

Security Council Vote on Myanmar: Clash of the Titans

Text of an introductory talk by Derek Tonkin at a seminar at
the Institute of South East Asian Studies in Singapore 25 May 2007

“A couple of days ago we clearly told the co-sponsors how the vote is going to go”

Russian Ambassador Vitaly Churkin, UN “Stakeout” - 12 January 2007

Abstract

The vote in the UN Security Council on 12 January 2007 on the agenda item “The Situation in Myanmar” was the culmination of a long fought battle by the United States, supported by the UK, to censure Myanmar in the Council for its lack of progress towards political reform and for serious, continuing human rights abuses. The US Administration had been under strong pressure from Congress to take action over Myanmar, and this suited the US Ambassador at the UN John Bolton who clearly relished a confrontation with China and Russia on a matter which concerned the competence of the Security Council. There was broad agreement in the Council that the situation in Myanmar had serious cross-border implications, notably as a result of the outflow of refugees, the trafficking of narcotics and people, and the spread of infectious diseases. China and Russia however denied that the situation warranted Council involvement and pointed out that not a single immediate neighbour of Burma, nor indeed any country in the region, had made any representations to any UN body about a supposed threat to their peace. The inevitable veto from China and Russia appears to have caused little concern in Washington, but considerable dismay among activist groups who saw that Myanmar had as a result gained a measure of international impunity. The US gained little from its actions in the Council, but the result of the vote may be a blessing in disguise as the focus for action over Myanmar moves away from America and Europe back to ASEAN, China and India where many feel it has always belonged.

Speaking in the United Nations Security Council on 12 January 2007 just prior to the voting on a draft Resolution sponsored by the US and the UK on the agenda item “The Situation in Myanmar”, China’s Ambassador at the UN Wang Guangya made it crystal clear that China had sought very hard through extensive consultations and discussions to prevent a vote and that accordingly the Council Meeting on that day was, as he put it, “the least desirable option”. Indeed, in a wide-ranging interview with *New York Times* correspondent James Traub on 3 September 2006, only 12 days before the Council voted to place “The Situation in Myanmar” on the Council’s agenda, Ambassador Wang had said that that he had “firm instructions” to block an existing US draft Resolution censuring Myanmar which had been circulating for some time.

Chinese and Russian Opposition from the Outset

Chinese opposition to any discussion of Myanmar in the Security Council has been consistent and principled ever since the suggestion was first raised by the United States during a session of “Consultations” in October 2004. These meetings, which are not formal sessions of the Council but essentially working sessions of members of the Council, have no public record. Nonetheless, important “Consultations” are sometimes followed by briefings to the Press. When raised informally in October 2004 by the US during UK chairmanship that month, it was not China, but the Philippines which delivered a *coup de grace* by pointing out that Myanmar was not on their agenda. The issue came up again during “Consultations” in June 2005. *The Irrawaddy* magazine reported ¹ that

“Russia and China objected to discussing Burma at a UN Security Council meeting on June 25 ², although interest in addressing the issue, which was raised by US ambassador to the UN Gerald Scott, was shared by several other members. ‘We don’t see any grounds for including it on the agenda, because the Security Council is seized with matters of international peace and security.’ Russia’s deputy UN Ambassador Konstantin Dolgov told reporters after the meeting. Diplomats at the meeting said that China, which has close relations with the junta, supported Russia’s objection.”

From this point onwards, the Chinese and Russian positions on Council discussion of Myanmar were identical. Reuter reported on 3 December 2005 that China’s Deputy Ambassador Zhang Jishan had said that “all the Asian members [of the Council] believe that Myanmar doesn’t pose a threat to the region or to international security, so it should not be discussed”, while Russia’s UN Ambassador at the time Andrej Denisov said that “while acknowledging all the problems in Myanmar.....there is no immediate threat to both international and regional peace and security - we don’t see it”. Nonetheless, both China and Russia did agree a few days later that UN Under-Secretary General for Political Affairs Ibrahim Gambari should be allowed to brief members of the Council during informal “Consultations” on 16 December 2005. The Chinese position was set out again very clearly

¹ *The Irrawaddy* July 2005 page 2

² There were no “Consultations” or formal Security Council meeting on Saturday 25 June 2005, but there were earlier in the week.

on 15 February 2006 when the Chinese Prime Minister Wen Jia-bao told visiting Prime Minister General Soe Win that:³

“The Chinese Government will never change its policy towards Myanmar. China condemned interference of Myanmar’s affairs and imposition of economic sanctions as well as submission of a report⁴ to UN Security Council to take action against Myanmar”.

The Russian position was further clarified by Ministry of Foreign Affairs spokesman Mikhail Kamynin in March 2006⁵ prior to the visit the following month by the second most senior junta leader Vice-Senior General Maung Aye. Kamynin commented that “Russia and Myanmar support the strengthening of the central role of the UN and its Security Council on issues relating to the maintenance of peace, uniting the efforts of the world community in the fight against international terrorism.” This might not in logic exclude Russian support for, or acquiescence in a Council Resolution on Myanmar, but after the visit of General Maung Aye and in the light of agreements reached on trade, technology and cooperation in several areas, including narcotics control, it was clear that Russian support for a Resolution on Myanmar could be discounted for the foreseeable future.

