Some Thoughts On The Special Rapporteur Paulo Pinheiro And His 2002 Final Report To The UN Human Rights Commission*

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As the Special Rapporteur, Paulo Sergio Pinheiro, began his 2003 fact-finding mission in Burma, he carried with him “harsh” criticism of his last report by U Lwin, spokesman for the National League for Democracy and similar comments made by others. He saw both Gen. Khin Nyunt and Daw Aung San Suu Kyi early in his visit and although there were no published accounts of what was discussed, it can be assumed that the criticism of his last report was raised. His mission ended abruptly on March 22, two days early, when he discovered a microphone beneath the table at which he was interviewing a prisoner in Insein Prison. Its presence in the room violated the promises and assurances he had received from the government that he was free to talk to prisoners without fear of eavesdropping or interference and assurance that there would be no reprisals by the government to the interviewee for speaking to the Special Rapporteur. He immediately halted the interview, lodged a formal complaint with the government and left the country without completing his schedule.

The first incident, the criticism of Mr. Pinheiro, marked a sharp change in the relations between the Special Rapporteur and the NLD; the second appeared more serious as it signaled a possible break in the relations between the UN representative and the military rulers which may not be repairable. In order to put these two events into perspective it is necessary to look more closely at the Special Rapporteur and his report.
Over the years, very little has been published in the world press about Mr. Pinheiro and his mission. Only when something out of the ordinary occurs, such as the events noted above, do the newspapers in Burma’s neighboring countries and the international press and radio give space and comment to his activities in Burma. Because he represents the UN Human Rights Commission and his reports go to the General Assembly, where the Third Committee pays great attention to them as they prepare their annual resolution on Burma, his observations and comments are important and deserve wider circulation in the press and study by students of international law and social and political affairs in Burma.

The Special Rapporteurs are selected by the UN Commission on Human Rights and not by the UN Secretary General, members of the General Assembly or the Security Council. As rapporteurs, they are not mediators, third participants or observers in any dialogue which might take place between the military rulers and the representatives of the Burmese people. Although there is nothing in their mandates demanding that they should or must be selected from countries outside of Southeast Asia, all have been. With the exception of Judge Rajsoomer Lallah, Mr. Pinheiro’s immediate predecessor—who, because of opposition from the government of Burma, was not admitted to Burma during the period of his appointment—all have been admitted and received cooperation from the government; until the listening device experienced by Mr. Pinheiro, all appeared to have had freedom of inquiry and the cooperation of the political parties as well as the rulers. From his first visit, the Special Rapporteur established himself as independent of all parties and governments, created his own agenda and itinerary, spoke and wrote about what he saw and heard, drew his own conclusions and made recommendations. He is assisted by a staff whose members remain anonymous and in the background as he alone spoke and wrote for the mission. Until U Lwin, the spokesperson for the NLD, made his attack upon him there was no public criticism of his behavior or his work.

In April 2001, shortly after his appointment as Special Rapporteur, he addressed the UN Commission on Human Rights in Geneva and used the occasion to tell the members of that body about himself and his approach to his assignment in Burma.

In his address, Mr. Pinheiro began by affirming that “the principal reference in fulfillment of my mandate is and will always remain the promotion of best interests of the victims of human rights violations.” He went on to say that

“I will not fail to speak very clearly about the situation of human
rights in Myanmar. I will report in an independent, objective, fair and transparent way under the terms of my fact-finding mandate. I will aim to offer my voice to the people and the civil society of Myanmar, presenting their allegations to the government and requesting their effective action to provide redress and prevent further violations…I understand that under the terms of the resolution on Myanmar, my role is also to seize every window of opportunity to contribute to the improvement of the promotion and the protection of rights in the country. In this endeavor, I will work together with the Government of Myanmar, the opposition, members of the emerging civil society, United Nations organizations and the international community at large…the nature of my mandate is fact-finding. I take note that the Government of Myanmar released from detention a number of members of the opposition…during my visit I expressed my opinion to the Government that there is an urgent need to consider the release of the old, the mentally disturbed and those prisoners whose sentences have reportedly already expired…I intend to remain seized of this important issue and will continue following it up with the authorities.”  

