ACTION IN BURMA: THE INTERNATIONAL RULE OF POLITICS

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INTRODUCTION

This article considers whether international intervention by the United Nations in Burma can be justified according to principles of current international law (*jus ad bellum* as distinguished from the *jus in bello*). Those propositions which are put forward as principle but do not as yet form part of positive law are assessed and distinguished from current international norms. It is argued that in reaching impasse and political stagnation, the Security Council has undermined principles of legal certainty and consistency extant, and held sacrosanct, by the international community as well as within many domestic jurisdictions including Burma itself[1]. The article considers that while Security Council Resolution 1973 (2011) may have shifted the language of intervention to "responsibility" nevertheless this remains a matter of semantics. Indeed, the international community only exercises *powers*, as opposed to *duties*, in respect of other individual states. However, certain reforms of the relationship between the organs of the United Nations are put forward which would help to better enforce the international rule of law, rather than perpetuating the international rule of politics and bowing to the political will of the Permanent Members. Moreover, whilst action with regards to Burma is crucial not only as a moral necessity, should such a reform be recognised, it would become a matter of legal necessity.

I. THREAT TO PEACE AND ITS EVOLUTION

The central justification for action in Burma would be the evolved 'Threat to Peace' doctrine. With the revolution of the concept of 'sovereignty'[2] has come the evolution of the doctrine of 'threat to international peace and security' under Chapter VII of the UN Charter. This section discusses the evolution of Article 39 determinations and Section III will illuminate the similarities between these cases and the situation in Burma.

Traditional Conceptions
Article 39 under Chapter VII of the UN Charter provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42 to maintain or restore international peace and security.

Article 39 gives the Security Council the power to determine whether particular circumstances amount to 'threats to peace' and what action should be taken to combat those threats. Under Article 42 the Security Council is empowered to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security' having determined that peaceful measures, under Article 41, would be inadequate. It is not clear that all peaceful measures as might be used under Article 41 are inadequate and that use of force of force would be necessary in Burma. However, whether any form of intervention at all, including an extreme case of the use of force, can be justified here will be considered here for the sake of completeness.

Prior to the 1990s the prohibition of the use of force, enshrined in Article 2(4) of the UN Charter[3], remained sacrosanct[4]. State Sovereignty was perceived as absolute, breach of which permitted only *in extremis*. The concern for Lauterpachtian notions of 'no violence'[5] manifested in two ways. Firstly, the international community were reluctant to determine the legal basis of intervention, post an Article 39 determination, as 'enforcement action' under Article 42. Between 1961 and 1964 the UN peacekeeping force in the Congo was authorized to use force to end the civil war.[6] Despite providing for 'the use, of force, if necessary, in the last resort'[7] the International Court of Justice, in the *Certain Expenses* case[8], determined the intervention not to be 'enforcement action.'[9] Such commitment to the principle of 'no violence' made identifying interventions under Article 42 difficult. Article 39 actions were instead labelled 'peace-

keeping' or 'self-defence', obfuscating the legal basis for the action. Secondly, there was an overemphasis of the 'international' element enshrined in Article 42 and in the 1948 debates on Palestine, the United Kingdom stated that any threat to peace must be a threat to 'international'[10] peace. Similarly, Resolutions relating to the Congolese situation referred to the presence of Belgium troops as contributing factors to the 'threat to peace'.

The Evolving Concept of 'Threat to Peace'

Later practice of the Security Council expanded the use of enforcement action to meet threats to peace and eroded the 'international' element of those threats[11]. Franck states:

The literal Charter text would appear to preclude any international action unless such "domestic" crises begin to threaten international peace. That threshold, however, has been *gradually lowered* in the practice of the United Nations' principal organs.[12]

Increased use of enforcement action may partly be due to the logical conundrum of an intervention for the 'massive flows of refugees'[13] yet not for prevention of 'a governments' slaughter of its own ethnic or political minorities.'[14] Further, the concept of 'sovereignty' was revolutionised and semi-humanised.[15] Though the principle of humanity does not pre-empt the vital element of 'collectivity' there has, nevertheless, been a shift away from the notion of *absolute* sovereignty. Whilst Article 2(4) still has resonance, neither 'political independence' nor 'territorial integrity' shield states committing serious human rights violations against its citizens any longer.

The lowered threshold has led to Article 39 determinations in circumstances such as (i) internal armed conflict, (ii) humanitarian crises and, (iii) disruption to democracy.[16] Each of these requisite components will be considered in relation to Burma in Section III. Cassese argues that the evolved threat to peace doctrine amounts to 'a *customary* rule [...] which is also operative within the UN legal system, in that it broadens the scope of Chapter VII'. It is this evolved doctrine which governs the international order for maintenance of international peace and security. Arguably, however, a further evolution is imminent into the language, if not the practice, of 'responsibility.'[17]

II. PROPOSITIONS AND RULES DISTINGUISHED

Some commentators have argued that not only has the notion of 'a threat to peace', as defined within the UN Charter scheme broadened, but that a right to intervene in circumstances where the Security Council has failed to act has grown up simultaneously as a matter of customary international law. Those commentators have argued that a right to unilateral humanitarian intervention should exist, and that if the right cannot be said to be a crystallised legal principle it ought to be.[18] Others have recognised the normative force of the unilateral right but have held fast to positivist views, stating that whilst such interventions remain unlawful, they may nevertheless be morally 'legitimate.'[19] However, it is submitted that a right to unilateral humanitarian intervention neither exists under current international law nor is it normatively desirable.[20] Others have suggested that even if there cannot be said to a right to intervene unilaterally, there may nevertheless be a responsibility to do so when certain 'just cause thresholds' and 'precautionary principles' are satisfied.[21] It is submitted that whilst proper recognition of a collective responsibility to protect victims from heinous crimes may be normatively desirable, any form of unilateral right which does away with "collective" element, surely cannot be said to be beneficial to the international legal order.

Blockmans states that 'humanitarian intervention', which encompasses unilateral right of intervention, can be defined as:

[T]he threat or use of force by a state, group of states or (an) international organization primarily for the purpose of protecting the nationals of the target state from widespread infringements of internationally recognized human rights, *without authorization by the target state or by the relevant UN organs.*[22]

In March 1999, NATO began Operation Allied Force and launched missiles at Serbian targets in Pristina and Belgrade. Though the Security Council had released four Resolutions[23] condemning 'the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the Kosovo Liberation Army'[24] it did not authorise enforcement action under Article 42 of the UN Charter[25]. In Resolution 1199 the Security Council determined that 'deterioration of the situation in Kosovo' amounted to 'a threat to peace and security in the region'[26] which gave ample justification for Security Council authorisation. However, the 'lingering threat of veto'[27] prevented any formal authorisation of use of force. NATO intervened, without authorisation, relying upon an amalgamation of various dubious legal grounds. The United Kingdom sought to rely both upon the 'customary international law

principle of humanitarian intervention'[28] and political rhetoric of 'battl[ing] for humanity'.

