



## Accountability and the Future A Commission of Inquiry into War Crimes in Burma

*by Kirsty*

There have been many calls for a Commission of Inquiry into crimes against humanity and war crimes in Burma. These calls often focus on the need to bring the ruling military regime to justice for the egregious human rights abuses it has committed over the past four decades. While the actions of the military regime in its various guises are thoroughly deplorable, it must be recognised that war crimes have been perpetrated by many parties to the conflicts in Burma. This article argues that for the sake of real national reconciliation, any such Commission of Inquiry should investigate the commission of war crimes by all parties. It is held that this could have both immediate preventative effects and help future relations between ethnic groups in Burma.

The UN has consistently noted that the ‘widespread and systematic’ grave crimes perpetrated by the Burmese authorities are the result of state policy at the highest levels<sup>1</sup>. The thorough review of UN human rights reports on Burma published by Harvard Law School in May 2009 emphasises that the knowledge already at the UN’s disposal clearly justifies the establishment of a Commission of Inquiry, or even a direct referral to the International Criminal Court, by the Security Council<sup>2</sup>. The latter is extremely unlikely due to the traditional positions of Russia and China. A Commission of Inquiry, by contrast, is an objective in-



investigative mission whose task is merely to ascertain the truth. Commissions of Inquiry, when truly objective, are thus less immediately menacing and perhaps less objectionable. Importantly, it is likely that China would at least consider supporting measures with the potential to lay the groundwork for genuine security in the border areas. Notably, Commissions of Inquiry established by the Security Council with regard to the former Yugoslavia, Rwanda and Darfur were all part of a process that ultimately resulted in international criminal proceedings.

Burma is home to approximately 135 minority groups, who mainly inhabit the volatile border regions. Ethnic tensions have troubled Burma's politics for centuries. Promises of self-determination made by the British and enshrined in the 1947 democratic constitution have never been realised. It is these people who have borne the brunt of the decades of conflict in Burma. As Burma moves forward, the interests of all civilians in the border regions must be fully respected.

### **The Laws of War**

International humanitarian law, or the law of armed conflict, has developed rapidly over the past hundred years largely in response to the barbarism witnessed in the mass conflicts of the twentieth century. The purpose of this corpus of rules is primarily to protect combatants and non-combatants from unnecessary suffering and to safeguard the fundamental human rights of persons who are not taking part in the conflict (including those who have ceased to take part). It is also hoped that by preventing the degeneration of conflicts into brutality and savagery, humanitarian law aids the restoration of peace and can promote the resumption of friendly relations between former belligerents.

Burma is a party to the four Geneva Conventions of 1949, which are in any case widely regarded to constitute customary international law. Burma is absolutely obliged to execute its military operations during armed conflicts in accordance with the minimum standards set out in Common Article 3 of the Geneva Conventions. The anti-government insurgencies in Burma certainly meet the 'internal armed conflict' threshold. Therefore, all armed belligerents are bound to



treat humanely all those taking no active part in hostilities, and to care for the wounded and sick. Violence towards non-belligerents, the taking of hostages, 'outrages upon personal dignity', torture and the extra-judicial passing of sentences and carrying out of executions are strictly prohibited.

## Accountability

Without an enforcement mechanism and an international judicial process, international law is but a charade followed by parties only at whim. Accountability is critical to ensure the adherence of individuals to international law. Supporters of international criminal justice consistently cite deterrence as a primary aim of punishing individuals found to be ultimately responsible for the perpetration of internationally condemned crimes.

In addition to the importance of deterrence, we must consider the more immediate purposes of international investigations and judicial processes. We must look beyond the purely legal. It is suggested that such processes are anthropologically cathartic. By giving victims of violence the opportunity to confront those held to have wronged them, these processes allow meaningful collective reconciliation and can avoid the perpetuation of enmity.

This retributive principle was expressly recognised by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the Erdemovic case. It stated that, 'thwarting impunity even to a limited extent would contribute to appeasement and give the chance to the people who were sorely afflicted to mourn those among them who were unjustly killed'.

