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Natural Disaster, National Sovereignty and State Negligence: An International Law Analysis of the Denial of Emergency Relief After Cyclone Nargis in Myanmar (Burma)

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In May 2008, the then Myanmar military regime denied the people of Myanmar¹ appropriate emergency relief assistance when the international community was disallowed access to the Irrawaddy Delta immediately following Cyclone Nargis. This paper will argue that this denial of aid by the regime amounts to a negligent act and/or omission that requires further consideration within international criminal law and raises issues of significance within international law.

Part I of this paper will explore the recent historical context of Myanmar and Part II will outline the circumstances surrounding Cyclone Nargis. Part III will briefly consider the current international law in relation to genocide, war crimes, crimes against humanity and the International

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¹ In 1989, the military regime altered the name of Rangoon to ‘Yangon’ and Burma to ‘Myanmar’. Daw Aung San Suu Kyi has publicly declared her preference to the former names so many within the international community respect that preference: (Australian Government, Department of Foreign Affairs and Trade, Burma Country Brief (2009) <http://www.dfat.gov.au/GEO/burma/burma_brief.html>). Since 2010, the Australian Government has shifted its position on the nomenclature of the country to a recognition that the name ‘Myanmar’ is used by international organisations such as the United Nation, the Association of South East Asian Nations and the World Trade Organisation. The current position is that ‘The Australian Government refers to the country as Burma. The Australian Government uses Myanmar when communicating directly with Burmese officials and in multilateral contexts, as appropriate’: Australian Government, Department of Foreign Affairs and Trade, Burma Country Brief (2010) <http://www.dfat.gov.au/GEO/burma/burma_brief.html>. The interchangeable nature of the nomenclature of the country is clear. This author will refer to the country as Myanmar (and the former capital city as Yangon) as this seems to be the name in greater use within the relevant literature, and the international community, at time of publication. This is not intended as a political statement.
Criminal Court (ICC). Part IV will explore the concept of negligence in the international criminal law context. Part V considers the identification of culpable individuals for potential prosecution, while Part VI will focus on the assertion of national sovereignty by the Myanmar military regime during Cyclone Nargis. Part VII will consider the Responsibility to Protect principle raised by some in the international community and finally, Part VIII suggests that a gap exists in international law in relation to the assertion of national sovereignty by a military dictatorship during a time of natural disaster in circumstances where the state lacks the will and/or the capacity to respond.

I RECENT HISTORICAL CONTEXT OF MYANMAR

Since the end of World War II, the people of Myanmar have struggled to obtain any measure of democracy, justice or freedom;² having gained independence from Britain in 1948,³ and later under the rule of General Ne Win following a coup in 1962⁴ and subsequent military regimes.⁵

Despite the United Nations’ (‘UN’) third Secretary-General hailing from the troubled land,⁶ the heady ideals on which the UN is based,⁷ remained a seemingly distant dream for the people of Myanmar.⁸ Over the past two decades, a number of events have occurred in the state that have gained the attention of the international media and shone light on this struggle.

In 1990, Daw Aung San Suu Kyi’s party, the National League for Democracy (‘NLD’), gained overwhelming popular electoral support, winning the state’s free and fair elections by securing 392 of the 484 available seats.⁹ Following that electoral victory, the Myanmar military regime refused to hand over power to the NLD, instead holding Daw

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² Independence was obtained from Britain in 1948. There was a subsequent military coup in 1962 lead by General Ne Win. The country has been under real or de-facto military rule since. See, eg, Myint Zan, ‘Judicial Independence in Burma: Constitutional History, Actual Practice and Future Prospects’ (2000) 4 Southern Cross University Law Review 17.
³ Ibid 22.
⁴ Ibid.
⁵ Ibid 38-59.
Aung San Suu Kyi under house arrest.\(^9\) Despite the regime repeatedly inviting her to go into exile, she stayed, with an inspiring resolve.\(^1\)

In addition to the deprivation of political self-determination, the people of Myanmar, comprised of over 100 ethnic groups,\(^12\) have had to endure forced labour, extortion, torture, killings and destruction of crops.\(^13\) The regime has asserted control through a 428,000 soldier army,\(^14\) of whom 70,000 are children,\(^15\) supported by the regime’s expenditure of more than 40 percent of the country’s Gross Domestic Product (‘GDP’).\(^16\)

Meanwhile, the people of Myanmar inhabit what has been described by Human Rights Watch (‘HRW’), as ‘one of the least developed and most poverty-ridden countries in Asia’.\(^17\) Combined expenditure on health and education has been estimated at one to two percent of Myanmar’s GDP.\(^18\) Myanmar currently scores 1.5 out of 10 on the Transparency International Corruption Index, an extraordinarily poor result.\(^19\)

In August 2007, Buddhist monks protested against increases in fuel prices\(^20\) and what began as a series of small protests across the nation quickly grew into internationally televised images of tens of thousands of monks walking in the streets of Myanmar with their alms bowls upturned; a symbolic gesture to the Myanmar military regime of religious excommunication.\(^21\) These protests ended with bloodshed when troops...
opened fire on the monks as they marched.\textsuperscript{22} One year after the crack-
down, permanent monk numbers had reduced from 30,000 to 6,000.\textsuperscript{23}

