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1-1-2010

### **Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity - The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis, 38 Denv. J. Int'l L. & Pol'y 227 (2010)**

Stuart K. Ford

*The John Marshall Law School, Chicago, fords@uic.edu*

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#### **Recommended Citation**

Stuart Ford, *Is the Failure to Respond Appropriately to a Natural Disaster a Crime against Humanity - The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis*, 38 Denv. J. Int'l L. & Pol'y 227 (2010).

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**IS THE FAILURE TO RESPOND APPROPRIATELY TO A  
NATURAL DISASTER A CRIME AGAINST HUMANITY?  
THE RESPONSIBILITY TO PROTECT AND INDIVIDUAL CRIMINAL  
RESPONSIBILITY IN THE AFTERMATH OF CYCLONE NARGIS**

STUART FORD\*

*On May 2 and 3, 2008, Cyclone Nargis struck Myanmar, devastating large portions of the Irrawaddy Delta and creating the potential for a massive humanitarian crisis. Yet, the Myanmar government rejected aid from some countries, limited the amount of aid entering the country to a fraction of what was needed, and strictly controlled how that aid was distributed. The United Nations and many governments criticized Myanmar's response to the cyclone as inadequate and inhumane, and senior politicians from a number of countries discussed whether the situation justified invoking the "responsibility to protect" doctrine*

*This article explores several questions, including: (1) whether an inadequate response to a natural disaster can constitute a crime against humanity and thus act as the trigger for the responsibility to protect; (2) whether the responsibility to protect could have been invoked by the international community in response to Cyclone Nargis; and (3) what countries would have been obligated to do if it had been invoked.*

*In particular, assuming that the invocation of the responsibility to protect would have been based on a finding by the Security Council that crimes against humanity were being committed by the government of Myanmar, would the international community be obligated to investigate and potentially prosecute the underlying violations of international criminal law? If so, what venues exist for the investigation and prosecution of these potential crimes?*

## I. INTRODUCTION

Cyclone Nargis struck Myanmar on May 2 and 3, 2008.<sup>1</sup> It wreaked havoc in the capital, Yangon, devastated large portions of the Irrawaddy Delta, and resulted in the immediate deaths of tens of thousands of people.<sup>2</sup> Most of the initial deaths

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\* Stuart Ford, J.D., LL.M., is an Assistant Professor at The John Marshall Law School in Chicago; previously he was an Assistant Prosecutor at the Extraordinary Chambers in the Courts of Cambodia. He has written about crimes against humanity, genocide, collective security and the use of force in international relations.

1. THE TRIPARTITE CORE GROUP, POST-NARGIS JOINT ASSESSMENT 1 (2008), available at <http://www.aseansec.org/21765.pdf>.

2. The initial estimates of the death toll were very low, but quickly increased as the scope of the devastation became apparent. See *Tropical Cyclone Kills More Than 350 in Myanmar*, N.Y. TIMES, May 5, 2008, at A10; Seth Mydans, *Myanmar Reels as Cyclone Toll Hits Thousands*, N.Y. TIMES, May

were caused by the storm surge, which sent a twelve-foot-high wave sweeping across parts of the Irrawaddy Delta and submerging many villages.<sup>3</sup> The storm surge destroyed housing,<sup>4</sup> polluted water sources,<sup>5</sup> and contaminated or destroyed food stocks.<sup>6</sup> Many areas remained underwater for days or weeks after the cyclone.<sup>7</sup> The widespread devastation caused by the cyclone created the potential for a massive secondary humanitarian crisis.<sup>8</sup> Moreover, the geography of the Irrawaddy Delta made the delivery of humanitarian aid very difficult.<sup>9</sup>

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6, 2008, at A1 (noting that the initial death toll was reported by state-owned television as 3,934, at the same time that some government media was indicating it could be 10,000 and the Thai Foreign Minister indicated it could be 15,000 after meeting with Myanmar's ambassador). By May 7, 2008, the government was estimating the death toll at 22,500 with an additional 41,000 people missing. See Seth Mydans & Helene Cooper, *Aid for Myanmar Mobilizes, Mixed with Criticism*, N.Y. TIMES, May 7, 2008, at A1. By May 14, 2008, the official government toll was 34,273 and the United Nations estimated that as many as 60,000 had died. See *Myanmar Government Still Blocking Large-Scale Relief; Death Toll Rises Again*, N.Y. TIMES, May 14, 2008, at A13.

Eventually, the Myanmar government estimated that at least 134,000 people either died or disappeared as a result of the cyclone. See Eric Schmitt, *Gates Accuses Myanmar of 'Criminal Neglect' Over Aid*, N.Y. TIMES, June 2, 2008, at A5; Seth Mydans, *Myanmar Rulers Still Impede Access, Relief Groups Say*, N.Y. TIMES, June 3, 2008, at A8. See also THE TRIPARTITE CORE GROUP, *supra* note 2, at 1. According to a joint report of the United Nations, the Association of Southeast Asian Nations (ASEAN) and the government of Myanmar, more than 800,000 people were displaced by the storm and more than 2.4 million people were "severely affected" by it. THE TRIPARTITE CORE GROUP, *supra* note 1, at 1. The report noted that there was "near-total destruction" of fields and housing in areas that were directly hit by the cyclone. *Id.*

3. See Mydans & Cooper, *supra* note 2.

4. An initial assessment by the World Food Program estimated that 1,000,000 people had been left homeless. See Mydans & Cooper, *supra* note 2. A joint report by the United Nations, ASEAN and the Myanmar government concluded that 450,000 houses were destroyed and found that 57% of the households in affected areas reported their housing totally destroyed, with another 25% reporting their houses partially destroyed. THE TRIPARTITE CORE GROUP, *supra* note 1, at 13-14.

5. "The storm has mixed drinking water and sewage, posing a severe risk of diarrheal diseases, and flooding has left vast pools of standing water where mosquitoes can breed and spread malaria and dengue fever." Andy Newman, *U.N. Pressuring Myanmar to End Barriers to Aid*, N.Y. TIMES, May 9, 2008, at A1. Prior to the cyclone, many people relied on rainwater collection systems and local ponds for water. More than 40% of these ponds were damaged by the cyclone and the rainwater collection systems were often destroyed along with people's housing. As a result, more than 60% of people in the affected areas had inadequate access to clean drinking water. THE TRIPARTITE CORE GROUP, *supra* note 1, at 15-16. In addition, the combination of unsanitary defecation practices and the increased reliance on drinking river water after the destruction of ponds created a significant health risk. *Id.* at 17.

6. See TRIPARTITE CORE GROUP, *supra* note 1, at 6-7 (noting that more than half of the households living in the most affected areas reported having lost all of their food stocks during the cyclone). See also *In Flooded Delta, a Want as Pervasive as Death*, N.Y. TIMES, May 10, 2008, at A1 (noting that villagers were eating waterlogged bananas and rotting fruit because there were no other alternatives); *Weeks After Cyclone in Myanmar, Even Farmers Wait for Food*, N.Y. TIMES, May 26, 2008, at A1 (noting that the storm destroyed rice stocks and ruined rice fields).

7. On 8 May 2008, whole villages in the delta remained underwater. See Seth Mydans, *Myanmar Faces Pressure to Allow Major Aid Effort*, N.Y. TIMES, May 8, 2008, available at <http://www.nytimes.com/2008/05/08/world/asia/08myanmar.html>. According to the regional director of UNICEF, a large number of villages remained inundated in early June. See Mydans, *Myanmar Rulers Still Impede Access, Relief Groups Say*, *supra* note 2.

8. It was obvious immediately after the cyclone struck Myanmar that it had created the possibility for a secondary crisis. International media reports quickly noted the lack of drinking water,

It quickly became apparent that unless a major aid effort was undertaken, tens of thousands more people could die from disease and starvation.<sup>10</sup> Yet, it appeared that the government was both ill-equipped to respond to the crisis<sup>11</sup> and reluctant to expend the effort necessary to organize an effective response.<sup>12</sup> Initially, the junta seemed more interested in preparations for a May 10 referendum on a new constitution.<sup>13</sup> There were also allegations that the government had been aware

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food, power, and the widespread destruction of homes. See *Tropical Cyclone Kills More than 350 in Myanmar*, *supra* note 2, at A10 (quoting the UN relief coordinator as saying “[t]he Irrawaddy Delta was hit extremely hard, not only because of the wind and rain, but because of the storm surge . . . . The villages there have reportedly been completely flattened.”); Mydans, *Myanmar Reels as Cyclone Toll Hits Thousands*, *supra* note 2. There were also fears of an epidemic caused by the many thousands of dead bodies that were left in the wake of the cyclone. See Mydans, *Myanmar Faces Pressure to Allow Major Aid Effort*, *supra* note 7.

9. See Thomas Fuller, *Region Poses Challenge for Aid Delivery*, N.Y. TIMES, May 6, 2008, at A14 (“The area worst affected by the cyclone that struck Myanmar on Saturday is a vast and populous delta crisscrossed by canals and inlets, qualities that are likely to make the damage extensive and delivering aid extraordinarily difficult.”); Schmitt, *supra* note 2 (quoting U.S. Defense Secretary Robert Gates as saying that helicopters were the only way to get assistance to many parts of the Irrawaddy Delta that had been cut off by the storm).

10. See Mydans & Cooper, *supra* note 2 (quoting the U.S. head of UNICEF as saying “Our biggest fear is that the aftermath could be more lethal than the storm itself.”); Newman, *supra* note 6 (“Aid officials and health experts warned that the slow response could lead to outbreaks of diseases like cholera and malaria, adding substantially to the death toll. And a prolonged delay could spread malnutrition and starvation across the vast area affected.”); Warren Hoge & Seth Mydans, *U.N. Leader Tells Myanmar's Regime There's 'No More Time to Lose'*, N.Y. TIMES, May 13, 2008, at A6 (quoting U.N. Secretary-General Ban Ki-Moon, who said “We are at a critical point . . . . Unless more aid gets into the country very quickly, we face an outbreak of infectious diseases that could dwarf today's crisis.”); Helene Cooper & Thom Shanker, *U.S. Frustrated by Myanmar Military Junta's Limits on Aid in Wake of Cyclone*, N.Y. TIMES, May 17, 2008, at A5; Seth Mydans, *Donors Press Myanmar to Let Aid Workers In*, N.Y. TIMES, May 26, 2008, at A6.

11. Groups outside Myanmar were quick to point out that the military junta was ill-prepared to respond effectively to the crisis and would need international assistance. See *Tropical Cyclone Kills More Than 350 in Myanmar*, *supra* note 2. See also Newman, *supra* note 6 (noting that Myanmar was ill equipped to respond to a public health crisis and that the country's public health infrastructure was crumbling); *Myanmar Government Still Blocking Large-Scale Relief; Death Toll Rises Again*, *supra* note 2 (noting concerns by the British ambassador to the United Nations that Myanmar government did not have the capacity to distribute aid to the more than 1.5 million people in need).

12. Residents of Yangon complained shortly after the cyclone struck that the military was doing little to help victims of the storm. See *Tropical Cyclone Kills More Than 350 in Myanmar*, *supra* note 2 (“Some in Yangon, formerly Rangoon, complained that the 400,000-member military was doing little to help victims after the storm . . . .”); Mydans, *Myanmar Reels as Cyclone Toll Hits Thousands*, *supra* note 2 (noting that some Burmese were complaining that the military had been slow to respond to the emergency). By May 8, 2008, the Myanmar government had committed to using 7 helicopters and 80 ships for relief work, a number described by the World Food Program as “a very small number considering the enormous logistical needs.” See Mydans, *supra* note 7.

