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Legitimate humanitarian intervention under international law in the context of the current human rights and humanitarian crisis in Burma/Myanmar

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Introduction

Burma¹ is a multicultural country, consisting of over 130 ethnic groups.² The Bama comprise more than half the population. Politically important minorities like the Karen, the Shan and the Mon are involved in armed conflicts with the Burmese military as well as with one another.³ Some of the armed groups belong to drug lords trying to defend their interests in the highly lucrative drug trade. The military junta has adopted a policy of tolerating, not to say supporting, the drug trade in exchange for cease-fire agreements with the drug lords. It seems that government officials are actively involved in drug trafficking, one of the main industries in rural Burma. The drug trade has become a threat to the entire region, fuelling an alarming AIDS epidemic and playing a part in driving corruption.

The junta continues to oppress opposition activities, to violate human rights on a regular basis and to refuse to share power.⁴ It has not managed to address fundamental problems of the country, namely the devastating economic situation, ongoing ethnic conflicts and drug production and trafficking. Recent negotiations⁵ between the opposition and junta members have not resolved the political deadlock.

¹ In 1997, the military regime changed the name of the country to Myanmar. This name refers to the Bama majority and is—contrarily to the reasoning put forward by the government - not inclusive as to represent the multi-ethnic character of the Burmese society.

² See further M. Smith, *Burma: Insurgency and the Politics of Ethnicity*, (London: Zed Books Ltd., 1993) See also the revised edition – M. Smith, *Burma: Insurgency and the Politics of Ethnicity* (Dhaka: University Press 1999) and Jeremy Sarkin, “Examining the Competing Constitutional Processes in Burma/Myanmar from a Comparative and International Democratic and Human Rights Perspective” (2001) 2(2) *Asia-Pacific Journal on Human Rights and the Law* 42.

³ For a complete understanding of the insurgency, see M. Smith, *Burma, Insurgency and the Politics of Ethnicity* (London: Zed Books, 2nd edition, 1999).

⁴ Jeremy Sarkin, “Dealing With Past Human Rights Abuses: Promoting Reconciliation in a Future Democratic Burma” (2000) 7 *Legal Issues on Burma Journal* 1.

⁵ See further Jeremy Sarkin, “Examining the Competing Constitutional Processes In Burma/ Myanmar from a Comparative and International Democratic and Human Rights Perspective” (2001) 2(2) *Asia-Pacific Journal on Human Rights and the Law* 42.

This paper focuses on the humanitarian situation in present-day Burma to discern options for external humanitarian intervention.⁶ Such intervention has to meet specific legal prerequisites and must be strictly limited in its scope.⁷ Thus, the paper substantiates the existence of a humanitarian crisis in Burma.⁸ To facilitate an understanding of the current situation of human rights in the various provinces, the paper sketches the political history of the state, from its independence from the British. Since 1962, Burma has been ruled by a small military group.⁹

After presenting the political situation of the country, the article will proceed to the illustration of a humanitarian crisis in Burma.¹⁰ The article scrutinises the possible legal grounds for humanitarian action.¹¹ The question of whether a right to humanitarian intervention exists is a source of debate among international law scholars, NGOs and governments. The legal issues involved will be discussed in this article, and the possible grounds for such a right under international law will be presented. The paper also examines the Genocide Convention, the UN Charter and, most importantly, customary international law. The recent cases of Iraq and Kosovo have lent authority to this position.¹²

⁶ An intervention on the territory of a sovereign state can be defined as the protection by a state or group of states of fundamental human rights, in particular the right to life, of nationals of, and residing in, the territory of other states, involving the use or threat of force, such protection taking place neither upon the authorisation by the relevant organs of the UN nor upon invitation by the legitimate government of the target state, D Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention" (1998) *Michigan Journal of International Law* 1005. See also M C Bassiouni, "The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities" (Fall 1998) 8(2) *Transnational Law and Contemporary Problems* 199.

⁷ See further T. Hadden and C. Harvey, "The Law of Internal Crisis and Conflict: An Outline Prospectus for Merger of International Human Rights Law, the Law of Armed Conflict, Refugee Law, and the Law on Humanitarian Intervention" (1999) 18 (833) *International Review of the Red Cross* 119.

⁸ Others have also noted the need for humanitarian intervention in Burma. Petersen for example lists a whole host of reasons why intervention should occur in Burma but notes that: "If humanitarian concerns were pre-eminent, action would most likely have been taken in ... Burma, yet human rights abuses continue." Frederick J. Petersen "The Facade of Humanitarian Intervention for Human Rights in a Community of Sovereign Nations" (Fall 1998) *Arizona Journal of International and Comparative Law* 871.

⁹ M. Ali Khan, *The Burmese Way: To Where? Report of a Mission to Myanmar (Burma)*, (Geneva: International Commission of Jurists, 1991) p 14.

¹⁰ The paper illustrates the severity of the humanitarian situation by examining a range of issues that impact on that state of affairs.

¹¹ On the issues broadly see Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (Oxford, New York: Oxford University Press, 2001).

¹² On Iraq see Louis Rene Beres, "Iraqi Crimes During and After the Gulf War: The Imperative Response of International Law" (April 1993) 15(3) *Loyola of Los Angeles International & Comparative Law Journal* 629. See also Ved Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti-Revisiting the Validity of Humanitarian Intervention Under International Law - Part I" (1992) 20 *Denver Journal of International Law and Policy* 305 and Ved P. Nanda, Thomas F. Muther, Jr., Amy E. Eckert "Tragedies In Somalia, Yugoslavia, Haiti, Rwanda And Liberia-Revisiting The Validity Of Humanitarian Intervention Under International Law- Part II" (Winter 1998) *Denver Journal of International Law and Policy* 827. On Kosovo there is a wealth of literature see for example Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 *European Journal of International Law* 1, Richard A. Falk, "NATO's Kosovo Intervention: Kosovo, World Order, and the Future of International Law" (1999) 93 *American Journal of International Law* 847, 853, Sergio Balanzino, "NATO's Actions to Uphold Human Rights and Democratic Values in Kosovo: A Test Case for a New Alliance" (1999) 23 *Fordham International Law Journal* 364, Jonathan Charney, "Anticipatory Humanitarian Intervention in Kosovo" (1999) 93 *American Journal of International Law* 834, Christine M. Chinkin, "NATO's Kosovo Intervention: A "Good" or "Bad" War?" (1999) 93 *American Journal of International Law* 841, Klinton W. Alexander, "NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval" (2000) 22 *Houston Journal of*

There is a legal tension, which the paper considers, between humanitarian relief and political intervention into domestic affairs. The focus of examination is placed on humanitarian action, as opposed to intervention in order to establish democracy. The use of force with political aims, as employed by the U.S. in Grenada in 1983 or Panama¹³ in 1989,¹⁴ that is to say an ideological intervention, is not discussed in this paper.¹⁵

After examining the theory, the paper applies it in the specific context of Burma. The legal footing of a possible humanitarian operation in Burma is also examined. The article considers the scope of a humanitarian intervention and defines its limitations. A section of the paper is dedicated to the issue of legitimate action, including the use of armed force.

The current humanitarian situation

In order to discern the possibilities for humanitarian intervention, it has to be shown that there is a humanitarian crisis in Burma. Human rights abuses take place on a daily basis, committed by the state, which oppresses the opposition, and by soldiers involved in the conflict between the various ethnic groups.

Although recent dialogue between the opposition, the UN and the military junta has occurred, this has not yet led to any political change.¹⁶ While in October 2000 the government decreed to abolish the practice of forced labour, little has resulted.

A regression however occurred recently. On 30 May 2003 Aung San Suu Kyi, and about 17 of her supporters, was arrested after being attacked by another group while undertaking a tour of north and central Burma. It is believed that a number of people died in the attack. The government has claimed to have taken her into protective custody. Many, including the UN Secretary-General, have called for her release.

The recent political past of Burma has led to political deadlock. Continuing political oppression has contributed to the deterioration of the humanitarian situation. Large parts of the population are subject to arbitrary violence and lack food, water, medical care and housing. The junta has put budgetary priority on expansion and maintenance of the army. This has resulted in a decline in spending on social welfare and human development, such as health and education.¹⁷ The

International Law 403, 448, Bartram S. Brown, "Humanitarian Intervention and Kosovo: Humanitarian Intervention at a Crossroads" (2000) 41 *William and Mary Law Review* 1683.

¹³ On the issues around Panama see Anthony D'Amato, "The Invasion of Panama Was a Lawful Response to Tyranny" (1990) 84 *American Journal of International Law* 516; and Abraham Sofaer, "The Legality of United States Action in Panama" (1991) 29 *Columbia Journal of Transnational Law* 281 and Julie Mertus, "Legitimizing the Use of Force in Kosovo" (2001) 15 *Ethics and International Affairs* 133.

¹⁴ Summarised in D. J. Harris, *Cases and Materials on International Law*, (London: Sweet and Maxwell, 5th edition 1998) pp. 890-894.

¹⁵ On the use of force see further Barry M. Benjamin, "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities" 16 *Fordham International Law Journal* 120, (1992-93) and Mary Ellen O'Connell, "Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy" 36 *Columbia Journal of Transnational Law*. 473 (1997).

¹⁶ See further Jeremy Sarkin, "Examining the Competing Constitutional Processes in Burma/ Myanmar from a Comparative and International Democratic and Human Rights Perspective" (2001) 2(2) *Asia-Pacific Journal on Human Rights and the Law* 42.

¹⁷ See further the Report of the Special Rapporteur of the UNHCHR, E/CN.4/2000/38, 24 January 2000, p. 12.

involvement of high government officials in drug trafficking¹⁸ has increased drug production and trade and has allowed the region to become destabilised.

In conjunction with daily violations of fundamental rights of the population, there are three critical factors that have caused an alarming humanitarian emergency. These are, firstly, the internal displacement of ethnic minority groups, secondly, the practice of forced labour and, thirdly, the growing AIDS crisis fuelled, at least in part, by the drug trade.

The analysis of a humanitarian crisis in Burma is conducted without reference to examples of other countries. Any intervention for humanitarian purposes is justified in itself by the severity of a given situation in the respective region. Selectivity in the choice of a people in need is not only inappropriate but is also not permissible in the spirit of international human rights law.

How the political past underlies the current internal situation

The independence struggle under General Aung San led to Burma's independence from the British Kingdom in 1948.¹⁹ With the exception of a brief period from 1958 to 1960, the communist party AFPFL (Anti-Fascist People's Freedom League) ruled the Union of Burma until 1962. Several non-Bama states had begun to strengthen federal structures in the multi-ethnic country when a military faction of the ruling AFPFL under General Ne Win staged a coup *d'état*. The taking of power was allegedly to prevent secession from the union.²⁰ The military Thakins²¹ claimed that civilian leaders were incompetent and that the parliamentary system was flawed. A military-socialist regime was put into place, following a doctrine of supposedly synthesised Buddhism and socialism.²² The coup leaders claimed the inheritance of Aung San, the mythologised leader of the Burmese independence struggle and father of Aung San Suu Kyi, the head of the National League for Democracy (NLD).²³ The new regime consisted of the Lanzin Party, promoting the Burmese Way to Socialism, and organs of the parliamentary state that soon became superfluous. Political activities outside the Lanzin Party were prohibited. The Lanzin Party was composed of members who were loyal to General Ne Win, but the main power lay with a handful of military personnel around Ne Win.

Politics in Burma, therefore, developed into a patrimonial dictatorship, supported by an efficient network of secret agents and spies.²⁴ The military-socialist regime outlawed any private economic activities and branded offenders as "economic insurgents".²⁵ A flourishing black market

¹⁸ See further D. Ball, *Burma and drugs: The Regime's Complicity in the Global Drug Trade*, (Canberra: Strategic Studies Centre, Australian National University, 1999).

¹⁹ See further Jeremy Sarkin, "Examining the Competing Constitutional Processes in Burma/ Myanmar from a Comparative and International Democratic and Human Rights Perspective" (2001) 2(2) *Asia-Pacific Journal on Human Rights and the Law* 42.

²⁰ The truth is that the federal movement of non-Bama states (including Shan and Karen rebels) never planned a secession from the union, see C-T. Yawngwe, "Burma, "The De-Politicization of the Political" in M. Alagappa, (ed.) *Political Legitimacy in Southeast Asia, The Quest for Moral Authority* (Stanford: Stanford University Press, 1995) p. 184.

²¹ Thakin means 'master' and referred in colonial times to white people. Freedom fighters attached the term to their names since the 1930s. See further Yawngwe (note 20 above) p. 368, footnote 44.

²² The core doctrine was known as 'System of correlation of man and his environment'. However, the real commitment of the military leadership is reflected in the comment of a former member: 'Ne Win will be a socialist when Mao Tse-Tung learns to play golf.' See further D. I. Steinberg, "The State, Power and Civil Society in Burma-Myanmar: The Status and Prospects for Pluralism" in Morton B. Pedersen, Emily Rudland, R.J. May (eds), *Burma-Myanmar: Strong Regime, Weak State?* (Adelaide: Crawford House Publishing, 2000) p. 99, footnote 5.

²³ See further Yawngwe, (note 20 above) p. 185.

²⁴ See further Yawngwe, (note 20 above) p. 187 and footnote 111.