Before the International Court of Justice[29] the United States, tried to fit the invasions within the legal framework of the Charter by arguing that the Resolutions determining a threat to peace justified the use of force under Chapter VII. Similarly, Belgium argued that the action was 'compatible with Article 2(4) of the Charter, which covers only intervention against the territorial integrity or political independence of a state.'[30] However, Belgium argued that it needed to go beyond the Resolutions in order to 'develop the idea of humanitarian intervention.'[31] Walzer[32] and Cassese[33] rely on such statements to argue that the parameters are now set for an existing rule of customary international law permitting unilateral use of force, and that if such a rule cannot yet be said to exist it ought to.

A Customary Right to Unilateral Intervention

It is difficult to assert the existence of a right to unilateral humanitarian intervention for several reasons. First, Article 2(4) of the UN Charter lays down the general prohibition on the use of force and whilst it does provide for two exceptions, Articles 51 and 39 of the Charter, neither of these provisions do away with the 'collective' element enshrined in Article 2(7) of the UN Charter.[34] Second, though the ICJ left open the possibility of *development* of a practice of unilateral intervention,[35] both the *Nicaragua*[36] and *Corfu Channel* cases[37] were clear that no such right exists under *current* international law. Lastly, in order for such a right to exist under current customary international law the prerequisites of state practice and *opinio juris* should be satisfied.[38] In addition to Kosovo (1999), the invasions in Iraq (1991) and Liberia (1990) are cited to support the existence of necessary state practice. Security Council Resolution 688 (1991) did not explicitly authorise force in Iraq and both France and the United Kingdom issued statements asserting an existing right of unilateral intervention to prevent mass human rights violations.[39]

However, whilst Resolution 688 (1991) may not have been explicit in its authorisation, it can certainly be read into the wording and into the general practice of the United Nations (of zealous intervention into Iraqi affairs in 1991).[40] Furthermore, a few instances of violation of international law ought not to amount to state practice such as to satisfy the prerequisite of customary international law. States' practice both before and after the Iraq invasion (1991) evince reluctance to intervene without Security Council authorisation, as demonstrated by the French invasion of Rwanda[41] and the United States' intervention in Haiti[42] (1994). France and the United States were keen to attain endorsement prior to intervention. Blockmans states that such reluctance demonstrates

lack of confidence in the ability of a state to proceed on its own initiative in conducting such intervention and a belief that the expectations of the global community in a post-cold war environment require approval by the Security Council.[43]

The overlapping between state practice and *opinio juris* is evident here; state practice has traditionally been to wait for Security Council authorisation and that practice in itself evinces an *opinio juris* that to do otherwise would be contrary to international law. However, arguably the defeat of the draft Resolution put forward at the 3988th Meeting of the Security Council[44] stating that the 'unilateral use of force constitutes a flagrant violation of the United Nations Charter'[45] evinces *opinio juris* in favour of a right to unilateral intervention. Whilst this does evince an opinion that the intervention in Kosovo may have been morally justified, this does not equate with an opinion that it was in conformity with principles of international law. Hilpold argues that states may realise the '*usus*' or 'necessity' of a particular intervention but this does not to amount to an endorsement of the legality of that intervention.[46] Whilst there may be some attempt to justify unilateral intervention by reference to an existing right under customary international law, a great number of states have doubted the legality of the Kosovo intervention.[47] It cannot, therefore, be said that the prerequisite of *opinio juris* is satisfied such as to confirm an existing right under customary international law.

Commentators have argued that from a teleological interpretation of the Charter and customary rules an existing right to unilateral intervention can be extrapolated.[48] Such Dworkinian interpretations, however, confuse what the law currently is with what it ought to be.[49] Advocates of this right argue it to be the principle providing the best moral justification for the institutional legal history.[50] Such arguments ignore the prerequisites for what the law actually is, and are better dealt with under a consideration of the normative value of a right to unilateral intervention.

On a positivist's view of the law, the rules of recognition (*opinio juris* and state practice) are not satisfied such as to affirm an existing unilateral right. States are reluctant to intervene without Security Council authorisation, labelling previous acts of unilateral use of force merely 'legitimate', evincing *opinio juris* that such interventions are not 'legal.' Furthermore, even on a Dworkinian interpretation of current state practice and *opinio juris*, there must be an *existing* principle which can be used as a tool for moralistic interpretation; it is this solidified principle which is lacking. In addition to which, even a Dworkinian interpretation would not require the Charter to be read at antipodal odds to its purpose and intent (namely a *collective* security system to ensure the maintenance of international *peace*). Unlike the evolution of the threat to peace principle,

which has departed from the four corners of the Charter text, a right to unilateral intervention cannot be said to fall within the scheme or purpose of the Charter nor is it based on an obvious development in state practice.

With regards to whether such a right is normatively beneficial advocates have pointed to Security Council inaction in severe cases, such as Rwanda and Kosovo. Cassese affirms his moral abhorrence for 'sit[ting] idly by'[51] and formulates a normative argument for legitimising a unilateral right to humanitarian intervention. Cassese argues that the combination of modern international trends and the circumstances surrounding the 1999 NATO intervention in Kosovo establish foundations for a unilateral right to humanitarian intervention which can be built upon with a number of strict limitations[52]. Thus, the international community would no longer stand idly by when human rights violations 'shock the conscience of all human beings.'[53]

There are two problems with Cassese's analysis. The first is that it is not at all clear that the relevant circumstances surrounding the 1999 NATO intervention would arise in the same way again. The second, and arguably the most important difficulty, with the purposed right to a customary unilateral right to intervention is that of abuse. Indeed, whilst Cassese does acknowledge the difficulties of potential abuse[54] and 'enormous risks of escalating violence'[55] he does not articulate the means for preventing those eventualities, save that the right should be used 'with great circumspection.' This begs the question as to *who* would be able to ensure such circumspection given that we are no longer speaking of a collective decision. Blockmans attempts to address the difficulty of potential abuse by a precise statement of the requisite circumstances to legitimate a unilateral use of force for humanitarian purposes. Similarly, Goodman postulates that a rule of unilateral humanitarian intervention would 'discourage wars with ulterior motives'.[56] He reaches this conclusion by reference to *'The politics of justification'*[57] which determines that the political rhetoric of 'humanitarian intervention', and the criteria pertaining thereto, would constrain later military action. Thus, the 'blowback effects' of a political statement that there exists a humanitarian crisis and that the prerequisites for legitimate intervention are justified, would have a restraining effect on any aggressive or self-interested action by the intervener state.

