

Strict positivism, moral arguments, human rights and the Security Council: South Africa and the Myanmar vote

*Dire Tladi**

Principal State Law Advisor for International Law, South African Department of Foreign Affairs, Pretoria, South Africa

Summary

Much has been made about the positions adopted by South Africa during its non-permanent tenure on the United Nations Security Council. In particular, much criticism has attached to the position adopted by South Africa with regard to a resolution introduced in the Council relating to human rights violations taking place in Myanmar. South Africa voted against the resolution on the grounds that the situation in Myanmar did not amount to a threat to international peace and security. This position, which relies on the text of article 39 of the UN Charter, has been criticised as representing an unduly restrictive and legalistic (or positivistic) approach. The essence of the critique is that human rights violations per se should be seen as constituting a threat to international peace and security. While undoubtedly the position adopted by South Africa relies on the text of the UN Charter, the question posed by this article is whether this approach is necessarily a positivistic approach. This article does so by reflecting on the limits of the powers of the Security Council. It suggests that understanding the limits of the power of the Security Council and, in

* BLC LLB (Pretoria), LLM (Connecticut), PhD (Erasmus, Rotterdam); tladi@foreign.gov.za. This article was inspired by sometimes heated debates between me and my colleagues, André Stemmet and JoAnn Schneeberger. I also want to express my thanks to Prof John Dugard, whose comments on the paper assisted me significantly. Needless to say, I take full responsibility for the views expressed in the paper. My views do not necessarily reflect the views of the Department of Foreign Affairs or the government of the Republic of South Africa.

particular, the rationale for the limits of the power of the Security Council, is central to determining whether the position is indeed excessively legalistic. Finally, the views contained here are inspired by the need to develop the rule of law as well as the coherence of the international legal system.

1 Statement of the issues

In January 2007, amid much excitement and contemplation, South Africa took up its seat as a non-permanent member of the United Nations (UN) Security Council. The event was widely hailed as a momentous achievement for South Africa, signifying South Africa's newly-assumed leadership position in international relations and human rights. The period leading up to South Africa's assumption of the non-permanent seat was characterised by a strong sense of goodwill and co-operation between the government, notably the Department of Foreign Affairs, the media and academia. Indeed, in keeping with this spirit of togetherness the Department of Foreign Affairs, in particular the UN Chief Directorate and the Policy and Research Unit of the Department, organised a workshop aimed at fostering engagement between academics and the government, on the approach to be adopted during our Security Council tenure.

At the time of writing this short article (November 2007), the picture is less rosy. The South African government has been criticised severely for the position it adopted in the Security Council by the media,¹ academics² and prominent South Africans, such as Archbishop Desmond Tutu.³ In the main the criticisms have a common theme, namely, that South Africa has betrayed its human rights principles by voting against, for example, the UN Security Council Resolution on Myanmar. To be true, South Africa was not the only country to vote against the Resolution. Moreover, South Africa's vote was insignificant in comparison to those of China and Russia, both of which have veto power in the Security Council. South Africa's vote, however, was met with greater criticism because of its recent history as a champion of human rights and its struggle against apartheid. This short paper evaluates criticism regarding South Africa's position from a legal perspective.

While my analysis is from a legal perspective, I adopt a broad, value-based approach to law (and legal interpretation) and certainly do not

¹ 'The idiocy of SA's foreign policy' *Financial Mail* 5 October 2007; P Fabricius 'SA makes u-turn on Myanmar debacle' *The Star* 5 October 2007; 'Foreign Affairs irony' *Business Day* 2 October 2007; P Fabricius 'UN is the battleground for a new Cold War' *The Star* 10 August 2007.

² See eg J Dugard 'Human rights in South Africa: Past, present and the future', paper presented at the Centre for Human Rights, University of Pretoria, April 2007.

³ Eg C Jacobson 'Tutu "deeply disappointed" with Myanmar vote', report of 21 January 2007 http://www.iol.co.za/index.php?set_id=14&click_id=68&art_id=iol116937588641B233 (accessed 14 October 2007).

support a literal, positivist approach.⁴ For the purpose of this analysis I focus on the Myanmar issue, mainly because it is the issue that has been (and continues to be) at the forefront of the debate. In the next section, I briefly describe the political situation in Myanmar and the debates within the UN Security Council. I next evaluate South Africa's position as well as the responses thereto. This is undertaken against the backdrop of the relevant legal approaches, for example, strict positivism, literalism as well as value-based approaches to international law.