²⁵ See further Yawngwe, (note 20 above) p. 188.

emerged, which allowed many to survive in a country that approached economic collapse.²⁶ The state's bureaucracy became the largest employer, the press was nationalised and membership of the party's youth organisation became necessary for any career aspirations.²⁷ Deteriorating social conditions and state repression by police and military intelligence resulted in student protests that in 1988 led to nationwide rallies. The "people power" uprising was put down by the army with the use of live ammunition that resulted in a massacre. However, the uprising gained such widespread support that the military reacted and staged a coup to "save Burma". On 18 September 1988 General Saw Maung installed himself as head of the State Law and Order Restoration Council (SLORC) and martial law was introduced.²⁸ The new military junta dropped the official socialist doctrine, but could not hide that the new regime was just a reshuffle of the members of the old order.²⁹ Seeking support from the Burmese people, the junta scheduled general elections that took place in 1990. Despite intimidation campaigns aimed at the opposition parties, including the imposition of house arrest on NLD leader Aung San Suu Kyi, the NLD won a landslide victory.³⁰

SLORC, however, ignored the outcome of the elections and continued developing a repressive military regime. Any important positions in the executive have been held by members of the *tatmadaw*,³¹ who are mostly ill-equipped and incompetent to perform their tasks. While General Ne Win resigned as a political office-bearer, it is well known that he remains a key player behind the scenes.³² Recently however, his influence has been weakened. Ne Win's son-in-law Aye Zaw Win and three grandsons were sentenced to death by hanging for plotting to overthrow the military government. The sentence for high treason followed convictions of more than 80 soldiers from Ne Win's security detail. The General himself has been under house arrest. Some analysts say that the junta is intent on crushing Sandar Win, who has built up a significant business empire. It is supposed that an internal fight on power has begun with senior military members losing their impact on the SPDC.³³

Regular human rights violations by public officials

The ruling SPDC³⁴ has not taken steps to improve its disastrous human rights record.³⁵ It pursues a strategy of suppressing democratic opposition through the detention of political activists, intimidation and the restricting of civil liberties. Freedom of expression, association, assembly and

²⁶ For a detailed illustration of Burma's economic decline see M Maung, *The Burma Road to Poverty* (Boston: Praeger Publishers, 1991) especially pp. 117-143, 171-231.

²⁷ See further Steinberg, (note 22 above) p. 107.

²⁸ Josef Silverstein, "The Evolution and Salience of Burma's National Political Culture" in: Robert I Rotberg (ed) *Burma - Prospects for a Democratic Future* (Washington D.C.: Brookings Institute Press, 1998) 17.

²⁹ See further Yawngwe, (note 20 above) p. 189.

³⁰ The NLD won 392 of 485 constituencies, see Burma Lawyers' Council, "Burma's Election and Constitutional History: A Snapshot" (December 2000) 7 *Legal Issues on Burma* p.70.

³¹ A Burmese word meaning members of the armed forces. See further Andrew Seth, *Burma's Armed Forces: Power Without Glory* (Norwalk, CT: EastBridge 2002).

New York, N.Y. : Palgrave Press, 2001.

³² Yawngwe, (note 20 above) p. 189.

³³ BBC on 26 September 2002, available at www.news.bbc.co.uk.

³⁴ The State Peace and Development Council, formerly called SLORC, but restructured in November 1997 in order to gain international recognition. SPDC and *tatmadaw* are terms used interchangeably by the junta, see J Saffin, "Law-Making and Law Enforcement in Burma: The Military Junta's Failure in Regard to Forced Labour" in: Burma Lawyers' Council (December 2000) 7 *Legal Issues on Burma Journal* p. 42.

³⁵ Robert H. Taylor, "Myanmar: Military Politics and the Prospects for Democratisation" (February 1998) 29 *Asian Affairs* 1.

movement are severely curtailed.³⁶ Opposition members are monitored by state agents, arbitrarily arrested and detained on fabricated charges.³⁷ Citizens are prevented from accessing any media other than state controlled sources. Police routinely infringe the right to privacy, searching houses without warrant and screening correspondence and telephone conversations.³⁸ Many political activists have fled and are in exile. Military intelligence and the army apprehend persons routinely for interrogation. The whereabouts of these individuals, including opposition members, often remain unknown.³⁹

The judiciary in Burma lacks independence from the executive.⁴⁰ The military junta appoints or approves judges and promulgates decrees for cases to be adjudicated. The right to a fair trial by an independent and impartial tribunal does not exist in political cases. Prisoners are ill-treated, beaten and tortured. Some detainees are denied medical care, causing death and serious diseases. Generally, prison conditions are harsh and life-threatening.⁴¹

The junta in Burma denies its citizens the right to choose their own government and suppresses political resistance. While the list of human rights abuses by the government is comprehensive and dire, it is doubtful whether violations of civil and political rights alone, though entailing physical hardship and even death in the case of disappearances, amount to a humanitarian crisis that would justify external intervention as defined above. Admittedly, there are no well-drawn lines between “domestic affairs”, implying human rights abuses committed by a government against its own people, on the one hand, and a humanitarian emergency situation with an imminent threat to life and physical integrity of the population in a given state, on the other. The universality of human rights beyond domestic jurisdiction has been jealously guarded by the international community and was reaffirmed during the Vienna World Conference on Human Rights in 1993.⁴² Human rights have increased in importance on the international level especially during the 1990s.⁴³ The few precedent cases when humanitarian ends were invoked by intervening states will be discussed below. In none of them did states satisfy themselves by simply referring to repeated gross violations of civil liberties. One has to bear in mind that state sovereignty is among the guiding principles of international law. If it is to be restricted, necessity and legitimacy must be well founded.⁴⁴

For these reasons, it will be shown that the humanitarian situation in Burma lies beyond only patterns of systematic civil rights violations. In fact, large parts of the population lack basic needs, namely food and physical safety. Apart from the described violations of political and civil

³⁶ Human Rights Watch World Report 2001.

³⁷ Report of the Special Rapporteur of the United Nations High Commissioner for Human Rights, 24 January 2000, E/CN.4/2000/38, par. 7.

³⁸ U.S. Department of State, Country Report on Human Rights Practices 2000, February 2001. See earlier reports as well. See as well generally the reports of the Office of the High Commissioner for Human Rights, UNHCHR, Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar.

³⁹ U.S. Department of State 2000 report. See also the earlier reports of this Department as well. Also see the various reports of Amnesty International.

⁴⁰ Myint Zan, “Judicial Independence in Burma: No March Backwards Towards the Past Asian-Pacific” (February 2000) *Law & Policy Journal* 1.

⁴¹ U.S. Department of State 2000 Report.

⁴² See D J Harris (note 14 above) p. 627.

⁴³ Manifesting itself in increased international collaboration, such as through the ad hoc tribunals, and the implementation of the ICC, not to mention military missions undertaken in Iraq, Somalia and Kosovo involving the protection of nationals.

⁴⁴ See further Antonio Cassese “Ex Inuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?” (1999) 10 *European Journal of International Law* 23.

rights, the junta denies socio-economic rights to the majority. The Special Rapporteur of the UNHCHR has stated that despite Burma's rich resources and economic potential, the country is "trapped in ... poverty".⁴⁵

The health performance by the government is poor and Burma ranked second last in a country study by the World Health Organisation.⁴⁶ Generally, food security does not exist in the country; three out of ten children under the age of three suffer from wasting and one in ten is severely malnourished.⁴⁷ Additionally, in civil war areas people have to give their food quotas to the army and rebel movements, causing serious food scarcity.⁴⁸ The state of education in Burma is alarming. Few obtain education beyond primary school level. While universities have been partly reopened after a decade of closure, access is extremely limited and then strictly controlled by the state.⁴⁹

More decisively, coming back to the definition of humanitarian intervention above, the lives of Burmese nationals are threatened by acts and omissions of government officials. Forced relocation exposes people to starvation, compels them to flee and to survive under appalling conditions in the jungle. Detainees at relocation camps are subjected to physical abuse, ranging from beatings to killings. Forced labour practices involve arbitrary detention, rape, assault and killings of civilians, especially in areas of civil unrest. Meanwhile, an HIV/AIDS crisis with shocking numbers of infections is supported by a thriving drug trade in the region between Burma, Laos and Thailand. Not only does the government's ignorance toward the HIV/AIDS epidemic lead to new infections every day, it leaves thousands of people dead due to a lack of medical care and prevention. The involvement of government agents in the drug industry might amount to a threat to the region's political stability. This could incite the Security Council to take action under Chapter VII of the UN Charter.

Each of the three factors scrutinised below contain threats to human lives and represents gross violations of fundamental human rights. However, they cannot be considered separately, as strategies of forced relocation and forced labour are rooted in systematic breaches of civil and political rights. Taken as a whole, human rights abuses, forced relocation and forced labour practices collectively create a humanitarian situation justifying an intervention. The HIV/AIDS crisis also contributes to the silent emergency prevailing in Burma and will be examined in the light of possible Security Council action.

Internally displaced persons and refugees

*Internally displaced persons (IDP)*⁵⁰

For decades the military governments of Burma have applied a policy of forced relocation against ethnic groups seeking autonomy. The strategy is directed at countering insurgency in territories contested by the various parties to armed conflicts.⁵¹ Members of the armed forces drive villagers

⁴⁵ Special Rapporteur UNHCHR, (note 37 above) par. 32.

⁴⁶ WHO, World Health Report 2000.

⁴⁷ Special Rapporteur UNHCHR, (note 37 above) par. 36.

⁴⁸ Human Rights Watch World Report 2001.

⁴⁹ U.S. Department of State Report 2000.

⁵⁰ See the issues relating to IDP from a humanitarian point of view in Peter Salama, Paul Spiegel and Richard Brennan, "No Less Vulnerable: the Internally Displaced in Humanitarian Emergencies" *The Lancet* (May 5, 2001) 357 (9266) pp. 1430. See also *Internally Displaced Persons Lack Effective Protection*, Report of the U.S. General Accounting Office (GAO), August 2001.

⁵¹ Human Rights Watch World Report 2001.

out of their homes or force them to flee. Especially along the Thai border, Karen and Shan people are affected and struggle to survive in the forests, without sanitation, drinking water and adequate food.⁵² It has been reported that members of the *tatmadaw* and allied insurgent groups like the Democratic Karen Buddhist Army (DKBA) enter villages and demand money and food. When the inhabitants deny them this, the soldiers assault, kill and rape the civilians.⁵³ The government has pursued plans to eliminate villages in ethnic minority areas, such as in the Karen State.⁵⁴

In areas of armed rebellion, the *tatmadaw* have established forced relocation camps and have implemented strict curfews for ethnic minorities living in and outside the camps.⁵⁵ Refugees have reported that villagers are forbidden to remain on the streets between dusk and dawn, and that this is sometimes coupled with a ban to speak.⁵⁶ At the relocation sites, detainees are subjected to up to 15 days a month of forced labour, while army members loot and burn their villages.⁵⁷ People at the relocation sites are used by the SPDC troops as porters for carrying military supplies as well as building and maintaining army camps.⁵⁸

Women of ethnic minorities are especially vulnerable to army violence and often become victims of rape.⁵⁹ It is reported that relocated people searching for food outside their relocation areas have been killed, especially in the Karen State.⁶⁰

The increased implementation of forced relocation targeting villagers suspected of supporting insurgents is mainly to be observed in the southern Shan State, Karenni State, Karen State and Tenasserim division. In all these territories, formerly concluded cease-fires or peace negotiations have collapsed since 1996.⁶¹ The prevalent reason for the ongoing fighting is access to strategic resources in the Border States.⁶² It is suggested that the total number of IDP in the border states Shan, Mon, Karen and Karenni exceeds one million, some sources estimating them to be at least over 600 000.⁶³

Refugees in Thailand, India and Bangladesh

Because of political persecution, hundreds of ethnic minority people from the Karen, Karenni and Shan states are entering Thailand every month. At the end of 2000, approximately 100 000 Shan refugees were awaiting humanitarian assistance in Thailand.⁶⁴ Tens of thousands of people from rural areas in eastern Burma remain displaced in the forests.⁶⁵ Lack of physical security is a main problem facing both IDP in hiding and those in relocation camps. Violence by the armed forces compels people to either seek shelter in the woods or cross the border to Thailand or Bangladesh.

⁵² U.S. Department of State Country Report 2000.

⁵³ www.soros.org/burma.

⁵⁴ Karen Human Rights Group, available at <http://www.db.idpproject.org> "Patterns of displacement in Myanmar"

⁵⁵ Human Rights Watch World Report 2001.

⁵⁶ Human Rights Watch World Report 2001.

⁵⁷ Human Rights Watch World Report 2001.

⁵⁸ <http://www.db.idpproject.org> "Protection concerns".

⁵⁹ Norwegian Refugee Council, 13 June 2001, available at www.reliefweb.int/w/rwà/96cf149a417a6bcec1256a6b0032dbba?OpenDocument.

⁶⁰ www.soros.org/burma.

⁶¹ Human Rights Watch World Report 1999.

⁶² U.S. Department of State country report 2000.

⁶³ Norwegian Refugee Council, BBC, U.S. Department of the State, available at <http://www.db.idpproject.org> "IDPs in Myanmar (Burma)".

⁶⁴ U.S. Department of State country report 2000.

⁶⁵ U.S. Department of State country report 2000.

Landmines in the border areas add to the risks.⁶⁶

In 1991 and 1992, some 250 000 Muslim Rohingya fled from northern Arakan State where they experienced discrimination, forced labour and confiscation of their property by junta officials.⁶⁷ The Rohingya are denied citizenship in Burma and education beyond primary school level.⁶⁸ The refugees sought protection in Bangladesh, but have been considered by the Bangladeshi government to be illegal economic immigrants. Under a UNHCR repatriation programme most of the Rohingya have returned to Burma, where they continue to face severe human rights abuses. About 22 000 refugees still remain in camps in Bangladesh.⁶⁹ The refugees in Bangladeshi camps are subjected to physical abuses and to coercion by camp administrators.⁷⁰ Human Rights Watch has expressed concerns about repatriation of Rohingya in Burma, as their safety and physical integrity cannot be guaranteed.⁷¹

Persecution and human rights abuses have caused many people to flee the country. Most people have fled to the nearest neighbouring country, i.e. India, Bangladesh or Thailand. It is estimated that there are about one million migrant workers in Thailand.⁷² At 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.⁷³

The extent of the refugee influx into Bangladesh, India and Thailand and the lack of physical safety and basic needs call for external support. The refugee problem has already destabilised the region politically.

