred the situation of Burma to the court. In light of these limitations in terms of international justice, national courts can and should play a role in combating impunity for grave violations of international human rights and humanitarian law, in applying the principle of "universal jurisdiction" (see above). Many countries have laws that would permit them to exercise universal jurisdiction and prosecute war crimes, torture and crimes against humanity under various conditions. There has been a rise in the number of cases prosecuted under universal jurisdiction laws in the past decade, particularly in Western Europe. Investigation and prosecution of serious international crimes committed in a foreign country is not an easy task but

successful prosecutions in national courts -- including in France, the United Kingdom, the Netherlands, Spain, Belgium, and Norway -- of international crimes committed in countries such as Mauritania, Afghanistan, the Democratic Republic of Congo, Rwanda, and Bosnia and Herzegovina, show that universal jurisdiction is becoming a reality.

Isn't there a double standard when it comes to international justice, with prosecutions only of individuals from states with less political clout?

Critics have highlighted that international justice does not apply equally to all. Perpetrators of serious crimes in violation of international law should be held to account irrespective of nationality. Admittedly, the landscape on which international justice applies is uneven. Leaders of powerful states and their allies are less likely to be prosecuted by international courts when they are associated with grave international crimes. This is due, in part, to the fact that these states have not ratified the ICC Statute and are not likely to let the UN Security Council refer situations to the court in which they have political interests. But justice should not be denied to some victims simply because it is not possible to ensure justice for all. Rather, the reach of accountability should be extended to wherever serious crimes occur. There has to date not been an investigation in Asia by the International Criminal Court. Unfortunately, only a few Asian states have ratified the ICC Statute (Bangladesh, Cambodia, Japan, South Korea, Samoa, Fiji, and Timor Leste). The egregious violations of international human rights and humanitarian law in Burma over many years and the complete failure of the government to investigate and prosecute these crimes warrant an independent and impartial international inquiry.

Appendix

Calls to Establish a Commission of Inquiry

In June 2007, the International Committee of the Red Cross (ICRC) released a rare public criticism of a warring party for widespread violations of international humanitarian law: "The Myanmar armed forces have committed repeated abuses against men, women and children living in communities affected by armed conflict along the Thai-Myanmar border. These have included the large-scale destruction of food supplies and of means of production. The armed forces have severely restricted the population's freedom of movement in these areas, making it impossible for many villagers to work in their fields. This has had a significant impact on the economy, aggravating an already precarious humanitarian situation. Furthermore, the armed forces have committed numerous acts of violence against people living in these areas, including murder, and subjected them to arbitrary arrest and detention. They have also forced villagers to directly support military operations or to leave their homes. The behaviour and actions of the armed forces have helped create a climate of constant fear among the population and have forced thousands of people to join the ranks of the internally displaced or to flee abroad." Jakob Kellenberger, ICRC president, said in the statement, "The repeated abuses committed against men, women and children living along the Thai-Myanmar border violate many provisions of international humanitarian law."^[13]

In a June 2008 report, Amnesty International said crimes perpetrated in conflict zones of eastern Burma amounted to crimes against humanity: "The following human rights violations have all taken place on a widespread and systematic basis during the military offensive: unlawful killings; torture and other ill-treatment of detainees and prisoners; enforced disappearances and arbitrary arrests; the imposition of forced labour, portering, and displacement; and the destruction or confiscation of crops and food-stocks and other forms of collective punishment. These violations, targeting civilians or carried out indiscriminately, have been preceded or accompanied by consistent threats and warnings by the *Tatmadaw* that such would occur, and by statements by Myanmar government officials. Amnesty International is concerned that

these practices have been the result of official government and *Tatmadaw* policy, and amount to crimes against humanity."^[14]

In May 2009, the Harvard Law School International Human Rights Clinic released a report called "Crimes in Burma," which reviewed UN human rights documents on Burma since 2002. The report was endorsed by five eminent jurists: Justice Richard J. Goldstone (South Africa), Judge Patricia M. Wald (United States), Sir Geoffrey Nice, QC (United Kingdom), Judge Pedro Nikken (Venezuela), Hon. Ganzorig Gombosuren (Mongolia). The report reviewed four types of crimes perpetrated in Burma and long documented in UN reports since 2002 (the year of the Rome Statute of the ICC entered into force): forced displacement of the population, sexual violence, murder, and torture. The report states: "For years the United Nations (UN) has been on notice of severe, indeed widespread and systematic abuses that appear to rise to the level of state policy. Over and over again, UN resolutions and Special Rapporteurs have spoken out about the abuses that have been reported to them. The UN Security Council, however, has not moved the process forward as it should and has in similar situations such as those in the former Yugoslavia and Darfur. In those cases, once aware of the severity of the problem, the UN Security Council established a Commission of Inquiry to investigate the gravity of the violations further. With Burma, there has been no such action despite being similarly aware (as demonstrated in UN documents) of the widespread and systematic nature of the violations...(W)e call on the UN Security Council urgently to establish a Commission of Inquiry to investigate and report on crimes against humanity and war crimes in Burma. The world cannot wait while the military regime continues its atrocities against the people of Burma. The day may come for a referral of the situation in Burma to the International Criminal Court or the establishment of a special tribunal to deal with Burma. Member States of the United Nations should be prepared to support such action. The people of Burma deserve no less."^[15]