Under US Pressure, Momentum towards a formal Council Meeting grows

Chinese and Russian acquiescence in a “Consultations” briefing for members of the Council on Myanmar on 16 December 2005 proved to be, as they had perhaps suspected, the thin edge of the wedge. In May 2006 Ibrahim Gambari paid his first visit to Myanmar, and on his return gave a second “Consultations” briefing to members of the Council. During the meeting, on 31 May 2006, the US made it clear that they would be circulating a draft Resolution. But immediately after the meeting, once again China and Russia told the international press that they were opposed to any such action as Myanmar “does not pose a threat to international peace and security”.⁶ This time they were joined by Japan’s UN Ambassador Kenzo Oshima who was reported as saying that “The Security Council is a body that is primarily responsible for threats to international peace and security” and

³ New Light of Myanmar- 20 February 2006 Page 9

⁴ No doubt a reference to “Threat to the Peace: A Call for the UN Security Council to Act in Burma” commissioned by Václav Havel and Bishop Desmond Tutu

⁵ Interview with Novosti Press Agency - 30 March 2006

⁶ Burmanet 1 June 2006

accordingly the issue only merited discussion informally. A few months later, however, no doubt under US pressure, Japan was to vote for the inclusion of Myanmar on the Council's agenda.

The US draft Resolution circulated after the May briefing by Ibrahim Gambari appears to have secured no reaction from either China or Russia. The US had however decided that they would push for Myanmar to be included on the Council agenda, and on 1 September 2006, US Ambassador John Bolton addressed a letter to the Greek President of the Council for the month of September, Adamanitios Vassilakis, expressing his concern, and that of other members of the Council about "the deteriorating situation" in the country, a situation he said "which is likely to endanger the maintenance of international peace and security" and requesting that the situation in Myanmar should be placed on the Council's agenda. The phrase "likely to endanger" was not as stark as John Bolton's previous public pronouncements. At his "stakeout" on 15 December 2005 after informal "Consultations" he had referred in forthright terms to "the threats to international peace and security caused by actions of the Burmese Government". No doubt he was careful that in his letter he did not presume to commit the "other members" to whom he referred to an acceptance of the US position.

"The Situation in Myanmar" adopted on the Council's Agenda

The US were by now assured of sufficient support for their proposal to put Myanmar on the agenda of the Council, which met on 15 September 2006. China, Russia, Congo and Qatar opposed the proposal, while Tanzania abstained. Ten affirmative votes were sufficient to carry the motion. Proposals to put items on the Council agenda are procedural issues, according to the Council's Rules of Procedure, so that the right of veto which China and Russia enjoy as Permanent Members of the Council on substantive issues was not available. The adoption of an agenda item does not however commit any member of the Council to any particular position. An agenda item, once adopted, is even open to challenge as a substantive issue on the grounds that the Council is not competent to address the matter raised. Chinese Ambassador Wang made it clear that he was not amused.

"According to the United Nations Charter it is only those questions that constitute threats to international peace and security that warrant discussion by the Security

Council. If the existence of such issues - including human rights questions, refugees, drugs and HIV/Aids - means that they are likely to endanger international peace and security and thus makes it necessary to make one country the subject of an item in the Council's agenda, then it follows that any country facing similar issues should likewise be inscribed on the Council's agenda. That is preposterous."

A transliteration of the original Chinese of the Ambassador's words for "That is preposterous" would be: "This is obviously contrary to logical thinking"⁷, which I find even more expressive, and reflected more accurately the Ambassador's steely televised calm on the occasion.

More intriguing than the Council meeting on 15 September 2006 was its continuation on 29 September. Though this was a closed meeting, copies of US Ambassador Bolton's comments were released by US/UN Office which made clear that the US saw "threats to international peace and security" in the situation in Myanmar and also stated the US intention "to work for a Security Council Resolution later this year". The UK Ambassador Sir Emyr Jones Parry confirmed that the UK "has supported discussion in the Security Council on Myanmar/Burma from the beginning" but he went on to say that "we don't for a moment think it's just the responsibility of the Security Council. It's something where we want to see the agencies, the family of the United Nations, working in concert, in cooperation with the government of that country, that's the sort of relationship we would like to see"⁸ and he went on to say that Myanmar's UN Ambassador U Kyaw Tint Swe, who had been invited to attend the Council meeting, had "paid tribute to the tonality of some of the interventions, and said in terms of the British intervention he would particularly report the cooperative way in which that was put." Sir Emyr concluded by saying that:

"The British Government cares about Myanmar, we are not looking for something punitive, we are looking at a country which is very blessed in terms of its resources, and above all its people, that for 60 years have had a bum rap, and they deserve better."

⁷ "Zhè xiǎn rán yǒu bèi cháng lǐ"

⁸ UN Webcast 25 September 2006

To show their disapproval of Council discussion of Myanmar, China was represented at the meeting only by a Third Secretary ⁹ who noted that China “has already opposed the act of putting Myanmar on the UNSC agenda during the session.”