Forced labour

Adding to the catastrophic situation of IDP and refugees, the practice of forced labour must be considered. The government continues to employ forced labour, directed in particular against ethnic minorities.⁷⁴ Villagers are forced to participate in the construction of roads, bridges and army camps. Forced workers have to do errands for members of the *tatmadaw*, and are at their unlimited disposal. In many cases, people are abused as porters for patrols and military operations.⁷⁵ The ILO Commission of Inquiry on Forced Labour in Myanmar Report 1998⁷⁶ revealed “a saga of untold misery and suffering, oppression and exploitation of large sections of the population by the government, military and other public officers”.⁷⁷ Since 1988, ethnic minorities in Shan State, Kachin, Karen and Arakan have been exploited as unpaid labour, at the disposal of the military and

⁶⁶ See www.soros.org/burma

⁶⁷ Human Rights Watch, 30 May 2000, available at www.freeburmacoalition.org/2000/05/28/burmeserefugeesbangladesh.html

⁶⁸ U.S. Department of State country report 2000.

⁶⁹ U.S. Department of State country report 2000.

⁷⁰ U.S. Department of State country report 2000.

⁷¹ See www.hrw.org/reports/2000/burma.

⁷² See www.soros.org/burma/burmadebate/fall99btm.html.

⁷³ See further www.soros.org/burma/CRISIS/health.html.

⁷⁴ U.S. Department of State country report 2000.

⁷⁵ ILO GB. 280/6, par. 65.

⁷⁶ Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No.29). See further International Labour Office, Governing Body (GB.280/6), 280th Session, *Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No.29)*.

⁷⁷ ILO Press Release, ILO/98/32, 2 July 1998, available at www.ilo.org/public/english/bureau/inf/pr/1998/32.htm

other public officials. Workers are guarded by soldiers and ill-treated, beaten and even killed.⁷⁸ In the case of female labourers, rape is used as a sexual service rendered to army members. Women are subjected to sexual violence, young women are at times abducted and only released after being gang raped and assaulted.⁷⁹ Women of ethnic minorities in general, and Rohingyas in particular, are lured by traffickers into becoming sex workers.⁸⁰

Little has been done about the practice of forced labour.⁸¹ Some groups of insurgents have adopted similar strategies, violating humanitarian law.⁸² The ILO Commission of Inquiry in 1998 stated that the junta was “guilty of an international crime that is also, if committed in a widespread or systematic manner, a crime against humanity”.⁸³

It is reported that since 1988 the junta has used forced labour for the development of cultivated land. “Labour villages” are sometimes erected to house forced workers on development projects.⁸⁴ Recruiting methods comprise the issuing of orders to attend meetings at military camps, ordering civilian authorities to supply the military with “servants” or “volunteer workers” and the arbitrary arrest of young men in order to turn them into forced workers.⁸⁵

The junta, despite international pressure from the ILO and various Western countries, has failed to disclose the real extent of the practice of forced labour throughout the country’s armed conflict areas. Resolutions adopted by the ILO have been disregarded and ignored.⁸⁶ The government repeatedly describes the practice of volunteer work as a part of Burmese Buddhist culture and thereby justifies widespread abuse thereof.⁸⁷ In 1999, the SPDC issued an order directing local authorities “not to exercise the powers conferred on them” under the Village Act (1908) or the Towns Act (1907), both of which provide for the exaction of work services upon requisition by police or government.⁸⁸ Failure to comply with these laws is punishable with imprisonment.⁸⁹ The junta has, however, made no commitment to discontinue forced labour practices. The 1999 order, as well as a Supplementary Order issued in October 2000, is limited in scope and the stipulations in the penal code prohibiting the imposition of forced labour have not been applied.⁹⁰

Forced labour violates international obligations, specifically the Forced Labour Convention, which Burma acceded to and ratified in 1955.⁹¹ The regime has not complied with ILO resolutions demanding effective measures stopping forced labour practices.⁹² While condemning ILO reports

⁷⁸ ILO Press release, ILO/98/32.

⁷⁹ ILO Press release, ILO/98/32, also Special Rapporteur UNHCHR, (note 37 above) p. 13.

⁸⁰ Special Rapporteur UNHCHR (note 37 above) p. 14.

⁸¹ Special Rapporteur UNHCHR (note 37 above) p. 14.

⁸² U.S. Department of State country report 2000.

⁸³ ILO Press Release, ILO/98/32, par. 538.

⁸⁴ U.S. Department of State country report 2000.

⁸⁵ ILO GB.280/6, par. 65, 66.

⁸⁶ ILO GB.280/6, par. 62.

⁸⁷ See further the government website at www.myanmar-information.net/political/english.pdf

⁸⁸ Order no. 1/99, see www.physics.adelaide.edu.au/~uneoo/a161000.html

⁸⁹ ILO GB.280/6, Appendix 8.

⁹⁰ U.S. Department of State Country Report 2000.

⁹¹ See ILO “Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No.29)”. See further R. Layton, “Forced Labour in Burma: A Summary of the International Labour Organisation Report & Subsequent Developments” (2000) 4 *Southern Cross University Law Review* 148.

⁹² A deadline set by the ILO in November 2000 was ignored by the government, which surprisingly granted an ILO delegation access to the country, see Human Rights Watch, available at www.hrw.org/wr2k1/asia/burma.html

as sources of “wrong information sent by runaways, insurgent organisations and groups of elements opposed to the Government”, Burmese officials attempt to distract international concerns.⁹³ Credible evidence of ongoing forced labour practices remains.⁹⁴

The HIV/AIDS crisis

The regime has seriously neglected the public health care sector. This has led to a sharp decline in the use of public hospitals.⁹⁵ About one million children are reportedly malnourished.⁹⁶ What threatens the health of the Burmese population even more, however, is the HIV/AIDS epidemic. UNAIDS estimated that there were around 440 000 infected people in 1997.⁹⁷ According to the World Bank, there were over one million cases of HIV/AIDS in 2000.⁹⁸ Other sources speak of four to five per cent of the population being HIV-positive, more than even in Thailand.⁹⁹ Spreading from Burma’s northeast, it is fuelled by a flourishing narcotics trade. Decades of opium production in the remote mountains of Burma has generated a culture of drug warlords ousting each other in the trade with narcotics. The junta’s cease-fire agreements with some ethnic groups give warlords a free hand in production and trading of heroin.¹⁰⁰ Burma’s border areas are awash with cheap supplies of the drug, which is also plentiful in the country’s largest cities, Rangoon¹⁰¹ and Mandalay.¹⁰² Heroin is far cheaper than syringes, and addicts routinely share needles. According to the UN Drug Control Programme and some NGOs, there might be as many as 500 000 heroin addicts in Burma.¹⁰³ In the border areas, the HIV scourge has devastated small communities. In parts of the Kachin State, intravenous infection amongst drug users is as high as 90 per cent.¹⁰⁴ Community leaders in northern Burma mention drug abuse and AIDS as the most important social problems that villages and towns are facing.¹⁰⁵

Members of the army, including the highest ranks in the cabinet, are involved in the drug trade.¹⁰⁶ It was predicted that around 50 laboratories in Burma would produce 600 million synthetic

⁹³ Statement by His Excellency U May Than, leader of the Myanmar Observer Delegation at the Plenary of the 279th session of the ILO Governing Body, after the adoption of the decision on the situation of forced labour in Burma, Geneva, 16 November 2000, ILO GB 280/6, Appendix 1.

⁹⁴ J Saffin, (note 34 above) p. 39.

⁹⁵ Special Rapporteur UNHCHR, (note 37 above) p. 11.

⁹⁶ Special Rapporteur UNHCHR, (note 37 above) p. 11.

⁹⁷ Special Rapporteur UNHCHR, (note 37 above) p. 11.

⁹⁸ Special Rapporteur UNHCHR, (note 37 above) p. 11.

⁹⁹ Steinberg, (note 22 above) p. 119.

¹⁰⁰ U Ne Oo, member of the NGO Free Burma, 16 October 2000, available at www.physics.adelaide.edu.au/~uneoo/a161000.html.

¹⁰¹ The capital Rangoon has been renamed Yangon.

¹⁰² www.soros.org/burma.

¹⁰³ www.soros.org/burma.

¹⁰⁴ B Lintner, “Drugs and Economic Growth in Burma Today” in M B Pedersen (ed.), *Burma/Myanmar, Strong Regime, Weak State?* (Adelaide: Crawford House Publishing, 2000) p. 184. See also Bertil Lintner, *Burma in Revolt: Opium and Insurgency Since 1948* (Chiang Mai, Thailand: Silkworm Books, 2nd edn, 1999).

¹⁰⁵ The HIV epidemic is also spreading through sexual contact. Many young women from Burma’s diverse hill peoples have been forced or lured into prostitution in Thailand. As many as 40 000 may be in the trade at any given time. Tragically, a large percentage become HIV-positive within a short time. The Burmese military has, at best, taken no action to prevent the trafficking of women into prostitution, and local commanders are accused of abetting the trade. See further www.soros.org/burma

¹⁰⁶ Lintner, (note 104 above) p. 186.

drugs tablets in 2001.¹⁰⁷ The SPDC co-operates with drug lords, and corruption has reached every level of the *tatmadaw*. Important drug syndicates are well organised and have close ties to the *tatmadaw*.¹⁰⁸ The government usually collects ten per cent of the drugs or their value in cash. The money accumulated via the drug trade is presumably reinvested in the building up of the armed forces and represents Burma's most important export currency.¹⁰⁹ Narcotics are the basis for a slight boom in the Burmese economy over recent years.¹¹⁰ Money made in the production and distribution of heroin, now also methamphetamines and ecstasy, is laundered through hotels, restaurants and shops.¹¹¹

The extent of the drug trade and abuse by addicts has come to threaten the security of the whole region. The Golden Triangle¹¹² generates enormous assets that are laundered in gambling activities and a sex industry equipped with sex workers from Thailand. Strip bars and brothels at Sai Lin's headquarters receive up to 500 000 Chinese visitors per year.¹¹³ China has barred several Burmese politicians from entry because of their personal involvement in the drug trade.¹¹⁴ The People's Republic now officially has 500 000 drug users, while other sources estimate at least 1.5 million.¹¹⁵ China has put pressure on the Burmese junta to take action against the drug economy.¹¹⁶ Thailand reportedly considered launching a covert military operation to destroy amphetamine laboratories located in Burma.¹¹⁷ Such action, though unlikely to be carried out, does not foster good relations and does not auger well for regional stability. India is likewise affected by the drug trade and drug use. It is believed that there were between seven and eight million drug addicts in India in 1992, many of them HIV-positive.¹¹⁸ Heroin from Burma is readily available in India via the Chin State.¹¹⁹ Interestingly, all refining of heroin nowadays takes place in northern Burma, as there are no refineries in regional drug-producing countries like Laos, Thailand, Vietnam, China or Cambodia.¹²⁰

The HIV/AIDS crisis in Burma is growing and spreading across the borders. The military junta has failed to take necessary measures to educate the population, provide medical help to addicts and infected persons, prevent drug abuse and sexual transmission of AIDS and to fight the drug trade. NGOs have been refused entry into Burma and the AIDS crisis has been played down by the government. The regime has proved unwilling to safeguard the social rights of the people, namely the right to physical integrity and access to health care.

¹⁰⁷ www.physics.adelaide.edu.au/~uneoo/a161000.html

¹⁰⁸ Lintner, (note 104 above) p. 178.

¹⁰⁹ Lintner, (note 104 above) p. 186, 187.

¹¹⁰ Lintner, (note 104 above) p. 179.

¹¹¹ Lintner, (note 104 above) p. 176.

¹¹² Region of drug production (mostly heroin) and drug trade between Burma, Laos and Thailand.

¹¹³ Lintner, (note 104 above) p. 179.

¹¹⁴ Lintner, (note 104 above) p. 173.

¹¹⁵ Yang estimated four million hard drug addicts in 1993. See D. Yang, "Illegal Drugs, Policy Change and State Power: The Case of Contemporary China" (1993) *The Journal of Contemporary China* p. 34.

¹¹⁶ Lintner, (note 104 above) p. 175.

¹¹⁷ *Far Eastern Economic Review*, 1 June 2000.

¹¹⁸ *India Today*, 30 November 1992.

¹¹⁹ Lintner, (note 104 above) p. 177.

¹²⁰ Lintner, (note 104 above) p. 178.

Thus, the drug industry represents a major problem for the political stability of the region. In fact, the situation might amount to a “threat to the peace” under Article 39 of the UN Charter.¹²¹ Such determination would allow the Security Council to take action under Chapter VII. The Council could impose economic sanctions on the military junta. If need be, sanctions could be replaced by military coercion under Article 42.

In 1992, the Council authorised military intervention in Somalia to provide humanitarian assistance to about one million people facing starvation.¹²² In Resolution 794, the Security Council determined a “threat to international peace and security” and, acting “under Chapter VII”, called upon member states to ‘use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations’.¹²³

In September 1999, the Security Council determined the humanitarian situation in East Timor to be a “threat to peace and security”.¹²⁴ Upon request by the Indonesian government, the Council in Resolution 1264 established a multinational force with the mandate to restore peace and order and “facilitate humanitarian assistance operations”.¹²⁵

The Somali mission did not achieve very positive results because of the ongoing civil war. The Security Council reacted by passing Resolution 814, which set up UNOSOM II with the mandate to take enforcement action, including the disarmament of all local factions. The Somali case provides an important precedent for UN action in a civil war situation in the absence of government consent.

