

Mission Creep Untrammelled: The UN Fact-Finding Mission on Myanmar

By Derek Tonkin

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1. The Mandate of the Mission

The mandate of the Independent International Fact-Finding Mission on Myanmar established by the United Nations ('UN') Human Rights Council in March 2017 was explicit:

to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State, including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims.¹

In a series of oral and written reports in 2017, 2018 and 2019, the Fact-Finding Mission presented the results of their investigations and made numerous recommendations for action by the Government of Myanmar and the international community, including the UN Security Council, General Assembly and Human Rights Council, as well as by UN Member States and regional organisations like the European Union and the Association of Southeast Asian Nations (ASEAN). Each report issued included a series of recommendations not only addressed to international organisations but also, as the occasion required, tailored to apply to individuals like investors, businessmen and 'consumers' as well as to social media.²

In principle, it is perfectly in order that UN fact-finding missions should make recommendations to appropriate bodies and organisations. The UN official Guidance issued to Commissions of Inquiry and Fact-Finding Missions states that:

The recommendations contained in a commission/mission report should be carefully worded, taking into consideration the mandate, the human rights situation, the actors to whom they are addressed, their relevance to effect the necessary changes to improve the human rights situation, and other issues, such as available resources and feasibility of implementation.³

Commissions of inquiry are far more likely than fact-finding missions to be tasked in their mandate to make recommendations. It will be noted that in the case of the Fact-Finding Mission on Myanmar, there was no particular request or requirement in the mandate to make recommendations on any aspect. However, the members of any such mission, even if only established to ascertain the facts as far as possible, would have at the forefront of their minds the need for continuity and follow-up action, once their task was completed. The phrase in the Myanmar mandate "with a view to ensuring full accountability for perpetrators and justice for victims" was in my view valid reason for the Mission to recommend the creation of an independent, impartial mechanism to prepare files based on their evidence for eventual criminal proceedings.

However, the language used in making this recommendation has caused surprise, even some political disquiet. The Mission's detailed report of 17 September 2018 recommends that:

1700. The Security Council should ensure accountability for crimes under international law committed in Myanmar, preferably by referring the situation to the International Criminal Court or alternatively by creating an ad hoc international criminal tribunal. Further, the Security Council should adopt targeted individual sanctions, including travel bans and asset freezes, against those who appear most responsible for serious crimes under international law. It should also impose an arms embargo on Myanmar.

1701. Until the Security Council acts, the General Assembly, or alternatively the Human Rights Council, should create an independent, impartial mechanism to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses and to prepare files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts or tribunals.⁴

¹ UN Human Rights Council ('HRC'), resolution 34/22, "Situation of human rights in Myanmar", 24 March 2017, UN Doc. A/HRC/RES/34/22, para. 11 (<https://legal-tools.org/doc/07b6ca>).

² The main reports are available on <https://www.ohchr.org/EN/HRBodies/HRC/MyanmarFFM/Pages/Index.aspx>.

³ UN Office of the High Commissioner for Human Rights ('OHCHR'), *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law: Guidance and Practice*, New

York and Geneva, 2015, UN Doc. HR/PUB/14/7 (<https://legal-tools.org/doc/kj1rsd>).

⁴ Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, UN Doc. A/HRC/39/CRP.2 (<https://legal-tools.org/doc/0c0c69>).

2. No Mandate to Engage the UN Security Council Directly

The Security Council is its own master and is unlikely to be impressed that the Mission should presume to tell the Council, whom they did not consult in advance, what they should be doing, especially as it should have been apparent to the Mission, as it was to everyone else, that there was no unanimity in the Council on the situation in Myanmar and that calls for sanctions, though already in place nationally by three Permanent Members (the United Kingdom, the United States and France), were strongly opposed by the other two Permanent Members (China and Russia). The “feasibility of implementation”⁵ (to quote the words of the Guidance) of this recommendation to the Security Council was as close to zero as it is possible to get. The phrase “Until the Council acts” might almost seem to be in the nature of an ultimatum, equivalent to “Unless the Council acts”.

