

Burmese Perspectives

Letter from Guildford, Surrey

18 January 2010

"Homo proponit, sed Deus disponit" ¹

Thomas à Kempis 1380-1471 - *Imitation of Christ: Book 1 Chapter 19*

In the wake of the earthquake which hit Haiti on 12 January 2010, the US political response has been exemplary, the logistic success to date disappointing. President Obama has announced an immediate and massive relief operation, pledging an initial US\$ 100 million to support the people of Haiti and directing the aircraft carrier USS Carl Vinson and the USS Bataan carrying a marine expeditionary force to the island, as well as a significant number of other naval vessels and aircraft, including a hospital ship USS Comfort. "This is one of those moments that calls out for American leadership," Mr. Obama said. "To the people of Haiti, we say clearly and with conviction, you will not be forsaken. You will not be forgotten. In this, your hour of greatest need, America stands with you." Even so, it has been exceptionally difficult to mount the relief operation due to the damage to Haiti's infrastructure, the lack of local resources and the collapse of the civil administration. The anger and frustration of the long-suffering Haitian people is shared by the international aid community. The race is now on to prevent a second wave of fatalities through disease and starvation. The expertise developed by the international community in the 2004 Asian Tsunami and 2008 Cyclone Nargis in establishing "clusters" to coordinate activity has yet to be put effectively into action. The disruption has simply been too monumental.

We might well contrast President Obama's response with President Bush's reactions ² in the wake of Cyclone Nargis which hit Myanmar on the night of 2/3 May 2008. Within 48 hours First Lady Laura Bush had given the military regime a tongue-lashing for their alleged ineptness and failure to issue adequate advance warning to the population. In the same time frame, President Bush announced additional sanctions already in the pipeline against Myanmar and the US Congress went ahead with a ceremony to bestow the Congressional Medal of Honour on Daw Aung San Suu Kyi. The State Department announced an initial token relief grant of only US\$ 250,000. More generous relief aid came only after several months. ³

Later in May 2008, the USS Essex, an amphibious assault vessel engaged in the annual "Cobra Gold" military exercise in Thailand (traditionally seen by the military regime as directed against a supposed threat from Myanmar) capable of carrying several thousand marines, supported by supply and communications vessels, appeared off the coast of Myanmar in the company of the French amphibious assault vessel "Le Mistral" and the UK frigate HMS Westminster. Their governments announced that they had come to provide cyclone relief, while French Foreign Minister Bernard Kouchner sought to persuade the UN Security Council that the "Responsibility to Protect" doctrine required immediate and unilateral intervention. Even the Americans were concerned and hastened to give public reassurance through Defence Secretary Robert Gates then in Singapore that there would be no breach of Burmese sovereignty. The military regime, to the surprise only of the Western powers, declined the offer of "assistance", fearing that it might be an excuse for a provocative incursion, if not an invasion.

Haiti has come up in a Burmese context this century in two campaigning documents masquerading as legal briefs, firstly in the report commissioned by Bishop Desmond Tutu and Václav Havel "Threat to

¹ "Man proposes, but God disposes."

² "Fox News" report 17 January 2010: "People love to point fingers," President Bush told CNN when asked about lessons learned from Katrina. "Now is not the time to focus on politics. There's a great sense of desperation. And so my attention is on trying to help people deal with the desperation."

³ Myanmar though still remains for receipt of aid at the bottom of the OECD list of fragile states.

the Peace: A Call for the UN Security Council to Act in Burma" (September 2005)⁴ and secondly in the report commissioned by five prominent jurists from the International Human Rights Clinic at Harvard Law School (May 2009) "Crimes in Burma"⁵ calling on the UN Security Council to act on human rights abuses in Myanmar. In both cases the reports cited a UN Resolution on Haiti as precedents for action, and not only on Haiti, but Resolutions on other countries as well. The Harvard Law School report, taking its material mainly from the Tutu-Havel Report, notes on page 75 that:

"The Security Council has taken action regarding Sierra Leone, Afghanistan, Haiti, Yemen, Liberia, Cambodia, Yugoslavia, Rwanda, and Sudan, among others. The Security Council acted in each of these situations, relying on Chapter VII [of the UN Charter], once it had determined that the situations in each of these countries constituted a 'threat to the peace' that required intervention to protect and preserve international stability."