Having outlined the paper's ambit, it is equally important to delineate what falls outside of the scope of the paper. The paper is not about whether the events in Myanmar constitute gross human rights violations or whether international action is the appropriate response. The question considered here is much narrower and concerns the position adopted by South Africa in January 2007 in the Security Council. In particular, the paper examines whether South Africa, in its vote on Myanmar and the subsequent explanations of its vote, adopted an unduly legalistic, literalist or positivist approach.

2 The story of Myanmar in the Security Council

No doubt Myanmar's story is one of gross human rights violations and brutality.⁵ Until 1948, Myanmar, then known as Burma, was under the control of the United Kingdom. In 1948, Sao Shwe Thaik became the first President of the Union of Burma with U Nu becoming the first Prime Minister. Democracy lasted until 1962 when General Ne Win carried out a *coup d'état* and established military rule. Civil unrest directed against perceived oppression, human rights violations and economic mismanagement followed. The government responded by violently suppressing the demonstrations. The massive demonstrations and the government's violent response led to another *coup d'état*, resulting in the establishment of the State Law and Order Restoration Council (Council), another military-led regime. It was under this Council that the name Myanmar was adopted. In 1990, under the leadership of the Council, free elections were held in which the National League for Democracy emerged victorious. The results of the election were annulled and the Council refused to surrender power. In 1991, Aung San Suu Kyi, the leader of the National League for Democracy, was awarded a Nobel Peace Prize in recognition of her fight against injustice in Myanmar.

⁴ See eg D Tladi & P Dlagnekova 'The will of state, consent and international law: Piercing the veil of positivism' (2006) *SA Public Law* 111.

⁵ The history of Myanmar reflected here is based loosely on various sources, including media reports and the internet. These include 'Myanmar' <http://www.infoplease.com/ipa/A0107808.html> (accessed 10 October 2007); 'The Politics of Burma' http://en.wikipedia.org/wiki/Politics_of_Myanmar (accessed 10 October 2007).

The period of military rule has been characterised by oppression and human rights violations.⁶ The recent prolonged house arrests, for the third time, of Aung San Suu Kyi, have served to heighten international scrutiny of the human rights situation in Myanmar. A series of pro-democracy demonstrations across Myanmar, including recent demonstrations by Buddhist monks, were met by a military show of force, leaving a number of people of dead.⁷ The situation in Myanmar situation has led to calls for the UN to do something.

On 12 January 2007 a draft Resolution was introduced in the Security Council by the United Kingdom and the United States.⁸ The draft Resolution called on the ruling junta to 'cease military attacks' and to put 'an end to human rights and humanitarian law violations'. The draft Resolution also called on the government of Myanmar to 'begin without delay a substantive political dialogue' with a view to 'genuine democratic transition'. The government of Myanmar was further called upon to, *inter alia*, 'allow freedom of expression' and to unconditionally release Aung San Suu Kyi. The draft Resolution was not passed, mainly because Russia and China exercised their veto power. However, what raised eyebrows, both within South Africa and abroad, was South Africa's decision to associate itself with Russia and China and to vote against the draft Resolution.

3 Evaluating South Africa's position

A useful starting place for evaluating South Africa's position is the statement by Ambassador Dumisani Kumalo, South Africa's Permanent Representative to the UN, in which he explained South Africa's vote.⁹ The South African Permanent Representative begins his statement as follows:

I regret to inform this Council that South Africa will vote against the resolution on Myanmar. My government decided on this action based on the following three reasons.

⁶ The human rights situation is captured in the Congressional Testimony provided by Tom Malinowski on 'Human Rights in Burma' 7 February 2006 http://hrw.org/english/docs/2006/02/10/usint12658_txt.htm (accessed 11 November 2007).

⁷ G Peck 'Generals aloof from turmoil in their new capital' *Pretoria News* 4 October 2007 10; SAPA-AP 'Crackdown on Myanmar Protesters' *Pretoria News* 4 October 2007 10; SAPA-AFP and Reuters "'We will send loving kindness to them": Monks plead for peace in face of security forces attack' *Pretoria News* 27 September 2007 14.

⁸ UN Doc S/2007/14.

⁹ The statement is available at <http://www.southafrica-newyork.net> (accessed 10 October 2007).

