

It's Time to Speak Truth to Power: Why Tomas Quintana Should Change His Tune

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Tomas Ojea Quintana has a very difficult job as United Nations (UN) *Special Rapporteur on the Human Rights Situation in Myanmar*. Since 2008, his job has been to monitor events in Burma without directly challenging the



United Nations Special Human Rights Rapporteur Tomas Ojea Quintana talks to reporters during his news conference before his departure at Yangon International Airport on 4 August 2012. (Reuters)

legitimacy of the government and constitution. Politics, not international law is the determining factor shaping his annual recommendations to the UN General Assembly. At the same time, as an independent expert, his credibility depends on making *credible and feasible recommendations*, based on his qualifications as a lawyer with human rights and international humanitarian law expertise.

Mr. Quintana has walked this tightrope between politics and international law with dedication, if not success. He has shown courage- given his UN limitations – in calling for a UN inquiry into the crimes of the military which could possibly lead to the Security Council referring Burma to the International Criminal Court. Quintana has been forthright in questioning the independence of the Burmese judiciary which remains dominated by the same

judges, including the Chief Justice of the Supreme Court Justice U Tun Tun Oo, who collaborated with the military and signed court orders imprisoning Aung San Sui Kyi and other political prisoners. And, Quintana's steadfast demand for the release of all political prisoners has been a much needed global voice pressuring the Burmese government.

However, Mr. Quintana, while acknowledging the problematic constitution which grants the military complete power over its affairs, continues to espouse reforms that cannot be imposed on a military which is outside of civilian control. Quintana has been trying to speak the “soft” truth about the military government, while never directly calling for the UN and all states to comply with their “hard” law obligations to take actions to end what Burma's grave breaches of the law of nations. The constitution itself is the root of these violations as it allows military impunity for war crimes and violates the UN Charter by putting the military outside the reach of the civilian government.

Now is a critical time in Burma, a time in which the fragile advances in openness and reform are soon --if they have not already --to hit the ceiling of military power. Mr. Quintana's politically pragmatic approach is not workable and must change.

The military-drafted constitution, fully implemented on January 31, 2011, establishes a structure of government in Burma that is unlike that of any other country in the world. The military, under the Commander in Chief, is given formal legal status as an autonomous entity outside of the sovereign state of the "Republic of the Union of Myanmar," which the constitution defines as being composed exclusively of the executive, judicial and legislative branches.

Under the constitution, Commander-in-Chief Min Aung Hlaing has sole control over military and police property, income, spending, corporations, courts, weapons and laws. Technically, under the constitution, Commander in Chief Min Aung Hlaing could even refuse to allow President Thein to enter military property without his consent; much less enforce any laws against the military.

None of Mr. Quintana's preliminary recommendations in his August 4, 2012 statement on Burma are credible steps towards real change given the 800 pound gorilla lurking in the background: the constitution. Consider the following:

- Mr. Quintana calls for parliamentary review of legislation and adoption of new laws as "central" to building a society based on the rule of law. But how can there be a rule of law with the military and police outside the reach of laws passed by parliament and the civilian courts? Who will enforce these new laws given Quintana's own admission that there has been no progress in Burma towards an independent judiciary?
- Mr. Quintana calls for an independent investigation into the situation in the Rakine State, including the alleged use of excess force by security and police forces. Yet, no government investigation, even if it were transparent and fair, could result in prosecuting or firing errant security forces unless the Commander-in-Chief consented.
- Mr. Quintana calls for the government and armed groups to "do more" to protect civilians and comply with international human rights and humanitarian law in the Kachin state. This ignores the fact that the constitution, on its face, renders the government legally incapable of enforcing the Geneva and Genocide Conventions ratified by Burma against the military. The armed conflict in the Kachin State is governed by the Geneva Conventions --the laws of war --and when these are breached by any State, all other State parties to the Geneva Conventions have a legal duty to take "all possible measures"---even if they have a low likelihood of success---to seek to end the breaches. By failing to point out the duties of states to ensure accountability for crimes by the military against civilians in the Kachin state, Mr. Quintana undermines the integrity of the laws of war.
- Mr. Quintana's sole call for accountability, after decades of heinous crimes of the military against the people of Burma, is to call for the Parliament to set up a "Truth Commission." Burma is not South Africa, which set up such a Commission as part of a full transition process, one in which the constitution provided for control over the military. In South Africa, the Truth and Reconciliation Commission was designed to be compatible with criminal accountability standards, which Burma has not established. In fact, the constitution establishes a 25% parliamentary quota for the military which ensures that such laws can be vetoed by that voting bloc.

No democracy has ever been built in a country without justice or accountability and with war criminals continuing to occupy top government offices including in the judiciary. No democracy has ever been built based on a constitution written by a criminal military to “legalize” their hold on power by guaranteeing the military both impunity from accountability for crimes and continued control over Burma’s natural resources and weapons development.

Mr. Quintana must make clear in his report to the UN this fall that whatever real reforms exist, Burma is not a “democracy in transition.” Nor can it be, until the constitution is revised by fairly elected representatives of the people of Burma. The constitution must ensure civilian control over the military and restore the legal competence of the civilian government to ensure Burma’s compliance with fundamental international law obligations, including those under the Geneva and Genocide Conventions and UN Charter. Of course herein lies the problem: the military deliberately designed the constitution to make it nearly impossible to amend without military consent. The 25% military quota in the Parliament precludes the 75% vote needed to amend the constitution.

Clearly, the international community needs to do everything possible to help break this impasse.

What can be done? First, Mr. Quintana should make amending the constitution his main priority and focus attention on the constitution’s violations of international law. These violations implicate the integrity of the UN Charter and threaten global peace and security. A Burmese civilian government without power over the military is incapable of enforcing Chapter VII Security Council Resolutions critical to global security, such as those sanctioning trade with North Korea.

Mr. Quintana should recommend that the UN General Assembly refer to the International Court of Justice (“ICJ”) the question of the legality of the Burma constitution under international law. Precedent exists for requesting an ICJ Advisory Opinion; most recently, the UN General Assembly referred the issue of whether the declaration of independence by Kosovo violated international law to the ICJ, which issued a decision within 18 months. The ICJ is the premier world court adjudging the legality of states actions. ICJ judges are universally acknowledged as among the world’s most influential international law jurists. Therefore, although an ICJ opinion itself would not result in any invalidation of the constitution, the normative effect of such a decision could be a game changer.

All states, including Burma, should welcome such a referral as a step towards the rule of law in Burma.

The people of Burma have suffered military abuse and ethnic cleansing for over fifty years. This generation of Burmese citizens are entitled under international law and moral imperatives to be able to enjoy human rights, live in a society governed by the rule of law and are part of a growing democracy. To do so, the embedded, criminal, and corrupt military power structures must be dismantled - starting with the constitution.

It is time for Mr. Quintana to step up to the plate and speak truth to power.

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