However, it is submitted that in fact neither Blockmans nor Goodman does away with the serious repercussion of abuse. Hilpold points to a similar list of legitimising criteria to that of Cassese and Blockmans and states that they are 'hurdles which can be taken even by a state acting *mala fide.*'[58] The mere existence of legitimising criteria does nothing to restrain the aggressor state without it later being held to account either for a misunderstanding, or bad faith statement, of their existence. Goodman would argue that the aggressor state would be held to

account by their electorate. This assumes that the electorate will necessarily become aware of the non-existence of one of the legitimising criteria and that the aggressor state will necessarily feel confined by electoral opinion. This simply cannot be the case, as evinced by the 2003 US invasion of Iraq. Moreover, such a restraint would require the aggressor state to be internally accountable when the breach is of international law and against an *external* territory. Thus, aside from the fact that a right to unilateral intervention entirely eradicates the Lauterpachtian ideal of non-intervention and the notions of *collective* security enshrined in Article 2(7) of the UN Charter, it lends itself to abuse by warmonger states. Thus, the right to unilateral humanitarian intervention does not form part of current international, nor should it do so.

The Responsibility to Protect (R2P)

The Responsibility to Protect doctrine (R2P) is borne out of the same concern to prevent 'future Rwandas and Kosovos.'[59] R2P invokes the notion of 'responsibilities' and shuns the idea of 'rights', yet the doctrine as currently applied in practice does little more than a properly construed 'threat to peace' doctrine. Section IV suggests that there is normative force in reforming the relationship between the organs of the United Nations such as to enforce a check on Security Council determinations. However, the argument that such a check should exist by means of devolution of all power, to authorise use of force, to the Member States encounters the same difficulties as the right to unilateral humanitarian intervention.

The ICISS Report begins with the assertion that a state has a responsibility to protect its own citizens and where a state fails in that responsibility, whether through incapacity or unwillingness, a second responsibility to protect falls on the international community to act through the UN.[60] ICISS details a continuum of obligations[61] from the 'responsibility to prevent'[62], through to the 'responsibility to react'[63] and the 'responsibility to rebuild.'[64] The Report states that legitimate use of force requires five components: 'The Just Case Threshold' and 'Precautionary Principles'[65]. First, there must be 'just cause' meaning that there is 'serious or irreparable harm occurring to human beings, or imminently likely to occur.' Such harm would involve either (i) large scale loss of life (with or without genocidal intent) as a result of state action or inaction or, (ii) large-scale ethnic cleansing whether by means of killing, forced expulsion, acts of terror or rape. Second, the intervention should be carried out with the 'right intention' such that the *primary* purpose, despite other purposes, must be to prevent human suffering. Third, military action must only be used as a 'last resort' such that there is a responsibility to explore possible peaceful resolutions and there must be reasonable grounds for believing that measures less of use of force would not succeed. Fourth, the means used for intervention must be

'proportionate' and the scale, duration and intensity of the action must be the minimum necessary to secure the objective of the intervention. Last, there must be a 'reasonable chance' of military action being successful in meeting the relevant threat. The ICISS Report further determined that where the five prerequisites have been satisfied but there has been a failure by the Security Council to authorize action either the General Assembly should consider itself seized of the matter, or an individual state or regional organization might legitimately intervene.[66]

Three responsibilities can be drawn from the ICISS Report: (i) the responsibility of the sovereign to its own territorial state (Sovereign Responsibility), (ii) the responsibility of the international community to react through the Security Council (Collective Responsibility) and (iii) the responsibility of regional organizations or other individual states towards those subject to international crimes in other states (Individual Responsibility).

(i) Sovereign Responsibility

This responsibility posits that 'sovereignty' is no longer a linguistic shield against 'the historical flood of imperial interventions by the more powerful states'[67] but entails a duty akin to Rousseau's social contract. The ICISS Report endorses the shift away from Westphalian notions of non-intervention to a 'humanized sovereignty' which requires that when a state manifestly fails to discharge its obligations to protect the fundamental rights of its citizens it becomes accountable.[68] This shift already forms part of international law under the evolved threat to peace doctrine.

(ii) The Collective Responsibility

It is in respect of the second responsibility (of the Security Council to react to atrocities occurring in other states) that a difference between the normative argument of the ICISS Report and the practice of the Security Council is discernable. The second responsibility, articulated in ICISS, will be here termed the 'Collective Responsibility.' How far this 'responsibility' has force of law depends upon whether the original articulation is perceived as a legal *duty* or merely a legal *power* to state that there exists a moral responsibility to intervene. If the ICISS Report is interpreted as an argument in favour of the latter there are many examples of R2P in current international law, not least Security Council Resolution 1973 (2011)[69] enforcing no-fly zones in Libya. However, if ICISS is seen as an endorsement of a legal duty it is difficult to say that there is such an obligation in practice.[70]

Arguably, the endorsement of R2P in international fora means there is an exist-

ing legal duty to protect those subject to mass atrocities in other states. The World Summit Outcome Document of 2005 acknowledged that '[t]he international community through the United Nations, also *has the responsibility* to use appropriate diplomatic, humanitarian and other peaceful means...to help protect populations'[71] and Security Council Resolutions 1265 (1999), 1296 (2000), 1674 (2006) and 1706 (2006) are frequently cited as evidence of an existing responsibility under international law.[72] Indeed, Resolution 1674 (2006) endorsed the approach of the 2005 World Summit Outcome Document whilst Resolution 1706 (2006) stated that it was 'the responsibility of the Government of Sudan to protect civilians under threat of physical violence.'[73]

Evans argues that 'the whole point of embracing 'the responsibility to protect' is that it is capable of generating an effective, consensual response in extreme cases, in a way that 'right to intervene' language simply is not.'[74] However, whilst it may be that the language of 'responsibility' has an effect on political will it does little to alter the current legal obligations under the UN Charter. The only way in which R2P might alter substantive legal principle would be if there were effective mechanisms for enforcing that responsibility. To the extent that the R2P doctrine has been incorporated into existing international law, it only imposes an obligation when the Member States agree that it does so. Thus, the so-called 'responsibility' arises only as and when those subject to it deem it to exist. For example, it is interesting that there was a so-called 'responsibility to protect' civilians in Libya, yet in almost identical circumstances in Syria, no such duty arose. Surely a responsibility which arises only when Member States agree as much, resembles *a power* to react to morally reprehensible circumstances more than an enforceable legal duty. Further, it can be argued that R2P is not an enforceable duty under current international law because of the indeterminacy as to what it requires.[75] Bellamy states that there are benefits in 'preserving flexibility for the future'[76] but that the lack of specificity undermines R2P's status as an existing legal norm. Disagreement as to what specific action is required or the cause, existence and scale of events taking place all cause hesitation and a weakening of the 'compliance-pull.' Therefore, until there is a means for enforcing this 'responsibility' to protect victims of international crimes, the responsibility cannot be said to have force of law. All that exists in practice is a power to act in circumstances which the Security Council judge fit and when they deem themselves morally obligated; in the same way as the evolved 'threat to peace doctrine' operates.