13. See *Tropical Cyclone Kills More Than 350 in Myanmar*, *supra* note 2 (noting that the government intended to go forward with the referendum despite the cyclone); Newman, *supra* note 5 (noting that the government had decided to postpone the referendum in parts of the Irrawaddy Delta affected by the cyclone but would continue with it in the rest of the country); Seth Mydans, *Myanmar Seizes U.N. Food for Cyclone Victims and Blocks Foreign Experts*, N.Y. TIMES, May 10, 2008, at A10 (“The junta's plan to go ahead with the vote while restricting aid deliveries drew widespread criticism and concern that soldiers who could be rescuing survivors were likely to be sent to polling places

that the cyclone would strike Myanmar and could cause considerable loss of life but had refused to warn the population in advance.<sup>14</sup>

The international community rushed to provide substantial humanitarian aid to the government of Myanmar.<sup>15</sup> However, the military junta rejected some of the aid offered by countries it viewed as hostile, including aid offered by the United States, France, and Great Britain.<sup>16</sup> It also strictly controlled how much aid was admitted<sup>17</sup> and how that aid was distributed.<sup>18</sup> The government particularly objected to the admission of international experts to assist in assessing the crisis and distributing the aid. Many aid workers were simply denied visas to enter the

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instead.”).

14. See Mydans, *Myanmar Reels as Cyclone Toll Hits Thousands*, *supra* note 2 (noting that both citizens of Yangon and U.S. First Lady Laura Bush complained that the Myanmar government failed to warn people in advance so that they could prepare).

15. By 7 May 2007, the international community and aid organizations were already mobilizing for a major relief operation and some international aid was already beginning to reach Myanmar. See Mydans & Cooper, *supra* note 2. By 26 May 2008, donors had pledged more than \$150 million in aid. See Mydans, *supra* note 10.

16. The United States offered to use Navy warships and aircraft to deliver aid and locate the missing but this was rejected. See Mydans & Cooper, *supra* note 2. By 8 May 2008, French, British, and Indian naval vessels were in position to provide aid, but this too was rejected. See Mydans, *Myanmar Faces Pressure to Allow Major Aid Effort*, *supra* note 7; Newman, *supra* note 5; Seth Mydans, *U.N. Leader Aims to Get More Aid in Myanmar*, N.Y. TIMES, May 22, 2008, at A14. On 8 May 2008, a Thai-brokered deal to allow an American C-130 to deliver aid fell apart, apparently over suspicion of the United States' motives. See Newman, *supra* note 5. By 13 May 2008, the U.S. had a dozen transport helicopters in position to assist, with another dozen set to arrive in 24 hours. Hoge & Mydans, *supra* note 10. The government eventually allowed some U.S. planes carrying relief supplies to land but refused U.S. offers to send search and rescue teams and disaster relief experts. *Myanmar Government Still Blocking Large-Scale Relief; Death Toll Rises Again*, *supra* note 2. The Myanmar government also apparently rejected offers of search and rescue teams from a number of other countries. *Id.*

17. See Mydans, *Myanmar Faces Pressure to Allow Major Aid Effort*, *supra* note 7 (“As hungry, shivering survivors waited among the dead for help after a huge cyclone in Myanmar, aid agencies and diplomats said Wednesday that the delivery of relief supplies was being slowed by the reluctance of the country's secretive military leaders to allow an influx of outsiders.”). *Id.* (“[T]he Myanmar government has let in little aid and has restricted movement in the delta, aid agencies say. It has not granted visas to aid workers, even though supplies are being marshaled in nearby countries like Thailand.”). See also *Myanmar Government Still Blocking Large-Scale Relief; Death Toll Rises Again*, *supra* note 2 (“Ten days after the devastating cyclone struck, the isolationist military government has slightly eased its restrictions on aid but is still blocking most large-scale deliveries of relief supplies, aid officials said.”).

18. On 8 May 2008, the World Food Program reported that a shipment of high energy biscuits had been delayed for a day because the Myanmar government had initially insisted that it control the distribution of the aid. See Mydans, *Myanmar Faces Pressure to Allow Major Aid Effort*, *supra* note 7. See also *Aid Groups Say Some Myanmar Food Aid is Stolen or Diverted by the Military*, N.Y. TIMES, May 15, 2008, at A12 (“The fate of the [relief] supplies after [they arrived in Myanmar], however, remained unknown, because the junta has barred all foreigners, including credentialed diplomats and aid workers, from accompanying any donated aid, tracking its distribution or following up on its delivery.”); Cooper & Shanker, *supra* note 10 (noting that four of the six plane-loads of supplies that arrived on 16 May 2008 went to the Myanmar military and only two went directly to nongovernmental organizations for distribution); Mydans, *supra* note 10 (“Until now, the military has mostly insisted that all aid go through its hands and has even confiscated supplies from residents who tried to distribute it.”).

country.<sup>19</sup> Moreover, for the first three weeks, all foreigners, including those aid workers that had been admitted to the country, were prohibited from entering the Irrawaddy Delta.<sup>20</sup> At one point, the government seized all of the food, aid, and equipment brought into the country by the World Food Program.<sup>21</sup> The regime also tried to control aid efforts by private individuals and domestic organizations,<sup>22</sup> and there were allegations that the junta was diverting aid from those in need to its own supporters.<sup>23</sup>

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19. As early as 7 May 2008, United Nations disaster assessment officials were waiting for visas to enter Myanmar and the government was refusing to allow entry to a team from the United States Agency for International Development. See Mydans & Cooper, *supra* note 2. By 8 May 2008 there were between 50 and 100 United Nations aid workers waiting for visas to enter the country. See Mydans, *Myanmar Faces Pressure to Allow Major Aid Effort*, *supra* note 7. See Newman, *supra* note 5 (“Since the cyclone hit, aid officials said, Myanmar’s military rulers have granted visas for aid workers only grudgingly and have placed restrictions on supplies coming into the country . . .”). *Id.* (“The Myanmar government said Friday that it was willing to receive relief supplies but not foreign relief workers and that it had turned back an aircraft that arrived Thursday carrying a search-and-rescue team . . .”). See *When Burmese Offer a Hand, Rulers Slap It*, N.Y. TIMES, May 12, 2008, at A1 (noting that many aid agencies were still waiting for visas for their staff). By 14 May 2008, the United Nations had received visas for less than half of the more than 100 staff who had applied. See *Myanmar Government Still Blocking Large-Scale Relief; Death Toll Rises Again*, *supra* note 2. On 15 May 2008, the military junta re-iterated its position that it was in control of relief operations and did not need foreign experts to Thailand’s prime minister. *Aid Groups Say Some Myanmar Food Aid Is Stolen or Diverted by the Military*, *supra* note 18.

20. See *International Pressure on Myanmar Junta Is Building*, N.Y. TIMES, May 18, 2008, at A8; Seth Mydans, *U.N. Chief Says Myanmar Yields on Aid Workers*, N.Y. TIMES, May 24, 2008, [http://www.nytimes.com/2008/05/24/world/asia/24myanmar.html?\\_r=1&scp=1&sq=U.N.%20Chief%20Says%20Myanmar%20Yields%20on%20Aid%20Workers&st=cse](http://www.nytimes.com/2008/05/24/world/asia/24myanmar.html?_r=1&scp=1&sq=U.N.%20Chief%20Says%20Myanmar%20Yields%20on%20Aid%20Workers&st=cse). Foreign aid workers were first allowed into the devastated areas on 27 May 2008. See Seth Mydans, *A Few Aid Workers Reach Into Myanmar*, N.Y. TIMES, May 28, 2008, at A7.

21. Mydans, *supra* note 13. At the same time, other aid agencies like UNICEF, the International Red Cross and Doctors Without Borders reported being able to deliver aid. *Id.*

22. See *When Burmese Offer a Hand, Rulers Slap It*, *supra* note 19; *Weeks After Cyclone in Myanmar, Even Farmers Wait for Food*, *supra* note 6 (noting that the police operated checkpoints, turned away foreigners without government-approved permits, and warned Burmese who passed through the checkpoints not to distribute aid).

23. See *When Burmese Offer a Hand, Rulers Slap It*, *supra* note 19 (reporting allegations that: (1) local military officials had received good rice from the United Nations but kept it for themselves and distributed rotten rice to the cyclone survivors; and (2) that the military had taken relief supplies donated by other countries and then sold it to those in need for a profit); *Myanmar Government Still Blocking Large-Scale Relief; Death Toll Rises Again*, *supra* note 2 (noting that the United Nations and the United Kingdom were concerned that aid was being diverted to people who did not need it); *Aid Groups Say Some Myanmar Food Aid Is Stolen or Diverted by the Military*, *supra* note 18 (“The directors of several relief organizations in Myanmar said Wednesday that some of the international aid arriving into the country for the victims of Cyclone Nargis was being stolen, diverted or warehoused by the country’s army.”). See also Amnesty Int’l, *Myanmar Briefing: Human Rights Concerns a Month After Cyclone Nargis*, AI Index ASA 16/013/2008, June 5, 2008, at 7-9, available at <http://www.amnesty.org/en/library/info/ASA16/013/2008/en>.

The United Nations repeatedly criticized the slow pace of the relief effort,<sup>24</sup> amid concerns that large numbers of people who had survived the initial storm surge were dying because they had not received aid.<sup>25</sup> On May 11, the spokesperson for the World Food Program stated that the government was only allowing in 10 percent of the needed aid.<sup>26</sup> Three weeks after Cyclone Nargis, aid was still only reaching 25 percent of the 2.4 million victims of the storm.<sup>27</sup> For its part, the Myanmar government insisted that things were quickly returning to normal and that it had the situation under control.<sup>28</sup> Senior British and U.S. officials criticized the response of the junta as “inhuman” and “criminal neglect.”<sup>29</sup>

On May 20, 2008, there was a small breakthrough, as the Myanmar government agreed to allow greater amounts of aid from fellow ASEAN countries.<sup>30</sup> This was followed on May 24, 2008 by a deal brokered by U.N. Secretary-General Ban Ki-Moon to allow aid workers of any nationality to enter

24. The United Nations official in charge of the relief effort said that “The situation is profoundly worrying . . . . They have simply not facilitated access in the way we have a right to expect.” See Newman, *supra* note 5. Secretary-General Ban Ki-Moon said that the effect of the government’s failure to allow aid could be “truly catastrophic.” Mydans, *supra* note 13. On May 13, 2008, the Secretary-General expressed “deep concern and immense frustration” with the government’s “unacceptably slow response” to the crisis. Hoge & Mydans, *supra* note 10.

25. See Newman, *supra* note 5 (“Aid officials and health experts warned that the slow response could lead to outbreaks of diseases like cholera and malaria, adding substantially to the death toll. And a prolonged delay could spread malnutrition and starvation across the vast area affected.”). *Id.* (“It’s a race for time, a race to save lives,” said Henrietta H. Fore, administrator of the United States Agency for International Development”). See Mydans, *supra* note 13 (“[T]he refusal of the country’s iron-fisted rulers to allow doctors and disaster relief experts to enter in large numbers contributed to the growing concern that starvation and epidemic diseases could end up killing people on the same scale as [Cyclone Nargis].”). See Hoge & Mydans, *supra* note 10 (“By keeping most foreign assistance out . . . the generals must be ready to accept the deaths of hundreds of thousands more people, according to foreign relief officials. At the moment, that is the choice it appears to be making.”).

26. See *When Burmese Offer a Hand, Rulers Slap It*, *supra* note 19. A few days later, the World Food Program indicated that it was only being allowed to ship in 20% of the food it needed to distribute to keep up with the most urgent needs. See Hoge & Mydans, *supra* note 10.

27. See Mydans, *U.N. Chief Says Myanmar Yields on Aid Workers*, *supra* note 20; Mydans, *supra* note 10.

28. See Newman, *supra* note 5. On May 24, 2008, even though only 25% of the victims had received assistance, the Myanmar government declared that “the emergency phase” of the crisis was over and that the government would now focus on reconstruction. Mydans, *U.N. Chief Says Myanmar Yields on Aid Workers*, *supra* note 20. The international community generally rejected the contention that the emergency phase of the crisis was over. See *Weeks After Cyclone in Myanmar, Even Farmers Wait for Food*, *supra* note 6. In response to criticism of its response to the cyclone, the Myanmar government claimed that it had promptly delivered relief to all of the storm’s victims. See Schmitt, *supra* note 2.