The Security Council would be in position to deem the cross-border drug industry in the Golden Triangle, resulting in an alarming HIV/AIDS crisis, a threat to international peace and security in the region. Although it has never adopted a resolution relating to the HIV/AIDS pandemic in a country as threatening international peace, the Security Council has expressed the theoretical option for such resolution.¹²⁶ In July 2000, the Council for the first time acknowledged the threat to international “stability and security” posed by HIV/AIDS, stressing “its possible growing impact on social instability and emergency situations”. The council, furthermore, recognised that the pandemic is “exacerbated by conditions of violence and instability”, causing refugee movements that increase the exposure to the disease and reduce medical care.¹²⁷ Thus, the Security Council has given itself the option of voting on a resolution that would link the threat to international security not only to a general humanitarian crisis in a given country, namely Burma, but to the HIV/AIDS pandemic in particular.

¹²¹ The Security Council has the political discretion to decide upon such resolution. Even though there might be other regions, especially in sub-Saharan Africa, where HIV/AIDS threatens the peace, the Council is empowered and called to act according to the provisions of the UN Charter (art. 1 (1), 24-26, 40-42).

¹²² See further Ruth E. Gordon, “Intervention By The United Nations: Iraq, Somalia, And Haiti” (1996) 31 *Texas International Law Journal* 43, Neal Higgins, “Intervention in Somalia, in *Ethics and Politics: Cases and Comments* 31 (Amy Gutmann & Dennis Thompson eds., 1997) and Alex de Waal and Rakiya Omaar, “Can Military Intervention Be “Humanitarian”?” (1994) 24(2)-(3) *Middle East Report* 3.

¹²³ Security Council Res. 794, December 1992, reprinted in P. Alston and H. Steiner, *International Human Rights in Context* (Oxford: Oxford University Press, 2000) p. 923.

¹²⁴ See further Mark Rothert, “U.N. Intervention in East Timor” (2000) 39 *Columbia Journal of Transnational Law* 257 (2000).

¹²⁵ Security Council Res. 1264, 15 September 1999.

¹²⁶ An increased focus on the issue by the UN can be seen in its establishment of a global fund to deal with HIV/AIDS.

¹²⁷ Security Council Res. 1308, 17 July 2000, concerning voluntary testing and counselling for peacekeeping personnel available at www.un.org/Docs/scres/2000/res1308e.pdf

The Security Council could authorise member states of the UN to intervene in order to channel humanitarian relief. Such military operation might be directed at the destruction of drug laboratories, plantations and refineries. In order to generate long-lasting effects, military action would have to include the disarmament of insurgent groups involved in the drug trade. The monitoring of disarmament, as well as the surveillance of military intelligence, might require the deployment of troops under UN command.

A silent emergency

The illustrated factors might in themselves not amount to a humanitarian crisis conducive to external military action. However, when the problems of IDP, practices of forced labour and the AIDS crisis are coupled together with consistent human rights abuses, committed mainly by members of the armed forces, this must amount to a humanitarian crisis. Massive and persistent violations of fundamental rights by members of the military regime increase the suffering of the ethnic groups as well as the population in general. Large segments of the Burmese populace are affected by malnutrition and starvation, notwithstanding the hazards to life and physical integrity caused by violent persecution and arbitrary killing.

As mentioned above, the human rights abuse record lists violations of political, civil, social, economic and cultural rights of the Burmese. The junta not only denies its citizens freedom of expression, association, assembly and movement, it detains people arbitrarily, keeps villagers in “relocation camps”, and tortures and kills people.¹²⁸ In terms of humanitarian needs, the government neglects to improve social standards of health, food and sanitation, especially in the border areas where armed conflicts persist. The expansion of the armed forces has caused a decline in spending on social welfare and human development.¹²⁹ The *tatmadaw* exacerbate the situation by pillaging, confiscating food and cash and recruiting forced labourers. Farmers are mistreated and exploited through quotas on rice or other foods, which are set by the government and enforced by the army.¹³⁰

Apart from the extremely difficult situation of food, health and security, members of the government armed forces, as well as some insurgent groups, continue to violate international humanitarian law. Burma ratified the Geneva Conventions in 1992,¹³¹ and although the junta did not adhere to the Optional Protocols, Common Article 3 applies in situations of internal armed conflict. The state is bound by all four Conventions and continuously breaches them in targeting civilians, raping women, killing civilians, beating them, through abduction, enslavement, torture and other acts. Members of the army appear to commit war crimes and crimes against humanity. Soldiers also keep violating the Convention against Discrimination of Women, ratified in 1997, the Forced Labour Convention and the Convention on the Rights of the Child, ratified in 1955 and 1991 respectively.¹³²

A report by the World Health Organisation recently placed Burma as 190th in overall health system performance of 191 countries surveyed. The regime spends over 200 per cent more on

¹²⁸ See further Human Rights Watch Report 2001 available at <http://www.hrw.org/wr2k1/asia/burma.html>. Mary Robinson put it drastically: “Count up the results of fifty years of human rights mechanisms, this is a failure of implementation in a scale that shames us all”, see B. K. Sen, “The Case for Humanitarian Intervention” in Burma Lawyers’ Council, (December 2000) 7 *Legal Issues on Burma Journal* p. 15.

¹²⁹ Special Rapporteur UNHCHR, (note 37 above) par. 12.

¹³⁰ U.S. Department of State Country Report 2000.

¹³¹ See further www.paris.msf.org “droit humanitaire”.

¹³² See www.paris.msf.org “droit humanitaire”.

military expenditures than on health and education combined.¹³³ According to a World Bank study in 1999, Burma is one of the poorest countries in the world. Acute poverty exists in large parts of the population, which subsists on a one-meal-per-day basis.¹³⁴ In 1990, 40 per cent of the Burmese lived below the poverty line. 40 per cent of the population did not have access to health services and safe drinking water in 1996. 57 per cent did not have proper sanitation.¹³⁵ Life expectancy is below 60 years of age, and infant mortality is double the rate of the rest of Asia. Child malnutrition rates are high enough to speak of a “silent emergency” in Burma.¹³⁶ IDP in the jungle live in the most dire health situations, with widespread malnutrition, chronic insecurity and high exposure to forest diseases, including malaria and diarrhoea. Mortality rates are very high.¹³⁷

The most critical emergency is the shortage of food. Food scarcity is a major problem in Burma. This is aggravated by the army, which regularly takes food from people in areas of armed conflict.¹³⁸ The Asian Human Rights Commission has indicated how the civil war creates food shortages. It identified six factors: direct attacks on civilians and food, looting of food and possessions, displacing people, restrictions on trade and travel, ecological damage and poor health.¹³⁹ The army imposes rice rationing on villagers and sometimes forces them to abandon their land. Soldiers warn villagers that anyone who refuses to move will be treated as an insurgent and shot on sight. Forced relocation and forced labour are strategies that render people in areas of civil war dependent on the armed forces. Because of malnutrition in the relocation camps, these practices increase starvation.¹⁴⁰ Outside the war zones, people suffer from hunger through agricultural mismanagement, rampant corruption, forced labour, arbitrary fees and land confiscation. The Asian Human Rights Commission found that the militarisation of Burma has led to food scarcity.¹⁴¹ Farmers are prevented from cultivating their land and from using water and natural resources to provide sufficient food. They are prevented from devoting their own labour to farming. Regardless of their economic situation, people are required to satisfy the army’s needs first; food security only comes second.¹⁴²

The humanitarian situation demands that measures be taken by the international community. Imminent threats to the life of internally displaced people, forced labour, detainees and rural people facing starvation justify an intervention of states in order to provide humanitarian relief and protection. As will be shown below, access for international organisations must be secured and troops deployed in order to monitor the human rights situation and ensure that humanitarian assistance reaches its destination.

Humanitarian access

¹³³ WHO, World Health Report 2000.

¹³⁴ See www.freeburma.org.

¹³⁵ See further the statistics in M. Than, “Recent Developments in Myanmar: Impacts and Implications of ASEAN Membership and Asian Crisis” in M. B. Pedersen (ed.) *Burma/Myanmar: Strong Regime, Weak State?* (Adelaide: Crawford House Publishing, 2000) p. 150.

¹³⁶ www.freeburma.org

¹³⁷ www.soros.org/burma/burmadebate/fall99bttm.html

¹³⁸ In 1996 the army announced fines and punishments stating: “If insurgents take tatmadaw equipment or food, the nearest village pays to replace it. Any village where a battle takes place or where insurgent supporters are exposed will be burned to the ground.” www.soros.org/burma/burmadebate/fall99bttm.html

¹³⁹ www.soros.org/burma

¹⁴⁰ www.soros.org/burma

¹⁴¹ www.soros.org/burma

¹⁴² www.soros.org/burma

The government impedes all efforts to collect information or investigate human rights abuses. It does not allow domestic human rights organisations to exist. The only assistance the internally displaced get is what can be delivered to them by the ethnic groups.¹⁴³ Although the ICRC (International Committee of the Red Cross) was allowed to commence prison visits, the government continued to impose restrictions on access to the country by international human rights organisations and foreign journalists.¹⁴⁴ Citizens with contacts to foreigners are interrogated and at times arrested. UN staff members have been denied free movement inside the country. The only NGO to be granted access to the Karenni State has been the ICRC.¹⁴⁵ Reports of abuses, especially those committed in prisons or ethnic minority areas, often emerge months or years after the abuses allegedly were committed and seldom can be verified.¹⁴⁶ Sanctions imposed by the ILO in 2000 because of forced labour resulted in the junta ending co-operation with the organisation.¹⁴⁷

The UNHCR has operated in Burma since 1994 in reintegrating 230 000 Muslim returnees from Bangladesh into Northern Rakhine State. The agency has also been involved in health assistance projects since 1995 as well as agricultural training projects. It has tried to curtail forced labour practices through its presence and advocacy in the field.¹⁴⁸

Urgent needs

The severity of the humanitarian situation in Burma is appalling. Humanitarian relief has to include the following various measures, which address merely the most urgent needs that have to be met.

All parties to conflicts in Burma must recognise the urgency of food scarcity. Measures must be taken in order to achieve food security, as laid out in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The UN and individual states have to strive to realise the principles declared in Article 1(2) of the Covenant.¹⁴⁹ This implies the guarantee that farmers may possess and use arable farmland and produce agricultural products. The Burmese authorities must be prevented from interfering in the subsistence of people by pursuing practices of forced labour and relocation.

IDP and refugees must be able to return to their original land and resume food production. The physical security of people in war zones must be assured. To this end, the looting bandits in the Shan and Karen States have to be placed under military control. More importantly, government forces have to be kept at bay. IDP in the jungle must be provided with food and health care, and be allowed to resettle in their former villages.

The repatriation of refugees from Thailand can only take place if the security of the returnees, especially Shan people, is guaranteed. Camps have to be set up to provide shelter, food and health care for the refugees. Protection and monitoring of camps located in Bangladesh and

¹⁴³ US Department of State Country Report 2000.

¹⁴⁴ UNICEF and WHO have had operations in the country as well as a few NGOs.

¹⁴⁵ US Department of State Country Report 2000.

¹⁴⁶ US Department of State Country Report 2000.

¹⁴⁷ ILO GB.280/6-Appendices, Appendix 1 and 6.

¹⁴⁸ See further Note on UNHCR's activities in Myanmar and compulsory labour, 21 December 2000, Appendix 9, GB.280/6-Appendices.

¹⁴⁹ Art. 1(2) reads: "All peoples may, for their ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based on the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence." Although not signed and ratified by Burma, the Covenant is part of *ius cogens* and therefore sets out universal human rights.

Arakan State in Burma are necessary in order to assure security and subsistence of Rohingya refugees. International protection should prevail until refugees can be repatriated voluntarily. Another option would be the local integration of Rohingya into Chittagonian society. As happened during the last decade, Rohingya have managed to obtain positions in Bangladeshi society that allow them to play a role in the community.¹⁵⁰ Repatriation and protection of refugees must be monitored by independent bodies.

The right to humanitarian intervention¹⁵¹ under international law

If the facts presented above call upon the moral conscience of the international community to act, any remedy providing humanitarian relief must comply with international law.¹⁵² The objective of intervention on the territory of a sovereign state is to meet basic needs and grant protection for human rights. However, it is also aimed at the enforcement of the rule of law and the strengthening of respect for fundamental and universal human rights. In order to be credible and authoritative, intervention with armed force must abide by the letter and principles of international law.

The different prerequisites for the application of the so-called right to humanitarian intervention are the following: use of armed force by a state or a group of states, absence of request from the government of the target state, persisting gross human rights abuses, sound legal footing of the right to intervene and the invoking of the right to humanitarian intervention by the intervening states.¹⁵³ Any intervention in Burma would entail the use of armed force in order to halt the existing human right violations and bring about an alleviation of humanitarian suffering. The intervening states would invoke a right to intervene and would certainly lack an approval or request of the military junta in Burma. The only problematic issue, therefore, is the legal footing of the right to intervene.

In the case of Burma, an intervention sponsored by the UN will be hampered by the veto of a permanent member, China. Thus, such a resolution will in all likelihood not be available.

Thus, it will need to be established whether states have a right to humanitarian intervention outside of the UN framework. The possible legal grounds will be examined, namely treaty law (the Genocide Convention and the UN Charter) and international customary law.

Security Council action likely to be vetoed

The Security Council would be competent to take measures under the UN Charter in order to maintain international peace and security (Article 24(1)). The humanitarian situation of refugees in

¹⁵⁰ See further www.hrw.org/reports/2000/burma.