(iii) Individual Responsibility

A legal duty on individual states or regional organisations[77] to use force independently of authorisation by the Security Council lacks normative force as it may lead to wayward imperialism[78] without an independent check on whether the

just cause threshold or precautionary principles are satisfied.[79] Though it could be argued that the language of 'responsibility' has a firmer constraining 'blowback effect'[80] than the language of rights, the legitimising criteria may still be fulfilled by a State acting *mala fide* in the absence of assessment of the veracity of those political statements by the international community[81]. Moreover, it would place larger states under a sharper responsibility than smaller states. That responsibility would both place intervener states under additional burdens and allow them to wield greater power. Thus, for the same dangers of abuse, noted above, this would not be a beneficial development.[82]

III. BURMA

A statement of the relevant principles of international law is as follows: there is a power to intervene in order to protect those subject to gross human rights violations under Article 39 of the UN Charter. Further, those violations must satisfy the practical requisites of the evolved threat to peace doctrine.

Chesterman determines that there are three evolved prerequisites for Security Council action under Chapter VII: (i) internal armed conflict, (ii) humanitarian crises, and (iii) disruption to democracy. However, at the Dumbarton Oaks Conference, the permanent members deliberately left the definition of 'threat to international peace and security'[83] open for a case-by-case analysis. Thus, it is difficult to discern certain criteria for an Article 39 determination. However, a Report commissioned by Vaclac Havel and Archbishop Desmond Tutu entitled "Threat to Peace Report: A Call for the UN Security Council to Act in Burma"[84] (2005) identified six crises in Burma and ample factual justification for a threat to peace determination under Article 39. It examines prior practice of the Security Council and clarifies the requisite elements for such a threat to exist. These elements include: (i) overthrow of democracy; (ii) conflict among factions; (iii) human rights violations; (iv) refugee outflows; (v) drug trafficking and (vi) HIV/AIDS.

(i) Overthrow/Disruption of Democracy

In 1960, U Nu became the first democratically elected prime minister and won a landslide victory in the elections. In March 1962, General Ne Win staged a military *coup d'état*, putting the elected cabinet into 'protective custody' for several years. U Nu was not released until 1966 by which time Ne Win's Lanzin Party had established itself as a tyrannical regime of just thirty three men who promoted the 'Burmese Way to Socialism'[85] and became the Burmese Socialist Programme Party. Ne Win imposed censorship and nationalisation of

the press, required membership of the Party's youth organization and brought about economic ruin through outlawing all private economic activity.[86] These conditions led to the 1988 student uprisings and the birth of Aung San Suu Kyi's Party, 'National League for Democracy' (NLD). The uprisings gave the military a unique opportunity to stage a coup to 'save Burma.' Thus, the State Law and Order Restoration Council (SLORC) took power through force claiming to restore peace. In reality, SLORC represented only a cosmetic change from Ne Win's government and martial law was once again instigated.[87] Inexplicably, SLORC permitted elections in 1990 where the NLD won 392 out of 485 constituencies. The junta ignored the result and the State Peace and Development Council (SPDC), formerly SLORC, continued to rule Burma through oppressive martial law with General Than Shwe at its head.

Thus, there are at least two instances where democracy has been *disrupted* (1990 and 1962), and one instance of a clear *overthrow* of democracy (1962). The differences between the Burmese disruption to democracy and that in Haiti (1991) are threefold[88]. First, Jean-Bertrand Aristide's escape and exile meant that he could instantly call upon the international community to take 'prompt and decisive action'[89]. U Nu could not do so until his incarceration ended in 1966, four years after the coup and installation of SLORC. Second, whilst demands on the international community have been made by Aung San Suu Kyi to 'put pressure on the present regime'[90] she was not 'overthrown' as democratic leader, as the 1990 elections occurred during SLORC's established rule. The third difference relates to the political interest both of the United States and Organization of American States (OAS) in Haiti. The first two differences between the Haitian and Burmese cases are immaterial. The language of Security Council Resolution 940 (1994) authorized the international community 'to use all necessary means to facilitate the departure from Haiti of the military leadership' and 'the prompt return of the legitimately elected President.'[91] Therefore, what is important is not the linguistic distinction between an 'overthrow' and a 'disruption', nor whether a demand by the elected Prime Minister is made in a timely manner. The required factors are merely that there be an elected government which is ousted from its rightful place and that that government support the intervention of outside forces. Finally, whilst proponents of *Realpolitik* will make much of the American support for the Haitian intervention this not a legal requisite for an Article 39 determination. Therefore, whilst a lack of national interest may be relevant with regards to practical impetus it does not *prevent* a threat to peace determination under Article 39.

(ii) Internal Armed Conflict

Security Council Resolutions 864 (1993) and 1973 (2011), exemplify instances where mere internal armed conflicts have amounted to threats to peace. After

disregarding the Angolan election result in 1992, the National Union for the Total Independence of Angola (UNITA) perpetrated continued attacks on civilians.[92] After a series of Resolutions condemning the humanitarian crisis in Angola, the Security Council ultimately adopted Resolution 864 (1993) which states that '*as a result of UNITA's military actions*, the situation in Angola constitutes a threat to international peace and security.'[93] Therefore the text of the Resolution is clear that it is the use of force by a regime against members of its own population which serves as a practical determinate of a threat to peace.

The ethnic diversity in Burma has led to the forming of rebellious minority groups, including: the Karen National Union (KNU), Karenni National Progressive Party (KNPP), the Chin National Front and Shan State National Army. The 2005 Report[94] identifies a number of occasions on which there has been warring between these factions and the Burmese National Army; the Report notes the destruction of over 2,500 villages and displacement of 600,000 citizens.[95] The Burmese National Army has violated a number of ceasefire agreements and continued persecuting the Karenni people[96] with '3,077 separate incidents of destruction, relocation, or abandonment of villages in eastern Burma between 1996 and 2006.'[97] Such stark evidence of internal armed conflict provides factual basis for an Article 39 determination in Burma.