In the immediate period following Cyclone Nargis in May 2008, a
referendum on a new constitution was conducted.\textsuperscript{24} HRW have
interviewed survivors who report that ‘officials used the promise of more
aid goods to procure “yes” votes’.\textsuperscript{25} The then Myanmar military regime
announced that of the ‘99.07 percent of the eligible voters cast ballots on
May 8, 1.4 million voters cast no ballots, with the vast majority, 92.4
percent voting ‘yes’.\textsuperscript{26} The military regime concluded that ‘the people of
Burma had overwhelmingly voted to adopt the new Constitution’.\textsuperscript{27}

Yet in recent times there have been glimmers of hope that political reform
and change may be occurring within the Myanmar political context.
These glimmers include the release of Daw Aung San Suu Kyi on 13
November 2010,\textsuperscript{28} the subsequent release of 871 other political
prisoners,\textsuperscript{29} Daw Aung San Suu Kyi’s election to the Myanmar
Parliament,\textsuperscript{30} her international tours\textsuperscript{31} and her return to Myanmar to
participate in the political process.\textsuperscript{32} Since released, Daw Aung San Suu
Kyi has stated, ‘[w]hat I see now as the most important thing for our
country is the emergence of an all-inclusive political process in which all
of our people can participate’,\textsuperscript{33} and further, ‘I would like everyone to
work for this purpose with unity’.\textsuperscript{34}

\begin{itemize}
  \item \textsuperscript{22} Ibid 93.
  \item \textsuperscript{23} International Burmese Monks Organization, ‘Statement on the One-year Anniversary of
  the Saffron Revolution from the International Burmese Monks Organization’ (Press
  Release, 26 September 2008) 2.
  \item \textsuperscript{24} David C Williams, ‘Constitutionalism Before Constitutions: Burma’s Struggle to Build a
  \item \textsuperscript{25} HRW, above n 8, 61.
  \item \textsuperscript{26} Ibid 63-64.
  \item \textsuperscript{27} Williams, above n 24, 1669.
  \item \textsuperscript{28} BBC, ‘Burma Releases Pro-Democracy Leader Aung San Suu Kyi’ BBC News, 13
  \item \textsuperscript{29} Australian Government, above n 1; HRW, \textit{Burma Political Prisoners Released}
  \item \textsuperscript{30} Thomas Fuller, ‘Myanmar’s Opposition Leader Takes Her Seat in Parliament’ \textit{The New
  York Times} (online), 2 May 2012 <http://www.nytimes.com/2012/05/02/world/asia/daw-
  aung-san-suu-kyi-myanmar-parliament-oath.html>.
  \item \textsuperscript{31} BBC, ‘Aung San Suu Kyi Arrives in Oslo to Give Nobel Speech’ \textit{BBC News}, 15 June
  \item \textsuperscript{32} The Guardian, ‘Aung San Suu Kyi Holds First Talks with Burma President Since
  Becoming MP’ The Guardian (online), 12 August 2012
  <http://www.guardian.co.uk/world/2012/aug/12/aung-san-suu-kyi-burma-president-talks>.
  \item \textsuperscript{33} Radio Free Asia, Interview with Daw Aung San Suu Kyi quoted in Transnational
  Institute (Radio Interview, 11 January 2011) \textit{Burma Policy Briefing Nr 5, February 2011,}
  \textit{Ethnic Politics in Burma: The Time for Solutions}, 13 <http://www.tni.org/briefing/ethnic-
  politics-burma-time-solutions>.
  \item \textsuperscript{34} Ibid.
\end{itemize}
Further to these extraordinary events, there have been a number of ceasefire agreements between armed ethnic groups including the Karen National Union (‘KNU’),\(^{35}\) the Shan State Army South,\(^{36}\) and the Chin National Front.\(^{37}\) In the case of the ceasefire with the KNU, it is worth noting that this ceasefire comes after ‘more than six decades of uninterrupted armed resistance’.\(^{38}\)

It seems prudent to not overstate these glimmers of hope, as anything much more than ‘glimmers’. In recent times, there has been much media attention on the conflict between Buddhists and Muslims in Rakhine state that necessitated the President of Myanmar to declare a state of emergency and impose a curfew.\(^{39}\)

Yet with Daw Aung San Suu Kyi herself maintaining a stance of ‘cautious optimism’\(^{40}\) it seems reasonable and appropriate for those who commentate on issues in relation to the country to also consider a similar stance.

## II CYCLONE NARGIS

Clearly, the human rights record of the Myanmar military regime prior to Cyclone Nargis was worthy of international criticism and condemnation,\(^{41}\) however the worst natural disaster in modern Myanmar history that struck the Irrawaddy Delta on 2 May 2008 again highlighted the intensity of the culture of paranoia within the regime.

It has been reported that by 29 April 2008 there were ‘clear indications that Nargis was a severe cyclonic storm heading for southern Burma and the Indian Meteorological Department relayed warnings to the Burmese Department of Meteorology and Hydrology’.\(^{42}\) Yet the regime at no stage issued any alert or warning.\(^{43}\) This has led a meteorological analyst to conclude that, ‘[b]e it through lack of communication, insufficient

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\(^{38}\) Saw Yan Naing, above n 35.