In November Ibrahim Gambari paid a second visit to Myanmar where he was photographed with Daw Aung San Suu Kyi, who looked pale and drawn. He subsequently gave another informal briefing to members of the Security Council, following which John Bolton announced on 27 November 2006 his firm intention to present a further draft Resolution to the Council and he hoped to have a text available within a week. It became apparent, though, that no draft could be put to the Council before the Christmas and New Year holidays intervened. It was with some surprise however that Russia, who had the Council Presidency for January 2007, soon found itself called on to preside over a meeting of the Council to vote on a US-UK sponsored draft Resolution. At a press conference on 3 January discussing the Council’s programme for the month, Russia’s UN Ambassador Vitaly Churkin reiterated that Russia remained opposed to Council discussion of Myanmar which did not fall within their mandate. “We do believe the situation in that country does not pose any threat to international peace and security. We are not the only ones to feel that way.” ¹⁰ At that point Ambassador Churkin had not been approached by the US for a session on “The Situation in Myanmar”, which was to take place on 12 January. He did however make another point of interest in relation to Myanmar which was that:

“There are matters, including human rights, which need to be addressed in the proper forum, and of course there is also the issue of a certain justifiable jealousy in the General Assembly and some other institutions of the United Nations, there is a tendency sometimes from the Security Council to take too much on its plate, and we share and understand that concern of UN members.”

Indonesia, which became a member of the Council only on 1 January this year, at once found itself in the hot seat. Almost a year previously, Indonesian Foreign Minister Hassan Wirayuda had described Myanmar in his annual foreign policy statement as being “somewhat disruptive to the balance of ASEAN” ¹¹ which had induced some human rights activists, without good reason, to claim that Indonesia at least had now recognised that

⁹ *New Light of Myanmar* 5 October 2006

¹⁰ UN Webcast 3 January 2007

¹¹ *Jakarta Post* 7 January 2006

Myanmar was a threat to regional peace and stability.¹² Hassan was also reported in September 2006¹³ as saying that the other nine members of the Association of Southeast Asian Nations had told Myanmar that they would no longer defend it if brought before the Security Council. "You must defend yourself," he said. "Even Burma's friends have abandoned it," said Tom Malinowski, Washington advocacy director for Human Rights Watch. But this was largely wishful thinking. Prior to the vote, Hassan had told the *Jakarta Post* that although Myanmar had faced problems relating to ethnic minorities in its own territories which had caused many refugees to flee to neighbouring countries, such as Thailand and Bangladesh, the problems were domestic and not yet a threat to security in the region, let alone in the world. "We should find more effective ways to help overcome problems in Myanmar"¹⁴ "I am not optimistic" declared Indonesian Member of Parliament Djoko Susilo, who is also a member of the ASEAN Inter-Parliamentary Myanmar Caucus. "The maximum, in my observation. They [Indonesia] will abstain."¹⁵

US-UK Draft Resolution defeated by Chinese and Russian Vetoes

It was then against this very unpromising background, with the near-certainty of vetoes from China and Russia, as well as a lack of support from at least four other countries, that the draft Resolution was put to the Council on 12 January 2007. Immediate prior to the vote, China and Russia made it quite clear that they would be voting against the draft, and that it would accordingly fail. South Africa likewise stated that they would vote against, while Indonesia and Qatar said they would be abstaining. Together with Congo (Republic of), that made three votes against (China, Russia, South Africa), three abstentions (Congo, Indonesia, Qatar) and nine votes in favour (Belgium, France, Ghana, Italy, Panama, Peru, Slovakia, UK, US). Congo said that it had intended to vote against, but in a spirit of reconciliation had decided to abstain. Italy voted for the draft, but Ambassador Aldo Mantovani made it clear that "punitive approaches have not yielded satisfactory results and should not be sought by the Council". France gave the US-UK draft impressively robust support. Panamanian Ambassador Ricardo Alberto Arias voted for the draft "on the understanding that the Resolution incorporated the views of the neighbouring countries and

¹² Testimony to the House of Representatives Committee on International Relations 7 February 2006 by Tom Malinowski, Washington Advocacy Director Human Rights Watch: "Most remarkably, in January the Foreign Minister of Indonesia, Hassan Wirayuda, suggested that Burma posed a threat to regional stability."

¹³ *Washington Post* 2 September 2006

¹⁴ *Jakarta Post* 6 January 2007

¹⁵ *The Irrawaddy* 11 January 2007

of the Non-Aligned Movement, namely, that Myanmar currently is not a threat to international peace and security”. Some might say that in logic Panama ¹⁶ should have voted against.

US Acting Representative at the UN Ambassador Alejandro Wolff, who had taken charge following the resignation only a few days previously of John Bolton, declared that the US were “deeply disappointed” by the Council’s failure to adopt the draft. The US and the UK sought to claim a moral victory because nine votes had been cast in favour, and nine votes is sufficient for a Resolution to be adopted, provided none of the five Permanent Members objects. This argument, however, is not one which commands much sympathy. The Council has its own House Rules, enshrined in the Charter, and a motion is either won or lost according to those House Rules. In this case, the US-UK lost. UK Ambassador Sir Emyr Jones Parry expressed regret

“that the draft resolution has been rejected despite what I believed to be an agreement among members of the Council.....Our disagreement is one of competence. Is this a valid issue for decision by the Security Council? The British Government believes that the situation in Burma/Myanmar represents a threat to regional peace and security, and to the security of the Burmese people.”