(iii) Human Rights Violations

The evolution of the Threat to Peace principle is demonstrative of the growing concern of the international community for grave human rights violations perpetrated by regimes against their citizens. The humanitarian crisis which led to Security Council Resolution 794 (1992) encompassed a number of separate elements including the arrival of 140,000 Somali refugees in Kenya, the 'heavy loss of human life'[98], widespread starvation, food shortages, disease and warring between ethnic factions. In 1992, the Secretary-General enumerated the urgent humanitarian conditions stating that 4.5 million people were threatened by starvation and disease (with 1.5 million at immediate risk) and that there had been over 300,000 deaths.[99]

Several different categories of rights violations can be identified in order to demonstrate an equivalent crisis in Burma: (a) forced labour, (b) child soldiers, (c) sexual violence, (d) mass killings and torture, (e) forced displacement, (f) arbitrary detention, and (g) disease.

Both the International Labour Organisation Commission of Inquiry on Forced Labour in Myanmar Report 1998 and 2005 UN Commission Resolution detail conditions where workers are forced to build roads, bridges and army camps in Burma, usually under threat of imprisonment or torture.[100] Workers are unpaid

and required to work 14 hour days. Sarkin states that recruitment of workers is carried out by 'arbitrary arrest'[101] and under threat of being 'beaten and even killed.' Other studies have put the numbers of labourers and 'human mine-sweepers' at over 800,000.[102] In 1955 the Burmese junta ratified the Forced Labour Convention and later the ILO issued Resolutions[103] deploring Burmese working conditions. Nevertheless, forced labour persists as 'a saga of untold misery and suffering in Burma.'[104]

In 2002 Human Rights Watch determined that of the 350,000 soldiers in the Burmese Army 70,000 are child soldiers.[105] Despite being a signatory to the Convention on the Rights of the Child and Security Council Resolutions 1460 (2003) and 1612 (2005), both expressing concern at the recruitment of children into the armed forces, children as young as seven are still recruited in Burma. Human Rights Watch reported that children are kidnapped and taken to Su Suan Yay training camps where they frequently die from beatings and illness. Those who survive are required to carry out gross human rights violations against ethnic minorities in the Shan, Kachin and Karen states.[106]

The Special Rapporteur on the situation of human rights in Myanmar (Myanmar Rapporteur) expressed concern about sexual violence sweeping the country.[107] Between 1991 and 2001, he received reports of 625 rapes of women and children in the Shan State alone and a further 188 cases between 2002 and 2006.[108]

Since 1992, the Myanmar Rapporteur and Commission on Human Rights have noted an increase in documented extrajudicial killings and torture.[109] The victims are usually internally displaced persons from the ethnic minorities, accused of belonging to armed ethnic nationality groups.[110] However, in 2003 these killings extended to civilians and the Execution Rapporteur intervened in a number of summary executions of women and children accused of supporting Shan soldiers.[111] In 2006, the Myanmar Rapporteur stated that '[v]iolence against unarmed civilians by the Myanmar military is a very serious concern.'[112]

As regards forced internal displacement, in 2006 the Myanmar Rapporteur noted that the 'total number of internally displaced persons (IDPs) who were forced to return and reintegrate into society is estimated to be at least 500,000.'[113] In that same year reports emerged that the military would operate a 'shoot-on-sight' policy for those who tried to return home without prior permission.[114]

Rampant disease and countless cases of arbitrary detention also evince the humanitarian crisis in Burma. Sarkin argues that the HIV/AIDS epidemic present in Burma could in itself constitute a threat to peace and security. He points to the 440,000 cases[115] of AIDS in 1997 as support for UN intervention.[116] The black market trade in heroin perpetuates the problem as 'addicts routinely share

needles.'[117] According to the UN Drug Control Programme 'there might be as many as 500,000 heroin addicts in Burma.'[118] The power-play between the drug war lords and junta exacerbates the crisis in Burma as military officials collude in the profitable narcotics black market.[119] Further, the military have arbitrarily detained countless citizens who participated in opposition groups or peaceful protests. The UN Working Group on Arbitrary Detention has issued judgments declaring 'illegal' the detention of those incarcerated without charge and due process.[120] In 2005, the Working Group held the detention of U Tin Oo (Vice-President of the NLD) to be 'arbitrary' and in contravention to the Universal Declaration of Human Rights.[121] The Working Group described how U Tin Oo was captured by 'government-affiliated thugs' whilst '[s]cores were killed and hundreds were wounded during the attack.'[122] Despite over a dozen Opinions from UNWGOAD, holding such detentions arbitrary and illegal, the regime has released no political prisoners.

(iv) Refugee Outflows

Though the significance of the 'international' stipulation in Article 42 of the UN Charter has reduced over time Chesterman nevertheless observes that 'it appears that [an Article 39] determination is more likely when the internal armed conflict has transborder consequences.'[123] In Resolution 794 (1992), the Security Council considered the movement of 700 refugees a day, and resulting 140,000 in Kenya, a threat to peace. Between 1991 and 1992, 250,000 Muslim Rohingya fled from the Arakan state to Bangladesh and over 1 million migrant workers were working in Thailand.[124] The number of Burmese refugees currently seeking asylum in Thailand, Bangladesh and India are unknown simply because the numbers are so large as to be indeterminate but Sarkin states that '[a]t least 250,000 Burmese refugees are found in these countries today, suffering limited health, food and sanitation services, as well as ill-treatment by local camp officials.'[125]

Consistency for Burma

The 2005 Threat to Peace Report formed the basis for a proposed Article 39 determination in Burma but no Resolution was passed owing to vetoes from Russia and China. Though there is legal *justification* for use of force in Burma, it is not legally *required*. However, if the maxims of legal consistency and certainty are to be upheld in international law the Security Council ought to intervene in Burma, though not legally obligated to do so. The above discussion demonstrates the vast lacuna between what the law is and what it should be. Burma is therefore presented as the case in support of the reform in the relationship between the organs of the United Nations to better uphold the International Rule of Law, as opposed to the International Rule of Politics.

IV. SREFORM OF THE COLLECTIVE SECURITY SYSTEM

This Section argues that reform of the relationship between the organs of the United Nations is necessary by recognition of the holistic 'collective responsibility' (the second responsibility set out in the 2001 ICISS Report). Reform ought not to involve an overreaction by devolution of power to the individual Member States[126] but should encourage collective decisions with numerous contributors, as envisaged by the original Charter scheme. However, as matters currently stand, the number of contributors is limited to fifteen particular parties to the Charter, only five of whom have any vital say.

