



Part B: Special Feature

Responding to the Human Rights Situation in Burma: A UN Framework for Non-Forcible Measures

*David I. Fisher**

1. Introduction

The United Nations, among whose proclaimed objectives is the universal promotion of human rights,¹ has long endeavored to address gross and systematic violations of the same by Burma's ruling military regime. After years of valiant but mostly futile UN efforts to improve the overall situation for human rights in Burma, hopes were raised in September 2006, when the issue of human rights and democracy was for the first time placed on the agenda of the Security Council, a body invested with broad powers of enforcement. However, subsequent efforts to pass a Security Council resolution addressing human rights violations in Burma, though supported by a sizable majority of the Security Council's members, was defeated by veto. Events in Burma since then, such as the violent suppression of the Saffron Revolution, the refusal at initial (and thus critical) stages of the deastation caused by Cyclone Nargis to permit international relief efforts and the extension of Aung San Suu Kyi's detention, have added urgency to the need for an effective international response to the human rights situation in the country.

Given the negative outcome of efforts to obtain a Security Council resolution on Burma, there is reason to query whether other UN bodies, namely the Human Rights Council and the General Assembly, could set the stage for a coordinated multilateral response involving non-forcible measures (i.e., economic, political and diplomatic sanctions). This article will therefore examine what role these organs could play to bring about concrete state action and what parameters would govern such action under international law. Beyond the scope of this article are other conceivable responses to human rights violations in Burma,



such as humanitarian intervention or referral of responsible individuals for prosecution before the International Criminal Court (ICC).²

2. The Security Council: Failed Attempts for a Resolution on Burma

The Burmese regime's long-standing record of gross and systematic human rights violations prompted efforts in January 2007 to obtain a Security Council resolution calling upon the regime to stop such violations. The proposed resolution, jointly sponsored by the United Kingdom and the United States, took as its premise that the human rights situation in Burma amounted to a "threat to international peace and security," a precondition under Chapter VII of the UN Charter for the Security Council to exercise its authority, including its (ultimate) power to decide on enforcement measures. The proposed resolution was however vetoed by China and Russia.³

The proposal was largely based on a report entitled "A Threat to the Peace: A Call for the UN Security Council to Act in Burma."⁴ The report, commissioned by Nobel laureates Vacláv Havel and Desmond Tutu, outlined the factors that had previously resulted in Security Council intervention vis-à-vis countries which, like Burma, were in a state of internal conflict. Among the factors applied in those cases were the overthrow of a democratically elected government; internal armed conflicts; widespread breaches of human rights and humanitarian law within the country; large-scale refugee outflows; and other cross-border problems (e.g., drug production and trafficking).⁵ The report also cited Security Council resolution 1308 (2000), which had labeled the spread of HIV/AIDS as a threat to international security (which was evident in the transborder spread of HIV/AIDS through the heroin trade originating in Burma).⁶

The report recommended that a resolution be adopted under Article 41 of the UN Charter, which authorizes the Security Council to decide on measures not involving the use of force.⁷ In the event that the Security Council were to find such (non-forcible) measures to be inadequate, Article 42 authorizes that body to take action involving the use of force. The report however stopped short of recommending armed force, deeming non-forcible measures to suffice.⁸ In line with the report's recommendations, the draft resolution refrained from



embracing measures involving force or any other form of external coercion, calling instead for self-correction, and co-operation with the UN (including the Secretary-General's "good offices" mission).⁹ Thus, Burma was called upon to cease military attacks on civilians in ethnic minority regions, to permit international humanitarian efforts to be carried out without restriction and to take concrete steps to allow the full exercise of political freedoms, including the free operation of political parties, such as the National League for Democracy (NLD). (Had the draft been adopted but not heeded, the Security Council could have, as appeared above, decided on measures involving the use of force under Article 42).