\(^{41}\) Falco, above n 13.

\(^{42}\) HRW, above n 8, 15.

\(^{43}\) Ibid.
warnings or a failure to realise the severity of the threat to the delta regions of the Irrawaddy, the lack of [official Burmese] response to the warnings resulted in far greater loss of life than needed to occur'.

During the cyclone, valuable agricultural land was devastated. Although exact figures are difficult to obtain, it is estimated that 150,000 people died and that 2.4 million people were severely affected in an area previously populated by 7.4 million people. In the affected areas, over 50 percent of schools and 75 percent of health facilities were either destroyed or damaged.

Rather than prioritising the humanitarian emergency relief response, the regime pushed ahead with a planned referendum on a new constitution for the state that had been under development since 1990. The signal was clear: the vote must go on. It seems reasonable to conclude that, to the regime at the time, the maintenance of power was more important than the needs of the people.

The culture of the Myanmar military regime was perhaps most succinctly summarised by a roadside sign in Yangon at the time. Erected by the regime, the sign read under a heading ‘People’s Desire’ as follows:

Oppose those relying on external elements, acting as stooges, holding negative views. Oppose those trying to jeopardize stability of the state and Progress of the nation. Oppose foreign nations interfering in internal affairs of the state. Crush all internal and external destructive elements as the common enemy.

Perhaps unsurprisingly, the regime determined that external assistance during the natural disaster was a threat to their national sovereignty and denied foreign aid workers access to the country. As Haacke observes,

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45 Lintner, above n 20, 18.
46 Ibid.
47 HRW, above n 8, 14.
48 It must be noted that there is a growing body of scholarship that is critical of the disaster relief industry. See Alex De Waal, Famine Crimes – Politics & the Disaster Relief Industry in Africa (African Rights & The International African Institute, 1997); Mary B. Anderson, Do No Harm – How Aid Can Support Peace – Or War (Lynne Rienner Publishers, 1999); Fiona Terry, Condemned to Repeat? The Paradox of Humanitarian Action (Cornell University Press, 2002).
50 Falco, above n 13, 8.
51 Lintner, above n 20, 12.
52 Emergency Assistance Team & Center for Public Health and Human Rights at Johns Hopkins Bloomberg School of Public Health, above n 49, 52.
the international political rhetoric soared. The then Prime Minister of Australia, Kevin Rudd, stated

forget politics...forget the military dictatorship. Let’s just get aid and assistance through to people who are suffering and dying as we speak, through a lack of support on the ground.

Zalmay Khalizad, the US Permanent Representative at the UN at the time stated, ‘[i]t should be a no-brainer to accept the offer made by the international community, by states, by organisations, by international organisations’.

The author stood in line at the Myanmar Embassy in Bangkok, Thailand and was told that he could not be granted a visa as he held a Thai visa that indicated he worked for a Non-Governmental Organisation (NGO); attempts to obtain a tourist visa were also refused. Fortunately other ways of obtaining visas can be found and qualified personnel were able to gain access, albeit delayed, to the state. It has been suggested that such denials were based on fears that approvals would result in foreigners having access to politically sensitive areas and that the regime delayed until there was assurance that foreigners would work under the direct supervision of the state.

Based on reports from relief workers and survivors, it has been alleged that the Myanmar military regime did not meet the immediate needs for food, water and shelter in the emergency phase, that they interfered with the delivery of aid, restricted access to information, forcibly relocated people, confiscated land from survivors, and determined aid recipients on the basis of ethnic origin and religion rather than humanitarian need. It is extraordinary that, given Myanmar’s estimated US$5 billion in foreign reserves and US$150 million per month in gas

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53 Jurgen Haacke, ‘Myanmar, the Responsibility to Protect, and the Need for Practical Assistance’ (2009) 1 Global Responsibility to Protect 156, 164.
54 Ibid 164.
55 Ibid.
56 This author is a Registered Nurse with a specialisation in International Health & Development and previous experience in three other natural disasters including the 2004 Asian Tsunami. He was living in Thailand at the time of Cyclone Nargis working for an NGO.
58 Emergency Assistance Team & Center for Public Health and Human Rights at Johns Hopkins Bloomberg School of Public Health, above n 49, 49.
59 Ibid 50.
60 Ibid 55.
61 Ibid 57.
62 Ibid 60.
63 Ibid 56.
export revenues, the regime allocated only US$50,000 to post-cyclone reconstruction immediately after the storm.\textsuperscript{64}