This was only the second time that the UK had in fact publicly declared that they saw the situation in Myanmar as a threat to international peace and security. The first time had been on 30 November 2006 when Ian McCartney, Minister of State at the Foreign and Commonwealth Office, had stated in a Written Reply to a Question by Shadow Minister of State Geoffrey Clifton-Brown that Myanmar’s failure to undertake a genuine and inclusive process of democratic reform had “exacerbated problems for Burma’s neighbours and across the region, including through the outflow of refugees, the production of narcotics and the spread of infectious diseases. The situation represents a threat to international peace and security.” ¹⁷ It would have been difficult for the UK to have co-sponsored the draft Resolution with the US unless they accepted the “threat to the peace argument.” However, the lack of credibility of both the US and UK assertions that Myanmar was a threat to international peace and security is only highlighted by the conviction expressed by most countries in the region and held by all that Myanmar did not represent such a threat.

¹⁶ I recall that a US-led invasion of Panama in 1989 deposed General Noriega.

¹⁷ Hansard House of Commons 30 October 2006

Claims by the US and UK of a Moral Victory difficult to sustain

The notion that the vote was a moral victory for the sponsors finds little support among experts in the fields of UN practice. Stephen Zunes, Professor of Politics at the University of San Francisco, who has done exhaustive studies on the voting patterns in the Security Council, has pointed out ¹⁸ that since 1970 the US had vetoed no fewer than 86 draft Resolutions in the Security Council, more than all the vetoes by all the other members of the Security Council combined. “Therefore, to claim a moral victory by gaining a majority of Security Council votes on the Burma Resolution, despite the Russian and Chinese vetoes, essentially acknowledges that these 86 Resolutions vetoed by the United States, all of which received at least nine affirmative votes, were also moral victories by the resolutions’ supporters. In 63 of the 86 Resolutions, the United States was the only negative vote. More than 40 of these have been in regard to Israeli violations of international law.”

The South African decision to join China and Russia in voting against the draft Resolution brought forth a storm of protest, not least in South Africa itself. In an address to the South African Institute of International Affairs on 13 February, Sir Emyr Jones Parry said that: “The UK did not walk on the other side when it passed sanctions against the internal apartheid policies of the then South African Government. We are not prepared to walk on the other side of an appalling situation in Myanmar.” In point of fact ¹⁹, with trade turnover, in good and services, with South Africa running at some £4 billion annually in the 1980s, for much of the time Britain did walk on the other side of trade and investment sanctions, though the UN arms and the Commonwealth sporting embargoes were strictly followed. In contrast to Myanmar, the apartheid regime had unquestionably waged war against its neighbours, Angola, Mozambique and Zambia, attacking ANC guerrilla targets in both air and land operations. The “threat” to the peace from South Africa was very real and was universally condemned. It was a matter of constant and vigorous complaint by all of South Africa’s neighbours who suffered under the assaults of the apartheid regime. The view among politicians in the UK was that South Africa had voted primarily to protect its accommodating policy towards Zimbabwe. South African UN Ambassador Dumisani

¹⁸ *Asian Tribune* 16 January 2007

¹⁹ I was Minister at the British Embassy in South Africa 1983-86

Kumalo, a former ANC activist, was quoted²⁰ as saying that his government was seeking to counter

“an imbalance of global power in the UN Security Council where he said the US, UK, France, Russia and China use their authority to attack enemies and shield friends. The Council should stick to resolving international conflicts and not abuse its role by bullying small countries or expanding its authority into areas beyond its jurisdiction, including human rights.”

The South-East Asian Dimension

The Indonesian presentation in the Council on 12 January 2007 by Ambassador Razlan Ishar Jenie was masterly. It also reflected what most other countries in the region feel about Myanmar, indeed, what I suspect most people of common sense and objectivity feel. Referring to problems like democratic transition, the promotion and protection of human rights, social issues such as HIV/Aids and trafficking in narcotics and people, Ambassador Jenie said that “these issues do not make Myanmar a threat to international peace and security. They inflict suffering on the people of Myanmar and create problems for its immediate neighbours, but they do not make the situation in Myanmar a clear and present danger to the rest of the world.”

The other eight countries of ASEAN agreed wholeheartedly. The Council debate on 12 January 2007 happened to coincide with the annual ASEAN Summit in Cebu in the Philippines. In her Chairperson’s Statement on 13 January, Philippine President Gloria Macapagal said that ASEAN had “agreed on the need to preserve ASEAN’s credibility as an effective regional organisation by demonstrating a capacity to manage important issues within the region.” Only a few months previously, as I have noted above, Myanmar had been told by ASEAN countries that they were on their own and would have to face the music at the Security Council. This momentary retreat into their shells by ASEAN has been rapidly reversed as the responsibilities which ASEAN has for the welfare and progress of their recalcitrant member have been acknowledged. “We think the Resolution should not be proposed in New York, in the United Nations Security Council. We are hoping that this issue will be discussed and contemplated upon by the members of the region. I think we

²⁰ *Washington Post* 16 April 2007

should have a big say on the issue” said Thai Foreign Minister Nitya Pibulsongram on the day of the vote.²¹ Declared Malaysian Prime Minister Datuk Seri Abdullah Badawi at a press conference in Cebu on 13 January 2007: “The situation in Myanmar is not a security issue that will have an impact on the region. It is not a matter for the United Nations Security Council but other forums.” His Foreign Minister Syed Hamid Albar agreed. Echoing the South African position in the Security Council, he declared that

“China and Russia have done the right thing on the question of principle. There have been too many abuses of the Security Council’s role by bringing matters and issues that are not security issues to the Security Council.”²²