29. The British Prime Minister described the crisis as a “man-made catastrophe [caused] by the negligence, the neglect and the inhuman treatment of the Burmese people . . . .” by the Myanmar government. *International Pressure on Myanmar Junta Is Building*, *supra* note 20. U.S. Defense Secretary Robert Gates accused the Myanmar government of “criminal neglect” for blocking international aid, although he ruled out any humanitarian intervention that did not have Security Council approval. See Schmitt, *supra* note 2.

30. See Seth Mydans & Alan Cowell, *Myanmar to Widen Neighbors’ Aid Role*, N.Y. TIMES, May 20, 2008, at A10.

the country.<sup>31</sup> A few days later, the government eased some of the restrictions on foreign aid workers and allowed more aid to flow into the devastated regions.<sup>32</sup> Despite the loosening of some restrictions, aid agencies continued to report that the government was making it difficult to coordinate and deliver aid.<sup>33</sup> At the same time, the government began evicting people from camps and shelters and sending them back to their home villages, even if their homes no longer existed.<sup>34</sup> Tensions continued between aid workers and the Myanmar government over the aid effort well into June.<sup>35</sup>

During the crisis, Bernard Kouchner, the French Foreign Minister, famously recommended that the international community deliver the waiting humanitarian aid over the objections of the Myanmar government: “We are seeing at the United Nations if we can’t implement the responsibility to protect, given that food, boats and relief teams are there, and obtain a United Nations resolution which authorizes the delivery and imposes this on the Burmese government.”<sup>36</sup> Kouchner also suggested that the ruling junta could be guilty of crimes against humanity for restricting the supply of aid.<sup>37</sup> Several other senior European officials made similar statements.<sup>38</sup> There are also indications that the United States and some European nations considered requesting a Security Council resolution that would

31. See Mydans, *U.N. Chief Says Myanmar Yields on Aid Workers*, *supra* note 20. Announcement of the deal was met with cautious optimism by aid agencies. *Id.*

32. See Mydans, *A Few Aid Workers Reach Into Myanmar*, *supra* note 20 (noting that the government was allowing some foreign aid workers to visit areas devastated by the cyclone).

33. Seth Mydans, *Myanmar Rulers Still Impede Access*, N.Y. TIMES, June 3, 2008, at A8; See also Mydans, *Myanmar Junta Begins Evicting Cyclone Victims From Shelters*, N.Y. TIMES, June 7, 2008, at A5 (noting that aid groups were still being required to apply for special travel permits to enter the delta).

34. See Amnesty Int’l, *supra* note 23, at 3-6 (noting that Amnesty International had identified more than 30 instances of the forcible displacement of cyclone survivors but that “anecdotal evidence from numerous sources strongly suggests a much higher number”); *Monks Succeed in Cyclone Relief as Junta Falls*, N.Y. TIMES, May 31, 2008, available at <http://www.nytimes.com/2008/05/31/world/asia/31myanmar.html>; see also Mydans, *supra* note 34; *Myanmar Junta Begins Evicting Cyclone Victims From Shelters*, *supra* note 33.

35. See *Burmese Endure in Spite of Junta, Aid Workers Say*, N.Y. TIMES, June 18, 2008, at A1 (noting that many people were still not receiving adequate aid and that the government had recently issued a directive effectively requiring all foreign aid workers to be accompanied by government officials).

36. See Mydans, *Myanmar Faces Pressure to Allow Major Aid Effort*, *supra* note 7. The United Nations was not particularly supportive of the idea. *Id.* Bernard Kouchner had been a proponent of the concept of humanitarian intervention, which had preceded the responsibility to protect doctrine. See Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT’L L.J. 703, 706 (2006).

37. See Mydans & Cowell, *supra* note 30.

38. At least one French ambassador warned that the Myanmar government’s refusal to allow aid might lead “to a true crime against humanity.” *International Pressure on Myanmar Junta is Building*, *supra* note 20. Javier Solana, the foreign policy chief for the European Union, echoed Kouchner’s words about invoking the responsibility to protect: “We have to use all the means to help those people . . . The United Nations charter opens some avenues if things cannot be resolved in order to get humanitarian aid to arrive.” *Myanmar Government Still Blocking Relief*, *supra* note 2. The British Foreign Secretary, David Miliband, took the position that the responsibility to protect could apply to the situation in Myanmar. *The UN and Humanitarian Intervention: To Protect Sovereignty, or to Protect Lives?*, ECONOMIST, May 17, 2008, at 50.



authorize the delivery of humanitarian aid without the consent of the Myanmar government. This plan was apparently dropped when it became clear that China would veto any such resolution.<sup>39</sup>

Kouchner's comments led to a vigorous debate about whether the responsibility to protect<sup>40</sup> could properly be invoked in response to the humanitarian crisis in Myanmar.<sup>41</sup> Some commentators have suggested that the responsibility to protect doctrine should have been applied,<sup>42</sup> while others have argued that it would have been inappropriate.<sup>43</sup> In order to determine if the

39. Cooper & Shankar, *supra* note 10; Jonathan Marcus, *World Wrestles with Burma Aid Issue*, BBC NEWS, May 9, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7392662.stm>. See also Mydans & Cowell, *supra* note 30 (noting that Chinese officials had stressed that Myanmar was a sovereign country and that the admission of aid would depend on the consent of the government).

40. The responsibility to protect doctrine is described in more detail below in Section III. It is a relatively recent development in international law and posits that states have an obligation to prevent certain crimes from occurring on their territory. If a state is unable or unwilling to prevent these crimes, then the international community may intervene to prevent them. Intervention is not mandatory and is still dependent on the political will of the international community and the acquiescence of permanent members of the Security Council, but the international community now generally accepts that some form of intervention is legitimate in response to particularly egregious international crimes.

41. See Ramesh Thakur, *Should the UN Invoke the 'Responsibility to Protect'?*, GLOBE AND MAIL (Canada), May 8, 2008, at A21; Lloyd Axworthy & Allan Rock, *Responsibility to Protect? Yes*, GLOBE AND MAIL (Canada), May 9, 2008, at A22; Marcus, *supra* note 39; Gareth Evans, *Facing Up to Our Responsibilities*, GUARDIAN (U.K.), May 12, 2008, <http://www.guardian.co.uk/commentisfree/2008/may/12/facinguptoourresponsibilities>; Fred Hiatt, *In Burma, a U.N. Promise Not Kept*, WASH. POST, May 12, 2008, at A19; Lloyd Axworthy, *International Community has a Responsibility to Protect Myanmar*, EDMONTON J., May 13, 2008, <http://www.canada.com/edmontonjournal/news/opinion/story.html?id=6056af9d-43eb-4575-81b3-9235750e3214>; Ivo Daalder & Paul Stares, *The UN's Responsibility to Protect*, INT'L HERALD TRIB., May 13, 2008, <http://www.nytimes.com/2008/05/13/opinion/13iht-edaalder.1.12841976.html>; Maggie Farley, *The World: How to Help When Help is Refused?*, L.A. TIMES, May 14, 2008, at 9; Robert D. Kaplan, *Aid at the Point of a Gun*, N.Y. TIMES, May 14, 2008, at A23; Editorial, *Shame on the Junta*, N.Y. TIMES, May 14, 2008, at A22; *The UN and Humanitarian Intervention: To Protect Sovereignty, or to Protect Lives?*, *supra* note 38; Chris Beyrer & Jared Genser, Op-Ed., *Burma's Next Wave of Dying*, BOSTON GLOBE, May 21, 2008, [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2008/05/21/burmas\\_next\\_wave\\_of\\_dying/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/05/21/burmas_next_wave_of_dying/); Tyra R. Saechao & Sujeet B. Rao, Op-Ed., *Aid for Myanmar: Strategies for International Relief*, WASH. TIMES, May 30, 2008, at A21; David Rieff, *Humanitarian Vanities*, N.Y. TIMES, June 1, 2008, at MM13; W. Andy Knight & Vasselin Popovski, *Putting People Ahead of Protocol*, EDMONTON J., June 4, 2008, <http://www.canada.com/edmontonjournal/news/ideas/story.html?id=0f041843-446d-4fce-b650-b3c904487a93>; Madeleine K. Albright, *The End of Intervention*, N.Y. TIMES, June 11, 2008, at A23.

42. See Evans, *supra* note 41 (noting that "[i]f what the generals are now doing, in effectively denying relief to hundreds of thousands of people at real and immediate risk of death, can itself be characterised as a crime against humanity, then the responsibility to protect principle does indeed kick in"); Lloyd Axworthy, *supra* note 41 (arguing that the responsibility to protect does apply to natural disasters); Daalder & Stares, *supra* note 41; *Shame on the Junta*, *supra* note 41; Beyrer & Genser, *supra* note 41; Knight & Popovski, *supra* note 41.

43. See Thakur, *supra* note 41; Saechao & Rao, *supra* note 41. The Asia-Pacific Centre for the Responsibility to Protect also produced a report that concluded that "there is no prima facie case for arguing that the regime's failure to provide full access to humanitarian organizations in the wake of Cyclone Nargis triggers the Responsibility to Protect principle." ASIA-PACIFIC CENTRE FOR THE RESPONSIBILITY TO PROTECT, CYCLONE NARGIS AND THE RESPONSIBILITY TO PROTECT: MYANMAR/BURMA BRIEFING NO. 2, at 8 (2008), available at <http://www.r2pasiapacific.org/documents>

responsibility to protect doctrine applied to Cyclone Nargis, it first must be determined whether or not the situation in Myanmar constituted a crime against humanity. While the situation in Myanmar did not fit easily into the confines of a traditional crime against humanity, it more closely resembles that than a war crime, genocide, or ethnic cleansing.<sup>44</sup>

If the situation in Myanmar was a crime against humanity, then the responsibility to protect would be applicable. First and foremost, this would impose a burden on Myanmar to take all necessary action to ameliorate the situation. If Myanmar was unable or unwilling to take the appropriate action, it would impose a burden on the international community to take steps to protect the civilian population of Myanmar. While the responsibility to protect doctrine emphasizes the need to use peaceful means first, it also commits the international community to taking “timely and decisive” action through the Security Council, if necessary.<sup>45</sup> This could include a Security Council resolution that permitted the delivery of humanitarian assistance by international forces on Myanmar’s territory, although coercive military action would generally be considered a last resort.

Thus, the question of whether crimes against humanity were occurring in Myanmar was crucial to the argument that the responsibility to protect doctrine could be invoked to override the government’s resistance to the delivery of humanitarian aid. It also gives rise to a second important issue. If crimes against humanity were being committed, then it raises the possibility that some person or group of persons could be held individually criminally liable for those crimes. These are two very different kinds of responsibilities: (1) the obligations of states (both Myanmar and the international community at large) to the civilian population of Myanmar, and (2) the possible criminal liability of individuals for crimes against humanity.

This article will first examine whether the situation in Myanmar could reasonably have been described as a crime against humanity based on the

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44. In October 2005, the heads of states present at the World Summit agreed that the responsibility to protect applied to situations where genocide, war crimes, crimes against humanity or ethnic cleansing were taking place. *See infra* notes 202-206. The situation in Myanmar was not a war crime because there was no armed conflict taking place in the Irrawaddy Delta at the time. It was not genocide because there was no evidence of a specific intent to destroy a particular racial, religious, national or ethnical group in whole or in part. Nor is there evidence that the dead and dying were targeted because of their membership in a protected group. Finally, it was not ethnic cleansing because there was no evidence that the Myanmar government (or anyone else) was using force or intimidation to remove people of a certain ethnic or religious group from the area affected by the cyclone. While there was some evidence of forcible displacements by the Myanmar government beginning at the end of May, those displacements did not seem to be motivated by the ethnicity or religion of the victims. *See supra* note 35. Rather, the displacements seemed to be an effort to minimize the apparent scope of the crisis by forcing people to leave shelters and government-run camps.