Whilst there is agreement amongst NGOs operating inside and outside of Myanmar as to the ‘inexcusable’\textsuperscript{65} neglect exhibited by the regime during the immediate emergency phase of the disaster, it should be noted that the final reports in relation to the disaster response vary widely in their assessment of the role of the Myanmar military regime. Interestingly, and perhaps not surprisingly, those NGOs with an ongoing presence in Yangon are very generous in their language when describing the role of the regime.\textsuperscript{66} NGOs based outside of the country are much more scathing.\textsuperscript{67} The report by the ‘relatively successful’,\textsuperscript{68} Tripartite Core Group (‘TCG’), an ad hoc collaboration of the UN, Association of Southeast Asian Nations (‘ASEAN’) and the Myanmar military regime, is very carefully worded.\textsuperscript{69} In response to claims that aid was delivered in a discriminatory manner based on ethnicity and religion the Yangon-based NGOs claim, ‘[t]he reality is that except for minor exceptions, aid has been delivered following humanitarian principles of impartiality’.\textsuperscript{70} In stark contrast, HRW holds that ‘the government’s distribution of aid has been marred by serious allegations of favouritism’.\textsuperscript{71} Again, an internal unpublished report, from a member of the Village Tract Assessment team working in the Delta with the TCG, the comment was that, ‘[t]here were reports that Burmese villagers received aid, whereas local Karen villages were overlooked. I can confirm this after an eight day visit’.\textsuperscript{72} The lack of independent access to the Delta gave the regime opportunity to apply pressure for reports to be altered in order to present the regime in a favourable light. Yet on one key issue, there is agreement. During the first month after Cyclone Nargis, the Myanmar military regime obstructed emergency relief efforts in the Irrawaddy Delta that arguably resulted in further loss of life and disease. In an indictment-like summary, HRW notes that:

\textsuperscript{64} HRW, above n 8, 8.
\textsuperscript{65} 21 Rangoon-based INGOs, ‘Joint Response to “After the Storm: Voices from the Delta”’ (Press Release, 8 April 2009) 2.
\textsuperscript{66} Ibid 1-4. See also Centre for Peace and Conflict Studies, Listening to Voices from the Inside: Myanmar Civil Society’s Response to Cyclone Nargis <http://www.centrepeaceconflictstudies.org>.
\textsuperscript{67} Emergency Assistance Team & Center for Public Health and Human Rights at Johns Hopkins Bloomberg School of Public Health, above n 49.
\textsuperscript{68} Mely Caballero-Anthony and Belinda Chng, ‘Cyclones and Humanitarian Crises: Pushing the Limits of R2P in Southeast Asia’ (2009) 1 Global Responsibility to Protect 135, 152.
\textsuperscript{69} Tripartite Core Group, Post-Nargis Joint Assessment, (2008).
\textsuperscript{70} 21 Rangoon-based INGOs, above n 65, 3.
\textsuperscript{71} HRW, above n 8, 9.
\textsuperscript{72} Name Withheld, Report: Post visit to Irrawaddy Delta, South Western Burma, 3 July 2008.
The military government blocked large-scale international relief efforts by delaying the issuance of visas to aid workers, prohibiting foreign helicopters and boats from making deliveries to support the relief operation, obstructing travel by aid agencies to affected areas, and preventing local and international media from freely reporting from the disaster area. Rather than prioritising the lives and well-being of the affected population, the military government’s actions were dictated by hostility to the international community, participation in the diversion of aid, and an obsession with holding a manipulated referendum on a long-delayed constitution.73

It has also been reported that once aid did begin, the regime erected roadblocks that ‘were more closely linked to corruption than to providing security’74 and that ‘some cyclone survivors displaced from their homes were forcibly sent back to their villages that remained uninhabitable’.75

III INTERNATIONAL CRIMINAL LAW GENERALLY

During the past sixty years it has been recognised that while in most circumstances the prosecution of crimes is appropriately handled within sovereign states, there are occasions when a crime occurs, particularly by a governing power, where intervention from outside international actors seems appropriate in the furtherance of human rights and international peace and stability. As Starr puts it,

the first option for prosecuting international crimes should always be the domestic courts of the states affected by the crime. International tribunals should step in only where there is no viable domestic remedy.76

It is on these bases that international criminal law has developed. The primary legal reflection of these principles is found in the Geneva Conventions,77 the Genocide Convention,78 the UN Charter, and more

73 HRW, above n 8, 7.
74 Ibid 15.
75 Ibid.
77 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 85 (I), (entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (II), (entered into force 21 October 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 85 (IV), (entered into force 21 October 1950); Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 85 (III), (entered into force 21 October 1950); (‘Geneva Conventions’).
recently in 2002, the Rome Statute.\textsuperscript{79} The latter document has established a permanent international tribunal with particular jurisdiction over international crimes in specific circumstances.

For Danner and Martinez, international criminal law is ‘ambitious’\textsuperscript{80} in that it:

seeks to meld two legal systems into a coherent whole; international criminal tribunals combine aspects of the common law adversarial system with the civil law inquisitorial system.\textsuperscript{81}

It seems prudent to recognise that in critiquing this area of international law, Damaska has observed shortcomings,

Because no cluster of effective supranational institutions yet exists to enforce international criminal law, the effective operation of international criminal courts must depend on the unstable reserve of political will, especially in world capitals. Without the cooperation and support of individual states, international courts are doomed to impotence: for example, they have no power to arrest, to compel the production of evidence, nor to enforce judgements. For these reasons alone, a rigorous system for the rule of law cannot at present be established; justice cannot be meaningfully administered without regard to the volatile and complex world of international politics. Powerful actors in the international arena are in position to ignore the demands of international courts, and the sword of justice tends to be used most against individuals from states that occupy a lowly place in the de facto existing hierarchy of states.\textsuperscript{82}

Yet, as Starr succinctly summarises, ‘[i]nternational criminal law is generally understood to be a mechanism for responding to, punishing, and preventing war crimes and mass atrocities’.\textsuperscript{83}

A War Crimes

Serious violations of the laws of war are considered war crimes. The Geneva Conventions,\textsuperscript{84} and more recently, Article 8 of the Rome Statute,\textsuperscript{85} elucidate these crimes. War crimes can be committed in either international or internal armed conflicts and in the case of internal armed


\textsuperscript{81} Ibid 77-78.