“I believe that the government should create the situation whereby such international assistance could be given and effectively reach the most vulnerable sections of the population, such as children, persons affected by HIV/AIDS and the poor.”

And to the concerned international public, he said, “Any positive initiative must be acknowledged and encouraged by the international community, which must be prepared to offer positive answers to any indicators of real progress towards democratisation and strengthening of human rights protection.”

Mr. Pinheiro has followed the path he charted and it is the standard to which he has held himself.

The reports submitted by the present Special Rapporteur are clearly written, filled with factual information, thoughtful commentary and sound recommendations. They are direct and tightly structured. They follow a set format, beginning with a brief introduction wherein the author sets forth his mandate by the Commission and, in his most recent report, he included the Commission’s request that he “keep a gender perspective in mind when seeking and analysing information.” During 2002, he submitted two reports, an early interim statement and a final document. The 2002 Report, like its predecessors, offered at the beginning, a brief summary of his visit, starting with the meetings he had while on his way to Burma in early February, and followed by a description of his move-
ments in the country. He expressed his appreciation for the full and unhindered cooperation of the government, which he said made it possible for him to “carry out his programme in its entirety and enjoyed freedom of movement and access to private persons and others of interest.”

For the reader with time only to read the observations made during his travels, Mr. Pinheiro offered three. He found that “the political space is being gradually reopened for the National League for Democracy (NLD) to resume activities” and suggested that it should be the same for “other legal political parties.” In conjunction with that positive remark, he offered a cautionary note that restrictions on freedom of expression, information and the press were still in place.

The second observation related to political prisoners. He said that the military rulers had accepted the figures established by the International Committee of the Red Cross (ICRC) that, as of October 21, 2002, there were 1,448 political detainees and the categories into which they were divided. The government also announced a month later that it intended to release a batch of 115 prisoners. If that number was actually released, Mr. Pinheiro wrote that would mean that 950 prisoners would have been released during the past two years. He broke the total down to include 550 political prisoners and 401 pregnant women or mothers. In general, he found the conditions of detention had improved; however, physical ill-treatment of political prisoners, such as beatings, have been reduced, but not eliminated. He noted that in many prisons, political prisoners were treated worse than ordinary criminals. He suggested areas of prison life, where further attention should be paid—the quality of the food served, the beatings of common prisoners and the availability of qualified medical attention and treatment, especially in emergencies for all prisoners.

The report used the term “un-rule of law” twice: once in the discussion of the administration of law and once in the recommendations, where Mr. Pinheiro wrote,

“...in the national reconciliation dialogue. This process must be accompanied by the launching of reform of the States apparatus, which could contribute progressively towards making the rule of law prevail in the un-rule of law,”

...to define the continuing pattern of arbitrary arrest, prolonged incommunicado detention and interrogation by military intelligence, extraction of confessions and information, often under duress of torture, summary trials.
Following his departure from Burma in March and during his short stay in Thailand, he reiterated the call he made in his report, that the military rulers release all political prisoners unconditionally and demanded,

“You have to release all the prisoners. You cannot continue using the excuse that some prisoners are very dangerous…I can barely imagine that prisoners 75 years old, in terrible state of health, are a security threat. This is nonsense, this is absurd…They cannot continue piecemeal, drop–by-drop releases. This is unacceptable.”

Mr. Pinheiro’s third observation was balanced between positive remarks about freedom of religion with negative statements on the employment of children in the military. He noted that conscription of children continues and applies both to the government and the insurgent groups. He reported some improvement in the freedom to practice religion in some areas and made the general observation that this freedom seems to be better in places close to centers of authority and the opposite in remote and counter-insurgency areas.