There are other voices in South East Asia which would disagree, however, notably the ASEAN Inter-Parliamentary Myanmar Caucus (AIPMC). The AIPMC does not however yet include members of parliament from Laos and Vietnam, while Brunei has had no parliament since 1962, nor Thailand since the military coup last September. The ASEAN representatives are mostly what we in the UK would call back-benchers, and some are not from ruling political parties, or tend to have radical tendencies commendably supportive of civil rights and political liberties. In June 2006 AIPMC produced a collection of essays “Asian Voices: Myanmar’s Threat to Regional Security” which endorsed the recommendations of the Report commissioned by Václav Havel and Desmond Tutu calling for a binding Resolution on Myanmar by the UN Security Council. The Malaysian Foreign Minister Albar has assured AIPMC members that their views “have significant bearing in the decision-making process of ASEAN with regard to the issue of Myanmar”.²³

More recently, AIPMC members meeting just prior to the Inter-Parliamentary Union’s Annual Meeting in Bali called on Indonesia as a member of the Security Council, when it assumes the Council presidency in the month of November 2007, to secure the passage of a binding Resolution which could include an asset freeze. After the double veto in January, this would be a heavy, indeed almost unrealistic burden to place on the Indonesian Representative in the UN, and the chances of success must be close to zero. It is not though in the nature of politicians to feel inhibitions about expressing their feelings, however

²¹ *Reuters* 12 January 2007

²² *Boomberg.com* 14 January 2007. “ASEAN says it needs to push Myanmar toward Democracy” - Arijit Ghosh.

²³ AIPMC website Report on Syed Hamid Albar’s speech on 21 July 2006 to AIPMC

unlikely the prospects for effective action may be. This is also true of some human rights groups which since the vote continue to call for a binding Council Resolution, as if simply repeating this mantra is all that is needed to secure its realisation.

Realising as well that the Chinese and Russian vetoes were founded on their refusal to recognise that the situation in Myanmar is a threat to international peace and security, the AIPMC and opposition groups overseas have renewed their insistence in articles and reports that the situation in Myanmar really is a threat to regional peace and have called on China and Russia to review their assessment. Beijing and Moscow, though, are not about to change their minds. AIPMC insistence on a perceived threat is in defiance of the generally normalised relations between Myanmar and her five immediate neighbours evidenced by high-level visits by Ministers and other senior personalities, defence cooperation including naval visits and border security exchanges, and the usual gamut of cultural, sporting, commercial and diplomatic exchanges. I sense a level of intellectual desperation in the insistence by AIPMC that, despite the various bilateral and multilateral committees working on cross-border issues like narcotics, refugees and infectious diseases, the State authorities of the five neighbouring countries are inexplicably blind to the dangers from Myanmar, which they stubbornly refuse to recognise and which only the AIPMC in their wisdom can perceive.

Binding and Non-binding Resolutions of the Council

It is worth reminding ourselves that in order to secure a “binding” UN Security Council Resolution, it is necessary for the Council to pre-determine under Chapter VII, Article 39 of the UN Charter that a situation is a “threat to the peace”. Most Resolutions adopted at the Council are not in fact “Chapter VII” Resolutions, but are often, and sometimes mistakenly referred to as “Chapter VI” Resolutions relating to the pacific settlement of disputes; these are non-binding. Such non-binding Resolutions however need to be passed unanimously for them to have any real impact. The draft Resolution put to the Council on 12 January 2007 was such a non-binding Resolution, which the US-UK agreed to co-sponsor in the ill-founded hope that its supposedly moderate wording might persuade China and Russia at the end of the day not to cast their promised veto. The suggestion then that in November this year Indonesia might put forward a Chapter VII Resolution is difficult to be take seriously.

When drafting Chapter VII resolutions, the Security Council is not always consistent. Normally there is a determination of a threat to international peace and security and a specific reference to Chapter VII or Article 39, but if such a specific reference is missing, it may be inferred from the wording of the rest of the Resolution, or from a previous determination. A Chapter VII determination is however a political act. As Professor Anthony Aust, former Deputy Legal Adviser at the Foreign and Commonwealth Office has put it in his “Handbook of International Law”²⁴ :

“An article 39 determination is a political act. In considering whether to make the determination, the governments of the members of the Council in practice ask themselves essentially political questions: Does something really have to be done? If so, what? Could it really be effective? Even if it would not be effective, do we still have to be seen to be doing something?”

It follows from this that members of the Security Council have complete discretion in making their assessment of the existence or otherwise of an alleged threat to international peace and security. In the event that only a potential threat is perceived, members still have good reason to bring the situation to the attention of the Council. The Council exists, after all, to preserve the peace, and it would be a dereliction of its duties and responsibilities to allow a situation to deteriorate to the point where a potential threat becomes an actual threat.

We might pause to ponder on whether the non-binding draft Resolution was so “moderate” that China and Russia behaved unreasonably in vetoing the Resolution. I would suggest they did so for three reasons. First, they would have seen the adoption of such a Resolution as the thin edge of the wedge. They had already been caught out in December 2005 by agreeing to a briefing by Ibrahim Gambari under informal “Consultations”. Second, the reference to the international situation in the preamble stated only that the Council were “underlining the need for tangible progress in the overall situation in Myanmar in order to minimize the risks to security and peace in the region”. This was so mild and innocuous as to invite the reaction that there was surely no reason at all for the Council to be seized of the problem. Third, some of the wording of the draft was close to formulations contained in the UN General Assembly Resolution of 22 December 2006 which both China and Russia has rejected, so that to include them in the draft Resolution was bound to invite a rebuff.