The vetoes of China and Russia were joined by the negative vote of non-permanent member South Africa. In essence, these countries asserted that the situation in Burma did not amount to a threat to international peace and security.¹⁰

3. The Human Rights Council: A New Tack to Take in the Burma Question?

Against the background of defeat of the proposed resolution in the Security Council and the ongoing deterioration of the human rights situation in Burma since then, there is reason to query what role the UN Human Rights Council could play to bring about a coordinated international response to Burma. Such a call to action has been made by the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, who, in a statement post-dating the negative vote in the Security Council, cited "an urgent necessity to better coordinate the different approaches among member states to find ways to contribute to the process of transition towards democracy." He called specifically on the Human Rights Council "to consider ways and means of initiating an effective collaboration with Myanmar."¹¹ What is more, various Security Council members, including some of those voting against the proposed resolution, considered that the Human Rights Council had a role to play in addressing the critical human rights issues posed by the situation in Burma.¹²

The Human Rights Council was established by General Assembly Resolution 60/251 in 2006 as part of the larger goal to reform the institutions of the United



Nations, to make them more effective and credible. Then UN Secretary-General Kofi Annan saw the Council as “a great new chance for the UN, and for humanity, to renew the struggle for human rights.”¹³ Even the United States, which voted against the resolution creating the Council, has since pledged to cooperate to make the Council as strong and effective as possible.¹⁴

The Human Rights Council, a subsidiary organ of the General Assembly, replaced the by then discredited UN Human Rights Commission. In its latter years, the Commission’s work had been undermined by the dubious human rights credentials of some of its members; its members’ frequent inability to place the effective protection of human rights before their economic and security interests; working procedures poorly adapted to deal with upcoming and ongoing human rights violations (including the Rwanda genocide); and selectivity with regard to the countries chosen for investigation and ultimate condemnation. Alas, the Human Rights Council itself has not been entirely immune from criticism, including complaints of selectivity of the kind that plagued its predecessor.¹⁵ Decisive action by the Human Rights Council on Burma, and for that matter on human rights situations elsewhere in the world that call for urgent attention, would thus bring it closer to fulfilling its promise as an effective mechanism of human rights protection.

The Human Rights Council seems in fact well placed to contribute to a coordinated international approach to the Burma question. The Council has already demonstrated its will and capacity to provide credible information about the ongoing human rights violations in Burma through its Special Rapporteur on the subject.¹⁶ The findings and recommendations of the Special Rapporteur form the basis of the Council’s resolutions, most recently in March 2008, in which the Council condemned “ongoing systematic violations of human rights,” including violations committed as part of the violent suppression of the September 2007 demonstrations. The resolution also called upon the Burmese Government to implement the (no less than seventeen) recommendations of the Special Rapporteur, including a call to release all persons taken into custody for the peaceful manifestation of their political beliefs.¹⁷



The pattern of fact-finding and recommendations by the Special Rapporteur followed by the Human Rights Council's endorsement of such recommendations and condemnation of the prevailing human rights situation has no doubt had its value, not least as a means of keeping the Burma question in international focus. However, as evidenced by the deteriorating situation for human rights in Burma, there is now reason to query whether the Council is empowered to expand its approach so as to recommend concrete measures to be implemented by the international community. We note in particular that Resolution 60/251 mandates the Council to "promote the full implementation of human rights obligations undertaken by States" and to "[m]ake recommendations concerning the promotion and protection of human rights."¹⁸ Given the acute nature of the human rights situation in Burma, there is also reason to note the Council's mandate to "respond promptly to human rights emergencies."¹⁹ Such a recommendation could help bridge the gap between states in their approaches to Burma (as proposed by the Special Rapporteur, *supra*); the present lack of a coordinated approach has seen some states choosing total inaction while others have been directly or indirectly supportive of the regime while yet others have applied sanctions. Measures recommended by the Human Rights Council could, without more, be immediately implemented by states. Ideally, however, the recommended measures would be incorporated into a resolution of the UN body most representative of the international community as a whole, namely, the General Assembly, as discussed below.