The Council has unsurprisingly not acted on the Mission’s recommendations, and seems unlikely to do so in the foreseeable future. At the 8333rd Meeting of the Council on 28 August 2018, the UN Secretary-General António Guterres told the Council: “I believe the report’s findings and recommendations deserve serious consideration by all relevant United Nations bodies”.⁶

Against the wishes of China and Russia, whose veto in the Council can block action but not discussion of an agenda item, the Council invited the Chairman of the Mission, Mr. Marzuki Darusman, to address the 8381st Meeting of the Council on 24 October 2018. Ambassador MA Zhaoxu for China observed before Mr. Darusman was invited to speak:

The fact-finding mission on Myanmar is a special mechanism of the Human Rights Council and does not have a mandate to brief the Security Council. Nor is there a precedent for the Security Council to receive a briefing from a country-specific special mechanism of the Human Rights Council. By receiving a briefing from the Fact-Finding Mission, the Security Council will encroach on the mandates of the General Assembly and the Human Rights Council, violate provisions of the Charter and weaken the responsibilities and roles of various United Nations bodies, thereby leading to grave negative consequences.⁷

Ambassador Nebenzia for Russia further noted:

We believe that the delegations that signed the letter [requesting the briefing] are consciously torpedoing the possibility of consensus in the Security Council. The value of the Council’s collective work lies in the unanimity of its decisions. Instead of undertaking a joint quest to find a long-term solution to the problem of the Rohingya refugees, therefore, these members are forcing the Council to engage in loudspeaker diplomacy.⁸

The decision to invite Mr. Darusman to address the Council was however supported by the other Permanent Members and six other Council Members, whose decision carried the day. Time alone will tell whether their action has in fact helped the Arakan Muslim population who wish to be known as ‘Rohingya’. The signs are not promising. Since the Council Meet-

ing on 24 October 2018, there has been only one further meeting, on 28 February 2019, to hear the report of Ms. Christine Schraner Burgener, Special Envoy of the UN Secretary-General on Myanmar.⁹ Attempts during closed-door ‘Consultations’ held outside the Security Council Chamber, most recently on 4 February 2020, to agree a way forward have received support from neither China nor Russia, according to informal accounts of what are supposed to be confidential discussions.¹⁰ The over-enthusiastic, politically motivated approach of the United States, the United Kingdom and France in the late autumn of 2018 may have satisfied some short-term domestic political need that ‘something must be done’, but it has set back the prospect of further formal Council deliberations, as Russia explicitly and China implicitly warned.

Mr. Darusman, a former Attorney-General of Indonesia, has long experience with the UN system. In 2009, he was appointed by UN Secretary-General Ban Ki-moon to a three-member UN Commission of Inquiry to investigate the assassination of former Pakistani Prime Minister Benazir Bhutto. In 2010, he was chair of the UN Secretary-General’s Panel of Experts investigating alleged war crimes in Sri Lanka. He also served as Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea (North Korea) from 2010 to 2016, and was a member of the Commission of Inquiry on Human Rights for that country.

3. The Mission Recognized No Limits to the Targets of its Recommendations

With such experience, Mr. Darusman may well have regarded his mandate on Myanmar as a *carte blanche* to indulge his talents, and would not have felt inhibited by the constraints of UN Guidance and Practice.¹¹ This laid down that: “Recommendations should be action-oriented and contribute to positive changes in the human rights situation including through accountability for crimes that may have been committed, remedies and reparations for victims, changes in law, policies and practice”. Indeed, Mr. Darusman and his two colleagues on the Myanmar Mission – the Sri Lankan lawyer Radhika Coomaraswamy and the Australian human rights consultant Christopher Sidoti – ranged well beyond the defined limits of their mandate and saw it as their right if not responsibility to address recommendations *urbi et orbi*, regardless of their practicality, feasibility or relevance.