There are two possible reforms of the collective security system which would allow for discharge of the 'collective responsibility'. Each of these propositions is not without its own difficulties, resolution of which is beyond the scope of this discussion, but they serve as better alternatives to the unfettered rule of politics currently in place.

Collective Responsibility: Primary and Secondary Duties
Before suggesting reforms there are three questions posed by critics of R2P which must be addressed in order to assess its normative value as an enforceable collective obligation.

(i) What are the Correlative Rights?

Welsh states that it is questionable whether R2P intended to impose a real 'duty' as it is not clear who would enjoy the correlative 'right' or what exactly that right would entail. Would the protected 'right' be to liberty, to security, or to protection of a group of certain fundamental rights?[127] It is imperative to be clear about the exact *responsibility* which must be at the centre of this discussion. The notion of 'collective responsibility' can be bifurcated into a primary responsibility to protect those subject to international crimes and a secondary responsibility to answer for breach of the primary responsibility.

R2P, as originally articulated in ICISS, advocated a primary responsibility to those in states subject to international crimes, including genocide, torture and rape as a weapon of war. Security Council Resolution 1973 (2011) appeared to take the correlative rights much further by asserting not only a negative right to be free from serious persecution but a positive right to 'restoration of peace'.[128] However, it is only with the luxury of a *power* to abide by a moral responsibility, rather than an enforceable legal duty, that such a broad mandate could be given. Though 'restoration of peace' might better correlate with the original ideology

of the Charter, than a narrow conception of only protecting against international crimes,[129] such a broad correlative right would give way to arguments that the right cannot be clearly identified and runs the risk of jeopardising more fundamental rights.[130] As Evans argues, '[i]f too much is bundled under the R2P banner, we run the risk of diluting its capacity to mobilize in cases where it is really needed.'[131] It is clear from the ICJ's case law[132]and World Summit Outcome Document that there was intended to be a narrowing of the correlative rights involved. Where those advocating a right to unilateral intervention could not be clearer than terms such as 'fundamental rights', R2P narrows focus onto international crimes, a focus not even deployed by current practice under the evolved threat to peace doctrine which allows for a broad consideration of mere 'human rights violations'.[133] Implicit within the text of the ICISS Report is the idea that legitimate intervention only occurs when there has been violation of the 1948 Genocide Convention amounting to 'large-scale killing'[134] or 'ethnic cleansing.'[135] Thus, the 'evasive' correlative rights can in fact be simply articulated as a right to be free from serious international crimes.[136]

The identification of the correlative rights of people in vulnerable nations means very little without the secondary responsibility which the Security Council owes, on breach of their primary responsibility, to the rest of the international community. The notion of a secondary responsibility deriving from breach of primary responsibility is neither a novel nor revolutionary concept.[137] In *Chorzów Factory* the Permanent Court of International Justice states: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'[138] Only on imposition of this secondary responsibility would any real reform of current international law occur. The primary responsibility advocated in the ICISS Report differs very little from the current practice of Article 39 determinations. That is to say that the power to abide by the moral responsibility only differs by way of semantics to a primary responsibility to protect those subject to international crimes. Indeed, it is difficult to imagine that the 'just cause thresholds' of large-scale killing or ethnic cleansing do not always amount to threats to international peace (particularly under the evolved doctrine). The determination of a threat to peace in these circumstances must be because the Security Council recognises that in a 'humanitarian crisis', which will inevitably involve the sorts of international crimes envisaged by the R2P doctrine, people's rights are being violated. Thus, whilst commentators have latched onto a critique of the R2P doctrine which states that R2P cannot be specific as to what correlative rights are involved, this misunderstands where the real reformation in responsibility comes. There would be no change in the current primary responsibility (except as a matter of semantics), the correlative rights would remain those of the people in the troubled nation subject to serious international crimes. The change would be in the recognition of a secondary responsibility, which the Security Council would owe, for breach

of its primary responsibility to protect the people in turbulent nations from international crimes. This crucial change in the recognition of the secondary responsibility would reform current international law.

(ii) On Whom Does the Collective Responsibility Fall?

Bellamy states that 'R2P is universal and enduring – it applies to all states, all the time.'[139] Such statements conflate the first 'sovereign responsibility', with the second 'collective responsibility' of the international community which arises *only* in circumstances where sovereign responsibility has been breached. Academic consensus suggests that the collective responsibility falls on the entire international community. Through ratification of the UN Charter, the international community have appointed the Security Council as bearer of the primary responsibility.[140] However, in fulfilment of the collective responsibility, the international community ought to provide a forum for the Security Council to discharge its secondary responsibility.

Some commentators argue that collective responsibility is borne by each individual state and that those proximate to the atrocities bear an additional burden in the same way as the Security Council. Support is cited in *Bosnia and Herzegovina v Serbia and Montenegro*[141] in which Serbia was held to have borne the responsibility to react to genocide due to proximity and possession of information. However, Arbour states that 'while proximity may matter most in terms of promptness and effectiveness of responses, it should not be used as a pretext for non-neighbours to avoid responsibility.'[142] Under Article 24(1) of the UN Charter, the international community conferred on the Security Council 'the primary responsibility for maintenance of international peace and security'. If a normative secondary responsibility were recognised this too should remain within the collective body of the international community. To assert that those proximate to international crimes bear an additional responsibility removes this necessary element of 'collectivity'. Once there has been a determination by the Security Council that international crimes are occurring, there will be practical considerations as to the provision of logistical support which may involve larger powers or regional organizations providing more forces[143]. However, this is a pragmatic point, the legal duty remains borne by the entire international community.

(iii) Can the Precautionary Principles be Determinate?

The difficulty of indeterminacy, articulated by Bellamy,[144] is simply dealt with by the propagation of documents providing further definition and clarification of the criteria which should be used for legitimising use of force under R2P[145]. The difficulties seen in the legitimising criteria of the 'right to unilateral intervention'

dissipate here as the level of clarity required is significantly lower owing to the insurance provided by the ability of the international community *to review* the existence of those criteria.