45. The Outcome Document of the 2005 World Summit specifically mentions the possibility of acting through Chapter VII of the United Nations Charter, which gives the Security Council the power to take coercive measures to ensure peace and security. 2005 World Summit Outcome Document, G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter 2005 World Summit Outcome Document].

information available to the international community in May 2008. It will examine various legal theories that are suggested by the facts outlined above and apply the jurisprudence of the existing international courts<sup>46</sup> to determine whether there was sufficient reason to believe that crimes against humanity were being committed to justify invoking the responsibility to protect. It will then address the applicability of the responsibility to protect doctrine and discuss what the international community could and should have done in response to the Myanmar government's refusal to admit aid. Finally, assuming there was reason to believe that crimes against humanity were being committed, it will examine potential venues for any investigations and trials.

## II. WERE CRIMES AGAINST HUMANITY COMMITTED IN THE AFTERMATH OF CYCLONE NARGIS?

Cyclone Nargis or its aftermath could be considered a crime against humanity if: (1) one or more of the following acts – murder, extermination, enslavement, deportation or forcible transfer of populations, imprisonment, torture, rape and sexual violence, persecutions, or other inhumane acts<sup>47</sup> – was committed; (2) in connection with a widespread or systematic attack upon a civilian population.<sup>48</sup>

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46. Throughout this article, except where it is specified otherwise, the term international courts will be used to refer to both fully international courts, including the International Criminal Court, the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, and to hybrid international courts like the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

47. These crimes are usually referred to as either: (1) the enumerated crimes because these are the crimes that are enumerated in the definition of crimes against humanity; or (2) the underlying acts because these are the acts that underlie a finding that crimes against humanity have been committed. The terms enumerated crimes and underlying acts will be used interchangeably in this article. Most definitions of crimes against humanity adopt a fairly similar set of enumerated crimes. *See* Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea art. 5, NS/RKM/1004/006, Oct. 27, 2004 [hereinafter ECCC Law]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex 1, art. 3, U.N. Doc. S/RES/955 (July 1, 1994) [hereinafter ICTR Statute]; The Secretary-General, Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Annex 1, art. 5, U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Statute]. The Statute of the Special Court for Sierra Leone expands the rape component to also include sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence. Statute of the Special Court for Sierra Leone art. 2(g), Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter SCSL Statute]. The Rome Statute also contains slightly broader definitions of a number of these components. For example, it includes forcible transfers in addition to deportations, presumably to cover situations where the victims are not forced to cross an international boundary. Rome Statute of the International Criminal Court art. 7(d), July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute]. It includes an expanded prohibition on sexual violence quite similar to art. 2 of the SCSL Statute and also includes a broader definition of persecution. *Id.* arts. 7(g)-(h). Finally, the Rome Statute includes two additional physical acts, apartheid and the enforced disappearance of persons, which are not present in the statutes of any of the other international tribunals. *Id.* arts. 7(i)-(j).

48. *See* Rome Statute, *supra* note 47, art. 7; SCSL Statute, *supra* note 47, art. 2; ICTR Statute, *supra* note 47, art. 3; ECCC Law, *supra* note 47, art. 5. ICTY cases have also adopted this requirement. *See, e.g.*, Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 181 (Nov. 30, 2005). There are some differences in how the various tribunals have addressed this element, and these differences will be

Both elements must be present for a crime against humanity to exist. This section will first address the necessary threshold for invoking the responsibility to protect. Next, it will examine whether any of the underlying acts necessary for a crime against humanity were present. Finally, it will address whether or not the cyclone or its aftermath constituted a widespread or systematic attack on a civilian population.<sup>49</sup>

*A. The Threshold for Invoking the Responsibility to Protect*

This article's determination of whether there was reason to believe that crimes against humanity were being committed in Myanmar during and shortly after Cyclone Nargis will be made based on the "facts" described above in Section I. These facts are taken from contemporaneous newspaper reports and the statements of various NGOs and United Nations agencies. The author's personal experience in investigating and prosecuting violations of international criminal law<sup>50</sup> suggests that a formal criminal investigation would conclude that the facts are far more complex and nuanced than is apparent from the sources cited above. Indeed, nothing in this article should be interpreted as a finding that crimes against humanity did, in fact, take place. Such a determination could only be made after a trial that met all of the procedural safeguards required by international law.

Nevertheless, it is not necessary (or possible) at this juncture to prove beyond a reasonable doubt that crimes against humanity were committed in Myanmar.<sup>51</sup> The responsibility to protect doctrine does not require a conviction for crimes against humanity before it can be invoked,<sup>52</sup> although it is not clear what level of

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addressed below in Section II(C).

49. The enumerated crimes will be addressed first because whether or not there is an attack depends on whether or not there is evidence of the widespread or systematic commission of crimes similar to the enumerated crimes. See *infra* Section II(C)(1). Thus, the existence of the enumerated crimes has a direct bearing on whether or not there is an attack.

50. The author spent several years working in the Office of the Co-Prosecutors at the Extraordinary Chambers in the Courts of Cambodia, where he investigated and prosecuted former leaders of the Khmer Rouge for war crimes, crimes against humanity and genocide committed in Cambodia between 1975 and 1979.

51. The "beyond reasonable doubt" standard would be necessary to obtain a conviction against a particular person on particular facts. Rome Statute, *supra* note 47, art. 66, para. 3; Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (Rev. 4), Rule 87(1), Sep. 11, 2009 [hereinafter ECCC Internal Rules]; Rules of Procedure and Evidence of the Special Court for Sierra Leone, Rule 87(A), Apr. 12, 2002 [hereinafter SCSL Rules of Procedure and Evidence]; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, Rules of Procedure and Evidence, Rule 87(A), U.N. Doc. IT/32/Rev. 43 (July 24, 2009) [hereinafter ICTY Rules of Procedure and Evidence]; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 87(A), U.N. Doc. ITR/3/REV.1 (adopted on June 29, 1995, as amended on March 14, 2008) [hereinafter ICTR Rules of Procedure and Evidence].

52. To require proof beyond a reasonable doubt before the doctrine could be invoked would essentially neuter it. The whole point of the responsibility to protect doctrine is to allow "timely and decisive" action in response to humanitarian crises. 2005 World Summit Outcome Document, *supra* note 45, ¶ 139. The threshold for action cannot be so high that the doctrine cannot be invoked in time to save lives. See Christopher C. Joyner, "The Responsibility to Protect": Humanitarian Concern and the Lawfulness of Armed Intervention, 47 VA. J. INT'L L. 693, 711 (2007).

evidence is required before the doctrine applies. One way to determine when the responsibility to protect can be invoked is to look at international criminal procedure. Since the responsibility to protect doctrine uses the commission of international crimes as its trigger, it stands to reason that the standards used by international courts to investigate and prosecute international crimes are relevant. There are three commonly used thresholds that might be relevant: (1) the threshold necessary to initiate a criminal investigation, (2) the threshold necessary to arrest a suspect or place a suspect in pre-trial detention, and (3) the threshold necessary to confirm an indictment.

All of the international courts use a system of increasing evidentiary thresholds at each stage of the proceedings. Generally, the threshold necessary to initiate an investigation is quite low. At the Special Court for Sierra Leone (SCSL), the decision to initiate an investigation is entirely at the discretion of the prosecutor.<sup>53</sup> At the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Co-Prosecutors must have a “reason to believe” that crimes within the jurisdiction of the court have been committed to initiate a judicial investigation,<sup>54</sup> but the belief is subjective.<sup>55</sup> The other international courts require either a reasonable or a sufficient basis to believe that crimes within the jurisdiction of the court have been committed.<sup>56</sup>

There is a higher standard applied to issuing arrest warrants and placing suspects in pre-trial detention. At the International Criminal Court (ICC), the Pre-Trial Chamber can issue an arrest warrant and detain a person pending trial when there are “reasonable grounds to believe” that the person has committed a crime within the jurisdiction of the court.<sup>57</sup> The SCSL uses a “reason to believe” standard.<sup>58</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) will place a suspect in provisional detention if there is a “reliable and consistent body of material which tends to show” that the suspect committed a crime within the court’s jurisdiction.<sup>59</sup>

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53. The SCSL imposes no threshold on the initiation of an investigation. The Prosecutor is responsible for the investigations and acts independently in fulfilling that responsibility. SCSL Statute, *supra* note 47, art. 15(1). Consequently, the decision whether to open an investigation is apparently entirely within the discretion of the Prosecutor. *See* Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶¶ 280-84 (Feb. 22, 2008) (holding that the Prosecutor had unfettered discretion to determine who to investigate and charge).

54. ECCC Internal Rules, *supra* note 51, Rule 53(1).

55. The Co-Prosecutors can “decide, at their discretion,” whether to accept or reject complaints. *Id.* Rule 49(4). Furthermore the Co-Prosecutors may change their decision “at any time.” *Id.* Rule 49(5).

56. At the ICC, the Prosecutor needs a “reasonable basis” to initiate an investigation. Rome Statute, *supra* note 47, arts. 15(3)-(4), 53(1). Both the ICTY and the ICTR allow the Prosecutor to initiate an investigation if there is a “sufficient basis.” ICTY Statute, *supra* note 47, art. 18(1); ICTR Statute, *supra* note 47, art. 17(1).

57. Rome Statute, *supra* note 47, art. 58(1).

58. SCSL Rules of Procedure and Evidence, *supra* note 51, Rule 40 *bis* (B)(ii).

59. ICTY Rules of Procedure and Evidence, *supra* note 51, Rule 40 *bis* (B)(ii); ICTR Rules of Evidence and Procedure, *supra* note 51, Rule No. 40 *bis* (B)(ii).

The ECCC requires a “well founded reason to believe” that the charged person committed the alleged crimes.<sup>60</sup>

The standard used to confirm an indictment and send a charged person to trial is generally the second highest evidentiary standard used by a court, surpassed only by the “beyond reasonable doubt” standard necessary for conviction. At the ICC, the charges are subsequently confirmed by the Pre-Trial Chamber if there are “substantial grounds to believe” that the person committed the specific crimes charged.<sup>61</sup> At the ICTY, the ICTR, and the SCSL, the prosecution must demonstrate a *prima facie* case before the charged person is sent for trial.<sup>62</sup> There is no explicit standard for confirming an indictment at the ECCC, and the decision is left to the discretion of the Co-Investigating Judges.<sup>63</sup>

The standard required to confirm an indictment is too high to trigger the responsibility to protect doctrine. Generally, the confirmation of the indictment comes after an extensive investigation of the facts and represents the best case the prosecution can put forward at the close of its investigation. The time and effort necessary to establish a *prima facie* case of crimes against humanity (or any of the other crimes that can trigger the responsibility to protect) would simply be too time-consuming<sup>64</sup> and difficult<sup>65</sup> during a humanitarian crisis. The responsibility

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60. ECCC Internal Rules, *supra* note 51, Rule 63(3)(a).

61. Rome Statute, *supra* note 47, art. 61(7).

62. At the ICTR and ICTY, the Prosecutor can issue an indictment if there is a *prima facie* case that crimes within the jurisdiction of the court have been committed. ICTY Statute, *supra* note 47, art. 17(4); ICTR Statute, *supra* note 47, art. 17(4). A judge of the Trial Chamber then reviews the indictment to see whether it establishes a *prima facie* case before confirming the indictment. ICTY Statute, *supra* note 47, at art. 19(1); ICTR Statute, *supra* note 47, at art. 18(1). A similar process is used at the SCSL. SCSL Rules of Procedure and Evidence, *supra* note 51, at Rule 47(E)(ii) (stating the reviewing judge shall approve the indictment if “the allegations in the Prosecution’s case summary would, if proven, amount to” a crime within the jurisdiction of the court).