¹⁵¹ Many different definitions for humanitarian intervention exist. See for example David J. Scheffer, "Toward a Modern Doctrine of Humanitarian Intervention" (1992) 23 *University of Toledo Law Review* 253, 264, Oliver Ramsbotham and Tom Woodhouse, *Humanitarian Intervention in Contemporary Conflict: A Reconceptualization* (Cambridge, Massachusetts: Polity Press, 1996), Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Irrington-On-Hudson, N.Y.: Transnational Press, 2nd edn 1997) and Aleksandar Jokic (ed), *Humanitarian Intervention: Moral and Philosophical Issues* (Peterborough, Ontario: Broadview Press, 2003). Sean Murphy uses the following working definition of humanitarian intervention: "Humanitarian intervention is the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of the target state from widespread deprivations of internationally recognized human rights." Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (Philadelphia: University of Pennsylvania Press, 1996) 11-12.

¹⁵² Stephen A. Garrett, *Doing Good And Doing Well: An Examination Of Humanitarian Intervention* 49 (1999).

¹⁵³ See also A. Cassese, "Ex Injuria Ius Oritur: Are We Moving towards Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 *European Journal of International Law* p. 26.

the camps of Bangladesh and Thailand, as well as in the relocation camps inside Burma, justifies measures of peaceful dispute settlement under Chapter VI. The council could authorise regional and international agencies to step in and halt a humanitarian catastrophe. ASEAN (Association of Southeast Asian Nations), as a regional arrangement under Article 53, could provide the necessary knowledge and logistical means. The council may not however get the support of ASEAN as ASEAN has not been willing to take a strong stand on the country in the past but have recently been willing to put some pressure on the country.¹⁵⁴

The Security Council could also determine the existence of a threat to the peace in the region, according to Article 39 of the Charter. A threat to the peace might be seen in the drug trade within the Golden Triangle, which in conjunction with the HIV/AIDS crisis destabilises the political relations between Burma, Thailand, Laos and India. Such determination would allow measures under Chapter VII of the Charter, including the use of armed force.

However, any attempt by the Security Council to handle the matter of human rights abuses or humanitarian crisis is likely to be vetoed by China. China is an important trade partner, delivers large amounts of arms and assists politically to strengthen the junta in power. China dominates parts of the Burmese economy and has a vital interest in not jeopardising its close relationship with Burma.¹⁵⁵ Therefore, any action taken by the Security Council would certainly meet with Chinese resistance.

Obviously, consent would be one route; but an intervention with the consent of the Burmese government is completely unrealistic. The military junta refuses to even recognise the need for external assistance and has repeatedly rejected outside interference. It has also remained suspicious of international concerns.¹⁵⁶

A right to humanitarian intervention under the Genocide Convention

In the light of the aforesaid, a right to humanitarian intervention must be found in either international treaty or customary law. The first possible ground for a legitimate right to humanitarian intervention could be provided by the Genocide Convention.¹⁵⁷ In its preamble, the Convention declares genocide to be a crime under international law, contrary to the spirit and aims of the UN. Article I, imposing an obligation upon states to halt genocide, provides that “genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish”. Genocide as a crime is defined in Articles II and III, which correspond to the wording of Article 3 of the International Criminal Tribunal for Rwanda Statute. However, the crucial clause in the Convention is Article V, which provides for the enactment of legislation necessary to give effect to the Convention and to punish perpetrators of genocide. The Convention further envisages perpetrators of genocide being tried in the states where they commit the offence or by an international penal tribunal (Article VI). Article VI has given rise to criticism as to a lack of universal jurisdiction. Because genocide may only be prosecuted by states where it occurs or by an international tribunal, other states have no jurisdiction over the crime. However,

¹⁵⁴ Bertil Lintner “Burma: No news is bad news” *Far Eastern Economic Review* August 02, 2001.

¹⁵⁵ See M. Malik, “Burma’s Role in Regional Security” in M B Pedersen, (ed) *Burma/Myanmar, Strong Regime, Weak State?* (Adelaide: Crawford House Publishing 2000) p. 273.

¹⁵⁶ See www.myanmar.com “Political situation”.

¹⁵⁷ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly in Resolution 260-A (III) of 9 December 1948 and entered into force on 12 January 1951.

international jurisprudence has clarified that genocide represents not only a treaty crime under the Genocide Convention, but also a core crime under customary international law.¹⁵⁸

In 1951, the International Court of Justice (ICJ) held that civilised nations acknowledge the Genocide Convention as binding on states, even in the absence of a conventional obligation. The court considered that the Genocide Convention was intended to be universal in scope.¹⁵⁹ Thereby, the ICJ recognised the customary character of the obligations deriving from the Genocide Convention. The Convention, ratified by more than 150 states, provides for universal jurisdiction for the crime of genocide.

The ICJ went further and held that the prohibition of genocide has attained the level of *ius cogens*.¹⁶⁰ During the armed conflict in former Yugoslavia, on 20 March 1993, Bosnia-Herzegovina requested the ICJ to grant provisional measures putting an end to alleged acts of genocide committed by forces supported and directed by Yugoslavia in Bosnia.¹⁶¹ In finding for Bosnia-Herzegovina as the Applicant State, the court stated that “the duty of states to prevent genocide was not limited to the exercise of criminal jurisdiction over individuals only, but extended to a duty of prevention at inter-state level”.¹⁶² This implies that duties placed upon member states with regard to the prevention and punishment of genocide are obligations *erga omnes*.¹⁶³ As part of *ius cogens*, no derogation may be permitted from the principle of the prohibition of genocide.¹⁶⁴

Subsequently, genocide has been specified as a core crime in statutes for the ad hoc tribunals and in the international criminal draft codes edited by the International Law Commission.¹⁶⁵

In elevating the duties of the Genocide Convention to the sphere of *ius cogens*, states are obliged to prevent the commission of genocide in a foreign sovereign territory, as required by Article I of the Convention. This obligation binds any state regardless of its ratification of the Convention. The right to intervene in a sovereign state can be deduced from the duty to prevent and halt acts of genocide. The Genocide Convention, and particularly its customary obligations, supply a legal justification for humanitarian intervention. It could be invoked in the Burma situation, provided that acts of genocide are being committed by the government (see below).

A Right to humanitarian intervention under the UN Charter

A second ground for humanitarian intervention can be found in the UN Charter. One of the determined aims of the UN is to guarantee and protect the fundamental rights and freedoms of all people. Member states commit their faith in human rights and resolve to combine their efforts to

¹⁵⁸ See further Dieter Kastrup, “From Nuremberg to Rome and Beyond: The Fight Against Genocide, War Crimes, and Crimes Against Humanity” (1999) 23(2) *Fordham International Law Journal* 404.

¹⁵⁹ ICJ, Reservations to the Convention on Genocide case, 1951, 18 *International Law Reports*, p. 370.

¹⁶⁰ Case concerning the application of the Convention on Genocide (Bosnia and Herzegovina v. Yugoslavia), 1993, 95 *International Law Reports* p. 1.

¹⁶¹ See further Roman Wieruszewski “International Response to the Human Rights Violations in the Territory of the former Yugoslavia” (1991-1002) 19 *Polish Yearbook of International Law* 203.

¹⁶² ICJ, Genocide case, p. 16.

¹⁶³ See Barcelona Traction, Light and Power Co. Case, 1970, *ICJ Reports* 3, par. 33-34, reproduced in Harris, (see note 14 above) p. 605.

¹⁶⁴ See art. 53 of the Vienna Convention on the Law of Treaties.

¹⁶⁵ Art. 4 I.T.F.Y. Statute, art. 2 I.C.T.R. Statute, art. 17 Draft Code of Crimes against the Peace and Security of Mankind 1996.

achieve these objectives.¹⁶⁶ Seven sections of the Charter deal with the issue of human rights.¹⁶⁷ The first article of the Charter, as a multilateral universal treaty, sets out the purposes and principles of the UN. One of the purposes proclaimed in Article 1(3) is to “achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all”. It could, therefore, be concluded that humanitarian assistance on the territory of a sovereign state without consent is not only justified under international treaty law, but falls within the essence of the UN’s foundation.

An external humanitarian intervention involving armed force challenges the fundamental principles of sovereignty and non-intervention. Specific norms have enshrined these principles. Article 2(4) of the Charter prohibits states from using force in their mutual relations. This section imposes an obligation on member states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. This provision has become one of the most controversial stipulations in the history of the organisation. Article 2(4) has been held to be part of *ius cogens*.¹⁶⁸ Despite this status, the prohibition of the use of force is not absolute, as it allows certain exceptions.¹⁶⁹

In fact, the use of force does not automatically fall within the realm of Article 2(4). Force is only unlawful if it is directed towards the “territorial integrity or political independence” of another state. To be problematic, the use of force has to be “inconsistent with the purposes of the United Nations”. This means that force remains lawful if it conforms to any principle or purpose of the UN as laid out in Article 1. As to the infringement of territorial integrity or political independence, these conditions for illegitimate force have been interpreted according to the given interests of parties to a conflict. For instance, the Israeli government denied violation of Article 2(4) after bombing a nuclear reactor in Iraq in 1981, arguing that Iraqi territorial integrity remained intact and that political independence *vis-à-vis* other states was not diminished.¹⁷⁰ Although the Israeli position in the Osirak case seems excessive, there is a need for flexible interpretation of Article 2(4), because a “mechanical interpretation may entail far-reaching social and economic changes and grave deprivations of human rights for substantial numbers of people.”¹⁷¹

It follows from the above that use of force can be compliant with Article 2(4). The protection of fundamental human rights of residents on the territory of a sovereign state by another state would comply with international law even if it involves the use of armed force. Such intervention would not be contrary to the spirit and the purposes of the UN.

Another obstacle to humanitarian intervention is the sound principle in international law of non-intervention. This principle has been firmly upheld by states and was found to have become

¹⁶⁶ Preamble of the Charter.

¹⁶⁷ Namely, articles 1, 13, 55, 56, 62, 68 and 76.

¹⁶⁸ Military and para-military activities in and against Nicaragua (Nicaragua vs. USA, the Nicaragua case), 1986, 25 ILM 1022, par. 190.

¹⁶⁹ Exceptions include the use of force under Chapter VII of the Charter for enforcement action by the UN, the use of force in individual and collective self-defence (art. 51) and the use of force against a former enemy state (art. 53), see also paragraph 193 of the Nicaragua case.

¹⁷⁰ A. D’Amato, “Israel’s Air Strike Upon the Iraqi Nuclear Reactor” (1983) 77 *American Journal of International Law* p. 585.

¹⁷¹ M. Reisman, “Coercion and Self-Determination: Construing Charter Article 2(4)” (1984) 78 *American Journal of International Law* p. 78.

part of customary international law, albeit frequently breached.¹⁷² During the 1960s and 1970s, the UN General Assembly passed several resolutions outlawing intervention in domestic affairs.¹⁷³ Moreover, Article 2(7) prohibits the UN from intervening in matters that are essentially within the domestic jurisdiction of member states. However, Article 2(7) does not preclude intervention carried out as part of enforcement action under Chapter VII of the Charter. The General Assembly, itself, may make recommendations regarding any internal situation in a given state, which is likely to result in a violation of the provisions or principles and purposes of the Charter.¹⁷⁴

With the continued pre-eminence of international human rights and humanitarian law, states have been hard put to assert that a serious violation of the rights of their nationals falls strictly within their domestic jurisdiction. Through the universality of human rights, humanitarian intervention is able to prevail over state sovereignty and can lead to a restricted application of the principle of non-intervention. NATO members in the Kosovo crisis countered the argument that human rights abuses constitute purely internal matters. During NATO's 1999 aerial intervention in Kosovo, on the territory of the Federal Republic of Yugoslavia, Belgium argued that such force was used purely for humanitarian purposes and was, therefore, compatible with Article 2(4).¹⁷⁵ The then U.S. President Clinton told the UN General Assembly in September 1999 that "by acting as we did, we helped to vindicate the principles and purposes of the UN Charter".¹⁷⁶

This line of argument seems to be supported by the ruling of the ICJ in the landmark Nicaragua decision. The court found that the funding and training of the 'contras' in Nicaragua by the U.S. government was illegal intervention.¹⁷⁷ However, not all assistance given by the U.S. was deemed unlawful. The ICJ stated that "there can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law".¹⁷⁸ Admittedly, this clear authorisation of humanitarian aid to persons in a sovereign state has to be viewed in the context of this case. "The use of force could not be the appropriate method to monitor or ensure ... respect' for human rights".¹⁷⁹ The lawfulness of humanitarian assistance depends on the "steps taken", which in the case of the U.S. in Nicaragua were found to be incompatible with the claimed objectives (the U.S. had laid mines, destroyed oil installations and armed and trained rebels).¹⁸⁰ The intention of the ICJ was to prevent states from escaping condemnation for unlawful intervention in the internal affairs of another state.¹⁸¹ It set prerequisites for legitimate humanitarian assistance, namely the non-discriminatory nature of the

¹⁷² ICJ, Nicaragua case, par. 202.

¹⁷³ Resolution 2131 of 1965, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, adopted by the General Assembly on 21 December 1965. The 1970 Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (adopted by the General Assembly in Resolution 2625 during its 25th session on 24 October 1970) also prohibited all forms of intervention.

¹⁷⁴ Art. 14 of the UN Charter.

¹⁷⁵ See D. Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia" (2000) 49 *International and Comparative Law Quarterly* p. 330.

¹⁷⁶ www2.whitehouse.gov/WH/New/html/19990921_1.html

¹⁷⁷ ICJ, Nicaragua case, par. 228.

¹⁷⁸ ICJ, Nicaragua case, par. 242.

¹⁷⁹ ICJ, Nicaragua case, par. 268.

¹⁸⁰ ICJ, Nicaragua case, par. 268.

¹⁸¹ ICJ, Nicaragua case, par. 243.

support granted, and pursuance of the purposes hallowed in the practices of the Red Cross.¹⁸² If humanitarian relief is given to persons regardless of their public function, political affiliation or adherence to a party in an armed conflict, it appears to be in conformity with international law, including Article 2(4) and the principle of non-intervention.