4. The General Assembly – Recommending Non-Forcible Measures under the UN Charter

Actually, the General Assembly has adopted many a resolution on the Burma question, not least in 2005, when the regime was called upon to "end [its] systematic violations of human rights."²⁰ More recently, the General Assembly has condemned Burma's suppression of the 2007 demonstrations, requesting it to fully implement human rights.²¹ Regrettably, these and other resolutions of the General Assembly, all of which have called upon Burma *itself* to comply with human rights, have been undercut by the regime's evident lack of will to do



so. Therefore, the General Assembly should urgently consider a resolution, preferably incorporating measures recommended by the Human Rights Council (as presented above), calling for action by the outside world.

Such a resolution would not be the first time the General Assembly called upon the international community to take measures against gross and systematic violations of human rights by a Member State. In this regard, there is the precedent of Apartheid South Africa. Thus, despite its lack of enforcement powers under the UN Charter, the General Assembly requested UN Member States as early as 1962 to undertake a broad range of measures, including the curtailment of trade, transportation and diplomatic relations. The measures were to be undertaken separately and collectively, in conformity with the UN Charter, “to bring about the abandonment of [Apartheid] policies.”²² That language bore close resemblance to the wording of Articles 55 (c) and 56 in which all Member States pledge to take *joint and separate action* in cooperation with the UN to promote, *inter alia*, universal respect for human rights.

As in the case of Burma, there was a longstanding lack of political will in the Security Council to act decisively on South Africa and it was thus not until 1977 that the Council was able to muster a weapons embargo against the regime, and then only after the bloody suppression of the Soweto uprising had shocked world opinion.²³ To its credit, the Security Council did ultimately adopt a recommendation to the Member States to impose sanctions on South Africa²⁴ and by the late 1980s, twenty-five countries had enacted laws imposing various trade sanctions and divestment policies.

As the example of Apartheid South Africa illustrates, a General Assembly resolution calling on Member States to take non-forcible measures would not encroach on the Charter-based powers of the Security Council. Although Article 41, as may be recalled, is fully sufficient to activate the Security Council’s powers to take measures not involving the use of armed force, it does not exclude the General Assembly’s power to recommend states to take such



measures in situations where the Security Council is not exercising its functions (cf. Article 12 [1]). Thus, save cases of Security Council action, Article 10 empowers the General Assembly to discuss any question or matter within the scope of the Charter and to make recommendations to the Member States on any such question or matter. In matters of human rights protection, the authority of the General Assembly to make recommendations is expressly recognized in Article 13 (1). Thus, until such time as the Security Council takes action on Burma, there appears to be no obstacle to a General Assembly recommendation in the matter.

Assuming that the Burma question is deemed by the General Assembly to be an “important question” under UN Charter Article 18 (2), a resolution on Burma would require a two-thirds majority of the Member States present and voting; if the question is instead found to rank among “other questions,” a simple majority of those voting and present would suffice under Article 18 (3). Thus, at most a two-thirds majority is required and, unlike the Security Council, there is no power of veto. Given the gravity and scope of human rights violations in Burma, as not least confirmed by recent events, attaining a simple majority, or alternatively a two-thirds majority, should not be an insurmountable task. It may be recalled that even the failed 2007 Security Council draft resolution on Burma had received the support of nearly two-thirds of the Council’s members.²⁵

5. International Law Parameters for State Action

As appeared above, the General Assembly is authorized under the UN Charter to adopt resolutions containing recommendations to the Member States in the field of human rights. The conformity with international law of the recommended measures cannot however be derived from the resolutions themselves; some independent basis in international law is thus required. A General Assembly resolution on Burma of the kind envisioned here could thus embrace non-forcible state measures falling into one or both of the following international law categories: a) retorsion, in which the state taking measures does so without suspending any international law obligation owed by it to the



targeted state; and b) reprisals, in which the state taking measures suspends international law obligations owed by it to the targeted state. Thus, reprisals (unlike retorsion) comprise measures which under normal circumstances would entail a breach of an international law obligation (e.g. a treaty obligation) on the part of the state taking such measures. For example, responding to a state's violation of human rights by suspending a trade agreement with that state would constitute a reprisal, whereas exercising the prerogative not to grant a loan to that state, would not be a reprisal (but would be retorsion).²⁶