63. ECCC Internal Rule 67 merely states that the case must be dismissed if there is “not sufficient evidence” against the charged person, but does not indicate a specific standard that the evidence must meet. ECCC Internal Rules, *supra* note 51, at Rule 67(3)(c). In the first indictment at the ECCC, involving Kaing Guek Eav, alias ‘Duch’, the Co-Investigating Judges adopted the language of Internal Rule 67 and concluded that there was “sufficient evidence” to send Duch for trial. Closing Order Indicting Kaing Guek Eav, alias ‘Duch,’ Case No. 001/18-07-2007-ECCC-OCIJ (Public Redacted Version), ¶ 130 (Aug. 8, 2008) [hereinafter Duch Closing Order]. Duch did not appeal his indictment. Consequently, there was no review by the Pre-Trial Chamber to see if the evidence was sufficient. However, it is likely that one or more of the other suspects, if they are indicted, will challenge the sufficiency of the indictment. This might lead to the Pre-Trial Chamber setting an explicit standard by which to evaluate the indictments. It is also possible that the Internal Rules could be amended to incorporate a specific standard.

64. Investigations at international courts routinely take a year or more. For example, the first formal investigation at the ECCC began on July 18, 2007. See Press Release, Extraordinary Chambers in the Court of Cambodia, Statement of the Co-Prosecutors, (July 18, 2007). The first indictment was confirmed almost one year later. See Duch Closing Order, *supra* note 63.

65. Generally, criminal investigations require extensive access to documents and witnesses. It is highly unlikely that the international community will have access to the requisite witnesses during the early phases of the humanitarian disaster. In the case of Cyclone Nargis, for example, one of the key complaints of the international community was that international experts did not have adequate access to the country to coordinate the relief effort. See *supra* notes 19-20. Access would probably have been

to protect doctrine must be triggered quickly if it to be of any use, which means that there is no time to conduct a full investigation.

On the other hand, the threshold necessary to simply open an investigation at an international court may be too low. The SCSL and the ECCC have subjective or discretionary standards for initiation of an investigation.<sup>66</sup> These are insufficient to trigger the responsibility to protect because the doctrine would be too inconsistently applied if it were based on a purely subjective evaluation. The standards used at the ICC, ICTY and ICTR seem more appropriate because they require some sort of objective (“reasonable” or “sufficient”) basis. The standards for issuing an arrest warrant or placing a suspect in pre-trial detention are also appealing for the same reason. While there is some variation in the wording, each international court applies an objective standard. The ICTY and ICTR require a “reliable and consistent” body of evidence, while the ICC, the SCSL, and the ECCC use some variation of a “reasonable belief” standard.<sup>67</sup>

Ultimately, the actual wording is probably immaterial. Whether one calls it a “reasonable basis,” “sufficient basis,” “reason to believe,” “reasonable grounds to believe,” or “well founded reason to believe” or requires a “reliable or consistent” body of evidence, in practice, it is probably very difficult to find any meaningful difference in how the different tests would be applied to the same facts. Thus, the author proposes using a test that is an amalgam of the various tests used by the ICC, ICTY, ICTR, SCSL, and ECCC to issue arrest warrants and place suspects in pre-trial detention. Consequently, this article proposes that in order to trigger the responsibility to protect, it is necessary to demonstrate an objectively reasonable basis to believe that a crime against humanity has been committed. This reasonable basis to believe will usually be based on a reliable and consistent body of evidence.

The reporting described above in Section I is a reliable and consistent body of evidence on many points. It comes from a variety of news sources, is internally consistent, and is corroborated by the statements of aid organizations, human rights organizations, and UN agencies. In short, this is exactly the sort of reliable and consistent body of evidence that one would expect to be available in the immediate

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even more limited if the international community had been seeking access for criminal investigators. For example, investigators from the ICC have had difficulty getting access to Darfur to investigate allegations of crimes being committed there. *See International Criminal Court Prosecutor Tells Security Council Sudan's Government 'Not Cooperating' in Darfur Investigation, Massive Crimes Continue*, STATES NEWS SERVICE, Dec. 5, 2007, available at [http://www.un.org/News/Press/docs/2008/sc\\_9349.doc.htm](http://www.un.org/News/Press/docs/2008/sc_9349.doc.htm); Alfred de Montesquiou, *Sudan Announces it will Suspend Cooperation with International Criminal Court*, ASSOCIATED PRESS WORLDSTREAM, Mar. 18, 2007 (indicating that Sudan would suspend all cooperation with the ICC in response to indictments issued against Sudanese officials); Peter Quayle, *Darfur – No Justice Without Peace?*, TIMES (London), June 20, 2006, at 5 (indicating that, as of June 2006, no ICC investigator had been allowed into Sudan).

66. *See* Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶¶ 280-82 (Feb. 22, 2008) (holding that the Prosecutor has unfettered discretion to determine who to investigate and charge); ECCC Internal Rules, *supra* note 51, at Rule 49(4) (explaining that Co-Prosecutors can “decide, at their discretion,” whether to accept or reject complaints).

67. *See supra* notes 56-59 and accompanying text.

aftermath of a humanitarian disaster and that one would expect the international community to use as the basis for invoking the responsibility to protect.<sup>68</sup>

### *B. The Existence of the Underlying Acts of a Crime Against Humanity*

This section will discuss whether there is a reasonable basis to believe that any of the enumerated crimes (sometimes also called the underlying acts) that form the basis for a crime against humanity charge were committed in Myanmar in the immediate aftermath of Cyclone Nargis. With one notable exception,<sup>69</sup> this section will limit the inquiry to information that was available to the international community within one month of the cyclone. This is being done for two reasons. Firstly, by most accounts, the humanitarian situation in Myanmar, while still severe, began to improve approximately one month after the cyclone, and secondly the responsibility to protect must be invoked quickly for it to be meaningful. The majority of the deaths probably occurred in the first month. Consequently, if the responsibility to protect were not invoked until later, it would fail in its primary objective – saving the lives of populations in danger. Accordingly, this section will assume that a decision whether or not to invoke the responsibility to protect would have been made during May 2008. Information that only became available after that date might have exculpatory value in any eventual trials for alleged crimes against humanity, but would not be relevant to whether the international community could or should have invoked the responsibility to protect in the immediate aftermath of the cyclone.

Not all of the enumerated acts that could constitute a crime against humanity will be addressed below. The author has found no evidence to suggest that there were widespread acts of enslavement, imprisonment, torture, or rape and sexual violence. The discussion below will focus on the crimes of murder, extermination, forcible transfer, persecution, and other inhumane acts. The issues of omission, motive, and intent will be discussed first because of their importance to any discussion of whether any of the underlying crimes were committed.

#### **1. Intent and Motive**

In order to commit a crime against humanity, the perpetrator must have the intent to commit the underlying offense.<sup>70</sup> Intent, of course, refers to the mental state of the accused at the time the alleged crime was committed, but unless the accused confesses or testifies, there is rarely any direct evidence of the accused's mental state. For this reason, intent can be inferred from circumstantial evidence.<sup>71</sup>

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68. See Joyner, *supra* note 52, at 713 n.73 (noting that the evidence necessary to invoke the responsibility to protect could be “gleaned from independent human rights organizations, United Nations observers, international media reports, eyewitness accounts of refugees, and national embassy and diplomatic assessments”).

69. See *Burmese Endure in Spite of Junta, Aid Workers Say*, *supra* note 35.

70. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 99 (Dec. 17, 2004); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 124 (July 29, 2004); Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 37 (Nov. 29, 2002).

71. See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 523 (Sept. 2, 1998) (noting that “in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact”); Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, ¶ 387 (Sept. 1,



Indeed, given that an accused can be convicted despite testifying that he or she did not have the requisite intent, circumstantial evidence of intent can be more convincing for the trier of fact than direct evidence of intent, presumably because it is viewed as more objective than the accused's own testimony. Consequently, the lack of "smoking gun" evidence of the intent to commit the underlying crimes below does not mean that the requisite intent could not be established in a court.

Moreover, the concept of intent as used by most international courts does not require proof of a deliberate purpose to commit the crimes. 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.<sup>72</sup> This is similar to the common law concept of recklessness, but has been held to constitute the requisite intent for prosecution of international crimes.<sup>73</sup>

Motive and intent are separate concepts and motive is generally irrelevant to the question of criminal intent.<sup>74</sup> Intent focuses on the question of what the accused intended to do. Motive focuses on the question of why the accused did something.<sup>75</sup> This distinction is important because the motive of the military junta, whether it was to enrich itself, avoid scrutiny of its political system by outsiders, hide the extent of the crisis from the world, or maintain its grip on power, is irrelevant to the question of whether or not the junta intended the consequences of its actions.

## 2. Crimes of Omission

The jurisprudence of the international courts demonstrates that crimes against humanity can be caused either by acts of the accused or by omissions, if those omissions are accompanied by the requisite criminal intent. For example, an accused can be criminally liable for murder if he omits to act, while intending that the omission will result in the death of the victim, and the victim dies as a result of

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2004); International Criminal Court Elements of Crimes, General Introduction, ¶ 3, ICC-ASP/1/3 (part II-B) (Sept. 9, 2002) [hereinafter ICC Elements of Crimes] ("Existence of intent and knowledge can be inferred from relevant facts and circumstances.").

72. See cases cited *infra* notes 89-92.

73. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 561 (Jan. 14, 2000) ("The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.").

74. Kordić & Čerkez, Case No. IT-95-14/2-A, at ¶ 99; Blaškić, Case No. IT-95-14-A, ¶ 124; Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 103 (June 12, 2002).

75. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 102 (Sept. 17, 2003) ("The Appeals Chamber . . . recalls its case-law in the *Jelisić* case which, with regard to the specific intent required for the crime of genocide, sets out 'the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide.' It is the Appeals Chamber's belief that *this distinction between intent and motive must also be applied to the other crimes laid down in the Statute.*") (emphasis added); Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, ¶ 49 (July 5, 2001).

the omission.<sup>76</sup> This is a very important point because some of those who argued that the responsibility to protect did not apply to the situation in Myanmar took the position that the junta's acts of omission were materially different from the sort of deliberate state-sponsored killings that allegedly should trigger the responsibility to protect.<sup>77</sup> However, legally, this is not the case. Killing 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.

### 3. Possible Scenarios

There are a number of allegations that could be made based on the facts described above in Section I that, at first glance, resemble the underlying crimes of a crime against humanity. These include: (1) the government's allegedly deliberate failure to warn the population of the Irrawaddy Delta of the approaching cyclone deprived them of the ability to seek shelter and greatly increased the death toll; (2) the government's refusal of offered aid, combined with strict limits on the amount of aid that was allowed into the country, the refusal to provide visas to international experts, and the insistence that the junta control the distribution of the aid despite its demonstrated lack of capacity to do so greatly increased the number of deaths and also created inhumane living conditions for many of the survivors; (3) the junta's diversion of humanitarian aid that was intended for survivors resulted in increased deaths and the creation of inhumane living conditions; and (4) the forcible transfer of survivors out of government-run camps and back to their villages resulted in additional deaths and the creation of inhumane living conditions. Each of these possibilities will be explored below.

#### a. The Denial of Aid to Survivors

As described above in Section I, during the first three weeks of the crisis the Myanmar government refused aid from some countries, strictly limited the amount of aid entering the country, refused visa requests from experts in disaster assessment and aid distribution and insisted that it control the distribution of the aid.<sup>78</sup> At the same time, it was alleged that the junta was ill-equipped and poorly

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76. Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 556 (Jan. 17, 2005) (“In the jurisprudence of both the Tribunal and the ICTR, murder has consistently been defined as the death of the victim which results from an act or omission by the accused, committed with the intent either to kill or to cause serious bodily harm with the reasonable knowledge that it would likely lead to death.”); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 485 (Aug. 2, 2001); Blaškić, Case No. IT-95-14-T, at ¶ 217; Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 236 (Feb. 26, 2001).