Thus, one strategy to reconcile the use of armed force in terms of humanitarian intervention is to interpret it as not violating Article 2(4) of the UN Charter. Taking it further, the objectives of the United Nations laid out in Article 1(3) the Charter enshrine the right to humanitarian intervention and, accordingly, provide a legal basis therefore. A humanitarian intervention in Burma, respecting the limitations of a purely humanitarian scope, would be justified by the UN Charter and would find the approval of the ICJ.

A right to intervention under customary international law

The most discussed legal footing of the right to humanitarian intervention is based on customary international law. Humanitarian intervention has been described as “the protection by a state or a group of states of fundamental human rights, in particular the right of life, of nationals of, and residing in, the territory of other states, involving the use or threat of force, such protection taking place neither upon authorisation by the relevant organs of the United Nations nor upon invitation by the legitimate government of the target state”.¹⁸³

In the Nicaragua case¹⁸⁴ the ICJ considered whether there might be a general right for states to intervene in another state (for instance, to stop the commission of serious violations of humanitarian law) with or without armed force.¹⁸⁵ Although the court found that no such general right existed at the time, it held that such a right may come into being, if shared in principle by other states,¹⁸⁶ fundamentally modifying the customary law norm of non-intervention.¹⁸⁷ The prerequisites for the emergence of a rule of customary international law imply a concordant practice by a number of states with reference to a specific situation in international relations. This practice must be continued over a considerable period of time and generally be approved by other states. Lastly, the states must perceive the practice as consistent with international law (*opinio iuris sive necessitatis*).¹⁸⁸

Under the current state of international law, these conditions now appear to be met, for the following reasons.

During and after the Cold War period, there have been precedent cases of humanitarian intervention. India intervened in Bangladesh in 1971 for humanitarian reasons, so did Tanzania in Uganda (1979) and Vietnam in Kampuchea (Cambodia, 1978).¹⁸⁹ However, in none of these cases did the acting state invoke a right to intervene.¹⁹⁰ Thus, although the incidents might serve as

¹⁸² ICJ, Nicaragua case, par. 243, the aims of the Red Cross being “to prevent and alleviate human suffering” and “to protect life and health and to ensure respect for the human being”.

¹⁸³ Kritsiotis, (note 6 above) p. 1005.

¹⁸⁴ ICJ, Nicaragua case.

¹⁸⁵ ICJ, Nicaragua case, par. 206.

¹⁸⁶ ICJ, Nicaragua case par 207.

¹⁸⁷ ICJ, Nicaragua case par 206.

¹⁸⁸ F L Kirgis, “Custom on a Sliding Scale” (1987) *American Journal of International Law* 146.

¹⁸⁹ See The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies (1995) 17 *Human Rights Quarterly* 192 and P Kurth, “Humanitarian Intervention: Lessons from the Past Decade” (2001) 45 *Orbis* 659. See further *Humanitarian Intervention: Definitions and Criteria*, Centre for Strategic Studies - Strategic Briefing Papers, June 2000.

¹⁹⁰ See further Kritsiotis, (note 6 above) p. 1014.

illustrations of state practice, an *opinio iuris* cannot be concluded, due to a lack of “reference to a new right of intervention or a new exception to the principle of its prohibition”.¹⁹¹

A general belief by states in the existence of a right to humanitarian intervention has been supported by three interventions during the 1990s. The Economic Community of West African States (ECOWAS) used armed force in Liberia in 1990 in order to halt a humanitarian crisis.¹⁹² Allied forces established a no-fly zone over Iraq after the Gulf War in 1991 and stopped the brutal repression of Kurdish people by the Iraqi armed forces, which had caused a major refugee afflux into neighbouring countries. In 1999, NATO carried out air strikes against Serbian armed forces that pursued a policy of ethnic persecution targeting Muslims in Kosovo.

In each of these cases, a mandate of the Security Council for the use of armed force was not available.

During the Liberian crisis, the Security Council failed to act, overloaded by the situation in Kuwait in August 1990. After the Operation Desert Storm, the allied powers took control over Kuwait on 26 February 1991. Defeat of the Iraqi armed forces gave Kurds the hope that Saddam Hussein’s regime would fall, so they rebelled. Iraq responded with particular violence, making free use of chemical weapons. More than two million Kurds were forced to flee their homes. The Security Council passed Resolution 688,¹⁹³ determining the repression of Kurds as representing a threat to international peace in the region. However, no authorisation was explicitly given to states for the use of armed force in Iraq. Nevertheless, the allied forces set up safe havens for the Kurdish population and occupied around 10 000 km² of Iraqi territory.¹⁹⁴ Resolution 678 had been passed prior to Operation Provide Comfort and was solely aimed at the use of armed force with the objective of an Iraqi withdrawal from Kuwaiti territory. In the absence of a clear authorisation by the Security Council, the allied forces had to justify their action by referring to a customary norm of humanitarian intervention.

In the Kosovo crisis, NATO acted without any Security Council approval. It is noteworthy that the resolutions passed by the Security Council defined the situation in Kosovo as a possible threat to peace and security in the region, but did not call upon member states to use armed force to redress the situation.¹⁹⁵ The reason for the paralysis of the Council once again was the threat of veto by permanent members, namely China and the Russian Federation.

These precedents provide a state practice that has stretched over a considerable amount of time. The acting states invoked their customary right to intervene in order to halt gross human rights violations committed by state agents on their own territory against their own nationals.

After the establishment of safe havens for Kurds through military force, then British Foreign Secretary, Douglas Hurd stated that the deployment of armed forces was not only entirely consistent with the objectives of the Security Council Resolution but was justified in the light of “extreme humanitarian need”.¹⁹⁶ When NATO members used armed force against Yugoslavia,

¹⁹¹ ICJ, Nicaragua case, par. 207.

¹⁹² See Ved P. Nanda, “Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti-Revisiting the Validity of Humanitarian Intervention under International Law - Part I” (1992) 20 *Denver Journal of International Law. & Policy* 305 (1992) and Ved P. Nanda, Thomas F. Muther, Jr., Amy E. Eckert Tragedies In Somalia, Yugoslavia, Haiti, Rwanda And Liberia- Revisiting The Validity Of Humanitarian Intervention Under International Law- Part II” (Winter 1998) 26 *Denver Journal Of International Law And Policy* 827.

¹⁹³ Reproduced in Harris, (note 14 above) p. 919.

¹⁹⁴ See further Harris, (note 14 above) p. 920.

¹⁹⁵ Resolutions 1199 and 1203 of 1998, adopted by the Security Council on 23 September 1998, available at www.un.org/Docs/scres/1998/sres1199.htm.

¹⁹⁶ See further Kritsiotis, (note 6 above) footnote 81.

because of its continued atrocities in Kosovo, they cited the right of humanitarian intervention in customary international law as a legal justification. The United States and the United Kingdom claimed that NATO action was necessary to avert a humanitarian catastrophe,¹⁹⁷ while Belgium argued that the use of armed force was purely for humanitarian purposes.¹⁹⁸ The states, ignoring the principle of non-intervention, acted in the belief that their actions were consistent with international customary law.

The remaining question is whether the continued state practice of the 1990s has found general approval of the international community.

At the UN, debates on the lawfulness of military humanitarian intervention against sovereign states without Security Council authorisation have reflected international disagreement. Some governments have held that respect for human rights can prevail over respect for state sovereignty. They argue that states should be able to intervene in the absence of Security Council approval. Other member states express the view that a right to humanitarian intervention is contrary to the UN Charter. These states stress the danger of legitimate governments being overthrown and the domestic constitutional order in question destroyed.¹⁹⁹ A third line of argument recalls the spirit of the Charter, demanding a specific UN mandate for intervention in the internal matters of a sovereign state. This opinion is driven by a fear of precedents set by certain states through the creation of *faits accomplis*.²⁰⁰ A universal agreement on the right to humanitarian intervention as part and parcel of international law can, therefore, not be detected in international relations.

However, with regard to the specific interventions in Liberia, Iraq and Kosovo, an appreciation of the respective international responses reveals that, despite the criticism of some states, few governments considered the interventions unlawful. Indeed, in most cases opposing states had other reasons for disapproval.²⁰¹ In the Kosovo case, for instance, Russia's President at the time, Boris Yeltsin, warned of an escalation of armed conflict as a result of the use of armed force.²⁰² Austria objected to opening its airspace for NATO aircraft because its neutrality was at stake.²⁰³ It might, thus, be possible to deduce a growing *opinio iuris* amongst members of the international community.

Prima facie, no strong opposition emerged during the intervention of ECOWAS in Liberia in August 1990. The little reaction by the international community seemed to express acquiescence. Indeed, the Security Council (much later, in November 1992) endorsed the armed intervention in Resolution 788.²⁰⁴

During the establishment of safe havens for the Kurds, the main problem for states appeared to be how to interpret Resolutions 687 and 688, in order to use them separately or in conjunction as a legal justification for the military occupation of Iraqi territory. International criticism of the humanitarian protection of the Kurds in 1992 was muted.²⁰⁵

¹⁹⁷ Kritsiotis, (note 175 above) p. 342.

¹⁹⁸ Kritsiotis, (note 175 above) p. 342.

¹⁹⁹ See further the debate in the General Assembly, Statement by the President of the General Assembly, UN Press Release GA/SM/105, 2 October 1999.

²⁰⁰ See further the debate in the General Assembly: Statement by the President of the General Assembly, UN Press Release GA/SM/105, 2 October 1999.

²⁰¹ Kritsiotis, (note 175 above) p. 342.

²⁰² See *The Guardian*, London, 25 March 1999, p. 3.

²⁰³ See *The Guardian*, London, 25 March 1999, p. 1.

²⁰⁴ Kritsiotis, (note 175 above) p. 354.

²⁰⁵ J Greenwood, "New World Order or Old? The Invasion of Kuwait and the Rule of Law" (1992) 55 *Modern Law Review* p. 176.

The same occurred during Operation Allied Force in Kosovo. Russia and China, as permanent members of the Security Council, objected to the intervention, inciting countries, such as India, Iraq and, of course, the Federal Republic of Yugoslavia, to back them. China used strong words to denounce a “flagrant violation of international law”.²⁰⁶ However, “no strong opposition emerged in the majority of member states of the United Nations” towards the NATO operation.²⁰⁷ The intervention was welcomed not only by NATO member states, but found support from governments in states from Eastern Europe like Bulgaria, Romania, Slovenia, Poland and the Czech Republic.²⁰⁸ In the Islamic world, Iraq was the only country to question the lawfulness of the operation.²⁰⁹ More importantly, a draft resolution condemning Operation Allied Force as unlawful, sponsored by the Russian Federation, Belarus and India, was dismissed by the Security Council on 25 March 1999 with a vote of 12 to three. The sizeable rejection of the resolution suggests that the intervention in Kosovo found broad support amongst UN members, who thereby expressed a collective *opinio iuris sive necessitatis*. NATO not only escaped the censure of the UN but was also strongly backed by the Secretary General of the UN, Kofi Annan.²¹⁰ It should be noted that neither UN resolution adopted after the commencement of the NATO operation was aimed at its lawfulness as such.²¹¹ NATO argued that it had done nothing more than to endorse the policy of the Security Council.²¹² In the light of the rejected condemnation of the intervention, this submission can be sustained. NATO was filling a gap in the Charter, in a situation where an exception to the prohibition of armed force was not at hand. The intervention for humanitarian purposes was consistent with the aims of the Charter, laid down in Article 1.²¹³

Thus, returning to the point of departure, namely the question of approval by the international community, it must be stated that the Kosovo crisis represents an illustration of a general belief among states. Admittedly, the main motivation of the NATO action was a call upon the moral duty of the world community not to stand by watching gross violations of human rights happening in Europe. However, the NATO strikes in Kosovo were accompanied by current trends in international law which underline a common approval within the international community of a right to humanitarian intervention in the absence of a Security Council mandate. Such right has been invoked repeatedly by intervening states and constitutes a departure from state practice during the Cold War period, where a right to intervene for humanitarian purposes was seldom claimed, even in the most appropriate circumstances.²¹⁴

Objecting states have raised policy concerns suggesting that humanitarian intervention would generate a high risk of abuse, a great propensity for selective application and lack of clear motives by intervening states.²¹⁵ However legitimate such fears are, adequate safeguards can be ensured, such as examining the purposes for which the action is taken, the necessity and the proportionate amount of force used. It is true that some aerial operations during NATO raids on

²⁰⁶ See *The Times*, London, 26 March 1999, p. 6.

²⁰⁷ Cassese, (note 44 above) p. 24.

²⁰⁸ Kritsiotis, (note 175 above) p. 346.

²⁰⁹ *The Times*, London, 6 April 1999, p. 5.

²¹⁰ *The Times*, London, 29 January 1999, p. 17, *Financial Times*, London, 26 May 1999, p.2.

²¹¹ Resolution 1239 of 14 May 1999 regulated the work of humanitarian organisations, Resolution 1244 (10 June 1999) established SFOR protection for the civil population after the hostilities.

²¹² Simma, (note 12 above) p. 12.

²¹³ Simma, (note 12 above) p. 26.

²¹⁴ Simma, (note 12 above) p. 26.

²¹⁵ Kritsiotis, (note 6 above) p. 1007.