\textsuperscript{83} Starr, above n 76, 1257.

\textsuperscript{84} Geneva Conventions.

\textsuperscript{85} Rome Statute art 8.
conflicts must be perpetrated against civilians. The prohibited acts may include rape and torture and have very specific proscribed elements. Additionally, the crime must have a nexus with the conflict and the perpetrator must be aware of the facts surrounding the armed conflict. It should be emphasised that the main distinctive of these crimes is that they occur during an armed conflict, and the armed conflict must be more than a riot or disturbance.

B Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as certain acts against a group of people 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. Article 6 of the Rome Statute echoes the Genocide Convention. Strongly influenced by the memory of the collective gasp of horror experienced by the international community during the immediate aftermath of the Holocaust, this Convention has been lauded as recognising the 'fundamental right of a human group to exist as a group'. Whilst a major diplomatic breakthrough, it has been recognised that the Convention is flawed in that it 'places primary reliance on prosecution by states in which acts of genocide have been committed'. This raises a fundamental difficulty of enforcement where governments have either been complicit or sponsored such acts. As Ford has observed, 'genocide is exceptionally difficult to prove...and genocide convictions are relatively rare'.

C Crimes Against Humanity

Drawing on the definition used in the Nuremberg Trials following World War II, Article 7 of the Rome Statute lists various acts ‘when committed as a part of a widespread or systematic attack directed against any civilian

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86 Ibid art 8(2)(c).
87 Ibid art 8.
89 Ibid 28.
90 Ibid.
91 Genocide Convention.
92 Ibid art II.
93 Rome Statute art 6.
95 Ibid 9.
96 Ibid.
natural disaster, national sovereignty and state negligence

population, with knowledge of the attack'.\footnote{98 \textit{Rome Statute} art 7.} The list of crimes includes: murder, extermination, enslavement, deportation, forcible transfer of a population, torture, imprisonment without regard to fundamental rules of international law, and rape.\footnote{99 Ibid.} There are other acts within the definition, concluding with, 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health'.\footnote{100 Ibid art 7(1)(k).} The relevant case law provides that for the commission of a crime against humanity, 'the perpetrator must have the intent to commit the underlying offence'\footnote{101 Ford, above n 97, 241.} and that this may be 'inferred from circumstantial evidence'.\footnote{102 Ibid.} Ford has concluded that, '[c]rimes against humanity...can be applied to a much broader range of situations including many that have not traditionally been prosecuted as violations of international criminal law'.\footnote{103 Ibid art 7(1)(k).}

The element of attack has been defined as 'an unlawful act or series of acts of the kind enumerated in the definition of crimes against humanity'.\footnote{104 Ibid art 275.} Ford recognises a somewhat 'circular'\footnote{105 Ibid.} notion here in that 'the jurisdictional prerequisite for charging crimes against humanity is proof of a course of conduct that involves the commission of the underlying acts that constitute crimes against humanity'.\footnote{106 Ibid.} As Ford explains, this is to 'prevent single, random, or limited acts from being categorised as crimes against humanity'\footnote{107 Ibid.} over acts that are 'widespread or systematic'.\footnote{108 Ibid.}

D Jurisdiction of the International Criminal Court

The ICC gains jurisdiction through the operation of the Rome Statute.\footnote{109 \textit{Rome Statute}.} Under this statute, the court is designed to be 'complementary to national criminal jurisdictions'.\footnote{110 Ibid art 1.} It works in 'relationship with the United Nations'\footnote{111 Ibid art 2.} and has legal personality and capacity to fulfil its purposes.\footnote{112 Ibid art 4.} The crimes discussed above fall within the jurisdiction, as they are the 'most serious crimes of concern to the international community as a
whole’. Starr notes that ‘[t]he question thus becomes how seriousness and international concern are defined. Two formulations have dominated: “threats to international peace and security” and conduct “shocking the conscience of humankind”’. The ICC may only prosecute crimes committed after the date of entry into force. Highly important to this discussion, is an awareness that the exercise of jurisdiction may only occur where the crime is referred by a state party to the Statute, or where the crime is referred by the UN Security Council invoking their Chapter VII power under the UN Charter, or alternatively, the Prosecutor may initiate an investigation using a process outlined in the Statute. As Myanmar is currently a non-signatory to the Rome Statute, the state would need to ratify the Rome Statute before any possible state party referral.

The court is a very young institution, arguably with milk teeth, and according to one commentator, ‘will never be able to cope with all the war crimes, all the crimes against humanity and all the acts of genocide that are tragically and unfortunately perpetrated around the world with all-too-familiar regularity’. Nevertheless, it remains a forum for obtaining justice for the victims of some of the most unimaginably heinous injustices that occur in lands previously, theoretically, beyond the reach of the law. It is noteworthy that ‘so far...the ICC has focused exclusively on armed conflicts’.