77. See Thakur, *supra* note 41 (suggesting that the responsibility to protect could be invoked to “halt large-scale killings” but that it did not apply to deaths caused by a natural disaster); *The UN and Humanitarian Intervention: To Protect Sovereignty, or to Protect Lives?*, *supra* note 38 (suggesting that the responsibility to protect was “never intended to cope with the aftermath of natural disasters” and distinguishing natural disasters from genocide, crimes against humanity, war crimes and ethnic cleansing); Saechao & Rao, *supra* note 41 (suggesting that a natural disaster cannot constitute a crime against humanity).

78. This is not the first time that a country has refused aid to its own people for political reasons. See Tyra Ruth Saechao, Note, *Natural Disasters and the Responsibility to Protect: From Chaos to Clarity*, 32 BROOK. J. INT'L L. 663, 687-90 (2007) (describing North Korea's control over and rejection

prepared to mount an effective response on its own, and it was well-known that the vast majority of the victims were not receiving any aid at all. This was all happening, despite the availability of international aid, because the government refused to allow that aid to enter the country in sufficient amounts. There was also a widespread belief that the junta's intransigence was resulting in the deaths of people who had survived the initial storm surge and could have been saved if aid had been made available promptly.<sup>79</sup> This is probably the strongest argument that the actions of the military junta constituted crimes against humanity. These deaths would most likely be treated as murder, extermination, or other inhumane acts. Murder will be addressed first.

### *i. Murder*

Murder as a crime against humanity requires three elements: (1) the death of a person; (2) that was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and (3) the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he/she bears criminal responsibility, with an intent to kill or to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.<sup>80</sup> There is no need to produce a body so long as there is sufficient circumstantial evidence that the victim is dead.<sup>81</sup>

There seems to have been a widespread belief amongst diplomats and aid agencies working on the crisis that people were dying in the Irrawaddy Delta because of a lack of aid.<sup>82</sup> The World Food Program initially indicated that it was only being allowed to bring in 10 percent of the needed aid, and even after three weeks the United Nations estimated that 75 percent of the survivors had received no aid at all.<sup>83</sup> Surveys conducted after the cyclone indicated that nearly 60 percent of the houses in the Irrawaddy Delta had been destroyed, that 60 percent of the population did not have access to clean water, and that more than half of the households lost all their food stocks.<sup>84</sup> It would have been reasonable at the time to conclude from these facts that deaths were occurring that would not have occurred if aid had been distributed. The author has not found any estimates of how many people died because of a lack of aid, but it is probably not necessary to know the exact number of deaths or even to have a reliable estimate of the deaths at the stage of invoking the responsibility to protect.

On the other hand, at least one report from late June 2008 suggested that the death toll from the lack of aid had not been as high as initially expected.<sup>85</sup> This

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of international aid that was offered in response to a widespread famine that occurred during the 1990s).

79. *UN Frustrated at Burma Response*, BBC NEWS, May 13, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7397012.stm>.

80. *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶ 381 (Sept 1, 2004).

81. *Id.* at ¶¶ 383-85.

82. *See supra* note 25.

83. *See supra* notes 26-27 and accompanying text.

84. *See supra* notes 4-6.

85. *See Burmese Endure in Spite of Junta, Aid Workers Say, supra* note 35.

would not affect the question of whether or not the responsibility to protect could have been invoked during May because that decision would depend on the information that was available in May, and there seemed to be reason to believe at the time that large numbers of deaths were occurring. Nor would it affect whether murder had occurred. A single death can be murder, and even the most optimistic reports do not suggest that there were no deaths. It would, however, have a bearing on whether or not extermination could have occurred.<sup>86</sup>

The next element of a murder charge would be evidence that the deaths were caused by an act or omission of the government of Myanmar. The deaths were caused by the government if an act or omission of the government contributed substantially to the deaths.<sup>87</sup> As noted above, there appear to have been deaths occurring that were caused by the lack of aid. This lack of aid was the result of an act or omission of the Myanmar government. The international community recognized the severity of the crisis within days and aid was quickly mobilized.<sup>88</sup> In addition to aid, the international community was also willing to provide disaster assessment experts, search and rescue teams, experts in aid distribution, and transportation of the aid to the areas that most needed it.<sup>89</sup> Nonetheless, there appears to have been a conscious decision taken by the military junta to reject aid from some countries and to impose strict limits on the amount of aid that entered the country.<sup>90</sup> These restrictions prevented the majority of people from receiving aid and therefore contributed substantially to some deaths. In short, there does seem to be a credible body of evidence indicating that some of the deaths were caused by an act or omission of the government.

The final element of murder as a crime against humanity is criminal intent. A plausible argument can be made that the junta intended for the deaths to occur. First of all, the required intent for murder as a crime against humanity encompasses both direct intent and indirect intent.<sup>91</sup> Direct intent is a deliberate purpose to kill someone. Indirect intent is similar to a recklessness standard. Accused are found to have legally intended to kill someone if they were aware that the death was a probable consequence of their acts or omissions, they act or omit to act anyway, and the death does occur.<sup>92</sup> To be intended, the death must be

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86. See *infra* note 105 and accompanying text.

87. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 382 (Sept. 1, 2004).

88. See *supra* note 15.

89. See *supra* notes 16-18 and accompanying text.

90. See *supra* notes 18-23 and accompanying text.

91. See Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 235 (Jan. 31, 2005); Prosecutor v. Strugar, Case No. IT-01-42-A, Judgment, ¶ 270 (July 17, 2008). Indirect intent is also sometimes referred to by the Latin name *dolus eventualis*.

92. *Brđanin*, Case No. IT-99-36-T, at ¶ 386 (referring to indirect intent as *dolus eventualis*). In the *Stakić* case, the Trial Chamber described indirect intent as “if the actor engages in life-endangering behaviour, his killing becomes intentional if he ‘reconciles himself’ or ‘makes peace’ with the likelihood of death.” Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 587 (July 31, 2003). The court went on to say that even conduct of minimal risk can qualify as intentional homicide if done with manifest indifference to the value of human life. *Id.* However, other courts that have addressed the standard appear to have taken the position that a minimal risk of death is insufficient and there must be a probability of death before the act can be considered intentional. See *Strugar*, Case No. IT-01-42-T,

probable, not simply possible.<sup>93</sup> In this respect, indirect intent encompasses recklessness but not negligence or gross negligence.<sup>94</sup>

The actions of the Myanmar government in response to Cyclone Nargis appear to be an example of indirect intent. It was widely known that hundreds of thousands of people were in need of assistance and that some of those people would probably die if they did not receive aid. Given the level of international media coverage, the government can hardly argue that it was unaware of the situation in the Irrawaddy Delta. The aid was available, yet the government either refused the aid or limited the amount of aid that it admitted, knowing that it was probable that deaths would occur. This is sufficient to draw a conclusion that the government intended to cause the deaths. The junta's motive for refusing the aid, whether it was general paranoia, a desire to control the information available to the rest of the world, or simply a desire to retain absolute power in Myanmar, is irrelevant.<sup>95</sup> Consequently, in May 2008 there was a reliable and consistent body of evidence that established a reasonable basis to believe that murder as a crime against humanity was occurring in the Irrawaddy Delta.

#### *ii. Extermination*

It is also possible that the junta's actions constituted extermination as a crime against humanity. Extermination requires proof of two elements: (1) that an act or omission resulted in the death of persons on a massive scale, and (2) the accused intended to kill persons on a massive scale or to create conditions of life that lead to the death of a large number of people.<sup>96</sup> Extermination is similar in many ways to murder, except that it occurs on a massive scale,<sup>97</sup> and it may be proved by evidence that victims were intentionally subjected to conditions that contributed to their deaths, such as the deprivation of food and medicine.<sup>98</sup> Consequently, many of the arguments made above with respect to murder also apply to the analysis of extermination. For example, the intent element of extermination is the same as that for murder and encompasses both direct and indirect intent.<sup>99</sup>

The discussion of murder as a crime against humanity has already established that there was reason to believe that people were dying as a result of the acts or omissions of the Myanmar government and that those acts or omissions were

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at ¶ 235-36.

93. See *Strugar*, Case No. IT-01-42-T, at ¶¶ 235-36.

94. *Brđanin*, Case No. IT-99-36-T, at ¶ 386; *Strugar*, Case No. IT-01-42-A, at ¶ 270; *Stakić*, Case No. IT-97-24-T, at ¶ 587.

95. See *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgment, ¶ 99 (Dec. 17, 2004); see also cases cited *supra* note 74.

96. *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, ¶ 572 (Jan. 17, 2005); *Brđanin*, Case No. IT-99-36-T, at ¶ 388. See also ICC Elements of Crimes, *supra* note 71, at art. 7(1)(b).

97. *Brđanin*, Case No. IT-99-36-T, at ¶ 388.

98. *Id.* at ¶ 389; see also *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 503 (Aug. 2, 2001); Rome Statute, *supra* note 47, at art. 7(2)(b) (“‘Extermination’ includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”).

99. *Stakić*, Case No. IT-97-24-T, at ¶ 642; *Brđanin*, Case No. IT-99-36-T, at ¶ 395.

intentional. The only additional element necessary for there to be extermination is that the deaths occurred on a massive scale. There is no minimum number of victims needed to satisfy the “massive” requirement, and the applicability of extermination must be based on a case-by-case analysis of all the relevant factors.<sup>100</sup> Nevertheless, in the Brđanin Trial Judgment, the court concluded that the deaths of at least 1,669 people was sufficiently massive to be considered extermination.<sup>101</sup> If less than 2,000 deaths can be considered massive, then the apparent scope of the deaths in Myanmar should probably be considered massive as well. As noted above, the author has found no credible estimates of how many people died due to a lack of aid in the weeks immediately following Cyclone Nargis. However, the United Nations estimated that 2.4 million people were severely affected by the cyclone.<sup>102</sup> 75 percent of them had not received any aid more than three weeks after the cyclone.<sup>103</sup> At the time, these figures would have provided reason to believe that deaths were occurring on a sufficiently massive scale for those deaths to be considered extermination as a crime against humanity.

However, reports from June 2008 indicate that the death toll from the lack of aid seemed to be lower than initially predicted.<sup>104</sup> This would not affect whether the responsibility to protect could have been invoked in May because the information was not available at that time, but it could impact any eventual judicial determination of whether extermination did occur. The lower the actual number of deaths, the less likely it is that extermination occurred.

### *iii. Inhumane Acts*

This section will examine whether the government’s decision to limit aid resulted in starvation, lack of housing, and lack of medical care for the inhabitants of the Irrawaddy Delta and, if so, whether it constituted an inhumane act. While murder and extermination focus on killings, the category of “other inhumane acts” is a residual category of crimes against humanity which criminalizes other acts of similar gravity to those that are specifically enumerated in the definition of crimes against humanity.<sup>105</sup> Acts are considered inhumane if: (1) the victim suffered serious bodily or mental harm or a serious attack on human dignity, (2) the suffering was the result of an act or omission of the accused or someone for whom the accused bears criminal responsibility, and (3) the accused or the person for whom the accused bears criminal responsibility intended to inflict the suffering upon the victim.<sup>106</sup> The severity of the act must be of “similar seriousness” to the

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100. *Blagojević & Jokić*, Case No. IT-02-60-T, at ¶ 573; *Brđanin*, Case No. IT-99-36-T, at ¶ 391; *Stakić*, Case No. IT-97-24-T, at ¶ 640; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, ¶ 716 (Sept. 27, 2006).

101. *Brđanin*, Case No. IT-99-36-T, at ¶ 465. The *Brđanin* Trial Judgment also noted that extermination had been found in other cases when as few as 733 persons had died. *Id.* at ¶ 381 n.926.

102. See TRIPARTITE CORE GROUP, *supra* note 1, at 1.

103. See Mydans, *supra* note 10.

104. See *Burmese Endure in Spite of Junta, Aid Workers Say*, *supra* note 35.

105. *Blagojević & Jokić*, Case No. IT-02-60-T, at ¶ 624; *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgment, ¶ 117 (Dec. 17, 2004); *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment, ¶ 152 (Dec. 5, 2003).