²⁴ “Handbook of International Law” Cambridge University Press 2005 ISBN -521-53034-2

It should by now be apparent that the decision by the US, supported by the UK, to force a vote on the draft Resolution may well have been part of a grander scheme to challenge what I might call the “classical” position of China and Russia on the competence of the Security Council whose reform, as we know, is a matter of considerable controversy. Ambassador John Bolton was unquestionably the driving force behind the US initiative and he seemed determined to push the Council well beyond its traditional practices. The US Administration had also been under constant pressure from Congress for some time to take action over Myanmar. The virtual certainty of a defeat in the Council seems not to have been judged by the White House to be a reason for not pressing ahead regardless. The *Washington Post* reported that

“the vote initially faced some resistance from some officials in the State Department and from European envoys, who feared it would damage US and European relations with China while exposing the depth of Third World opposition to Security Council interference in Burma’s affairs. But President Bush and Secretary of State Condoleezza Rice decided it was worth making the point on a matter of principle.”²⁵

Deputy Undersecretary for Political Affairs R Nicholas Burns told the *New York Times*: “We forced this issue on to the agenda for one reason. The Security Council is the only place that can deal with human rights.”²⁶ China and Russia strongly disagreed.

Myanmar let off the Hook

I am myself doubtful that it was a wise decision to push the issue to a vote. The general reaction is that Myanmar has been let off the hook and has been emboldened to pursue even tougher internal policies. Min Ko Naing, the high profile “88” student leader, told Mizzima News recently²⁷: “It is like China and Russia have encouraged the military junta to rampantly suppress democracy activists. So it is high time that the international community raises the question to the two veto wielding countries, and how they intend to solve the problems in Myanmar.” National League for Democracy (NLD) Spokesman U Myint Thein is likewise reported in the same article as saying the junta, following the double veto by

²⁵ *Washington Post* 13 January 2007

²⁶ *New York Times* 13 January 2007

²⁷ *Mizzima News* 3 May 2007

China and Russia at the Security Council, has enforced a violent crackdown on activists. More likely, though, the spiralling cost of living is causing resentment among urban dwellers, and their readiness to demonstrate publicly seems to have increased as police surveillance has declined in the wake of the collapse of the ubiquitous Military Intelligence following General Khin Nyunt's fall from grace. It is against such unexpected shows of public unrest that the recent crackdowns seem to have been targeted.

More generally, the NLD may have been unwise to have given its uncritical support to the Havel-Tutu report in a Special Message to the Security Council in October 2005²⁸ in which the report was described as "fair and upright" and supposedly made "no mention of the use of force or sanctions", though Article 41 of the UN Charter on enforcement measures is included in the report's Recommendations. Following the briefing of members of the Security Council on 31 May 2006, NLD Spokesman Nyan Win is reported to have said that: "We want the UN Security Council to discuss [Burma] on the formal agenda and adopt a binding Resolution."²⁹ It seems doubtful that the NLD understood the implications of what they were seeking, in a situation where even the US had acknowledged that a binding Resolution stood no chance of success. The subsequent relaying of amendments to the draft Resolution from the US and UK Embassies to NLD headquarters as the time for the vote on 12 January 2007 approached did not go unnoticed by the authorities in Rangoon. On 11 January 2007, the NLD called on all members of the Security Council to support the draft Resolution, and after the vote called on China and Russia to reconsider their opposition to Council action.

The *Financial Times* has reported³⁰ that "Washington expects China to take a leading role in pushing Burma's military junta to embrace reforms" and that comments by Eric John, Deputy Assistant Secretary for Asian Affairs "suggest the Bush administration might now take a back seat in the global response to the crisis in Burma....". It is hard to believe that the US has simply cut and run. It is unlikely that the US was simply keen to score a few brownie points on human rights. It is more likely to have been a combination of reasons, including the greater importance of policies in the Middle East, notably the decision to stage a "surge" of US troops into Iraq, the continuing crisis over Iran's nuclear ambitions (and

²⁸ "A Special Message to the United Nations Security Council on Burma's predicament" Central Executive Committee, National League for Democracy 28 October 2005

²⁹ *The Irrawaddy* 1 June 2007

³⁰ *Financial Times* 12 February 2007

those of North Korea as well) and the unrelenting tensions involving Israel and her neighbours. Myanmar has not seemingly been upgraded in the list of US priorities. This suits the military regime in Myanmar well. To a degree, furthermore, in both London and Washington administrations have been reacting to congressional and parliamentary pressures for something to be done, to the extent that further drift over Myanmar could have led to increased domestic criticisms. So the two administrations acted, with predictable results. But, like Myanmar, London and Washington are now in a sense off the hook as well. They have done what human rights campaigners have wanted. It has failed, but not through want of trying by Ambassador John Bolton.