The Special Rapporteur took note of the “serious problems with the way the army and armed groups treat civilians in ethnic counter-insurgency areas.” He observed that these problems cannot be wished away nor will they disappear by denial; instead they must be acknowledged and addressed in a creditable manner. On the issue of the rape of Shan women by soldiers and officers in the minority areas which became an international issue after the release of the report, Licensed to Rape: The Burmese Military Regime’s Use Of Sexual Violence In The Ongoing War in Shan State, Mr. Pinheiro refused to undertake an immediate investigation because of a shortage of time and the need to do so within the framework of his mandate and according to international standards for such inquiries. He offered to return and conduct an independent assessment under his mandate and said that,

“It is essential that there be a clear acceptance by the SPDC of the modus operandi based on international standards and including sexual violence against Shan women in the terms of reference, and possibly including a review of the findings by the Special Rapporteur’s team in Thailand and of allegations of other human rights violations in ethnic minority areas.”

The Special Rapporteur concluded his executive summary by reporting that in response to the precarious humanitarian conditions in Myanmar, the United Nations “country team is preparing a framework document which is expected to function as a blueprint for direct action.”
In the main body of his report, Mr. Pinheiro wrote that to speed up progress toward peace and reconciliation, it was necessary to call for an end to the stalemate in talks between the NLD and the government and noted that “greater progress in the promotion and protection of human rights will help create an adequate atmosphere to break the impasse.”

In the last section of the main body of the report, Mr. Pinheiro said, without fanfare or qualifying words to preface his thought and recommendations,

“The Special Rapporteur is convinced that to help enhance the dialogue between all political actors in Myanmar…it is necessary more than ever to build a rational discourse on policy and strategy alternatives that are effectively possible.”

The Special Rapporteur followed the above statement with remarks which drew criticism from members of the press and Burmese political parties. He wrote, “It is high time to replace the high expectations of the ideal game scenario and the writing of constitutional models with a down-to-earth discussion of less prescriptive requirements which will be able to stimulate a real process of change. It is crucial to follow, understand and strengthen the internal forces within Myanmar, as in the end, only they will be able to bring about possibilities for change. To this end, instead of continuing to complain that little has changed in the past 14 years in terms of power and influence inside the SPDC, the army and society, it is time to take stock of, acknowledge and evaluate the ongoing effects of incremental change which have taken place.”

The Special Rapporteur then wrote that it was possible to see movement on all sides and “a road map for substantive dialogue and setting out objectives for both sides is essential for progress towards democratic transition.”

In this situation, Mr. Pinheiro declared that the international community must continue its dialogue with all sides…member states and international organizations must follow the lead of domestic actors concerning the political transition. “At the time that the NLD General Secretary and her colleagues are beginning to operate, it is of fundamental importance to be pragmatic and to work within the compromises and negotiations defined by the NLD with other political parties, ethnic groups and civil groups...Let us not refuse to acknowledge progress because the changes do not fulfill a maximalist scenario.”

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It is time, he said, to leave behind the illusion that after the political tran-
sition the apparatus and agents of the State will magically disappear. He expressed the view that the sooner the international community is ready to assist, the better and smoother the change will be in Burma. “He therefore continues to urge the international community to engage with Myanmar even before the SPDC introduces democratic reforms.”\(^{20}\) The policy option at the present time, he wrote, is principled engagement—a dialogue, support for change, empowerment of community, strengthening of autonomous civil society elements, and the enlargement of the presence and the capacity of United Nations agencies.

What he did not do was to urge the international community to step up financial support to the SPDC or to consider the suspension of economic or political sanctions; “it is not part of his mandate to advise Member States on this matter.”\(^{21}\)

The discussion and criticism of the 2002 Report turned, in part, on the question, did the Special Rapporteur exceed his mandate in calling on the international community to become more involved; implicit in the criticism, was the question, was he asking it to favor the military over the popular opposition? In both cases, it is the opinion of this writer that he did not. His report makes clear that the present situation cannot continue and result in political change. Consistent with his mandate as he defined it in 2001, the 2002 Report speaks very clearly about the situation of human rights in Burma. As he described conditions inside of the country at that time, there is no real movement to desired change. But he sees the protagonists in the struggle to transform authoritarian rule to democracy as entering a new phase in which, “the Commission of Human Rights and the international community must acknowledge and act...”