106. *Kordić & Čerkez*, Case No. IT-95-14/2-A, at ¶ 11; *Prosecutor v. Vasiljević*, Case No. IT-98-

enumerated crimes against humanity.<sup>107</sup> As with murder and extermination, intent can be demonstrated by either direct or indirect intent.<sup>108</sup>

While there is a reasonable inference that people died as a result of the Myanmar government's decision to limit the amount of aid,<sup>109</sup> it is virtually undisputed<sup>110</sup> that approximately 75 percent of the 2.4 million people severely affected by the cyclone received no aid at all during the first three weeks of the crisis.<sup>111</sup> As noted above, approximately 60 percent of these survivors had no housing, inadequate access to water, and no food.<sup>112</sup> In addition, the cyclone damaged almost 75 percent of the health facilities in the Irrawaddy Delta, which resulted in a "considerable decline in health service provision."<sup>113</sup> More than 65% of households reported health problems in the weeks after the cyclone, including fevers and diarrhea.<sup>114</sup> Consequently, there is a credible body of evidence that suggests that a very large number of people suffered a lack of shelter, food, clean water, and medical care.

Many of the people who received no aid would have received aid if the government had not imposed limits on the amount of aid it accepted. The exact number of people affected by the government's decision is difficult to estimate, although news reports suggest that it was probably hundreds of thousands of people.<sup>115</sup> Thus, the government's decision to refuse aid caused the additional suffering<sup>116</sup> of those people who would have received help if not for its decision to refuse aid. Moreover, the government was certainly aware from international media reports that its actions would result in the cyclone survivors being left

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32-A, Judgment, ¶ 165 (Feb. 25, 2004); see also *Blagojević & Jokić*, Case No. IT-02-60-T, at ¶ 626; *Galić*, Case No. IT-98-29-T, at ¶ 152; see also ICC Elements of Crimes, *supra* note 71, at art. 7(1)(k).

107. *Vasiljević*, Case No. IT-98-32-A, at ¶ 165; *Blagojević & Jokić*, Case No. IT-02-60-T, at ¶ 627.

108. See *id.* at ¶ 628 ("It is required that the perpetrator, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim(s), or that the perpetrator knew that his act or omission was likely to cause such suffering to, or amount to a serious attack on, the human dignity of the victim(s) and, with that knowledge, acted or failed to act."). See also *Galić*, Case No. IT-98-29-T, at ¶ 154; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 132 (Mar. 15, 2002); *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgment, ¶ 76 (Oct. 17, 2003); *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment, ¶ 236 (Nov. 29, 2002).

109. See *supra* Section II(B)(3)(a)(i).

110. The Myanmar government did claim that everyone had received aid, see *supra* note 89, but this appears to be untrue.

111. See *supra* note 27; Mydans, *U.N. Chief Says Myanmar Yields on Aid Workers*, *supra* note 20.

112. See *supra* notes 4-6 and accompanying text.

113. THE TRIPARTITE CORE GROUP, *supra* note 1, at 7-8.

114. *Id.* at 8.

115. See *Cooper & Shanker*, *supra* note 10 (noting that French naval vessels carrying 1,500 tons of food were denied permission to offload their cargo); see also *International Pressure on Myanmar Junta is Building*, *supra*, note 20 (noting that the French vessels held enough food to feed 100,000 people for 15 days); *Schmitt*, *supra* note 2 (noting that while 1.5 million pounds of supplies had been brought in by U.S. planes, "much more" could be brought in from the waiting U.S. naval vessels).

116. Some amount of suffering would have been caused by the cyclone itself. The government would only be liable for that additional suffering that was caused by the lack of aid. See *supra* Section II(B)(3)(a)(iii) (explaining that inhumane acts require an act or omission).

without food, water, shelter, and medical care. Consequently, the government intended to deny this aid to the survivors.

In effect, this makes out virtually all the elements of the crime of inhumane acts: large numbers of people suffered as a result of the government's decision to refuse aid, and this suffering was an intended result of the refusal of aid. The only question that remains is whether the denial of food, water, housing, and medical care constitutes a serious bodily or mental harm or a serious attack on human dignity. The denial of food, water, housing, and medical care, when done in conjunction with other acts like unlawful imprisonment, physical and psychological abuse, or beatings, does constitute an inhumane act.<sup>117</sup> It is less clear whether the denial of these things, standing alone, constitutes an inhumane act, although at least one case has appeared to hold that it does.<sup>118</sup>

The key question is whether the lack of food, water, housing and medical care subjected the survivors to severe mental or physical harm or a severe attack on human dignity. This evaluation must be done on a case-by-case basis and with due regard for the individual circumstances of the victims.<sup>119</sup> This means that whether or not the lack of aid was an inhumane act depends on the particular circumstances of the crisis and of the victims. In the cyclone's aftermath, many of the survivors lost family members and almost everything they owned. In addition, conditions in many parts of the Irrawaddy Delta were terrible. Whole villages were destroyed. Many areas remained underwater for long periods of time, and rotting and decomposing bodies were a common sight.<sup>120</sup> The combination of the lack of aid and the terrible conditions appear to have inflicted severe physical and mental trauma on some survivors.<sup>121</sup> This physical and mental suffering is the hallmark of an inhumane act. Thus, there is reason to believe that the government's actions

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117. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 155 (July 29, 2004); Prosecutor v. Simić, Case No. IT-95-9-T, Judgment, ¶¶ 97, 773, 775 (Oct. 17, 2003); Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶¶ 605-10 (Jan. 17, 2005); Prosecutor v. Nikolić, Case No. IT-02-60/1-S, Judgment, ¶¶ 36-37 (Dec. 2, 2003).

118. *Blaškić*, Case No. IT-95-14-A, at ¶ 155 (“The Appeals Chamber considers that the acts charged in the Indictment which encompass the detention of Bosnian Muslim civilians who were killed, used as human shields, beaten, subjected to physical or psychological abuse and intimidation, inhumane treatment, and deprived of adequate food and water, all rise to the level of gravity of the other crimes enumerated in Article 5.”) (emphasis added) (footnote omitted). While the decision on inhumane acts is limited to a single paragraph, it does seem to hold that each of the acts described, including deprivation of food and water, individually constitutes an inhumane act.

119. See Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 117 (Dec. 17, 2004).

120. See *supra* note 7. See also Mydans, *Myanmar Faces Pressure to Allow Major Aid Effort*, *supra* note 7 (“Relief workers and survivors described scenes of horror as people huddled on spits of dry ground surrounded by bodies and animal carcasses floating in the murky water or lodged in mangrove trees.”); *In Flooded Delta, a Want as Pervasive as Death*, *supra* note 6 (“In the village of Day Da Nam . . . residents said the remains of 28 farmers killed by the storm were still floating in the falling floodwaters.”); *Weeks After Cyclone in Myanmar, Even Farmers Wait for Food*, *supra* note 6 (“Dead bodies floating down the Pyapon river are no longer strangers to us.”).

121. See *Monks Succeed in Cyclone Relief as Junta Falters*, *supra* note 34 (describing one woman who lost the eight other members of her family and was contemplating suicide); *id.* (quoting a doctor as saying, “Our patients suffer from infected wounds, abdominal pains and vomiting. They also need counseling for mental trauma, anxiety and depression.”).



constituted the crime of inhumane acts.

*iv. Persecution*

Persecution requires: (1) an act; (2) that discriminates in fact and denies or infringes upon a fundamental right; and (3) that was carried out with the intent to discriminate based on political, national, racial, ethnic, cultural, religious, gender, or other impermissible grounds.<sup>122</sup> The underlying acts that can constitute persecution must be of equal gravity to the enumerated acts of a crime against humanity,<sup>123</sup> and thus include but are not limited to the enumerated acts.<sup>124</sup> This means that the acts described above that constitute murder, extermination and inhumane acts would also constitute persecution if they discriminated in fact and were carried out with the requisite discriminatory intent. Discrimination occurs when the victim is targeted because of his or her membership in a group defined by the perpetrator on any of the discriminatory grounds.<sup>125</sup> The victim does not have to be an actual member of the targeted group, so long as the perpetrator believes the victim to be associated with the targeted group.<sup>126</sup> The culpable act must result in actual discrimination against the victim.<sup>127</sup>

The facts described above do not seem to constitute sufficient evidence of persecution to invoke the responsibility to protect. There is no reliable and consistent body of evidence that indicates that the decision to deny aid to survivors living in the Irrawaddy Delta was based on the government's identification of them as being members of a particular political, national, racial, ethnic, cultural, or religious group. Rather, it appears that all of the survivors were mistreated in a similar fashion. There may have been instances where supporters of the government or members of political groups affiliated with the government received aid in situations where those who were not affiliated with the government were denied aid.<sup>128</sup> If this occurred, it could be persecution because access to aid would be based on membership in a favored political group, and the denial of aid to disfavored groups would result in discrimination in fact. However, there is not a reliable and credible body of evidence indicating that this was occurring regularly or systematically. Consequently, the government's actions do not appear to have been persecutory.

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122. See, e.g., Prosecutor v. Deronjić, Case No. IT-02-61-A, Judgment, ¶ 109 (July 20, 2005) (describing the elements of a persecution charge). The list of groups that can be discriminated against is taken from art. 7(1)(h) of the Rome Statute. See Rome Statute, *supra* note 47, art. 7(1)(h).

123. See, e.g., Kordić & Čerkez, Case No. IT-95-14/2-A, ¶ 102.

124. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 219 (Sept. 17, 2003); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 994 (Sept. 1, 2004).

125. See Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 583 (Jan. 17, 2005).

126. Prosecutor v. Simić, Case No. IT-95-9-T, Judgment, ¶ 49 (Oct. 17, 2003); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 734 (July 31, 2003).

127. Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 113 (Feb. 25, 2004); *Blagojević & Jokić*, Case No. IT-02-60-T, at ¶ 583 (Jan. 17, 2005).

128. This seems likely given the allegations of diversion of aid to supporters of the government. See *supra* note 23. One possible consequence of the diversion of aid is that supporters of the military government received preferential treatment over those who were not affiliated with the government.

### b. The Diversion of Aid

There is some evidence that aid intended for the survivors of the cyclone was diverted by members of the military either for their own use or so that it could be sold to victims for a profit,<sup>129</sup> and this may have resulted in increased deaths and the creation of inhumane living conditions. This scenario is being treated separately from the refusal of aid and the junta's strict control over how much aid was imported and how it was distributed because it is not clear that the diversion of aid was an official policy of the government. While there are some indications that the diversion of aid happened systematically,<sup>130</sup> there are also instances that appear to have been initiated by local officials or military personnel.<sup>131</sup>

Diversion of aid probably constitutes the same underlying crimes discussed above with regard to the junta's refusal of aid for the same reasons. The diversion of aid in a situation where people are dying because of lack of food, water, shelter, and medical care, could constitute murder as a crime against humanity if the person diverting the aid knew that death was a probable outcome of the act. The diversion of aid could also constitute an inhumane act if it caused severe mental or physical suffering for the survivors who were denied aid as a result. It would be difficult to argue that the diversion of aid constituted extermination unless it happened on a massive scale. If it happened only sporadically, then it seems unlikely that the resulting number of deaths would be massive. If, however, diversion occurred systematically across the whole Irrawaddy Delta, then it begins to look like extermination.

The issue of whether the diversion of aid was a systematic policy of the junta has no bearing on whether the individual acts of diversion constitutes the underlying acts of a crime against humanity. It does, however, impact on who might be legally responsible and whether or not they would be tried. If the diversion was not a systematic policy of the government, then the people who bear the criminal responsibility for the resulting crimes might be mostly local officials. It is unlikely that the international community would attempt to prosecute such low-level people.<sup>132</sup> Moreover, for purposes of invoking the responsibility to protect, if the occurrences of diversion are sporadic, then the "attack" may not be widespread or systematic enough to warrant the conclusion that a crime against humanity is underway.<sup>133</sup> Ultimately, the evidence indicates that some acts of diversion probably did result in the commission of underlying crimes, but the

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129. See *supra* note 23.