Activist Pressures over the Years for Council Action in the end counterproductive

Over the years there has been a flurry of studies by activist organisations pressing for Security Council action. In October 2003 the National Coalition Government of the Union of Burma Office and George Soros's Burma Fund jointly published "The Crisis in Burma: An Agenda for the UN Security Council" and in the same month the National Council of the Union of Burma produced "Time for UN Intervention in Burma". On 20 September 2005 appeared the report commissioned by Václav Havel and Bishop Desmond Tutu to which I have previously referred. This was greeted in certain quarters almost rapturously, but it had numerous deficiencies. It was a campaigning document masquerading as a legal brief, with no fewer than 711 footnotes. Its principal fault was to call mistakenly in its Recommendations for a binding Resolution under Article 41 of the UN Charter, which empowers the Council to apply "enforcement measures" (or sanctions in popular terminology) in the event of non-compliance with a Chapter VII Resolution. The report made it clear, to our general relief, that it was not suggested that action such as armed intervention and blockades "are sought or required in Burma. Rather, this report encourages the Security Council to adopt a resolution consistent with its powers under Article 41 of the Charter."³¹ It is possible that the opening sentence of the Recommendations, which reads:

"The UN 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) and past Security Council precedents."

³¹ Havel-Tutu Report Page 65

was a simple error by the group of human rights lawyers who drafted the report, since they must have known that Article 39, not Article 41 is the operative Article. Their eyes may have been too firmly fixed on their advocacy of enforcement measures through the provisions of Article 41.

The methodology of the report sought to assess determining factors resulting in Council intervention through a matrix in which all six “criteria” boxes were ticked, at least two more than in the seven other cases examined.³² The Report highlighted how in the case of Myanmar: “Relying on Chapter VII, the Security Council has intervened in such countries as Sierra Leone, Afghanistan, Haiti, Yemen, Rwanda, Liberia and Cambodia when it determined the situations in those countries to constitute a ‘threat to the peace’ that required intervention to protect and preserve international stability.” An analysis of the seven Security Council Resolutions designated in the Report strongly suggests however that they do not provide tangible or relevant precedents:

- Four of the Resolutions quoted - Afghanistan (1076/1996), Yemen (924/1994), Rwanda (812/1993) and Cambodia (668/1990) - neither determine a “threat to the peace”, nor make reference to Chapter VII or any Article in Chapter VII (such as operative paragraph 39), nor use language which could be construed as a Chapter VII binding requirement in any operative paragraph.
- As regards the other three Resolutions - Haiti (841/1993), Sierra Leone (1132/1997) and Liberia (788/1992) - contain both 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” as well as specific reference to Chapter VII. However, even these three Resolutions cannot be adduced as precedents in the case of Myanmar because action was taken by the Council on the basis of representations made by regional organisations and States, notably by the Organisation of American States (Haiti) and by the Organisation of African Unity (Sierra Leone and Liberia). No such representations by the Association of South Asian Nations (ASEAN) or any other regional organisation or States have been made to the Security Council in this case, or are thought likely.

³² The criteria were Overthrow of Democratic Government, Conflict among Factions, Human Rights Violations, Refugee Outflows, Drug Trafficking (Other) and HIV/Aids (Other)

- The Resolution on Haiti also underlines the “unique and exceptional circumstances” of the determination of the threat to the peace, which makes it very difficult to adduce this particular Resolution as a precedent unless the circumstances were to be virtually identical.

It was no doubt for these reasons that, when speaking at his “stakeout” on 16 December 2005, Ambassador Bolton made reference, not to any of the doubtful precedents in the Havel-Tutu report, but to Security Council Resolution 688/1991 on Iraq, a binding Chapter VII Resolution, which was primarily concerned with “a massive flow of [Kurdish] refugees towards and across international frontiers”. Ambassador Bolton may have quoted this Resolution not so much because it was a response to representations from two countries in the region, Iran and Turkey, but because France, a country outside the region, also made representations. However, without the support of Iran and Turkey, it is most unlikely that representations from France alone would have been sufficient.

The Havel-Tutu report also failed to mention that no country in the region had expressed its concerns about a possible threat to its security and stability, contained no analysis of the Russian position, devoted but one paragraph of eight lines to the Chinese position, quoting only an anonymous Chinese diplomat as telling BBC Correspondent Larry Jagan that “lack of legitimacy will lead to political instability and could pose a major threat to regional stability on the future.”³³

It seems likely as well that China suspected a measure of collusion between the authors of the Havel-Tutu report and the US Administration. The timing of its appearance on 20 September 2005 seemed too fortuitous to be coincidental. The evidence however is that the Administration found that the report had complicated its efforts to secure an agenda item in the Security Council. In testimony to the House of Representatives Sub-Committee on Asia and the Pacific only a day after the appearance of the report, Deputy Assistant Secretary Eric G John hastily rephrased his written testimony that “we are also working with our partners to support efforts to place Burma on next month’s Security Council agenda” with oral testimony that the US would be discussing the issue during the current General Assembly session. It took another three months of persuasion before China was willing to agree to a

³³ *Inter-Press Service* 27 August 2003 “China supports Burma, but urges change” [not “27 August 2004” as given in the Havel-Tutu report]

“Consultations” briefing and another 12 months before “The Situation in Myanmar” could be put on the agenda.

Chinese and Russian Reactions to the Vote

Ambassador Churkin characterised the Russian position succinctly in his “Stakeout” on 12 January 2007 immediately after the vote: “If this issue is to be posited as a human rights issue, it doesn’t belong in the Security Council, if this issue is to be posited as a threat to international and regional peace and security, we should listen to the opinion of the neighbouring countries, and not a single of the five neighbouring countries regards the situation in Myanmar as a threat to them, so on the basis of that there is no ground for the Security Council to consider this matter, there are so many other things to do.”