Beware 'victor's justice'. The punishment of only one party to a conflict denies the victims of other parties a voice in the process. A one-sided investigation could deny the real harm suffered by thousands of civilians at the hands of non-state armed forces. Enmities could remain unresolved, or, as history has demonstrated, deepen.



## The Recruitment of Child Soldiers

Burma is a State Party to the Convention on the Rights of the Child 1989, Article 38 of which prohibits the recruitment of anyone under the age of 15 into the armed forces and demands that 'all feasible measures' are taken to protect those under 15 from direct involvement in hostilities. In addition to this, there are also various hollow Burmese laws which purport to proscribe the recruitment of under-18s into the armed forces<sup>3</sup> and penalize 'employing or permitting a child to perform work which is hazardous to the life of the child [...] or which is harmful to the child's moral character'<sup>4</sup>.

Burma seriously breaches its obligations under both international and domestic law. Contrary to the Burmese government's claims that all of its soldiers are volunteers and that all those accepted are 18 or over, it is said that the number of children in the Tatmadaw Kyi is now inestimable<sup>5</sup>. In 2002, it was suggested that there were approximately 70,000 in the government forces alone<sup>6</sup>. Active recruitment is believed to have increased due to a drop in volunteers following the regime's deeply unpopular crackdowns in 1988 and 2007 and concurrent orders for increased security. Children are easy targets for those seeking to satisfy government quotas. Desertion is severely punished, with death or execution a real possibility.

The International Labor Organization has reported that the Burmese authorities have made some response to the ILO's complaints on under age recruitment by the Tatmadaw Kyi. Serious reprimands, the docking of wages or demotion have been imposed on 26 soldiers found guilty of recruiting under age soldiers. A commissioned officer is said to have been dismissed from the military and sentenced to a year's imprisonment, while two privates are believed to have been sentenced to three-month's imprisonment with hard labour.

According to the Secretary-General's 2010 report to the UN General Assembly on children and armed conflict, a tiny number of child soldiers have been released through Burmese Government mechanisms<sup>7</sup>. These commendable, if inadequate, steps demonstrate that objective investigations and recommendations can have some beneficial effect.



The Tatmadaw Kyi is by far the largest recruiter and user of child soldiers in Burma, but it is not alone. It is believed that up to 7,000 children serve within different non-state armed forces. This year, the UN Secretary-General reported that the following non-state opposition forces actively recruited and used children:

- Democratic Karen Buddhist Army
- Kachin Independence Army
- Karen National Union - Karen National Liberation Army Peace Council
- Karen National Liberation Army
- Karenni Army<sup>8</sup>
- Karenni Nationalities People's Liberation Front
- Myanmar National Democratic Alliance Army
- Shan State Army-South
- United Wa State Army
- Human Rights Watch has reported that the following groups may also have a history of conscripting child soldiers<sup>9</sup>:
  - Arakan Rohingya National Organization
  - Chin National Army
  - Kachin Democratic Army
  - Karen National Defense Organization
  - Karen Peace Army
  - Kayan New Land Party
  - Myanmar National Democratic Alliance Army-East
  - Mon National Liberation Army
  - Mongko Region Defense Army
  - National Socialist Council of Nagaland / Isaac-Muivah
  - National Socialist Council of Nagaland / Khaplang
  - New Democratic Army - Kachinland
  - Pa'O National Army
  - Palaung State Liberation Army
  - Shan State Army (North)
  - Shan State National Army
  - Shan State Nationalities People's Liberation Organization



The recruitment and use of under-age soldiers is a violation of international humanitarian and domestic Burmese law. The physical and psychological effects on these young soldiers and their families are profound. The children recruited by the non-state armed groups also deserve recognition as victims. Impunity must not be tolerated for any party. The threat of a Commission of Inquiry may do much to catalyse real change in the attitudes of all armed parties.

### **Use of Antipersonnel Landmines**

There is an emerging international norm prohibiting the use of antipersonnel landmines. Though Burma has still not acceded to the Mine Ban Treaty 1997, the continued use of landmines is strongly condemned by the international community and may be found to constitute a breach of customary international law. An objective investigation is needed to ascertain the scale of, and strategy behind, landmine use in Burma and to consider whether this use contravenes the basic principles of military necessity, humanity and proportionality that underpin humanitarian law.