Before explaining the reasons for the vote, Ambassador Kumalo adds that he wishes to 'reaffirm that my delegation is concerned about the situation in Myanmar'. Both the fact that the ambassador expressed 'regret' that South Africa will vote against the resolution and the statement that South Africa is 'concerned' about the situation in Myanmar, are relevant in setting out what the vote (and this article) is *not* about. The South African vote was not about whether there were human rights violations in Myanmar, nor about whether action had to be taken to deal with the situation. What is worthy for analysis is the international law argument put forward by South Africa in voting against the Resolution.

There are three reasons put forward by South Africa's Permanent Representative for his country's decision to vote against the Resolution. First, in the view of South Africa, the Resolution would 'compromise the "good offices" of the Secretary-General' in dealing with the matter. Second, the statement notes that the issues raised in the draft Resolution are best dealt with by the newly-established UN Human Rights Council. Finally, and most important for our purposes, in the view of South Africa the draft Resolution 'does not fit with the Charter mandate conferred on the Security Council which is to deal with matters that are a threat to international peace and security'.

The first two reasons are purely institutional in that they suggest different forums within the UN system that are appropriate to deal with the matter. While the final reason is also institutional in that it specifies that the Security Council is an inappropriate forum for the matter, it is also normative in that it provides a reason why the Council should not deal with this matter. There is also an important relationship between the final reason and the first two reasons, that is that the 'good offices of the Secretary-General' and the Human Rights Council are more appropriate forums for this matter because the Charter of the UN does not allow the Security Council to deal with the matter. Nevertheless, it is the final reason that caused a stir, and it is on this reason that I focus.

South Africa was criticised for this position which is said to signify a 'betrayal of our noble past'.¹⁰ The arguments raised against the position adopted by South Africa on the Myanmar situation are numerous, but can be summarised as involving four related assertions.¹¹ First, the arguments point to the fact that human rights abuses no longer fall within the category of issues that are shielded from international scrutiny, as is shown by international developments since the end of World War II. Thus, the mere fact that violations of human rights take place is sufficient to trigger the concern of the international community. Second, critics of South Africa's position seem to suggest that gross

¹⁰ 'The idiocy of SA's foreign policy' (n 1 above) 12.

¹¹ Eg see Dugard (n 2 above) 6.

human rights abuses, *per se*, constitute a threat to international peace and security. Third, and this is linked to the first two arguments, critics of South Africa's position point to the fact that the Security Council on several occasions found that apartheid (a policy with internal applications) was deemed to constitute a threat to international peace and security. Finally, encapsulating all the above points, the view adopted is that South Africa has adopted 'an extremely legalistic' approach to the provisions in the UN Charter relating to the powers of the Security Council.¹² Other arguments — for example arguments that other UN organs or institutions such as the Human Rights Council are ineffective — although falling outside the scope of this paper, have also been raised and therefore deserve mention.

4 The limits of Security Council power: International peace and security

In evaluating the arguments raised against South Africa's position, it is useful to begin with the overarching argument, that is that South Africa's position is positivist or 'extremely legalistic'. My sincerely held views on the matter reflect my general approach to international law. In the past I have argued against a positivist approach to international law.¹³ In other words, I support a value-based, purposive approach to law and not 'an excessively legalistic' approach. It is this value-based approach that informs my approach to the proper role of the UN Security Council. Months before South Africa assumed its seat as a non-permanent member of the Council, and certainly before South Africa was confronted with criticism against the positions adopted at the Council, I concluded a paper with the following remarks:¹⁴

In order to promote the rule of law in international law, all subjects and organs of international law must be bound by rules of the legal system and none can be allowed to operate above the legal system. One way that the Security Council can be held accountable for its use of power, is through constant scrutiny by observers.

In order to hold the Security Council accountable, it is important that its mandate be fully understood. In terms of the Charter of the UN, the Security Council has the 'primary responsibility for the maintenance

¹² 'Foreign affairs irony' (n 1 above). In his report in *The Star*, Peter Fabricius, who has been one of the most outspoken journalists on this issue, notes that the position adopted by South Africa as regards Myanmar, is 'widely condemned as excessively legalistic'; Fabricius 'SA makes u-turn on Myanmar debacle' (n 1 above).

¹³ Tladi & Dlagnekova (n 4 above).