IV NEGLIGENCE IN THE INTERNATIONAL CRIMINAL LAW CONTEXT

The then US Defence Secretary, Robert Gates, reportedly said at the time of Cyclone Nargis that:

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113 Ibid art 5.
114 Starr, above n 76, 1268.
115 Rome Statute art 11(1).
116 Ibid art 13(a).
117 Ibid art 13(b).
118 Ibid art 13(c).
120 Damaska, above n 82, 329.
122 Starr, above n 76, 1258.
Myanmar was guilty of "criminal neglect" for blocking large-scale international aid to cyclone victims, and that more Burmese civilians would perish unless the [Myanmar] military regime reversed its policy.\textsuperscript{123}

Consideration is now given to this issue, within the international criminal law context of the omission to allow aid, or conversely, the act to deprive aid.

As Ford has observed:

\begin{quote}
[t]he jurisprudence of the international courts demonstrates that crimes against humanity can be caused by either acts of the accused or by omissions, if those omissions are accompanied by the requisite criminal intent,\textsuperscript{124}
\end{quote}

and further that:

\begin{quote}
in many cases, courts have held that an accused intended an act if he or she knew that the criminal outcome was the probable result of an act or omission yet chose to commit the act or omission anyway.\textsuperscript{125}
\end{quote}

In this way, '[k]illing by omission, so long as it is accompanied by the requisite criminal intent, is just as much a crime against humanity as killing by commission'.\textsuperscript{126}

O'Reilly has characterised negligence in this context as a 'highly-debated, but well established basis for imposing criminal liability'.\textsuperscript{127}

Such liability arises where 'a reasonable person should have known that his conduct would have certain consequences'.\textsuperscript{128} O'Reilly holds that in such circumstances 'there must be some individualization of fault before criminal liability is ever appropriate, and that this individualization must exist in the confluence of conduct and mental state'.\textsuperscript{129} It should also be noted that there has been some consideration within the relevant literature of state 'organizational deviance which, when combined with human rights violations, amounts to state crime'.\textsuperscript{130}

\textsuperscript{124} Ford, above n 97, 242.
\textsuperscript{125} Ibid.
\textsuperscript{126} Ibid 243.
\textsuperscript{128} Ibid.
\textsuperscript{129} Ibid 99-100.
\textsuperscript{130} Penny Green, 'Disaster by Design: Corruption, Construction and Catastrophe' (2005) 45(4) British Journal of Criminology 528, 529.
V CONSIDERATION OF CULPABLE INDIVIDUALS

In 2007 Ferdinand Nahimana, the founder and director of a private radio station in Rwanda, was convicted by the International Criminal Tribunal for Rwanda for ‘public and direct incitement to genocide and crimes against humanity’. He was ‘convicted under the doctrine of superior responsibility for failing to prevent the broadcasters from inciting to genocide in their programs or to punish them for having done so’. Important for our purposes, is an understanding that he did not broadcast personally. There has been criticism of this approach by some scholars as ‘an instrument of victor’s justice, rather than as a well-considered theory of criminality.’

Ronen has summarised the four elements for a superior to be held responsible under international criminal law. Namely:

1. an international crime has been perpetrated by someone other than the defendant;
2. there existed a superior-subordinate relationship between the defendant and the perpetrator;
3. the defendant as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so; and
4. the defendant as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator.

The ICC Statute requires:

‘a causal link between the superior’s dereliction of duty and the commission of the crime’ and ‘expressly provides for the responsibility of military commanders (and persons effectively acting as military commanders) and other superiors.’

While Singerman has argued that ‘the ICC ought to be especially wary of pursuing sitting heads of state. Such action could disrupt the international political system and cause more harm than help’, the ICC Statute contains express provisions at Article 27:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament,
an elected representative or a government official shall in no case exempt
a person from criminal responsibility under this Statute, nor shall it, in and
of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the
official capacity of a person, whether under national or international law,
shall not bar the Court from exercising its jurisdiction over such a
person.\footnote{Rome Statute art 27.}

Singerman expresses concerns about ‘overzealous or quixotic
prosecutors\footnote{Singerman, above n 138, 457.} in a world that is ‘not yet ready or able to form a quasi-
world government’\footnote{Ibid.} He holds that ‘pragmatic realities and realpolitick
must be the basis for many decisions of when and how to try international
war criminals’\footnote{Ibid.} This perspective seems in stark contrast to the mandate
of the ICC in the Statute.

In an extensive analysis of the Myanmar context, Nowak\footnote{Scott Nowak, ‘Justice in Burma’ (2010-2011) 19 Michigan State Journal of
International Law 667, 691.} has suggested
Senior General Than Shwe, General Maung Aye and General Thura Shwe
Mann, three key regime leaders, as possible defendants before the ICC.
This author is inclined to agree.