From his perspective and consistent with his interpretation of his mandate, his role, as he sees it, “is to seize every window of opportunity to contribute to the improvement of the promotion and protection of human rights in the country. In this endeavour, I will work together with the Government of Myanmar, the opposition, members of the emerging civil society, United Nations organizations and the international community at large.”\(^{22}\) Recommending a more active role for the international community and its impartial involvement with all sides is consistent with a condition of his mandate—to seize every window of opportunity to contribute to the improvement and protection of human rights in Burma.

Finally, what of the criticisms made by U Lwin, the spokesman for the NLD and others before Pinheiro’s February return to Burma? It was reported that in an interview prior to his return, the NLD leader said that he was not impressed with Pinheiro “even a little bit.” He accused Mr.
Pinheiro of being inconsistent when commenting on the situation inside Burma. “We don’t see any improvement in the human rights conditions since he took the position. What he says varies from one place to another. He says one thing before he comes to Burma, but he changes it when he arrives in Rangoon. And when he leaves Rangoon he holds a press conference in Bangkok, his statement is different again.” The NLD “does not expect anything” from his visit. 23  Aung Naing Oo, an exiled political analyst said, “Politics in Burma are black and white. If you aren’t a friend [of the opposition], you’ll be the enemy. So if he says something positive for the junta, he will be in trouble and lose his credibility [with the opposition].” Finally, Khun Tun Oo, Chairman of the Shan Nationalities League for Democracy, was reported to have said, “What he has to do is just about human rights. We will tell him to do his own task. The issue of engagement doesn’t concern him at all.” 24

The Special Rapporteur faced other criticism as well. Most of it reflected little real knowledge of what he was charged to do, what his relations with the government were and the degree of latitude he had in carrying out his work. He has proven himself to be an independent thinker and actor. His report demonstrates his courage to speak his mind without fear of reprisal or criticism. The work he and his predecessors have done is in many ways pioneering. Sovereign states cloak themselves with the protection afforded by the international law principle of noninterference in their internal affairs. That principle is embedded in the UN Charter (Art. 2.7) and the representatives of Burma never cease to invoke it in the face of any criticism or questions about the way their government treats its citizens. As noted earlier, the Special Rapporteur is given a mandate by the Commission on Human Rights and the power to report. Because the Commission is not one of the stronger organs of the UN; its relies on the integrity and diplomatic skills of the men and women who represent it and often stand alone as they confront the governments on behalf of the people and give their time and use their energy, intelligence and determination to carry out their mandates, no matter how difficult.

The Special Rapporteur in Burma has demonstrated that the pen can be mightier than the sword if used honestly and well. He has not won every contest he undertook and he may not win the present one. But he has compiled a record on which his successor can build and he knows that he did his best to improve human rights for the peoples of Burma.

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Endnotes

* Professor Josef Silverstein is an academic from the United States of America. He is a well-known Burma expert with a long history of involvement in the issues of Burma. The Professor witnessed political changes in Burma from democratic regime to dictatorship in 1962, as he was teaching at Mandalay University in central Burma during that period. He has written and edited several books and articles on Burma, involving “Burma: Military Rule and the Politics of Stagnation” (Cornell University Press, 1977).

3. As this is being written, there is no resolution and it remains unclear whether or not Mr. Pinheiro will return and resume his UN assignment.
4. Statement of Special Rapporteur on to the Commission on Human Rights, Geneva, 6 April 2001. From this point on there will be extended quotations from his remarks and report in order for the reader to have a basis for making his/her own assessment of what he said or wrote Hereafter cited as Pinheiro Geneva Statement.
5. Ibid.
6. Ibid.
7. Ibid.
10. Ibid, Para.(58)
13. Ibid, Para (f).
15. Ibid, Para. (g).
17. Ibid, Para. 52.
18. Ibid.
20. Ibid, Para. 53.
22. Pinheiro Geneva Statement
24. Ibid.