Serbian troops gave rise to allegations of violations of humanitarian law.²¹⁶ Indeed, certain actions of Operation Allied Force led to loss of civilian life and prompted investigations by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia.²¹⁷ Criticised acts of NATO included the bombardment of a civilian passenger train at Gredlica on 12 April 1999, the attack on state-owned Serbian Radio and TV Station, RTS, in Belgrade on 23 April 1999 and the bombing of the Chinese Embassy in Belgrade on 7 May 1999. Each of these incidents caused “collateral damages”, which might as well be described as unlawful killings, violating the Principles of Distinction,²¹⁸ Proportionality²¹⁹ and the Respect of Precautionary Measures.²²⁰

Since such excesses in the pursuance of humanitarian intervention must be taken into account, any intervention would need to be benchmarked against specific parameters. These limitations demand that armed force is exclusively used for the limited purpose of stopping atrocities and restoring respect for human rights. Military intervention must be subject to independent observation as to the proportionality and lawfulness of its performance. Once the serious violations of humanitarian law have been contained, the intervening states are necessarily obliged to pull their forces out of the territory. The role of preserving peace and setting mechanisms for the punishment of perpetrators must then be consigned to the United Nations.

Thus, in conclusion on the existence of a right to humanitarian intervention under international customary law, it is appropriate to recall the dictum of the ICJ in 1986, that “reliance by a State on a novel right or an unprecedented exception to the principle (of non-intervention) might, if shared in principle by other States, tend toward a modification of customary international law”.²²¹ It appears that the response by the international community to the relevant precedents in Liberia in 1990, Iraq in 1992 and Kosovo in 1999 has revealed an approval, tacitly or expressly, of the reliance of intervening states on a customary right to humanitarian intervention. Such right can be exercised without UN mandate, but must be accompanied by regulating principles. Customary international law supplies the third possible ground and justification for humanitarian action in Burma.

Application to the situation in Burma

The humanitarian situation in Burma demands external intervention. A legal footing for such intervention can be found in the Genocide Convention, the UN Charter and international customary law. The following section discusses which legal footing could provide the basis for humanitarian action and how operations including the use of armed force would be benchmarked and limited to the necessary extent. In order to comply with international law, any operation would have to be well-defined in its scope and time frame. External military campaigns must be limited to humanitarian purposes, without bearing any political motives or aspirations.

The legal basis for a humanitarian operation in Burma

²¹⁶ Amnesty International, “Collateral Damage or Unlawful killings?: Violations of the Laws of War by NATO During Operation Allied Force 7 May 2000” available at www.amnesty.org/ailib/intcam/kosovo/docs/natorep_all.doc

²¹⁷ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, available at www.un.org/icty/pressreal/nato061300.htm

²¹⁸ Enshrined in article 51 (2) and 52 (2) of the 1977 First Additional Protocol to the Geneva Conventions.

²¹⁹ The general principle of *ius in bello*.

²²⁰ Enshrined in art. 57, especially art. 57 (2) (a) (ii) of the 1977 First Additional Protocol to the Geneva Conventions.

²²¹ ICJ, Nicaragua case, par. 207.

As seen above, the UN Charter and international customary law serve as legal bases for a right to intervene in Burma with military means. Humanitarian action could also rest on the Genocide Convention and its duty *erga omnes* to prevent acts of genocide, provided that state agents in Burma committed acts of genocide as defined in Article II of the Genocide Convention. The armed forces in Burma have pursued a policy of forced relocation directed at certain ethnic and religious minorities. In the course of military actions against rebel groups in the border areas near Thailand and Bangladesh, civilians have become victims of unlawful killings, physical abuse and rape. The Burmese army specifically targeted the Karen people with the apparent aim of eliminating them.²²² State agents, thereby, fulfilled the objective elements of genocide as spelled out in article II(a), “killing members of the group”, and article II(b), “causing serious bodily or mental harm to members of the group.”

However, it is doubtful whether the responsible military units, in fact, acted with the intent to destroy, in whole or in part, an ethnic group.²²³ The subjective element of genocide as an international crime demands a high threshold and must be proved beyond any doubt. The submitted facts on the persecution and forced relocation of ethnic minorities in Burma do not sufficiently sustain allegations of genocidal intent. Most of the crimes committed by members of the *tatmadaw* satisfy a motivation to suppress opposition and supply the army with funds and food. An intent to destroy the Karen as an ethnic group would meet serious difficulties of proof.

There is a more decisive argument to reject the Genocide Convention and its duty *erga omnes* to prevent and punish the crime of genocide as a legal justification for humanitarian intervention; that is the limited scope of action that could be taken on such a basis. An objective to stop acts of genocide would be limited to the protection of concerned groups like the Karen, requiring the disarmament of the responsible units of the Burmese army. Thus, the urgent needs listed above, including the protection of refugees, the establishment of safe havens and facilitating access for humanitarian support would fall out of the realm of the legal grounding.

It stems from practical considerations that the Genocide Convention does not offer a comprehensive justification for the necessary operations in Burma. That is why a humanitarian intervention in Burma would not rest upon the duty to halt genocide but on the UN Charter and customary international law.

Scope of humanitarian action

It is essential for the lawfulness of humanitarian intervention, as a transgression of the prohibition on the use of force, that the scope of military action is precisely defined. This section tries to set guidelines for a humanitarian mission in Burma accompanied by military force.

A concerted action undertaken by a group of states must be supported by a motivation to ease human suffering in Burma. The focal point must be the protection of life and physical integrity as well as the provision of food, housing, drinking water and medical care and the protection of ethnic groups. The presence of armed forces of the Burmese government as well as insurgent groups calls for military action that ensures that humanitarian measures can be affected without obstruction. Of no less importance is the task to prevent the outbreak of a civil war through disarmament operations and the protection of targeted groups.

²²² See Karen Human Rights Group, available at www.db.idpproject.org “Patterns of displacement in Myanmar.”

²²³ Art. II of the Genocide Convention.

More specifically, the mandate of a united force has to include the tasks below, according to the urgent needs detailed earlier.²²⁴

Protection

To achieve the free access of international humanitarian organisations to all regions of the country, safe havens must be established in areas of persecution. The protection of life must be given priority, in and outside war zones, and must be directed at IDP, forced labourers, detainees and villagers affected by military violence. The establishment of well-defined protected zones would require the prohibition of any military activity. This could hardly be achieved through the imposition of no-fly zones, as was done in Iraq in 1992, because the affected regions in the border areas near Thailand, Bangladesh and Laos, embracing the Shan, Arakan, Karen, Mon and Kachin States and the Tenasserim Division, are mostly mountainous and covered with tropical forests. These inaccessible areas would have to be monitored by ground troops of the alliance, if necessary accompanied by aerial support, possibly from aircraft carriers, with sophisticated weaponry and (radar) instruments of detection.

The safe havens must protect people in the southern Shan, Karenni and Karen States and in the Tenasserim Division from being forcibly relocated by the *tatmadaw*. Members of the armed forces in areas of civil unrest, especially in eastern Burma, would thereby be prevented from looting villages and from killing, raping and assaulting people. Karen and Shan people, momentarily displaced and struggling in the jungle, would fall under the protection of the intervening states. The protection of life and physical integrity would be achieved also by decreasing starvation. As soon as the confiscation of food, cash and land by the *tatmadaw* is stopped, farmers in the safe havens will be able to cultivate their soil again, without the interference of the Burmese army. The protection of ethnic groups in the border areas would serve to halt violations of international humanitarian law committed by the Burmese army and rebel groups.

Humanitarian aid

Once safe havens have been established, humanitarian assistance, provided for by international organisations, can be channelled to reach the proper destinations. Food security has to be ensured in the protected zones. For this UN agencies and NGOs could play a role. They certainly have more expertise in this area.

The Office of the United Nations High Commissioner for Refugees (UNHCR) could assist in co-ordinating the import, administration and distribution of nutrition, seeds and fertilisers. Farmers must be able to regain their plots and to cultivate arable land with rice and other subsistence agricultural products. Access to drinking water must be provided for by laying water pipes, installing pumps and generators and developing natural water sources. Sanitation facilities have to be built if necessary. Agricultural training programmes, already in place and run by the UNHCHR, should be continued and widened. Health programmes in the border areas of Laos and Thailand should be launched and should provide medical care for drug users. The prevention of HIV infections could also fall within such programmes. These tasks could be performed by specialists from non-governmental organisations as well as UN agencies like the UNHCHR, UN-IP and UNDP. Considerable logistical efforts will have to be undertaken and managed by independent, preferably non-governmental and non-commercial bodies.

Disarmament

²²⁴ See Steinberg, (note 22 above) pp. 21, 22.

To ensure that humanitarian assistance can reach its recipients, any armed factions must be kept at bay, i.e. out of the protected zones. A mandate for the alliance of intervening states must include a prohibition of any foreign military assistance to the *tatmadaw* or rebel movements in these areas.²²⁵ Furthermore, provincial sections of the Burmese armed forces could become the object of restructuring measures, in order to ensure the safety of refugees and the rural population.²²⁶ If necessary, rebel groups and units of the *tatmadaw* must be disarmed.²²⁷ The alliance must be equipped with sophisticated military means necessary to impose and enforce a general cease-fire in the safe havens. The troops need the competence to actively defend themselves against possible attacks by rebel groups and the *tatmadaw*. Moreover, the mandate must enable them to take effective measures of disarmament, with or without the consent of concerned armed groups. The ground troops would also have to monitor the transport and distribution of humanitarian aid items, and ascertain the physical security of all civilian workers involved in the operation.

Resettlement

Another part of the operation must concern the resettlement of IDP and refugees. Naturally, the geographical scope of the military operation must be well-defined and limited exclusively to protected zones. In the course of resettlement, however, the refugee issue must be tackled comprehensively. A resettlement programme could be launched by a UN agency, for instance the UNHCR, and military protection provided through the alliance. 150 000 refugees from India and Bangladesh have to be resettled in their former villages. 100 000 Shan people are in exile in Thailand. This process should be scheduled over a period of several years and be accompanied by a comprehensive housing programme. Camps must be erected in order to shelter the arrivals and to provide food, medical aid and sanitation. The troops of the alliance have to be responsible for the surveillance of the resettlement process. A mandate must cover the protection of the affected people, transport devices and camp areas and must commence at the present refugee camps outside Burma. The Rohingya refugees remaining in Bangladeshi camps require special protection in the target area of resettlement, Arakan State. The refugees' resettlement programmes have to be conducted in a concerted and consensual way with the Thai, the Bangladeshi and the Indian governments.

The resettlement of IDP will prove less problematic, but will require similar protection programmes for Karen and Shan people presently seeking shelter in the forests near the Thai border. About 600 000 to one million displaced people in Shan, Mon, and Karen States will have to be included in the resettlement programmes.

Forced dissolution of relocation camps and labour villages

A selected unit of the alliance troops must assume competence for the dissolution of forced labour camps and labour villages in Shan, Kachin, Karen and Arakan States. Forced dissolution must also be the fate of all relocation camps set up by the *tatmadaw* in rural areas within the safe havens. The mandate of the intervening troops must ensure the abolition of curfews placed upon people in the protected zones.

²²⁵ Such a mandate was given to the UN operation in Nicaragua, Honduras, El Salvador 1989/90. See A Pellet, *Droit International Public* (Paris: Librairie Generale de Droit et de Jurisprudence, 6th ed 1999) p. 971.

²²⁶ To the same end, the provisional authority mission of the UN in Cambodia undertook measures of regrouping the warring factions under Security Council Resolution 745 in 1992. See Pellet, *ibid* p. 971.

²²⁷ Likewise, UNOSOM II was charged with the disarmament of Somali military clans under Security Council Resolution 814 (1993). See Pellet, (note 225 above) p. 971.

The tasks that the intervention must fulfil have to be precisely specified by military experts. In general, all humanitarian assistance should be carried out by civil organisations, while troops should bear responsibility for the physical safety of all persons. In addition, the alliance could organise fund-raising activities in order to equip international organisations with the means to fulfil their humanitarian mission.

Any mandate given to an alliance of states to intervene in Burma must rest upon a motivation to sponsor humanitarian relief in the country. The purity of motives is the central limitation to the scope of military action to be taken by the participants in the operation.

Limitations

As any military action will impede upon the sovereignty of Burma as a state, the mandate of the armed forces sent by participating states must be as limited as possible. Humanitarian intervention is the *ultima ratio* in a process of efforts directed at decreasing the humanitarian crisis in Burma.²²⁸ This implies that throughout any military intervention, all political channels of negotiation must remain open and diplomatic talks with the Burmese authorities have to be initiated and pursued.

If Article 2(4) of the UN Charter is interpreted as not being violated, the territorial integrity of Burma can only suffer as much as is required to obtain the desired result. This means that any deployment of military personnel on Burmese soil has to be necessary and proportional. It also means that troops must be withdrawn as soon as the purpose of the mandate is attained. Removal in parts can become mandatory if the respective units have completed their tasks or in the event that no armed resistance is met, so that continuity of the military mission proves disproportional.

While the territorial integrity of Burma will necessarily be impaired, the political independence of the country as such must not be tempered with. It is important to display a politically neutral mission without political motivation capable of redefining the course of action. Foreign affairs policies will naturally be based on strategic considerations, nursed by the interests of the respective governments in power. However, if no altruistic aspirations are to be expected, the fundamental motivation to act has to be placed upon the moral duty and legal right to intervene in an internal situation in order to halt atrocities and ease a humanitarian emergency. Other motives and interests of intervening states must take a back seat.

The line between humanitarian relief measures and interference in domestic affairs is delicate. Therefore, any trespass on essential competences must be prevented. In general terms, immediate relief should be pursued, as opposed to measures of a political nature taken to unfold effects in a medium or long term. This consideration excludes any political intervention into legislative competences. The intervention cannot take the initiative to adjust agricultural mismanagement, corruption or administrative land confiscation as factors of food scarcity. The alliance will have no right to avail itself of the competence to legislate, be it in order to guarantee farmers the possession and use of arable land or to abolish rice quotas throughout the country. This is an important distinction from a political intervention, which would question the credibility of the intervention because it would rest upon a different legal footing.