Paulo Pinheiro, former UN special rapporteur for human rights in Burma, supported the call for a CoI in an opinion piece in the *New York Times*: "[S]ince 1990, U.N. representatives have visited the country 37 times in an attempt to facilitate dialogue and promote human rights. They have exhausted all domestic and diplomatic remedies without achieving human rights protection and national reconciliation in Myanmar. And while the U.N. General Assembly and the U.N. Human Rights Council have passed over 35 resolutions regarding Myanmar, the U.N. Security Council has yet to pass a single one. The United Nations will not be successful until the Security Council acts to directly address our stagnant efforts. It is clear that the attacks in Myanmar will continue. It is equally evident that the country's domestic legal system will not punish those perpetrating crimes against ethnic minorities. It is time for the United Nations to take the next logical step: The Security Council must establish a commission of inquiry into crimes against humanity and impunity in Myanmar. Creating a commission of inquiry will accomplish three important goals: First, it will make the junta accountable for its crimes with a potential indictment by the International Criminal Court. Second, it will address the widespread culture of impunity in Burma. Third, it has the potential to deter future crimes against humanity in Myanmar."^[16]

Japanese law professor **Yozo Yokota**, former UN special rapporteur for human rights in Burma, wrote in 2010 that, "Impunity prevails in Myanmar and no action has been taken to bring an end to these crimes. That is why we believe the United Nations has an obligation to respond to the current rapporteur's recommendation and establish a commission of inquiry, to investigate war crimes and crimes against humanity and propose action."^[17]

In September 2009, the **International Center for Transitional Justice** specifically called for a CoI in their analysis

of the 2008 constitution and the system of impunity for serious crimes in Burma: "[E]stablishing a Commission of Inquiry is a measure that the international community has supported in a range of situations in which more information is needed to decide if further action is necessary. Given the difficulties of getting thorough information from Burma, a commission could help assess the nature and extent of serious human rights violations." [18]

In response to Quintana's March 2010 report, **Human Rights Watch** stated at the Human Rights Council: "A commission of inquiry would be a first step towards providing justice for victims of serious abuses in Burma and to deter future violations of international law. The Burmese armed forces in its conduct of military operations in Burma's long-running armed conflicts has been implicated in numerous violations of international human rights and humanitarian law against Burma's ethnic minority populations...The Human Rights Council should support the Special Rapporteur's call for a commission of inquiry with a fact-finding mandate in Burma. An international investigative body would provide the factual and legal groundwork for an independent justice mechanism to hold accountable those most responsible for war crimes and crimes against humanity. Justice and accountability are at the foundation of the United Nations system, rooted in the Universal Declaration of Human Rights, which calls for an international order in which the rights and freedoms set out in the declaration can be fully realized. Failing to act on accountability in Burma will embolden the perpetrators of international crimes and further postpone long-overdue justice. Human Rights Watch urges the Secretary-General to support Mr. Quintana's recommendation and convene a commission at the highest levels of the UN to put it into effect." [19]

Following Quintana's report to the HRC in May 2010, **Burma's ambassador to the UN** in Geneva, U Wunna Maung Lwin, released a statement that said in part: "This line of action is unjustifiable and disproportionate. It will never serve the interest of the country which is committed to the promotion and protection of the human rights of its own people. Never in the history of the [Human Rights Council] had such a line of action been warranted on the situation of human rights in the particular country. This will set dangerous precedent for all the developing countries." [20]

[1] See Irish Centre for Human Rights, *Crimes Against Humanity in Western Burma: The Situation of the Rohingyas*, Galway, ICHR, June, 2010, and Human Rights Watch, *Perilous Plight. Burma's Rohingya Take to the Seas*, May 2009, discrimination, xenophobia and related intolerance), "UN Human Rights Experts Call on Myanmar to Address Discrimination Against Members of Muslim Minority in North Rakhine State," Geneva, United Nations Press Release, April 2, 2007.