¹⁴ D Tladi 'Reflections on the rule of law in international law: The Security Council, international law and the limits of power' (2006) 31 *South African Yearbook of International Law* 231 243.

of international peace and security'.¹⁵ Further, article 39 provides the trigger requirements for Security Council action under chapter VII:

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

It is on this basis that South Africa adopted the position that it did with respect to Myanmar. The question raised by this article is whether the position is 'excessively legalistic'. In other words, does the approach adopted rely too much on a literal and textual interpretation of the provisions of the Charter?¹⁶ Without question, the approach adopted by South Africa in the Myanmar vote is consistent with a textual interpretation of the Charter. But does it reflect an approach that ignores other values?

In interpreting article 39 of the Charter, the context of the provisions as well as the context of the far-reaching powers of the Council must be borne in mind. In this regard, it must be remembered that the composition of the Security Council raises questions about the legitimacy of the institution: an institution where, essentially, five states have ultimate power internationally. From a moral point of view, and not a purely textual (or 'excessively legalistic') point of view, it would seem appropriate to raise concerns about such an institution wielding unlimited power. This fear is aptly reflected by Koskenniemi, who holds as follows:¹⁷

Given the Council's composition and working methods, its monopolisation of UN resources and the public attention focused on the Council is problematic. The dominant role of the permanent five, the secrecy of the Council's procedures, the lack of a clearly defined competence and the absence of what might be called a legal culture within the Council hardly justify enthusiasm about its increased role in world affairs.

Raising the same concern, Franck has commented that¹⁸

[w]hile the Council has the power to act on behalf of the UN as a whole and to commit its members to action under Charter article 25, it is only a distorted miniature executive council of the UN membership. A third of its members are unelected. To assert the legitimacy of its actions ... the Council must be seen to be acting in accordance with established procedures and limitations.

¹⁵ Art 24(1) Charter of the United Nations.

¹⁶ The 1969 Vienna Convention on the Law of Treaties provides that treaties (and the Charter is a treaty) are to be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.

¹⁷ M Koskenniemi 'The police in the temple. Order, justice and the UN: A dialectical view' (1995) 6 *European Journal of International Law* 325-327.

¹⁸ TM Franck *Fairness in international law and institutions* (1995) 218. See also S Wheatley 'The Security Council, democratic legitimacy and regime change in Iraq' (2006) 17 *European Journal of International Law* 531-532.

These concerns are real and suggest a need to restrictively interpret the powers of the Security Council, not for narrow legalistic reasons, but for reasons based on moral notions of legitimacy and democracy. It is true that this assertion, against which few would argue, does not respond directly to the more specific concerns raised about human rights as a justification for an expansive interpretation of the mandate of the Security Council. However, it is important, first and foremost, to raise the issue about the framework within which the Council is supposed to function, and then to juxtapose this framework against the human rights arguments raised in connection with Myanmar.

It seems clear that we have to accept that there are legal limits to the power of the Security Council.¹⁹ The question is as to where those limits lie.²⁰ In particular, what are the limits of the discretionary power afforded to the Council under article 39 of the Charter? A purely logical approach (assuming one accepts that this discretion is not unfettered) would be that the issue at hand must raise questions of international peace and security, that is, there is a situation that either threatens or breaches international peace and/or security or an act of aggression. In my view, the conclusions reached by De Wet about what would constitute a threat to international peace are correct.²¹ Having analysed various approaches, ranging from the broad to the narrow definitions, she argues that international peace has to be taken to mean the absence of armed conflict between states.²² A threat to the peace, therefore, means a situation that has the potential of disturbing this 'absence of armed conflict'. As she correctly states (and consistent with the concerns raised about legitimacy above), to adopt a different view would imply 'unlimited discretion' which in turn would 'ignore the structural limitations which are necessary for the efficient functioning of the Charter system'.²³

The idea that, from both a purely legal and a moral/value-based perspective, there is a need to interpret the powers of the Council restrictively should, in my view, form the framework for the analysis of the Council's role in the case of human rights violations.²⁴ Against

¹⁹ Tladi (n 14 above).

²⁰ For a comprehensive study of the limits of the power of the Council, see E de Wet *The Chapter VII powers of the United Nations Security Council* (2004).

²¹ De Wet (n 20 above) 138-144.

²² De Wet (n 20 above) 144.

²³ As above.