As concerns *retorsion*, there is no requirement that the state against which measures are undertaken has committed any breach of international law. Thus a state desiring to take retortive measures against Burma for non-respect of human rights will not be precluded from doing so on the ground that Burma is not bound by a particular treaty to respect the human rights in question. This may be significant given that Burma is party to very few such treaties. Similarly, any argument along the lines that Burma is not bound by international customary law to respect the right(s) in question would be immaterial (even if there is ample evidence of Burma's breaches of international customary law in the realm of human rights, especially regarding breaches of *jus cogens*, as addressed below). Perhaps retorsion, more so than reprisals, could fill a special function vis-à-vis third states who through their trade, joint infrastructure projects, political support, etc., prop up the Burmese regime and thus indirectly perpetuate human rights violations in the country.²⁷

To the extent that a General Assembly resolution recommends *reprisals*, international law would require such measures to be a proportionate response to the breach of an international obligation (e.g., breach of a human rights obligation stemming from a treaty or customary law). The purpose of the measures shall be to induce the wrongdoing state to end its breach; thus, reprisals are not permitted as a form of retaliation or as a means to gain undue political or diplomatic advantage over the targeted state.²⁸ As the purpose is thus to restore compliance with international law obligations, the measures have to cease upon termination of the breach.



In order to undertake reprisals, a state has to be *aggrieved* by the breach of the wrongdoing state. This generally means that the rights of the state taking such measures have been violated by the failure of the targeted state to comply with its obligations under a treaty (to which both states are parties) or under international customary law. A state's breach of its obligations under a human rights treaty should thus give rise to a right on the part of the other states to the treaty to undertake reprisals, with the possible exception of human rights treaties containing a compulsory mechanism for dispute settlement.²⁹

As to the breach of obligations to uphold human rights under international customary law, the aggrieved state will generally be that of the human rights victim's nationality. In Burma, violations of human rights are of course primarily committed against the country's own nationals (or against its many stateless inhabitants); it is therefore necessary to examine how the prerequisite of the aggrieved state is to be fulfilled in cases where human rights victims lack the protection afforded by a foreign nationality. Regarding such cases, we may note that certain human rights fall within a special category of customary law norms from which no derogation is allowed, i.e., the norms of *jus cogens* (mandatory or peremptory norms). *Jus cogens* prohibits slavery (including forced labor), torture, racial discrimination and the arbitrary taking of life (not least genocide). Breaches of *jus cogens* norms are considered so serious that the violating state is deemed to have breached its obligations *erga omnes*, i.e., vis-à-vis the international community as a whole. Thus, *all other states* qualify as aggrieved states.

Concerning the question of *jus cogens* violations in Burma, we may refer to reports filed by Special Rapporteur Pinheiro with the Human Rights Council. Dr. Pinheiro stated in February 2007 that during the course of his mandate (which began in December 2000),³⁰ he had received reports of widespread and systematic human rights violations that included summary executions, torture, forced labor practices, sexual violence and the recruitment of child soldiers.³¹ Similarly, in connection with the violent suppression of the September 2007 demonstrations, he found the use of unnecessary and disproportionate lethal



force against civilians; the death of persons held in custody; cruel, inhuman and degrading treatment; torture; and other violations.³² It is submitted that most, if not all, of these practices constitute human rights violations on the level of *jus cogens*. Thus, with regard to Burma's most egregious violations of human rights, i.e., of the *jus cogens* type, all states would qualify under international law as *aggrieved*, and therefore entitled to undertake reprisals.