The Report of the High-level Panel[146] echoed the criteria enshrined in ICISS: seriousness of the threat; proper purpose of the intervening force; last resort; proportional means and a reasonable prospect of success such that there is a reasonable chance that intervention will not result in greater loss of life and breach of rights. Moreover, arguments which assert that flexibility will be unnecessarily curtailed are misplaced and circular; surely the rigidity of no intervention at all is more undesirable than clarifying the prerequisites for that intervention. As yet the criteria cannot be said to have force of law. The World Summit Outcome Document provided merely that the international community is 'prepared to take collective action [...] *on a case by case basis*'.[147] Moreover, the Outcome Document does not endorse the notion of a 'collective international responsibility to protect' in the same way that the Report of the High-level Panel suggests (dealing with it under the rubric of human rights rather than with regards to the duty that the international community owes).[148] However, it cannot be denied that reform is necessary. 'Future Rwandas and Kosovos' are not only a possibility but a reality, as evinced by the brutal violations occurring in Burma. Therefore, adopting the clarifying criteria under R2P is normatively desirable as they would provide a means for identifying when legitimate action should occur.

Reforms

(i) Uniting for Peace

The first reform would be to adopt the suggestions embodied in General Assembly Resolution 377 (V),[149] 'Uniting for Peace'. The resolution resolves that when the Security Council reaches an impasse and thereby 'fails to exercise its primary responsibility [...] the General Assembly shall consider the matter immediately with a view to making recommendations to Members for collective measures.' Unlike, a right to unilateral intervention, such reform has both constitutional and practical foundations. Under Article 11(2) of the UN Charter the Assembly may make recommendations on 'questions relating to the maintenance of international peace and security' and Article 14 gives the Assembly 'authority and responsibility for matters affecting international peace.'[150] In practice, 'Uniting for Peace' has been invoked on a number of occasions, including in 1960 to assist the Congolese government in restoration of peace in Katanga province.[151] However, Article 12 of the UN Charter appears to preclude the General Assembly from making recommendations in areas in with the

Security Council is 'still exercising in respect of any dispute or situation the functions assigned to it in the present Charter.'[152] However, in circumstances where the Security Council has not given proper consideration to the legitimising criteria of (i) the seriousness of the threat, (ii) the proper purpose of the military action, (iii) the requirement of a last resort, (iv) proportionate means and (v) the reasonable prospect of success, the Security Council should no longer be said to be properly exercising its functions on the matter[153].

(ii) International Court of Justice

Another reform would entail review of Security Council decisions by the International Court of Justice.[154] It has been argued that the *Kadi*[155] case would prevent such a review.[156] Here, however, reluctance to review Security Council Resolutions was expressed by the European Court of Justice which, unlike the ICJ, it is not an organ of the United Nations and review of these decisions does not fall within ECJ competence. Where the ICJ could form a legitimate judicial check upon the decisions of the Security Council, a Court divorced from the Member States of the United Nations obviously could not. In *Certain Expenses*[157], the ICJ noted the implicit secondary responsibility, arising from breach of the Security Council's 'primary responsibility', under Article 24(1) which the Assembly could exercise when the Security Council was paralysed. Implicit within the reasoning is the suggestion that a 'primary responsibility' is not an 'exclusive responsibility.' Similarly, in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[158] the ICJ stated that the prohibition on simultaneous action had been superseded by later practice. Thus, the ICJ could act as a forum for discharge of the international community's secondary responsibility and could make suggestions either of reconsideration by the Security Council, devolution to the General Assembly or of a 'Responsibility not to Veto'[159].

This reform would better enforce the International Rule of Law as opposed to the International Rule of Politics. Peters argues

> Under the rule of law there is an obligation to state the reasons on which legal acts are based [...] because it forces the decision- or law-maker to rely on arguments which are admissible in that very legal order, thereby enabling other political actors and those subject to the act to criticize it and eventually to attack it if those reasons are legally and politically unpersuasive[160]

Thus, the legitimising criteria of the R2P principle need not be feared for potential abuse or indeterminacy. Those very elements would be questioned by the organs of the United Nations which would put an investigative check on the reasoning of the Security Council.[161] In *Tadic*[162] the ICTY stated that the Se-

curity Council does operate under the rule of law. Thus, as Peters argues, requiring the Security Council to provide reasons to the rest of the international community would not require any form of departure from the current legal order as 'the obligation to state the reasons for the veto already exists as a matter of (unwritten) legal principle.'[163]

V. CONCLUSION

It has been argued that use of force in Burma is justified but not legally required under the evolved threat to peace doctrine (Article 39 of the UN Charter). The humanitarian crisis in Burma differs very little from other instances in which there have been Article 39 determinations (Haiti, Somalia and Angola). The Security Council has thus failed to uphold principles of legal certainty and consistency by vetoing action in Burma. Burma is thus presented as the case for reform of the relationship between the organs of the United Nations in order to better ensure the International Rule of Law and eliminate the dominance of political will.

The UN Charter has now been interpreted to include 'humanitarian' and 'sovereign' concerns. These notions elide with the original scheme of the Charter to provide a cohesive system for ensuring peace and security. Incorporating 'collective responsibility,' with its bifurcated limbs of primary and secondary responsibilities, compliments and maximises that intent. Security Council Resolution 1973 (2011) marks the beginning of the shift into the recognition of a primary responsibility to protect those subject to international crimes. Whilst at present this is merely the language of 'responsibility', rather than discharge of a legal duty, Resolution 1973 (2011) may indicate the beginning of the recognition of the responsibility borne by the international community, as a collective body, to protect victims of international crimes.

Law is a living instrument which mutates with changing circumstances. This paper has dealt with positive changes already extant. However, to truly enforce 'sovereign responsibility', to insist upon accountability for international crimes, and to genuinely uphold the original UN Charter scheme, a further change is not only desirable but necessary. Burma is surely the case indicative of that necessity for reform. Each day millions suffer at the hands of the military regime, the time has come for action for Burma by way practical implementation of those principles said to be revered by the international community. It is not enough to give rhetorical lip service to those notions of "rule of law" or "accountability". Practical recognition of the International Rule of law is a matter of moral necessity in order to protect those subject to mass murder, rape and torture. Therefore, this paper advocates the utter abolition of the international rule of politics

and suggests a practical means for the practical recognition of the International Rule of Law.