[2] The *Tatmadaw* is inclusive of the army (*Tatmadaw Kyi*), Navy (*Tatmadaw Ye*), Air Force (*Tatmadaw Lay*) and assorted paramilitary forces. Most human rights violations in Burma are perpetrated by the *Tatmadaw Kyi*, or army, while on counterinsurgency operations, infrastructure projects, or guarding state installations.

[3] Human Rights Council, "Progress report of the Special Rapporteur on the situation of human rights in Myanmar, Mr. Tomás Ojea Quintana," Geneva, A/HRC/13/48, March 5, 2010.

[4] "European Parliament Resolution of 20 May, 2010 on the situation in Burma/Myanmar," Strasburg, May 20, 2010. The resolution called on the EU high representative and member states to "publicly to support the recommendation of the United Nations Special Rapporteur on Burma/Myanmar that the United Nations establish a commission of inquiry into war crimes and crimes against humanity in Burma/Myanmar, and to include this request in the draft resolution to be discussed at the United Nations General Assembly in 2010."

[5] Letter to Secretary of State Clinton, "Support a UN-led Commission of Inquiry on Burma," United States Senate, Washington DC, July 30, 2010. <http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressRe...>

[6] Chapter I. Basic Principles of the Union. (43). No Penal law shall be enacted to provide retrospective effect.

Chapter VII. Defence Services. (343). In the adjudication of Military justice:

- (a) The defence Services personnel may be administered in accord with law collectively or singly;
- (b) The decision of the Commander-in-Chief of the defence Services is final and conclusive.

Chapter XIV. Transitory Provisions. (445). All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties. Ministry of Information, Constitution of the Republic of the Union of Myanmar (Yangon: Printing and Publishing Enterprise, 2008) (In English and Burmese).

[7] ARTICLE 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

[8] Human Rights Watch, *Sold to be Soldiers. The Recruitment and Use of Child Soldiers in Burma*, October 2007, and International Campaign to Ban Landmines, "Burma/Myanmar," *Landmine Monitor Report 2009*, ICBL, November 2009, pp.1029-1040.

[9] Tom Kramer, "Burma's Cease-fires at Risk," Amsterdam, Transnational Institute Peace & Security Briefing No.1, September 2009.

[10] In one of the first calls for an international investigation into serious crimes in Burma, the UN General Assembly resolution in 2002 specifically called on the SPDC to: "facilitate and cooperate fully with an independent international investigation of charges of rape and other abuse of civilians carried out by members of the armed forces in Shan and other states." United Nations General Assembly, "Situation of human rights in Myanmar," New York, Resolution adopted by the General Assembly, 57/231, 77th Plenary Meeting, December 18, 2002, A/RES/57/231, February 28, 2003.

[11] United Nations General Assembly and Security Council, "Children and armed conflict. Report of the Secretary-General," New York, A/64/742-S/2010/181, April 13, 2010, International Labour Organization, "Committee on the Application of Standards: Special sitting to examine developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)," Geneva, ILO, June 4, 2010.

[12] International Labor Organization, *Forced Labour in Myanmar (Burma)*, Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), Geneva, August 1998.

[13] International Committee of the Red Cross, "Myanmar: ICRC denounces major and repeated violations of international humanitarian law," ICRC News release 82/07, June 29, 2007.

[14] Amnesty International, *Crimes Against Humanity in Eastern Burma*, London, ASA 16/011/2008, June 2008. See also remarks in Amnesty International, "Myanmar's 2010 Elections: A Human Rights Perspective," AI Briefing, ASA 16/007/2010, May 11, 2010.

[15] International Human Rights Clinic, *Crimes in Burma*, Cambridge, Harvard Law School, Harvard University, May 2009.

[16] Paulo Pinheiro, "End Burma's System of Impunity," *New York Times*, May 27, 2009. See also Paulo Pinheiro, "Obama's failure in Burma," *Washington Post*, July 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/22/AR201007...>

[17] Yozo Yokota, "Challenge impunity in Myanmar," *Jakarta Post*, June 7, 2010, <http://www.thejakartapost.com/news/2010/07/06/challenge-impunity-myanmar.html>.

[18] International Center for Transitional Justice, *Impunity Prolonged. Burma and its 2008 Constitution*, New York, ICTJ, September 2009.

[19] "Human Rights Watch Interactive Dialogue with the Special Rapporteur on the Situation of Human Rights in Burma," March 16, 2010.

<http://www.hrw.org/en/news/2010/03/16/human-rights-watch-interactive-dia...>

[20] Statement by H.E. U Wunna Maung Lwin, Leader of the Myanmar Delegation at the 13th Session of the Human Rights Council, March 15, 2010.

<http://www.hrw.org/en/news/2010/08/10/q-international-commission-inquiry>

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