6. Concluding Remarks

The Security Council's missed opportunity to influence the human rights situation in Burma does not rule out initiatives by other organs of the UN. A recommendation by the General Assembly (or by the Human Rights Council) could provide states with the moral impetus to participate in concrete and coordinated action on Burma. Although it would not be realistic to expect all states to participate in the recommended action, the example of UN recommendations regarding Apartheid South Africa indicates that formidable results can be achieved even without universal participation. States professing a commitment to human rights and democracy, including some of Burma's own neighbors, might be willing to join other states in taking measures that they would not be inclined to take on their own. Needless to say, any measures recommended to states would have to be carefully devised so as to minimize potentially negative effects on Burma's population. In that regard, perhaps targeted sanctions along the lines applied by e.g., Australia, the US and the EU could serve as a model.³³ In any case, the world need not wait for the next time the Security Council is ready to act on Burma; as discussed above, a UN framework for the formulation and recommendation of non-forcible measures exists already today and states who implement such measures will have the backing of international law.

(Endnotes)

* Professor of International Law, Stockholm University.

1. UN Charter, Art. 1 (3) and Art. 55 (c).

2. The question of humanitarian intervention in Burma received renewed attention following the Burmese Government's apparent indifference to the needs of its population in the wake of Cyclone Nargis. See e.g., Gareth Evans, "Facing Up to Our Responsibilities," *The Guardian* 12



May 2008. With regard to international criminal responsibility, the European Parliament called on EU members to press for a Security Council referral to the ICC in the event the Burmese authorities continued to prevent aid from reaching those in danger. "European Parliament resolution of 22 May 2008 on the tragic situation in Burma," P6_TA-PROV(2008)0231.

3. UN Security Council draft resolution, SC/8939 Security Council 5619th Meeting (PM). The vote was as follows - in favor: Belgium, France, Ghana, Italy, Panama, Peru, Slovakia, UK, US; against: China, Russia, South Africa; abstaining: Congo, Indonesia, Qatar (U.N. Doc. S/PV.5619 p. 6). The draft resolution and explanation of votes is published at www.un.org/News/Press/docs/2007/sc8939.doc.htm. Although two of the Council's permanent members, China and Russia, voted against the question being placed on the agenda, this did not suffice to defeat the item, given that the question was at that stage a question of procedure rather than substance. Cf. UN Charter, Art. 27 (2).

4. "A Threat to the Peace" is published at www.unscurma.org/Report.htm.

5. *Id.*, pp. 51-56.

6. *Id.*, p. 57.

7. *Id.*, p. 59. Actually, Article 41 authorizes a host of measures of a more coercive nature than those recommended by the report (or included in the draft resolution), e.g., the interruption of economic relations, interruption of various means of communication and the severance of diplomatic relations.

8. *Id.*, p. 65.

9. This function has been filled by UN Special Envoy Dr. Ibrahim Gambari, who has in recent years made several missions to Burma, including one in November 2007 (after the violent crackdown on the Saffron Revolution) and most recently in March 2008. Gambari's persistent pleas for human rights and democracy are generally considered to have fallen on deaf ears.

10. See verbatim statements explaining their negative votes at U.N. Doc. S/PV.5619: China (pp. 2-3), Russia (p. 6) and South Africa (pp. 3-4).

11. See transcript of statement at <http://burmalibrary.org/docs4/2007-03-SRM-oral.pdf> (p. 3). More recently, the role of the Human Rights Council has been confirmed (albeit in a different way) in Pinheiro's post-uprising report "Human Rights Situations that require the Council's attention." Report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, mandated by resolution S-5/1 adopted by the Human Rights Council at its 5th Special Session. U.N. Doc. A/HRC/6/14 (7 Dec. 2007).