²⁴ Dugard, in disagreement with this position, makes the following observations: 'And now there is new support for [human rights offenders] in the form of arguments raised by South Africa in the Security Council in respect of human rights violations in Myanmar and Zimbabwe. The Security Council is illegitimate by reason of its composition which means that its powers should be restrictively construed.' J Dugard 'The future of international law: A human rights perspective – With some comments on the Leiden School of International Law' (2007) 20 *Leiden Journal of International Law* 729 733.

this background, I now turn to evaluate the human rights arguments that have been used to suggest that South Africa should have adopted a different position on account of the human rights situation in Myanmar.

5 Human rights violations, international peace and the Security Council

As mentioned above, the human rights argument for Security Council intervention in Myanmar is based on three interrelated elements. First, that human rights violations no longer can be deemed to be an internal affair; second, that human rights violations are, *per se*, a threat to international peace and security; and third, that the numerous resolutions adopted by the Security Council against apartheid South Africa should be instructive in the case of Myanmar. I will deal with each of these arguments in turn.

The first argument, that human rights are the concern of the international community and can no longer be deemed to be the exclusive concern of domestic law, is not open to debate.²⁵ The notion that human rights law is the concern of the international community has its roots in the Nuremburg tribunal and is reflected in the myriad international human rights instruments adopted since the end of World War II. However, the fact that human rights are the concern of the international community does not take us very far in this debate. This fact is not authority for the view that the Security Council, the 'distorted miniature executive council of the UN membership', is mandated to deal with human rights issues that do not involve international peace and security. All that it tells us is that human rights violations, wherever they occur, are the responsibility of the international community. This means that the UN Human Rights Council, the body created by the international community specifically to deal with human rights issues, or the UN General Assembly, the body most representative of the international community, could never be faulted for taking action in Myanmar or any other situation of human rights violations. I leave aside, for now, the perceived ineffectiveness of the Human Rights Council and the General Assembly. What is important, though, is that the place of human rights as a concern of the international community cannot, without more, bestow on the Security Council the mandate to intervene in Myanmar or any other situation.

The second argument, on the other hand, raises fundamental questions that need to be answered with reference to the framework presented above. In terms of the argument, any situation which

²⁵ J Dugard *International law: A South African perspective* (2005). While I quote only one source, this fact is truly trite and can be confirmed by any textbook on international law or international human rights.

amounts to a violation of human rights (particularly massive or gross human rights violations) should be the concern of the UN Security Council. In rejecting this notion, De Wet explores some of the legal reasons that are advanced for this position and determines that they are not convincing.²⁶ It is unnecessary to here repeat these arguments and De Wet's responses to them. It suffices to say that they are based on a purposive interpretation of the Charter and the *erga omnes* nature of some human rights, that is, that they are the concern of all humankind.²⁷ In responding to these arguments, it is necessary to be honest about their nature. The argument that human rights violations, *per se*, constitute a threat to international peace and security reflect sincerely held beliefs about the importance of human rights. What the argument says is that human rights are important and they must be protected at all costs, even at the cost of the legitimacy of the international system. Indeed, human rights are important and must be protected, without threatening the integrity of the system. However, the weakness of the argument that all serious human rights violations should be handled by the Security Council, whether threatening international peace and security or not, is that it implies that *all important* issues should be dealt with by the UN Security Council. The test for whether the Security Council, this body with serious democratic deficiencies, should act is no longer whether there is a threat or breach of international peace or security, but rather whether the issue is important internationally (and has a high profile). Apart from the fact that this is highly problematic from a legal point of view, it also poses a serious danger to the integrity and further development of the international legal system and, in particular, the international human rights system.

This discussion begs the question, though, why adherents to the human rights-constitutes-a-threat-to-international-peace arguments, believe all important issues belong in the Security Council. I would propose that the reason must be because of a perception that the Security Council gets things done and that all other UN organs and institutions are ineffective talk shops. This argument falls outside the scope of this paper, but nevertheless two points can be offered in response. First, if it is true that the Security Council is the only effective organ of the UN, then, surely, if we are concerned about the protection of human rights internationally, the response should not be to send everything to the Security Council, but rather to put in place measures that will ensure that bodies that are appropriate to deal with human rights issues are strengthened so as to make them more effective. Second, while recognising the power that the Security Council yields, it is important not to overstate its effectiveness (power should not be equated with effectiveness). There are countless situations which can

²⁶ De Wet (n 20 above) 142.