UN Guidance and Practice also provides that: “While commissions/missions are not obliged to consult those to whom they address their recommendations, it can sometimes be useful to do so. Consultation on what may be practicable and feasible, while preserving the independence of the commission/mission, can ultimately strengthen the recommendations”. One of the least satisfactory of the Mission’s ventures, and where little consultation took place, was their Report on the Economic Interests of the Military of 5 August 2019.¹² This

⁹ *Idem*, 8477th meeting, 28 February 2019, UN Doc. S/PV.8477 (<https://legal-tools.org/doc/bpagjg>).

¹⁰ What’s in Blue, “Briefing on Myanmar following the ICJ Order Indicating Provisional Measures”, 3 February 2020 (<https://legal-tools.org/doc/514kc5>).

¹¹ OHCHR, 2015, see above note 3.

¹² UNHRC, Independent International Fact-Finding Mission on Myanmar, “The economic interests of the Myanmar military”, 5 August 2019,

⁵ OHCHR, 2015, see above note 3.

⁶ UN Security Council, 8333rd meeting, 28 August 2008, UN Doc. S/PV.8333 (<https://legal-tools.org/doc/yugx2l>).

⁷ *Idem*, 8381st meeting, 24 October 2018, UN Doc. S/PV.8381 (<https://legal-tools.org/doc/zzapdv>).

⁸ *Ibid.*

was largely a rehash of existing open-source materials on two military-owned industrial and commercial conglomerates known as Myanmar Economic Holdings Limited ('MEHL') and Myanmar Economic Cooperation ('MEC'). MEHL and MEC were well known targets for Western sanctions during the regime of direct military rule (1988–2010), but were virtually outside the sphere of influence of sanctions regimes in force at the time, as indeed they are today. MEHL and MEC derive most of their income from licences to exploit natural resources, including metals, precious stones and timber which are generally off-limits to foreign investors. Their industrial enterprises employ civilian labour and include a limited number of joint ventures, with mainly minority equity holdings in partnership with Chinese, Hong Kong, South Korean and Singapore companies, which are generally unmoved by Western pressures. It is difficult to sanction these companies and to attempt to do so means targeting their civilian workforce. A handful of Western companies have acknowledged business links with the conglomerates, and one or two have withdrawn their association, but reaction generally to the Mission's exhortations on sanctions has been muted and they have received remarkably little support even from Western governments.

As an exercise designed to help the Rohingya population, the Report on the Economic Interests of the Military was, to be frank, a complete waste of time, and for that reason contrary to UN Guidance and Practice. But the Mission knew that they could range far and wide outside the confines of their mandate without any fear of criticism or restraint by the majority of governments in the Human Rights Council who had approved their carefully defined mandate in the first place, but who willingly acquiesced in their mission creep even as it was taking place. Indeed, it is to be doubted that the processes of the Mission will ever be judged in the Human Rights Council to be the classic example of the mission creep which it has undoubtedly been. The political will to do so does not exist. The national interest for so many countries favours silence on the matter.

4. A Tale of Two Fact-Finding Missions

The situation today is that we have two detailed accounts of the tragic events in Rakhine State: (a) the reports issued by the UN Fact-Finding Mission, and (b) the report of the Independent Commission of Enquiry ('ICOE') set up by Myanmar.¹³ The Mission enjoyed the full technical support of the UN system, including publicity outlets, translation services and legal advice, while the ICOE was poorly funded, understaffed and had to rely on low-grade IT. The contrast could not have been greater: on the one hand, prima donna, politically savvy operators making full use of UN facilities, and on the other hand, gifted amateurs working on a shoe-string in a critical international environment.

In an article in the *Financial Times* on 23 January 2020, Daw Aung San Suu Kyi observed:

The case against Myanmar before the International Court of Justice, the statements by the prosecutor to the International Criminal Court, and the private lawsuit brought in Argentina all rely extensively on a fact-finding mission by the UN Human

Rights Council. This is precariously dependent on statements by refugees in camps in Bangladesh.