(Endnotes)

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[12] ibid 41
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[16] Chesterman,(n 9); Cassese, International Law (OUP 2005), 347-351
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[22] Blockmans (n 18) (emphasis added); Franck (n 1) 136
[23] Security Council Resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1207 (1998)
[24] Security Council Resolution 1160 (1998)
[25] Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia" (2000) 49 ICLQ 330 at 335
[26] Security Council Resolution 1199 (1998) preamble
[27] Kritsiotis (n 25)
[28] Statement of the Secretary of State for Defence George Robertson, HC Hansard, Vol.328, cols 616-617 (1999); Foreign and Commonwealth Office (1992) 63 B.Y.B.I.L. 824, 827
[29] ICJ Press Communiqué No.99/17
[30] CR 99/15 Verbatim Record of 10 May 1999
[31] ibid
[32] Walzer (n 18)

[33] Cassese, International Law (2nd ed OUP 2005) 373-374
[34] Article 2(7) of the UN Charter provides: '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any State'
[35] Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States), Merits Judgment of 27 June 1986, 1986 ICJ Rep 14, 109, para 207
[36] ibid 106-109 and 123-27
[37] Corfu Channel Case (United Kingdom v Albania), Merits Judgment, 9 April 1949, ICJ Rep 9,35
[38] Lowe, International Law (OUP 2007) 280-282
[39] Blockmans (n 18) 776 – 779
[40] Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order 1 (University of Pennsylvania Press 1996) 364
[41] Security Council Resolution 929 (1994)
[42] Security Council Resolution 940 (1994)
[43] Blockmans (n 18) 776
[44] S.C.O.R. (LIV), 3988th Meeting, 26 March 1999 (on the NATO invasion of the FRY). The proposed resolution was defeated by 12 votes against to just three in favour.
[45]UN Doc S/1999/328, 26 March 1999; Franck (n 11) 163-170; Kritsiotis (n 25) 347
[46] Hilpold, "Humanitarian Intervention: Is there a Need for a Legal Reappraisal?" (2001) 12 EJIL 437, 462; Mendelson, "The Formation of Customary International Law", 272 RdC (1998) 268
[47] Krisch, "Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council", 3 Max Planck Yearbook of United Nations Law (1999) 59, 84
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[49] Ress, "Interpretation", in Simma, The Charter of the United Nations – A Commentary (1995) 677, 42 para 34
[50] Dworkin, Law's Empire (Hart Publishing 1998) 227-228
[51] Cassese, "Ex iniuria ius oritur: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 EJIL 25; Greenwood, "International Law and the NATO Intervention in Kosovo" (2000) 49 ICLQ 926-934
[52] Cassese, (n 51) 27 Cassese lists limitations which should be put on the unilateral right: i) violations must be "gross" or "mass" and perpetrated directly or with the support of the government, (ii) proof that the central authorities are responsible for the crimes against humanity and that they have on a number of occasions refused to comply with the recommendations or decisions of international institutions and organisations, (iii) the Security Council has refused to sanction enforcement action, (iv) all peaceful means are exhausted, (v) a group of states, and not merely one crusader, preferably with the agreement of the majority of members of the UN agree to intervene, (vi) force is only used for the purpose of halting the atrocities alone.
[53] Walzer (n 18) 3
[54] Evans, 'From Principle to Practice: Implementing the Responsibility to Protect', Keynote address to Egmont Conference and Expert Seminar From Principle to Practice: Implementing the Responsibility to Protect, Royal Institute of International Affairs, Brussels, 26 April 2007; see also Barnet, "Patterns of Intervention" in Falk (ed), The Vietnam War and International Law (1969)1164
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[56] Goodman, "Humanitarian Intervention and Pretexts for War" (2006) 100 AJIL, 107
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[67] Tanguy, "Redefining Sovereignty and Intervention", Ethics and International Affairs, 17, no 1 (2003) 143

[68] Peters, (n 2); see also Arbour "The responsibility to protect as a duty of care in international law and practice" Review of International Studies (2008) 34, 448

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[74] Evans, "The Responsibility to Protect", International Relations 22, no. 3 (2008) 283, 294

[75] Bellamy, "Responsibility to Protect – Five Years On", Ethics and International Affairs, 24, no 2, (2010) 143-169

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[80] Goodman (n 56)

[81] Hilpold (n 46)

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[102] Howse & Genser, "Are EU Trade Sanctions on Burma Compatible with WTO Law?", 29 (2008), Issue 2, MJIL, 165-196
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[136] Bellamy (n 59) 143-169
[137] Photo Productions Ltd v Securicor Ltd [1980] 1 All ER 558 (Lord Diplock); Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 1962 ICJ 163 at 164; Frey "Obligations to Protect the Right to Life: Constructing a Rule of Transfer Regarding Small Arms and Light Weapons" in Gibney & Skogly (eds), Universal Human Rights and Extraterritorial Obligations, (University of Pennsylvania Press 2010) 34
[138] Chorzów Factory (Jurisdiction) (1927), PCIJ Ser. A, no. 9, 21
[139] Bellamy (n 59)
[140] Article 24(1) of the UN Charter which provides that the Security Council shall have 'primary responsibility for the maintenance of international peace and security'
[141] ibid
[142] Arbour (n 72) 454
[143] Walzer (n 18)
[144] Bellamy (n 59)
[145] Annan, "In Larger Freedom: Towards Development, Security and Human Rights for All", Report of the Secretary General, A/59/2005, 21 March 2005
[146] Report of the Secretary-General's High-level Panel on Threats, Challenges and Change (n 146)
[147] 2005 World Summit Outcome Document, A/60/L.1, para 139 (emphasis added)
[148] Welsh, "The Responsibility to Protect: Securing the Individual in International Society", in Goold & Lazarus (eds) Security and Human Rights (Hart Publishing, 2010) 379
[149] G.A.O.R., 5th Sess., Annexes, vol 2, Item 68, UN Doc. A/1377 (1950)
[150] US Secretary of State Dean Acheson see Franck, Recourse to Force (n 14) 33
[151] General Assembly Resolution 1474 (ES-IV) 1960
[152] Blum, "Who Killed Article 12 of the United Nations Charter?" in Blum, Eroding the United Nations Charter (Brill Academic Publishers 1993)
[153] UN Secretary General's High Level Panel on Threats, Challenges and Change (n 146)
[154] Blockmans (nn18) 785
[155] Joined Cases C-402/05 P and C-415/05 P, Kadi & Al Barakaat v. Council of the European Union , 3 CMLR 41 (2008)
[156] Kidd White, "Humanity as the Alpha and Omega of Sovereignty: Four Replies to Anne Peters", The European Journal of International law 20 (2009), 545-567, 546

[157] Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 1962 ICJ 163, 164

[158] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory I.C.J. Reports 2004, 136, paras. 27-28

[159] The Responsibility Not to Veto: A Way Forward, Citizens for Global Solutions, White Paper (2010)

[160] Peters (n 2) 569-573

[161] Elster, 'Deliberation and Constitution Making', in Elster (ed.), Deliberative Democracy (1998) 97, 111

[162] Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 ct 1995, Case No. IT-94-1-AR72, 105 ILR 419, paras 26–28

[163] Peters (n 1)

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