The importance of Chapter VII of the UN Charter is highlighted particularly in the 2005 report which demanded that the Security Council should:

"adopt a resolution on the situation in Burma in accordance with its authority under Chapter VII of the UN Charter (Article 41)⁶ and past Security Council precedents."

The 2009 report in its turn demanded *inter alia* that the Security Council should:

"declare that the situation in Burma constitutes a threat to international peace and security and initiate a formal investigation through a Commission of Inquiry to investigate crimes committed in Burma."

It would seem, alas, that the authors of the two reports have pulled the wool over the eyes of both sets of honourable Commissioners⁷, who may not have read the texts of seven of the nine UN Security Council Resolutions adduced in both reports as "precedents", because if they had done so they would have seen at once that they were of little relevance.

Four of the cases mentioned in both reports - Afghanistan (1076/1996), Yemen (924/1994), Rwanda (812/1993) and Cambodia (668/1990) - were not binding "Chapter VII" Resolutions at all. They neither determined a "threat to the peace", nor did they make reference to Chapter VII or any Article in Chapter VII, nor did they use language which could be construed as a Chapter VII binding requirement in any operative paragraph. Accordingly as non-binding "Chapter VI" Resolutions relating to the "peaceful settlement of disputes" - for that is what they were - all four Resolutions use language which "calls on", "requests" and "urges" the States concerned to take immediate remedial action, but eschew language which "requires", "demands" or "decides" that specific action must be taken which is the hallmark of a Chapter VII Resolution.

As for the other three cases mentioned in both reports - Sierra Leone (1132/1997), Liberia (788/1992) and the now disaster-stricken Haiti (841/1993) - while all three contain a preambular formula "determining" that the situation "constitutes a threat to" (Sierra Leone and Liberia) or "threatens" (Haiti) "international peace and security in the region" and also make specific reference to Chapter VII, even

⁴ Text at <http://www.unscburma.org/Docs/Threat%20to%20the%20Peace.pdf> with 711 footnotes

⁵ Text at <http://www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf> with 470 footnotes

⁶ The reference to Article 41 has probably been left in by mistake. This Article only refers to measures to be taken in the event of non-compliance. It seems likely that the authors intended in an earlier draft to make it clear that they were not proposing the use of force in the event of non-compliance, but forgot to remove the reference in the final draft, where it is otiose.

⁷ This would not be the first time that a group of eminent international lawyers has been led up the garden path by campaigners. See <http://networkmyanmar.org/images/bp%2011%20september%202008.pdf> for another occasion relating to a intended challenge to the occupancy of the Myanmar seat in the United Nations in late 2008.

these three Resolutions cannot be adduced as precedents for action in relation to Myanmar because the texts highlight the representations made by regional States and Organizations seeking Security Council action. In the case of Haiti, the Organization of American States is mentioned no fewer than 14 times in the text. The resolution on Haiti furthermore, while determining that the situation at the time threatened international peace and security, also made it clear that the circumstances were "unique and exceptional" which is fair warning that that Resolution is not to be used as a precedent.

In neither report, on the other hand, is there to be found any reference to concerns held, let alone representations made to any UN body about supposed "threats to the peace" by regional neighbours of Myanmar or by regional groupings and organisations of which Myanmar is a member, such as the Association of South East Asian Nations (ASEAN). Nor have such concerns or representations at any time surfaced in the context of discussion on the "Situation in Myanmar" in the Security Council, neither in the draft Resolution which was vetoed by China and Russia in the Security Council on 12 January 2007 nor in the two Presidential Statements and the three Press Statements which have subsequently been agreed.

While I would not expect either Bishop Tutu or Václav Havel to appreciate that Article 41 was not relevant to the Recommendation, we might perhaps have expected that at least one of the five eminent international jurists⁸ would have taken the trouble to take a closer look at the "precedents" offered. In their defence it should be noted that they did not specifically endorse either of the three specific recommendations of the authors of the report, but concluded only that:

"Based on this report's findings and recommendations, we 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."