²⁷ As above.

more realistically be deemed to constitute threats to international peace and security and with which the UN Security Council has been seized, which have not been resolved, notwithstanding the Council's protracted involvement.²⁸

Finally, it is appropriate to address the argument that apartheid, although not constituting a classic case of a threat to peace, was the subject of numerous UN Security Council Resolutions. In terms of this argument, the rationale that was used in the case of apartheid should be used in the case of Myanmar. The reliance on the apartheid situation is misplaced, principally because in the case of apartheid, a link between apartheid and a threat to international peace and security was established. In this regard, it is important to draw a clear distinction between the types of resolutions adopted by the Security Council with respect to South Africa.²⁹ The Security Council adopted only one resolution with respect to apartheid under chapter VII.³⁰ The rest of the resolutions were adopted under chapter VI.³¹ The distinction is relevant because the mandates of the Council under these chapters are different. The threshold for action under chapter VI is much lower and is met where there is a situation 'which is likely to endanger international peace'. As Dugard points out, it is clear that the Council considered apartheid to be a situation that constituted 'a "potential threat" to international peace and not an actual "threat to the peace" or "breach of the peace"'.³² I cite Dugard here because, while he has also relied on the comparison between Myanmar and apartheid to criticise the restrictive interpretation of the threat to international peace requirement, he himself has recognised this distinction previously.

It must be said that the draft Security Council Resolution on Myanmar does not declare itself to be a chapter VII resolution. I have used the notion of a 'threat to the peace' as the basis for analysis principally because the debates within the Council, as well as the subsequent critique of South Africa's position, have all assumed the 'threat to the peace' dimension as the focus of the debate. More to the point, while the 'potential threat' to international peace requirement in chapter VI imposes a lower threshold, the need to provide evidence of a *potential* threat nevertheless remains. This means that, while it is not necessary

²⁸ These include the Middle East conflict, Iran, Darfur and, before the US invasion, Iraq.

²⁹ For a full discussion, see Dugard (n 25 above) 487. Interestingly, Dugard in his lecture (n 2 above), while comparing the Myanmar situation to apartheid, does not highlight these differences which he clearly highlights in the textbook.

³⁰ UN Security Council Resolution 418 of 1977. Resolution 421 of 1977 was adopted pursuant to Resolution 418 and set up mechanisms of implementation.

³¹ There are numerous examples, but one can mention Resolution 417 of 1977, Resolution 189 of 1964, Resolution 190 of 1964 and Resolution 282 of 1970.

³² Dugard (n 25 above) 487. See B Simma *The Charter of the United Nations: A commentary* (1994) 610, who says that 'an abstract distinction between the threat to the peace and the mere endangering of peace does not seem possible'.

to show an *actual* threat to the peace, the *potential* must nevertheless be shown.³³ The result is that the mere existence of serious human rights violations, by itself, does absolve us from the responsibility to provide some evidence linking the violation to international peace and security.

While comparison between the resolutions adopted by the Council under chapter VI and the Myanmar situation are inappropriate because of the difference of the mandate of the Council under the respective chapters, the comparison between the Myanmar situation and the Security Council Resolution 418 of 1977 is inappropriate for another, more important, reason. In Resolution 418, the link, tenuous though it may have been, between the situation in South Africa and potential destabilisation in the region was established.³⁴ It was for this reason that the Resolution primarily required states to implement an arms embargo against South Africa.

The distinction between the treatment of Myanmar in the Security Council and Resolution 418 provides an opportunity to raise another important issue. The argument advanced in this paper is *not* that the situation in Myanmar does not warrant Security Council action. Rather, the argument advanced here is that the mere fact that there are gross human rights violations does not, in and of itself, justify the Council's involvement. In order for the Council to be properly seized of the matter, an argument has to be made, which the Council must rationally consider, that there exists a threat to international peace and security. That argument was made with respect to South Africa, but not with respect to Myanmar. With Myanmar only arguments raising human rights violations were raised. Indeed, it will be recalled that South Africa, when explaining its vote against the draft Myanmar Resolution, made the following comments linked to the regional situation:

Finally, it is worth recalling that the Association of Southeast Asian Nations (ASEAN) has stated that Myanmar is not a threat to its neighbours. Just yesterday, on 11 January 2007, the ASEAN Ministers meeting in the Philippines reaffirmed that Myanmar is no threat to international peace and security.

The Council could legitimately act in the Myanmar situation if, and only if, it had been shown that there was some connection between that situation and a threat to international peace and security. In this regard, the point, already made, must be emphasised: The position taken in this paper is *not* that human rights violations or any other internal situation cannot constitute a threat to the peace, for surely it

³³ Simma (n 32 above) 555.