The ICOE reports that some refugees may have provided inaccurate or exaggerated information. While this is understandable, we have to recognise that there is a systemic challenge. The international justice system may not yet be equipped to filter out misleading information before shadows of incrimination are cast over entire nations and governments. Human rights groups have condemned Myanmar based on unproven statements without the due process of criminal investigation.¹⁴

The full ICOE Report has not yet been released, only the Executive Summary and Annexes 16–28 recording interviews in some of the more controversial areas where human rights abuses undoubtedly took place, like Tula Toli and Inn Din. Myanmar has so far declined to release the full Report, not only because they know it would be subject to hostile criticism from human rights activists, but also, I judge, because they are anxious to avoid providing any modicum of support to the work of the Fact-Finding Mission and may well feel reluctant to release their version of events unless and until they feel it is in their interests to do so.

5. Misrepresentation and Historical Bias

Myanmar concerns with the UN Fact-Finding Mission reports would also be enhanced by the historical bias and misinformation apparent in the Mission's detailed report of 17 September 2018. In two recent analyses¹⁵ analysing the extent of their historical bias and detailing examples of factual inaccuracy, I have drawn attention to what seems to be a lack of intellectual rigour and curiosity, an inclination to naivety if not gullibility, and a readiness to put an unduly critical interpretation on events. One episode in particular merits attention, and that is the gratuitous insult to a former Head of State, U Thein Sein, in paragraph 712 of the Mission Report, which reads:

On 11 July 2012, President Thein Sein held a meeting in Naypyidaw with Mr. Antonio Guterres, then United Nations High Commissioner for Refugees. During this meeting, the President referred to 'illegal migrants' who 'sneaked into' Myanmar and 'later took the name Rohingya'. He stated that he could not take responsibility for them and that they should either be sent to IDP camps and be supported by UNHCR, or be sent to a third country.¹⁵³⁰ A depiction of this nature by Myanmar's highest official further stigmatised the Rohingya in an already tense climate.

¹⁵³⁰ V-243

If the former President had indeed stigmatised the Rohingya in this way, then there would have been merit in the Mission's criticism. The President's Office did, however, issue an official record, in the Burmese language only, of U Thein Sein's conversation with Mr. Guterres which contradicts the Mission's account.¹⁶ The writer and historian Dr. Thant My-

¹⁴ Aung San Suu Kyi, "Aung San Suu Kyi: Give Myanmar time to deliver justice on war crimes", *Financial Times*, 23 January 2020.

¹⁵ Derek Tonkin, "Historical Bias in the Report of the UN Fact-Finding Mission on Myanmar", Network Myanmar, 7 December 2019 (<https://legal-tools.org/doc/x8yqs7>), and *idem*, "The UN Fact-Finding Mission's Mischievous Use of Historical Sources", Network Myanmar, 1 March 2020 (<https://legal-tools.org/doc/jt4zpp>).

¹⁶ Myanmar, Office of the President, "ပြည်ထောင်စုသမ္မတမြန်မာနိုင်ငံတော် နိုင်ငံတော်သမ္မတဦးသိန်းစိန် ကုလသမဂ္ဂအထွေထွေအဖွဲ့မှူး Mr. Antonio Guterres ဦးဆောင်သော ကိုယ်စားလှယ်အဖွဲ့အား လက်ခံတွေ့ဆုံ" ("President of the Republic of the Union of Myan-

UN Doc. A/HRC/42/CRP.3 (<https://legal-tools.org/doc/0e8h44>).

¹³ Myanmar, Independent Commission of Enquiry, "Executory Summary", document undated [21 January 2020] (<https://www.legal-tools.org/doc/h3k7jz>).

int-U has provided his own idiomatic translation of what the President is reported to have said:

During the colonial period, many Bengalis came to Arakan to work. A portion chose to stay. Under Burmese laws, anyone who is a third-generation descendant of these immigrants is entitled to Burmese citizenship. But there are also illegal immigrants who have come since colonial times and who are using the name 'Rohingya'. Their presence threatens stability. We cannot take responsibility for them. The UN should place them in refugee camps until they can be taken to a third country.¹⁷

Dr. Thant Myint-U's translation is fully consistent with the original text. Clearly, U Thein Sein was not stigmatising the Rohingya community generally, but was expressing his concern only about the presence of Bengalis who had migrated illegally into Arakan after independence in 1948. There are no contemporary reports quoting him as saying that they had "sneaked into" Myanmar, which would be distinctly unpresidential language.¹⁸