VI NATIONAL SOVEREIGNTY

Since 1648, international relations has had as its cornerstone the concept
of national sovereignty.\footnote{Ruti Teitel, ‘A Cornerstone of International Law- and an Obstacle to Protecting
Citizens’ (2002) 26 Legal Affairs 1.} It has been described as ‘an iron curtain’,\footnote{Louis Henkin, ‘That “S”Word: Sovereignty, and Globalization, and Human Rights, Et
Cetera’ (1999-2000) 68 Fordham Law Review 4.} and perhaps most succinctly by one writer:

Sovereignty means ‘leave us alone’. Sovereignty is: “we will engage in a
minimal amount of cooperation, if we as sovereign states consent”...In
general, I fear sovereignty as we have known it is alive and well.\footnote{Ibid 5.}

The principle of non-intervention underpins the concept of national
sovereignty and is enshrined in the UN Charter as follows:

Nothing contained in the present Charter shall authorize the United
Nations to intervene in matters which are essentially within the domestic
jurisdiction of any state or shall require the Members to submit such
matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.\textsuperscript{147}

It is to this principle of customary international law that the Myanmar military regime clung during Cyclone Nargis. Despite overwhelming international outrage to the contrary, the Myanmar military regime recalled the earlier described road sign\textsuperscript{148} and used the principles therein as a road map.

Whilst the UN Charter does allow for enforcement, under Chapter VII, China and Russia have previously used their powers of veto to stop binding resolutions. Therefore this remains an unlikely course of action.\textsuperscript{149} Instead of outraged condemnation at the extent of human rights abuses, the UN Security Council continues to ‘affirm their commitment to the sovereignty and territorial integrity of Myanmar’.\textsuperscript{150}

Perhaps some reflection upon the words of Raphael Lemkin is warranted:

\begin{quote}
[s]overeignty implies conducting an independent foreign and internal policy, building of schools, construction of roads...all types of activity directed towards the welfare of people. Sovereignty cannot be conceived as the right to kill millions of innocent people.\textsuperscript{151}
\end{quote}

\section*{VII RESPONSIBILITY TO PROTECT}

Rhetorically endorsed by the UN Security Council in 2006,\textsuperscript{152} the basic principles of the Responsibility to Protect (‘R2P’) are:

\begin{enumerate}
\item A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.
\item B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.\textsuperscript{153}
\end{enumerate}

\textsuperscript{147} Charter of the United Nations, opened for signature 26 June 1945, art 2(7) (entered into force 24 October 1945).
\textsuperscript{148} Lintner, above n 20, 12.
\textsuperscript{153} International Commission in Intervention and State Sovereignty (ICISS), ‘The Responsibility to Protect’ (Report, ICISS, 2001), XI.
Despite the seeming top-level endorsement of the concept, the ‘promise of R2P has so far failed to materialize in all cases’.  

For military intervention to be justified under R2P a number of criteria must first be met. Firstly, ‘the primary purpose of the intervention must be to halt or avert human suffering’.  

Secondly, ‘every non-military option for meeting the threat in question must have been explored, and that there must be reasonable grounds for believing that other measures will not succeed’.  

Thirdly, ‘the scale, duration and intensity of the proposed military action must be the minimum necessary to meet the threat in question’.  

And finally, ‘there must be a reasonable chance that the military action will be successful in meeting the threat in question’.  

In the wake of Cyclone Nargis, and specifically in the immediate period following the natural disaster, there were a number of international actors calling for the invocation of R2P. One leading voice was the French Foreign Minister, Bernard Koucher who ‘proposed that R2P be invoked to legitimize the forcible delivery of humanitarian assistance without the consent of the government of Myanmar’.  

The former US Secretary of State, Madeleine Albright, added her voice with a forceful piece,  

The Burmese Government’s criminally neglectful response to last month’s cyclone, and the world’s response to that response, illustrate three grim realities today: totalitarian governments are alive and well; their neighbours are reluctant to pressure them to change; and the notion of national sovereignty as sacred is gaining ground, helped in no small part by the disastrous results of the American invasion of Iraq.  

Albright went on and called for the international community’s responsibility to:  

override sovereignty in emergency situations – to prevent ethnic cleansing or genocide, arrest war criminals, restore democracy or provide disaster relief when national governments were either unable or unwilling to do so.  

Comments such as these have led Haacke to observe that R2P, within the context of Cyclone Nargis:  

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156 Ibid 14.
157 Ibid 15.
158 Ibid 16.
159 Belamy and Davies, above n 152, 548.
160 Madeleine Albright, ‘Since Iraq, the World is Scared to Help’, Sydney Morning Herald (Sydney), 12 June 2008.
161 Ibid.
served as a rhetorical device for Western countries to influence both Naypyidaw and ASEAN as regards the practical need of facilitating humanitarian relief.