The Burmese regime was the only government to lay antipersonnel landmines in the past year, according to the International Campaign to Ban Landmines<sup>10</sup>. Non-state armed groups in Burma also continue to cause concern with their use of the indiscriminate weapons. As well as the Tatmadaw Kyi, the Karen National Liberation Army and the Democratic Karen Buddhist Army are believed to have been responsible for laying mines in Karen areas. Villagers and internally displaced persons continue to be subjected to the terrible effects of landmines. Their continued use must be wholeheartedly discouraged. The threat of an investigation may well prompt a much-needed fall in the practice.

### **Violations of international law perpetrated against Tatmadaw soldiers**

It is suspected that treatment of captured Tatmadaw Kyi soldiers is cruel. Allegations of torture and summary execution must be investigated. This need is



only emphasised by the suspected numbers of child soldiers in the Tatmadaw, and the fact that many soldiers may have been forcibly conscripted.

## **Violations of international law perpetrated against civilians**

The abhorrent crimes of the Burmese regime against the civilian population are well-documented. There are, however, worrying allegations that non-state armed groups have also abused the civilian population<sup>11</sup>. Accusations of torture, forced labour and murder must be investigated.

## **Conclusion**

The people of Burma have for too long been victim to the most egregious of human rights abuses. While the vast majority of these abuses have been, and continue to be, perpetrated by the Burmese military regime, many people have been severely abused by non-state armed groups. It is essential that the suffering of these people is given the same recognition as those victims of the Tatmadaw. A Commission of Inquiry is sorely needed to establish the truth about all serious violations of humanitarian law in Burma.

The conflict in Burma is already brutal and savage. The education of the non-state armed groups is essential to ensure that they abide by humanitarian law. The threat of an investigation into the perpetration of war crimes by all parties may significantly encourage real compliance with these crucial rules. A process which prevents children from being forcibly recruited into armed forces, the laying of new anti-personnel landmines or other terrible abuses against civilians can only be positive.

One-sided justice should be avoided in the interests of Burma's future peace and stability. Those who have suffered at the hands of belligerents must be afforded real reconciliation so they can move forward.



Human rights arguments can only be truly credible if they are universally applied. The law is simple and unequivocal. All those who break it should be held accountable.

*(Footnotes)*

- <sup>1</sup> Such observations have been made by, for example, the past three Special Rapporteurs on the situation of human rights in Myanmar.
- <sup>2</sup> The International Human Rights Clinic at Harvard Law School, *Crimes in Burma*, 2009
- <sup>3</sup> Directive 13/73 (1974) of the Myanmar Defence Services and War Office Council
- <sup>4</sup> The Child Law 1993, Section 65
- <sup>5</sup> Human Rights Watch, *Sold to be Soldiers. The Recruitment and Use of Child Soldiers in Burma*, October 2007.
- <sup>6</sup> Human Rights Watch, *My Gun was as Tall as Me*, October 2002.
- <sup>7</sup> United Nations, *Children and Armed Conflict: Report of the Secretary-General*, 13 April 2010. At paragraph 23.
- <sup>8</sup> It is to be noted that the Karen National Liberation Army and the Karenni Army have both sought to conclude action plans with the UN in order to comply with Security Council Resolutions 1539 (2004) and 1612 (2005). The Burmese military regime has prevented both parties from working with the UN, and has refused to allow the UN to establish contact with any of the non-State armed groups listed. *Ibid.* At paragraph 15.
- <sup>9</sup> This information is taken from the Human Rights Watch report, *My Gun was as Tall as Me*, as above. Many of the groups listed are extremely small, and may no longer be operating.
- <sup>10</sup> Agence France-Presse, *Burma world's only landmine user*, *Democratic Voice of Burma*, 25 November 2010
- <sup>11</sup> David Scott Mathieson, Senior Researcher for Human Rights Watch, *Commission of Inquiry for Burma is long overdue*, *Bangkok Post*, 28 March 2010

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