What should be targeted are practices of forced labour as imminent acts of human rights violations (direct attacks against civilians). They can be stopped as they violate both international and Burmese law.²²⁹ Likewise, the termination of forced labour and the closure of forced relocation

²²⁸ See further Human Rights Watch, World Report 2000.

²²⁹ See the Burmese Criminal Code.

camps does not infringe on domestic affairs, because the universality of the rights to life, physical integrity and the freedom of movement prevail over the principle of non-intervention.

As far as funding is concerned, any financial assistance given to organisations operating on Burmese territory must satisfy humanitarian purposes, in order not to amount to illegitimate intervention.²³⁰

The eminence of the principle of non-intervention in international law has to be relaxed with regards to measures combating the drug-trade, although this depends on comprehensive humanitarian action. In fact, the flourishing drug trade increases HIV infections, the trade of sex workers and, most importantly, enables mighty armed groups to terrorise sections of the population. Military operations against drug refineries, plantations and laboratories would need to be carried out in the areas of drug production. However, such military action would fall into the realm of domestic affairs and justifiably attract accusations of being politically motivated. The fight against government-involved trade in narcotics in Burma only indirectly promotes the aim of bringing about humanitarian relief. Since the operation would not be sponsored by any UN mandate, it cannot cover the prevention of political destabilisation through drug production and trade in the Golden Triangle.

There are other and more convincing reasons why the government-related drug trade cannot be easily halted and should not appear on the schedule of the operation. Politically, cease-fire agreements with several insurgent groups have relieved the junta from pressure. If the junta were to move against any drug-lord army now, a renewed civil war would be very likely. Corruption throughout the army also entails personal bonds between drug traders and the administration, which leads to mutual trust and dependence between key figures of the drug economy. More importantly, the booming drug trade in Burma has made the domestic economy dependent on income from illicit narcotics. In fact, the lion's share of export income, although officially not acknowledged, derives from the drug industry.²³¹ This dependence was increased by the Asian currency crisis in the late 1990s. A 53 per cent drop in foreign direct investments in 1998 can be attributed to the financial crisis in South Asia. Since then, more foreign companies have pulled out of Burma. Today Burma is the first state in Asia that survives on the export of illicit drugs.²³² Any attempt to wipe it out would cause the collapse of the Burmese economy.

Two key factors will be crucial for the credibility and authority of the operation. One is transparency of measures. All actions taken by the alliance must be monitored by an independent body that is not part of the operation. The mandate might envisage a body comparable to the UN inspectors in Iraq, responsible for the monitoring of military programmes and arms reduction. Such a body must constantly reflect the events and report on the legality of the operation. Transparency of action does not mean that all military planning must be made public. Nor does it mean that the surveillance body consists of the world press. Rather, transparency demands the ongoing legal scrutiny of every single military action.

Proportionality, necessity and conformity with international humanitarian law must be assured at all times. In order to prevent the shortcomings of the Kosovo precedent, where violations of the Geneva Conventions occurred and caused loss of civilian lives, the military command of the operation must be subjected to a system of "check and react". In the event that military action becomes excessive, unnecessary or falls short of remaining legitimate, the monitoring body must have the power to impose rectifying conditions. Obligations to render the operation legal have to

²³⁰ See further Harris, (note 14 above) p. 886.

²³¹ Lintner, (note 104) p. 189.

²³² Lintner, (note 104) p. 189.

include the removal of single units, the exchange of commanding officers and the transfer of specific tasks to civilian organisations. If need be, the monitoring body should be enabled to halt the operation as a whole. The establishment of a sufficiently independent and impartial body will increase the international acceptance and legality of the intervention.

The other pivotal factor for the authority of the intervention is the limitation to the sole purpose of stopping human rights abuses and restoring respect for fundamental rights. Consequently, the use of force must be discontinued as soon as this purpose is satisfied.²³³ Foreign troops must be withdrawn from Burmese territory and the tasks initiated transferred to civilian bodies. Military enforcement of human rights must be replaced, in time, by civilian mechanisms under the umbrella of UN agencies – UNHCHR, UN-IP and UNDP. International organisations will also be responsible for the monitoring of the human rights situation after the military operation is completed.

Criminal procedure measures concerning the punishment of perpetrators of international crimes must not reside with those involved in the operation. Investigations into crimes against humanity for acts causing food scarcity should be instigated by the relevant Burmese authorities. This is unlikely to happen at the moment, but might become part of a process of dealing with past injustice in a future democratic Burma.²³⁴

The success of the intervention, as well as its continuity through the work of UN agencies and non-governmental organisations, will depend on the responsible key figures heading the respective bodies. The persons in charge, vested with responsibility for humanitarian relief programmes, for resettlement, protection programmes, administration and distribution of food and medical aid, water supply, etc., must try to gain personal acceptance within the segment of population with whom they work. This is decisive, since few cultures attach greater importance to power as a value than the Burmese. Considerations of power and status permeate even social relationships and tend to politicise ordinary life.²³⁵ Power is seen as finite, which means that the delegation of power becomes more delicate. Instead of depending on ideological or institutional relationships, power and loyalty appear highly personalised. When power becomes personalised, patron-client relationships prevail, and factionalism is created. Social hierarchy depends on personal loyalty to power-bearers. Interestingly, opposition is not conceived as ideological but as a breach of loyalty.²³⁶ Compromises become problematic, and a deep mutual social distrust builds up.²³⁷ Responsible key figures must deal with these social issues, bearing in mind the long history of militarisation that Burma has gone through in the last four decades.

The discussed limitations do not intend to arbitrarily bind the hands of actors who are unwilling to stand by watching a humanitarian emergency worsening. The illustrated aspects constitute prerequisites for the legality of the entire operation. If respected the intervention will attain its purpose to provide humanitarian relief and halt gross human rights abuses.

Conclusion

The analysis of the current situation in Burma reveals a political reality of gross and systematic

²³³ See further Cassese, (note 44 above) p. 27.

²³⁴ See further Jeremy Sarkin "Dealing with Past Human Rights Abuses and Promoting Reconciliation in a Future Democratic Burma" (December 2000) 7 *Legal Issues on Burma* 1.

²³⁵ See further L. W. Pye, *Politics, Personality, and Nation Building: Burma's Search for Identity* (New Haven: Yale University Press, 1962) p. 146.

²³⁶ See further Steinberg, (note 22 above) p. 94.

²³⁷ See further Steinberg, (note 22 above) p. 105.

violations of international human rights and humanitarian law by members of the ruling military apparatus. Repression of political opposition, persecution of ethnic minorities, their forced displacement and acts of unlawful violence threatening life and health of civilians have caused an alarming humanitarian emergency. Persisting insurrections and civil war cause atrocities directed at Burmese citizens. This has created a climate that is un-conducive to physical safety, while promoting food scarcity in the border areas as well as in neighbouring countries. India, Bangladesh and Thailand are increasingly affected by refugee influx, cross-border drug trade and HIV/AIDS. The situation of refugees in and outside Burma, living in camps or hiding in forests, is more than critical, with a serious shortage of food, water and medical aid. The severity of the silent humanitarian emergency in Burma has surpassed the threshold of internal affairs. Recent developments have not improved the political situation in Burma. When, in October 2000, the junta resumed dialogue with the NLD and Aung San Suu Kyi, some were expecting the political deadlock that has obstructed political change during the last decade to be resolved. The UN envoy Razali Ismail, from Malaysia (a country that strongly supported Burma's admission into ASEAN in 1997) has managed to initiate talks between Aung San Suu Kyi and General Khin Nyunt.²³⁸ In 2001, the junta released about 200 political prisoners and granted the NLD permission to reopen 23 offices throughout the country. The regime also resumed co-operation with the ILO and allowed the UN Special Rapporteur, Sergio Pinheiro, to visit the country twice.²³⁹ In September 2002 it extended another invitation to Prof. Pinheiro to make another official visit.²⁴⁰

However, these measures have to be viewed with suspicion as they might first and foremost appear to be aimed at the withdrawal of international economic sanctions. In this context, the European Union did not see reasons to review the sanctions imposed upon the country.²⁴¹ On 31 October 2001, the Council of Ministers extended the ban on weapons sales and the restriction of all but humanitarian aid for another six months.²⁴² While Aung San Suu Kyi and some other political prisoners were released in 2002, she was rearrested in May 2003, and a number of political prisoners remain detained. While the NLD was able to reopen offices, any political activities in these offices are prohibited and opposition members continue to be harassed and intimidated. The opposition confirms that there has been no improvement of the political situation in Burma.²⁴³

The military junta has proved unwilling to halt acts of violence against civilians and insurgents, violating international human rights and humanitarian law. Instead, the *tatmadaw* have increased their grip on power, moving closer to China, which provides large quantities of arms. The refugee situation destabilises the political balance of the region, but there is no serious hope for a Security Council resolution that might address humanitarian issues or determine a threat to international peace and security.

Without being measured against other countries, Burma satisfies all conditions for a humanitarian intervention with armed force. There are gross and persisting human rights abuses, a government causing and reluctant to ease, humanitarian suffering, and the absence of a UN mandate or an invitation by the government. An international operation with a humanitarian mandate has to be launched by a group of states willing to put an end to a dramatic emergency situation in Burma.

²³⁸ *Neue Zuercher Zeitung*, Saturday 14 April 2001.

²³⁹ In April and October 2001, including meetings with Aung San Suu Kyi.

²⁴⁰ Xinhua News Service 27 September 2002, available at www.news.xinhuanet.com

²⁴¹ These sanctions are enormously important in the context of the country and are particularly important in the context of a debate about whether the international community may lawfully (and should) intervene.

²⁴² www.burmaproject.org

²⁴³ www.burmaproject.org

The intervention must carry out an exactly defined mandate. The states have to deploy troops that will pursue the protection of civilians. The establishment of safe havens would grant access to humanitarian NGOs and prohibit any military activities by the Burmese *tatmadaw* or insurgent groups. The physical safety of IDP, refugees, detainees and members of ethnic minorities in the protected areas would be focused on, enabling Burmese citizens to halt starvation. The alliance would have to be sufficiently equipped to disarm military factions of the *tatmadaw* and rebel groups, in order to gain control over the safe havens and ensure the functioning of humanitarian assistance. The provision of food, water, agricultural and health programmes would be the initial task of the alliance, in co-operation with civilian and independent international organisations. Another exercise of the operation would consist of the dissolution of forced labour and relocation camps. The suggested operation would be transformed into a more permanent civilian initiative of humanitarian assistance, realised by international organisations under the umbrella of branches of the UN. These tasks demand a high degree of logistical and military planning and co-operation.

More decisively, however, such an operation has to abide by international law and must strengthen the supremacy of the rule of law, in order to be credible and to create long-lasting effects in Burmese society.²⁴⁴ Credibility of the operation would rest upon its legitimacy and transparency. The alliance of intervening states, therefore, must at all times be supervised and observed by a body independent of any political authority involved in the operation. In order not to breach international law and the prohibition of the use of force as well as the principle of non-intervention, the operation needs to invoke a legitimate justification and be subjected to precise limitations. International law provides a possible legal basis that is twofold.

One legal foundation of the right of the alliance to intervene in Burma for humanitarian purposes derives from the UN Charter, provided that a military operation respects the political independence of the Burmese state. If a concerted operation of a group of states fulfils a mandate of providing humanitarian assistance and halting violations of international human rights and humanitarian law, it appears to be consistent with the purposes of the UN. International jurisprudence deems Article 2(4) of the UN Charter not to be violated in the event that humanitarian aid is given in pursuance of the practice of the ICRC. This means the actors have to remain impartial, independent and neutral. Compliance with the Charter demands, in addition, a strict limitation in time; military action must stop as soon as the humanitarian aims clearly defined in the mandate of the operation have been attained.

A more crucial reason for the right to intervene in Burma has its roots in international customary law. The analysis of state practice and their *opinio iuris* has proved the sound existence of a right to humanitarian intervention in international law. In fact, the precedents of Liberia, Iraq and Kosovo, in conjunction with the reaction of the international community thereafter, have created a new rule of international customary law. The so-called right to humanitarian intervention can be claimed by the alliance in conformity with international law.

However, the limitations above also apply here. Most importantly, the acting states have to abstain from any politically motivated actions that might fundamentally question the humanitarian character of the mission. States can avoid accusations of acting unlawfully if they strictly uphold a clear distinction between domestic affairs and acts necessary to halt atrocities. The monitoring body would prevent any act crossing the red line of interference in internal matters. The mandate would diminish this risk by laying down competences for immediate humanitarian relief measures only.

²⁴⁴ On the need to reconcile and develop the rule of law, see Jeremy Sarkin “Dealing with Past Human Rights Abuses and Promoting Reconciliation in a Future Democratic Burma” (December 2000) 7 *Legal Issues on Burma* 1.

These include the provision of people with food items and the organisation of transport, administration and distribution of goods, engineering services, medical assistance and the making available of shelter. Only imminent violations of the most important rights to life and physical integrity demand action taken by the alliance. The operation would not be competent to enact laws in Burma, as this would breach the state's sovereignty and political independence. While the proposed operation might appear, at times, to be close to interference in domestic affairs, with a supervising body and a precise mandate, the customary right to humanitarian intervention will develop another precedent. As a legal safeguard for the lawfulness of the military action it must serve the principles of necessity and proportionality, outweighing the somewhat antagonistic interests of sovereignty and protection of life.

The intervention must be construed as a catalyst for the enforcement of basic rights and needs. If carried out under the true claim of humanitarian assistance, within the guidelines set out by the codified and other rules of international law concerning the use of force and the sovereignty of states, the intervention has a good chance of gaining international acceptance. It will, thus, affirm the existence of a customary right of states to intervene in another state in order to put an end to crimes committed by a government against its own people.