Gareth Evans, former Australian Foreign Minister and one of the architects of R2P

warned that applying the [R2P] doctrine in the Myanmar case might be counterproductive for three reasons: (1) it would increase the paranoia of the junta; (2) it could diminish the doctrine in the future; and (3) in practical terms, intervention in the form of air drops would probably be ineffective.162

Evans’ warning seems salient in the ASEAN context where Caballero-Anthony and Chng have observed that ‘many ASEAN governments have remained critical of the R2P. Among the concerns cited include the issue of double standards, intervention being the prerogative of the strong against the weak’.163 It is worth noting Heath’s persuasive argument that ‘the [R2P], with its orientation toward military intervention, may be appropriate for genocide and war crimes but not for peace-time disasters’.164

VIII GAP IN INTERNATIONAL LAW

The invocation of R2P to force humanitarian aid during Cyclone Nargis is a purely theoretical consideration, as this did not occur. Barber has explored the legality of the proposition and concludes that justification under the R2P principle would be difficult to argue, but that

it is possible to envisage situations where, in the aftermath of a natural disaster, a government’s refusal to allow access to survivors might be so complete, and the humanitarian needs so immense, that the use of force may be warranted.165

Caballero-Anthony and Chng have proposed a variation to R2P that they have coined, R2P-Plus. They hold that it is

responsive to different kinds of human security threats, such as those caused by intentional state neglect in times of natural disasters, and sensitive to the political context in Asia.166

162 Haacke, above n 53, 168.
163 Caballero-Anthony and Chng, above n 68, 136.
165 Barber, above n 155, 1.
166 Caballero-Anthony and Chng, above n 68, 138.
It differs in that the capacity for aggression or armed interference is removed.\textsuperscript{167} Instead there is concentration on ‘natural catastrophes and conflict situations that are arguably of a lighter scale as it need not involve widespread and motivated physical violence, but covers situations that might be similarly dire in the extent of human suffering’.\textsuperscript{168}

Heath has argued that ‘disaster victims deserve a law that provides that, where a state has, for example, clearly manifested its unwillingness to help a particular population, the international community can compel access to that population’.\textsuperscript{169} The law would provide for the state to seek external assistance and disallow the state to withhold consent to assistance.\textsuperscript{170} Heath argues that the strength of this ‘duty of states to accept assistance’\textsuperscript{171} law proposal is that ‘while a state is required to seek offers from the international community, it retains the discretion to choose among the offers it receives’.\textsuperscript{172} Heath calls for the International Law Commission to be tasked to develop this law.\textsuperscript{173}

Article 7 of the Rome Statute, especially as it pertains to ‘other inhumane acts’, seems to provide promise as a legal recourse to the injustice of aid denied by a governing power. As Barber reasons,

> the act of severely restricting life-saving humanitarian aid to disaster affected populations—thus subjecting them to undue physical hardship—may fall within the range of conduct envisioned by Article 7 of the Rome Statute.\textsuperscript{174}

In his analysis of the aftermath of Cyclone Nargis, Ford concludes that ‘there was reason to believe that all of the elements of a crime against humanity were present in Myanmar in the immediate aftermath of Cyclone Nargis’.\textsuperscript{175} Given the exploration of the context of Myanmar during Cyclone Nargis and the exploration in this paper of the relevant law pertaining the crimes against humanity, this author agrees with this assertion and sets aside the possibility of war crimes or genocide convictions. Indeed, any criminal conviction of individuals responsible for acts or omissions under current international criminal law would require either a referral from the state or the cooperation of the UN

\textsuperscript{167} Ibid 145.
\textsuperscript{168} Ibid 148.
\textsuperscript{169} Heath, above n 164, 462.
\textsuperscript{170} Ibid 472.
\textsuperscript{171} Ibid 447.
\textsuperscript{172} Ibid 472.
\textsuperscript{173} Ibid 447.
\textsuperscript{174} Barber, above n 155, 10.
\textsuperscript{175} Ford, above n 97, 261.
Security Council and a referral to the ICC. As has been discussed, such support is difficult to muster, and may never be forthcoming. Ford proposes the creation of ‘a new ad hoc international tribunal or hybrid tribunal to investigate serious violations of international law in Myanmar’. This may indeed be the way to proceed, although any such considerations would need to be mindful of the criticism that such organs may only ‘expose a partial “truth” of state crime’.

Given power of the regime has now been ceded to a new government and given the glimmers of hope within Myanmar, it may yet be possible that a future administration could agree to a domestic proposal for redress of the atrocities that have occurred. While some may regard this as fantasy, given the extraordinary developments in Myanmar in recent times, it seems appropriate to again consider a domestic remedy in Myanmar.

IX CONCLUSION

While the remedy in Myanmar will likely take a unique form, it remains appropriate for the international community, to recognise the issues raised by the then Myanmar military regime’s refusal to allow assistance to those in desperate need living in the region of the Irrawaddy Delta. It is on this point that consideration must continue within the literature to ensure that where gaps exist in the relevant international law, they are considered and addressed.

In deference to those who have suffered, it seems manifestly appropriate for people of conscience to continue to work towards documents, such as the Rome Statute, and institutions such as the ICC, that highlight the aspirations of the international community and make amendments to statutes and processes that reflect the international community’s expectations.

As an international community we stood frozen as the then Myanmar military regime stole food, medicine, shelter, and in many cases, ultimately the gift of life, from the survivors of Cyclone Nargis. There was a deep awareness of the need to ‘do something’. Any amendments to international law need to adequately reflect that which many at the time of Cyclone Nargis viscerally knew to be wrong. It seems appropriate that the post-Holocaust cry of ‘never again’ be once again on the lips of the international community.

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176 Ibid 270.
177 Ibid 271.