12. The UK "welcomed agreement amongst all Security Council members that there were serious issues of concern in Burma. Some believed the appropriate UN body to take forward action on Burma was the Human Rights Council. We therefore look forward to working with its members to address this profoundly disturbing situation." **"FCO Minister Challenges UN Human Rights Council to Give Voice to the Voiceless" 13 March 2007: www.britainusa.com**. Likewise, the South African delegate said that the situation in Burma was a matter best left to the Human Rights Council. U.N. Doc. S/PV/5619 p. 3. That the Human Rights Council should continue to act is also supported by various non-governmental organizations dealing with the Burma question. See e.g., Yvonne Terlingen, "The Human Rights Council: A New Era in UN Human Rights Work?" UN Non-Governmental Liaison Service, 9 July 2007: "The case of Myanmar will be an immediate test for the Human Rights Council's resolve to address such serious situations... This once more illustrates that the Human Rights Council cannot postpone acting on these and other serious country situations any longer. www.un-ngls.org/site/article.php3?id_article=332&var_mode=calcul.

13. "The Secretary-General's address to the Human Rights Council," 19 June 2006 published at www.un.org/apps/sg/sgstats.asp?nid=2090.

14. US Ambassador to the UN John Bolton, "Explanation of Vote on the Human Rights Council Draft Resolution" 15 March 2006 published at www.state.gov/p/io/rls/rm/63143.htm. (The US cast a negative vote based on its objections to procedures established for election and removal of Council members).



15. For example, UN Secretary-General Ban Ki-moon expressed disappointment at the Council's decision to single out only one specific regional item (by implication Israel). See "Ban Emphasizes Need for Human Rights Council to Consider all Rights Violations" at United Nations Radio 21 June 2007, published at <http://radio.un.org/story.asp?NewsID=7223>. See also, Human Rights Watch, "U.N.: Mixed Start for New Human Rights Council – Body Must Be Even-handed in Addressing Rights Crises," 30 June 2006 published at www.hrw.org/english/docs/2006/06/30/global13685.htm.

16. The Special Rapporteur for Burma had been established by the Human Rights Commission in 1992 and has continued under the Human Rights Council as one of its "special procedures." Cf. U.N.G.A. Res. 60/251 para. 6.

17. U.N. Doc. A/HRC/7/L.36 28 March 2008. See the report of the Special Rapporteur at U.N. Doc. A/HRC/6/14, 7 Dec. 2007.

18. Para. 5 (d) and (i).

19. Para. 5 f.

20. Resolution. 59/263, U.N. Doc. A/res/59/263 17 March 2005.

21. Resolution 62/222, U.N. Doc. A/res/62/222 28 Feb. 2008.

22. U.N.G.A. Resolution 1761 (1962).

23. Security Council Resolution 418 (1977). It was also in this resolution that the Security Council for the first time referred to the policies of the Apartheid regime as a threat to international peace and security. Later attempts in the Security Council to impose binding sanctions on South Africa met however with the vetoes of the United States and the United Kingdom (who asserted that the sanctions would be counter-productive). Security Council Official Record S/PV. 2797 p. 19 (8 March 1988). http://findarticles.com/p/articles/mi_m1309/is_n2_v25/ai_6621234.

24. Security Council Resolution 569 (1985).

25. See voting record, *supra*, n. 3.

26. On retorsion, reprisals and sanctions, see generally Antonio Cassese, *International Law*, 2nd ed., pp. 299-300 & 310-313, Oxford University Press, Oxford 2005.

27. This is not to rule out that such support could *in certain cases* amount to a human rights violation on the part of the third state, thus giving rise to a right of reprisal against such a state.

28. Cf. A. Cassese, *supra*, n. 26, p. 312.

29. *Id.*, p. 302.

30. Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council." Report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro. U.N. Doc. A/HRC/4/14 12, p. 11, 12 Feb. 2007.

31. *Id.*, p.2

32. See "Human Rights Situations that require the Council's attention," *supra*, n. 11, paras. 29-62.

33. For Australia, see www.dfat.gov.au/un/unsc_sanctions/burma.html; for the EU, see "Council Regulation EC (No 194/2008) of 25 February 2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar . . ." at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:066:0001:0087:EN:PDF>; and see an overview of US sanctions at <http://www.treas.gov/offices/enforcement/ofac/programs/burma/burma.pdf>.

* * * * *