In that respect a current Early Day Motion in the House of Commons, which has already attracted 149 signatures out of a total of 646 MPs, only

".....calls on the Government to urge the United Nations to establish a Commission of Inquiry into these crimes in addition to supporting the International Labour Organisation's calls to refer the use of forced labour to the International Court of Justice."

Though such Motions are unlikely to be debated, they are a reflection of the feelings of Members of Parliament on particular issues and merit respect and attention.

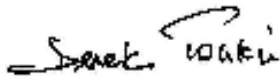
The authors of the 2009 report seem to have shown little political sensitivity or even plain common sense. We might have thought that they could at least have mentioned the fact that not one of the 192 members of the United Nations had prior to the report called for an Inquiry, or even characterised human rights abuses in Myanmar as "crimes against humanity" or "war crimes", and neither had any of the array of UN specialist envoys, advisers and rapporteurs. Only Professor Sérgio Pinheiro, formerly the Rapporteur on Myanmar, has since done so, but that was after his retirement from that position. The current incumbent Tomás Ojea Quintana has declined to offer his support. As regards perceptions by members of the Security Council of what constitutes a threat to the peace, the Report says that: "To date, there is no precise definition of what constitutes a 'threat to the peace' as the Security Council has responded to the totality of the situation that arose in each set of circumstances." While this is true enough, those experienced in UN practices and procedures could have told them that the determination of what constitutes a "threat to the peace" is at root a political perception and hence a political decision. It was the supposed threat from Haiti to the peace and security of the

⁸ Justice Richard J. Goldstone (South Africa), Patricia M. Wald (United States), Sir Geoffrey Nice QC (United Kingdom), Judge Pedro Nikken (Venezuela) and Hon. Ganzorig Gombosuren (Mongolia)

United States which led them to support the 1993 Resolution, even though such "threat" would have been no more than the unwelcome arrival of boat-loads of Haitian refugees escaping the chaos in Haiti - a "threat" no doubt not far from the surface in the present disaster. There is no examination of the position of either China or Russia which are crucial to the establishment of a Committee of Inquiry under Security Council auspices.

None of this should be taken in any way to imply that there is no good reason for the strength of international concern about the serious human rights abuses which have taken place in Myanmar over the years, and which are well documented in both the 2005 and 2009 reports. But the political will to take action at the present time simply does not exist. The United States has embarked on a process of political dialogue which they expect to take considerable time well beyond the elections due later this year. The European Union has said that they wish to explore the same prospects, and a delegation of senior officials may be due in Myanmar soon. Both US and EU negotiators have a difficult furrow to plough, since they are constrained not to offer concessions on sanctions until there is progress on political reform, in a situation where it is now generally agreed that sanctions over the past twenty years have been quite without effect, offering only "modest inconveniences" (US Assistant Secretary Kurt Campbell) or "serving no useful purpose" (French Foreign Minister Bernard Kouchner). In such circumstances they offer no leverage at all.

Finally, the international community is today much more concerned with the credibility of the planned elections, the discussions within the National League for Democracy on whether they should take part in these elections, and the process of the final appeal by Daw Aung San Suu Kyi, which began today and may be decided later this week, against her conviction for the alleged breach of the conditions of her restricted residence. Reconciliation in Myanmar may still be only distant dream, but the pressures are today more in favour of the resolution of Myanmar's problems by the Burmese themselves than through external intervention.



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Burma/Myanmar: What Everyone Needs to Know by David I. Steinberg ⁹

This succinct analysis of a complex country of many contradictions is arranged in 8 Sections (covering crises, pre-colonial residues, legacy of colonial period, independence and civilian government, the military coup and socialist period, the SLORC/SPDC era). Steinberg's guide to the present situation is presented as a response to over sixty question headings, e.g.: How do the Burmese today view the colonial era? How did the Chinese Nationalist incursion affect Burma? What were the effects of the 1947 constitution? What were the May 1990 elections about? What is the role of Buddhism in Burma today and what is its relation to political legitimacy?

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⁹ See biography at <http://explore.georgetown.edu/people/steinbdi/>