The Mission Report could and should have referred to the official record (a copy of which I had sent to the Mission as a document of interest to their enquiries on 2 January 2018, together with translation)¹⁹ as the most, indeed only, reliable source of reference. Instead, the Report refers to a document identified in a footnote only as "V-243". I do not believe that this document is a reliable record of the conversation on 11 July 2012. I have asked the UN Office of the High Commissioner for Human Rights by e-mail if I might see a copy of this reference, and explained my reasons. It is now three months since I made my request, which has been twice acknowledged by e-mail from the OHCHR, but so far I have had no definitive reply, neither a copy of the document itself, nor a regret that, for whatever reason, they are not able to provide a copy.

I have also drawn attention to a remarkable speech replete with historical errors made in Colombo on 3 May 2018 by the Sri Lankan lawyer Radhika Coomaraswamy, a member of the Mission.²⁰ In this speech made during the conduct of the Mission's enquiries, Ms. Coomaraswamy made the aston-

ishing allegation that in 1947 Aung San had "called the Panglong Conference and negotiated with the ethnic minorities, including the Rohingyas, and created the Union of Burma". Not only were the Rohingyas not represented at Panglong, but Aung San had never heard of them; nor at the time had the Shans, Kachins and Chins either, the main participants at the Conference; nor had anyone else present at the Conference, including the United Kingdom Government representative, Mr. Arthur Bottomley; nor indeed in Burma generally. The Rohingyas were, in 1947, still an unknown community.

6. An Investigative Mechanism Devoid of Purpose Without Myanmar Engagement

We might ask ourselves: which of the two inquiries do we believe provides the truer picture of human rights violations in Rakhine State? The two inquiries are complementary to each other and may need in due course to be considered in tandem, should there ever be a prospect of fair and independent criminal proceedings in order to address the issue of accountability. But this cannot be achieved on the basis solely of allegations made to the Fact-Finding Mission and now under examination by the Independent Investigative Mechanism for Myanmar. It is unlikely that any meaningful result will be attained unless the ICOE's findings and recommendations are fully taken into account.

The organs of the United Nations most closely involved, and especially the Human Rights Council, should be asked to make an honest appraisal of the far-from-reliable process pursued by the Fact-Finding Mission. The historical bias, disregard of mandate, and factual inaccuracies contained in the detailed Mission Report of 17 September 2018 should at least be mentally redacted, as they detract from the credibility of the Report's findings and the dossier of 1,227 interviews and 56,500 files now under examination by the Investigative Mechanism.

In our post Covid-19 world, misplaced reliance on the Mission Report and the Investigative Mission alone will not bring peace and stability to Rakhine State, nor achieve the safe return of Rohingya refugees in Bangladesh back to their homes in Myanmar.

Derek Tonkin was Burma Desk Officer in the United Kingdom Foreign Office 1962–66. He was United Kingdom Ambassador to Vietnam 1980–82 and to Thailand and Laos 1986–89.

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mar U Thein Sein meets a Delegation led by Antonio Guterres" [unofficial translation]), 12 July 2012 (<https://legal-tools.org/doc/2gjnnb>).

¹⁷ Thant Myint-U, *The Hidden History of Modern Burma: Race, Capitalism, and the Crisis of Democracy in the 21st Century*, W. W. Norton, 2019, p. 182.

¹⁸ See Tonkin, 1 March 2020, above note 15, for my in-depth analysis from contemporary sources of this unfortunate misrepresentation.

¹⁹ Derek Tonkin, "The Muslim Presence in Arakan: Four Important Historical Documents: A submission by Mr Derek Tonkin to the HRC Fact-Finding Mission on Myanmar", 2 January 2018 (<https://legal-tools.org/doc/wdeffd>).

²⁰ *Idem*, "Comments on a Speech by Dr Radhika Coomaraswamy at the Lakshman Kadirgamar Institute of International Relations and Strategic Studies in Colombo on 3 May 2018", Network Myanmar, 21 December 2018 (<https://legal-tools.org/doc/74yw5m>).