China can be well satisfied with the results of this debacle. They successfully resisted what they saw as an endeavour by the US, in the absence of tangible progress on Security Council reform, to extend *ad hoc* the competence of the Security Council to include human rights issues. China at the same time appeared as champion of the cause of the “Group of 77” which now comprises 131 countries in the UN and of the 118 members of the Non-Aligned Movement. China was given an excellent opportunity to express its concerns about the situation in Myanmar, occasionally in terms which could almost have been drafted in Washington or London. “China sincerely hopes that the Myanmar Government will.....listen to the call of its own people, learn from the good practices of others, and speed up the process of dialogue and reform, so as to achieve prosperity for its nation, bring benefits to its people and contribute to peace, stability and development in South-East Asia.”³⁴

Indeed, the two presentations by Ambassador Wang to the Council on 15 September 2006 and 12 January 2007 contain by far the most explicit statement of Chinese policy towards Myanmar to date, in terms which should have to some extent reassured the US and countries in the EU. All in all, it was a dazzling display of China’s growing sophistication in international diplomacy. This was also only China’s fifth veto in the Council since 1972, previously applied twice on issues of principle relating to recognition involving Taiwan (Guatemala 1997 and Macedonia 1999), once relating to the admission of Bangladesh (1972)

³⁴ 5619th Meeting of the UN Security Council 12 January 2007

after its split from Pakistan, and once in a double veto with the USSR over the Middle East (on 10 September 1972) on an Amendment to a Resolution which may not count as an historical Chinese veto as the US vetoed the Resolution itself later the same day.

Costs of the failed Resolution greater than any Benefits

I see little benefit to the Western position from what was a precipitate vote in the Security Council. Panamanian Ambassador Arias, like Indonesia a new boy at the Council table, reflected the views of most members when he said in the Council on 12 January 2007 that: “Panama expresses its concern today about the pressure that has been exerted in the Council’s decision-making on the matter at hand.” The best that can be said is that China and Russia have spoken out about human rights in Myanmar, that all 15 Council members support the UN Secretary General’s good offices which resulted in visits by Ibrahim Gambari to Myanmar and that all are agreed that a successor to Razali Ismail could usefully be appointed as the UN Secretary General’s Special Representative on Myanmar.

From Nay Pyi Taw’s point of view, the timing could not have been better. They have now been given virtual immunity from censure by the Council. Though “The Situation in Myanmar” is still technically on the agenda³⁵, there is unlikely to be any further discussion in the Council unless the situation were to deteriorate sharply, or unless the Council were to request a “Consultations” briefing following a visit sponsored through the UN Secretary General’s good offices mandate. For the SPDC, the decks are now cleared for the National Convention to be completed, the draft Constitution to be submitted for a national referendum and eventually elections to be held.

The driving factor behind the Security Council initiative lay with Ambassador John Bolton, whose determination to press the issue was as commendable as its results were predictable. There is a certain irony in the fact that he left office only a few days before the vote was taken. John Bolton belongs to those who feel that the UN and its agencies merit substantial reform. He once famously said that it would make no difference if the UN were to lose ten of its upper floors. While we can admire his tenacity, his judgement seems to have been questionable. Ideology took the upper hand over commonsense. In retrospect, the initiative on Myanmar was doomed from the start, though at least the Five Permanent Members of

³⁵ S/2007/10 of 9 February 2007 and S/2007/10/Add.1 of 12 February 2007. “The Situation in Myanmar” was listed as item 142 of 144 matters with which the Security Council is seized.

the Council were able to confront each other like Titans and even establish a measure of understanding on the nature of the problem, despite their substantive disagreement on the competence of the Council to handle the issue.

Yet perhaps a Blessing in Disguise?

In retrospect, the Council's decision could be a blessing in disguise. The ball is now firmly back where it belongs - with the countries of the region, notably with China, India and Thailand as immediate neighbours, with ASEAN and its associated organisations regionally, and with Russia and Japan, Pakistan and the two Koreas. The first major statement from the European Union, the European Council's "Conclusions" after their annual review last month³⁶, while expressing deep concern at the lack of progress on political reform and at continuing human rights abuses, was more balanced and less strident than in previous years, and supported the UN Secretary General's good offices, ASEAN's continued efforts, the Three Diseases Fund and the recent Understanding between the ILO and Myanmar enabling the victims of forced labour to seek redress. More recently³⁷ the EU has accepted that Burma may sit in on negotiations for a new trade pact between the ASEAN and the EU

The final judgement on this intriguing clash between Titans at the Security Council was poignantly expressed by Panamanian Ambassador Arias, who concluded his remarks to the Council on 12 January 2007 by saying that:

"Panama regrets that we have not been able to reach consensus on this item, and we feel that in this we have all failed."

If realism can replace ideology in supporting Myanmar's progress to political and economic reform, progress may yet be made.

Derek Tonkin

25 May 2007

³⁶ General Affairs Council Conclusions on Burma/Myanmar Luxembourg 23 April 2007

³⁷ *Financial Times* 10 May 2007 "Burma to take part in ASEAN talks"