³⁴ The second preambular paragraph of the Resolution, eg, states that the Council recognises 'that the military build-up by South Africa and its persistent acts of aggression against neighbouring states seriously disturbs the security of those states'. See also De Wet (n 20 above) 150 151. With regard to this Resolution, De Wet reminds the readers that South Africa had been involved in armed operations against Zambia and Marxist-backed forces in Angola.

can.³⁵ Rather, the argument is that, in any given situation, before the Council takes up a matter, a link between the situation and a threat to international peace must be shown. In the case of Myanmar, no evidence has been provided to substantiate such a link. Had the Security Council acted in such a case (and should they act in the future under the same circumstances), then such actions would be beyond the scope of the Council's mandate and consequently illegal under international law. This does not mean that the international community should be passive. Indeed, with regards to the Myanmar situation, the international community has been everything but passive. The good offices of the Secretary-General, in the form Ibrahim Gambari, continue to seek a resolution to the Myanmar situation.³⁶ At the same time, the Human Rights Council, at a special session, adopted a strongly-worded resolution by consensus against Myanmar.³⁷ The Resolution, amongst other things, provides that the Council '*strongly deplores* the continued violent oppression of peaceful demonstration in Myanmar'³⁸ and '*urges* the government of Myanmar to ensure full respect for human rights'.³⁹

It is apposite, at this point, to make a remark about the possible implications of this position for Africa, particularly the situation in Zimbabwe. The link between the position on Myanmar and Zimbabwe looms large in many of the discussions.⁴⁰ The question is whether the position outlined above implies that human rights abuses on the continent, such as in Zimbabwe, fall outside the mandate of the Security Council. The answer is no. All that the position outlined above implies is that in any given situation, whether in Zimbabwe, Myanmar or elsewhere, an argument is needed on why the particular situation qualifies as a threat to international peace and security. Thus, if it may be argued that any situation on the continent or elsewhere, including in Zimbabwe, meets this test, then the Security Council *can* place the situation on its agenda. Whether the Security Council does in fact place such a matter on its agenda will depend, unfortunately, not on considerations of human rights or international law, but rather on political considerations, flowing mainly from the interests of the five permanent members.

³⁵ Simma (n 32 above) 611 states that it now seems 'accepted that extreme violence within a state can generally be qualified as a threat to the peace'. It is clear from the rest of his analysis that some kind of link with a threat to the international peace must be shown.

³⁶ 'UN sees progress in Myanmar' published on 8 November 2007 on <http://www.thetimes.co.za/News/Article.aspx?id=608685> (accessed 11 November 2007).

³⁷ Res S-5/1: Situation of human rights in Myanmar. It is worth mentioning that the draft UN Security Council Resolution was no stronger in its condemnation than the adopted Human Rights Council Resolution.

³⁸ Para 1 Res S-5/1.

³⁹ Para 2 Res S-5/1.

⁴⁰ See contributions in n 1.

6 Concluding remarks

Human rights violations, wherever they occur, should be condemned by the international community and action should be taken wherever possible. Whether this necessarily implies that such action should be taken by the Security Council is more problematic. The mandate of the Council is limited and should be interpreted restrictively. This flows not only from the clear textual directive in the Charter, but is also consistent with moral tenets of legitimacy and democracy. We should not, in trying to deal with real problems facing us, rush to discard fundamental principles which could come back to haunt us. The recent vociferous calls for the Security Council to act in situations where it is not shown that there is a threat to international peace and security will lead to the entrenchment of the dominance of the Council (and attendant illegitimacy) and the erosion of the rule of law, the principle of equality of states and true multi-lateralism in international law. I conclude with a statement by Dugard who, himself a critic of South Africa's position on the Myanmar situation, offers the following warning against an overly-broad interpretation of the Security Council's mandate:⁴¹

The Security Council is using its enforcement powers to adopt normative resolutions that are legally binding on all members of the United Nations. In so doing, it has assumed the role of international law-maker. Such legislative role may be justified *if it is restricted to action taken under chapter VII, designed to maintain international peace and security and confined to subjects that threaten international peace ...* Clearly, this legislative role, in which a 15-member Council takes decisions that bind 191 states, must be exercised with care.

⁴¹ Dugard (n 25 above) 494 (my emphasis).