130. *Aid Groups Say Myanmar Food Stolen by Military*, *supra* note 18 ("The directors of several relief organizations in Myanmar said Wednesday that some of the international aid arriving into the country for the victims of Cyclone Nargis was being stolen, diverted or warehoused by the country's army.").

131. *When Burmese Offer a Hand, Rulers Slap It*, *supra* note 19 (reporting allegations that local military officials had received good rice from the United Nations but kept it for themselves and distributed rotten rice to the cyclone survivors).

132. See *infra* notes 251-256 and accompanying text.

133. See *infra* Section II(C)(2) (discussing the requirement that the attack be widespread or systematic).

evidence seems too inconsistent and too sparse to warrant concluding that the diversion of aid was a systematic policy of the Myanmar government. Consequently, it is doubtful whether the responsibility to protect could have been invoked solely in response to these acts.

c. The Forcible Eviction of Survivors from Aid Camps

Towards the end of May and into early June, the junta apparently began a policy of forcibly transferring survivors out of government-run aid camps and back to their villages,<sup>134</sup> which may have resulted in additional deaths and the creation of inhumane living conditions for the victims. The forcible displacements began in late May and coincided with the government's announcement that the rescue phase of the response was over.<sup>135</sup> The displacements affected thousands of people, many of whom had nowhere to go.<sup>136</sup>

The forcible transfer of persons from one location to another can constitute a crime against humanity. Historically, the definition of crimes against humanity has expressly prohibited only deportations,<sup>137</sup> which require that the person be forced to cross an international border.<sup>138</sup> However, forcible transfers that occur entirely within the borders of a country are also prohibited. For example, the Rome Statute expressly includes forcible transfer in its list of enumerated crimes in the definition of crimes against humanity.<sup>139</sup> Other courts, like the ICTY, have used their jurisprudence to extend the definition of crimes against humanity to include forcible transfers by treating them as a special form of "other inhumane acts."<sup>140</sup>

The crime of forcible transfer requires: (1) the forcible displacement of persons; (2) from an area in which they are lawfully present; (3) without grounds permitted under international law.<sup>141</sup> For the displacement to be forcible, it must be involuntary, but it does not have to be the result of physical force. Displacement is forced if it is the result of force, threats of force, coercion, fear of violence, psychological oppression, or abuse of power.<sup>142</sup> The perpetrator must act

134. See *supra* note 34 and accompanying text. It appears that the evictions occurred too frequently for them to be uncoordinated.

135. See Amnesty Int'l, *supra* note 23, at 3; *Monks Succeed in Cyclone Relief as Junta Falters*, *supra* note 34; Mydans, *Myanmar Rules Still Impeding Access*, *supra* note 2.

136. See Amnesty Int'l, *supra* note 23, at 4-5; Mydans, *supra* note 33.

137. Most of the constituent documents of international criminal tribunals prior to the Rome Statute explicitly prohibited deportations but not forcible transfers. See *supra* note 47.

138. Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 544 (Sept. 1, 2004); Prosecutor v. Simić, Case No. IT-95-9-T, Judgment, ¶ 122 (Oct. 17, 2003), Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 672 (Jul. 31, 2003).

139. Rome Statute, *supra* note 47, art. 7(1)(d).

140. *Brđanin*, Case No. IT-99-36-T, ¶ 544; *Stakić*, Case No. IT-97-24-T, ¶ 671; Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 523 (Aug. 2, 2001).

141. *Brđanin*, Case No. IT-99-36-T, ¶ 544; *Simić*, Case No. IT-95-9-T, ¶ 122; *Stakić*, Case No. IT-97-24-T, ¶ 672; see also Rome Statute, *supra* note 47, art. 7(2)(d) ("'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.").

142. *Brđanin*, Case No. IT-99-36-T, ¶ 543; *Simić*, Case No. IT-95-9-T, ¶ 125; *Stakić*, Case No. IT-

with intent that the victims be removed and that they not return.<sup>143</sup> There is no minimum number of people who must be displaced.<sup>144</sup>

The forcible removal of people from government-run aid camps, schools and monasteries in late May looks like a forcible transfer. Although the exact nature of the coercion is rarely described in the reports, the circumstances leave little doubt that the displacement was involuntary. There is no indication that the people were in the Irrawaddy Delta unlawfully, and it appears that the justification offered by the government – the need to switch from relief efforts to reconstruction – was a sham.<sup>145</sup> Finally, the removals appear to have been done deliberately with the goal of removing the persons from the places they had congregated and not allowing them to return. In short, it appears that all of the elements of a forcible transfer as a crime against humanity are present.

Moreover, the forcible transfers might serve as the acts that give rise to other crimes, including murder and other inhumane acts. Assuming that the individuals ordering the evictions knew that there was nowhere for the survivors to go once they were evicted and that aid was not reaching the vast majority of the survivors, they might be liable for any deaths from disease and starvation that resulted from the evictions. They might also be liable for the severe mental or physical suffering of the people who were evicted but had nowhere to go. On balance, there appears to be reliable and consistent evidence that crimes resulted from the government's policy of forcibly evicting cyclone survivors from aid camps.

However, the timing of the forcible transfers suggests that they would not have been useful in invoking the responsibility to protect. Most of the forcible transfers seem to have begun in late May and continued into June. However, by this point, the amount of aid entering the country was increasing and the crisis was becoming less severe. In other words, even if the forcible transfers could have been used to invoke the responsibility to protect, they occurred after the worst of the harm had already occurred. To be effective in its stated goal of saving lives, the responsibility to protect would have to have been invoked earlier in the crisis.

#### d. The Failure to Warn

Allegations have been made that the Myanmar government knew that Cyclone Nargis was going to hit the Irrawaddy Delta but failed to notify the population.<sup>146</sup> If these allegations are true, the military junta might be criminally

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97-24-T, ¶ 682; *Krstić*, Case No. IT-98-33-T, ¶ 529.

143. *Brdanin*, Case No. IT-99-36-T, ¶ 545; *Stakić*, Case No. IT-97-24-T, ¶¶ 686-687.

144. *Stakić*, Case No. IT-97-24-T, ¶ 685.

145. The international community rejected the government's contention that the relief phase of the crisis was complete. See *supra* note 28.

146. See *supra* note 14. However, there are several news articles in the days immediately before the cyclone struck that suggest Myanmar was making some effort to warn its population. See *Cyclone Lashes Myanmar After Missing Bangladesh*, AGENCE FRANCE PRESSE, May 1, 2008, available at <http://afp.google.com/article/ALeqM5g1RRGj6eAYhPLa8JFCEfyDvz0PgA> (“Myanmar’s state-run newspapers have run warnings about the impending storm.”); *Nargis Gets a Move, Readies for Landfall*, HINDU BUSINESS LINE, May 2, 2005, available at <http://www.thehindubusinessline.com/2008/05/02/stories/2008050250281100.htm> (noting that Myanmar had “already set into motion a

liable for some of the tens of thousands of deaths that were caused by the storm surge.<sup>147</sup> Depending on the facts, these deaths could be described as murder and extermination because some people that died as a result of the storm surge would have lived if they had been warned in advance. These would be the deaths caused by the failure to warn.

On closer examination, however, there does not seem to be much substance to the allegation. To prove the requisite intent, it would be necessary to prove that the government either directly intended the deaths or knew that the deaths were a probable outcome of the decision not to warn the population. While it was relatively easy, after the fact, to claim that the deaths were foreseeable and that the failure to warn was a culpable omission, there does not seem to have been a widespread awareness, prior to Cyclone Nargis' landfall, of how destructive it would be. There are many news articles that mention Cyclone Nargis in the days that lead up to May 2,<sup>148</sup> but none of the ones the author was able to locate suggested that the cyclone would cause a humanitarian crisis on the scale that it did.<sup>149</sup>

Given that the international community apparently did not recognize the potential destructiveness of Cyclone Nargis in advance, it would be hard to argue that the Myanmar government knew that its failure to warn would probably lead to widespread deaths. Therefore, it does not appear that the requisite intent for the crimes of murder or extermination existed. On balance, there is not a reasonable basis to believe that the failure to warn the population constituted a crime against humanity.

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disaster preparedness drill" after having been notified about the impending storm).

147. Tyra Saechao has previously argued that there is an international obligation to warn about impending natural disasters and that states might be legally responsible for a failure to warn. See Saechao, *supra* note 78, at 681-85. This is similar to but conceptually different from the question of whether or not there is individual criminal liability arising out of a failure to warn.

148. A LexisNexis search run by the author retrieved 33 news reports that mention Cyclone Nargis on or before May 2, 2008. Some of them describe the storm as severe with high winds and rough seas, but none of them suggest that it will result in a humanitarian catastrophe. For a fairly representative selection of these articles, see *Cyclone Lashes Myanmar After Missing Bangladesh*, *supra* note 146; *Tropical Cyclone Nargis Gains in Strength on Way Toward Myanmar*, BLOOMBERG, May 2, 2008, available at [http://www.bloomberg.com/apps/news?pid=20601080&sid=aR0BCBZCz\\_Ws&refer=asia#](http://www.bloomberg.com/apps/news?pid=20601080&sid=aR0BCBZCz_Ws&refer=asia#); *Severe Cyclone Nargis Over Bay Moves Eastwards in Frequent Change of Course*, U. NEWS OF BANGLADESH, May 2, 2008, available at LexisNexis; *Squally Winds Reach 73 Kmph, City Gears Up for Rain*, HINDU (India), April 30, 2008, available at <http://www.thehindu.com/2008/04/30/stories/2008043059530400.htm>; *B'desh Raises Storm Alert, Urges Swift Rice Harvest*, REUTERS, April 29, 2008, available at <http://www.alertnet.org/thenews/newsdesk/DHA224084.htm>.

149. Only a few articles describe indicate concern about the storm. See *B'desh Raises Storm Alert, Urges Swift Rice Harvest*, *supra* note 148 (noting that the government of Bangladesh had issued a storm warning and urged coastal residents to be ready for a quick evacuation); *Bangladesh Prepares to Meet Cyclone Nargis*, INDO-ASIAN NEWS SERVICE, May 2, 2008, available at LexisNexis (noting that Bangladesh had asked fishermen to return to port and had activated its disaster management facilities and cyclone shelters); *VOA News: Bangladesh's Farmers Told Not to Panic about Approaching Cyclone*, US FED NEWS, April 29, 2008, available at LexisNexis (warning that the storm could damage Bangladesh's rice crop).

#### e. Conclusion

This section examined four factual situations that could have constituted the underlying crimes of a crime against humanity. Upon analysis, it appears that only two of these situations could have given rise to a reasonable belief that the underlying crimes of a crime against humanity were being committed. Moreover, for one of these two situations – the forcible eviction of cyclone survivors from aid camps – it appears that the relevant acts began occurring in late May. Thus, the forcible transfers could not have been used to invoke the responsibility to protect during the most critical period – the first three weeks of the crisis. Only the government's refusal of aid, limitations on how much was allowed into the country, and strict control over the distribution of aid is supported by credible evidence that gives rise to a reasonable belief that the underlying criminal acts of a crime against humanity, including murder, extermination and inhumane acts, were occurring during the critical period.

However, this is not enough by itself to invoke the responsibility to protect or to conclude that crimes against humanity were committed. To constitute a crime against humanity, the underlying crimes must be committed in connection with a widespread or systematic attack on a civilian population,<sup>150</sup> and the perpetrator must know the attack is taking place and that his acts are part of the attack.<sup>151</sup> The following section will evaluate whether the government's refusal of aid, limitations on aid, and control over the distribution of aid occurred in the context of an attack on the civilian population of the Irrawaddy Delta. It will also look at whether the architects of that policy knew an attack was taking place and that their acts or omissions were part of the attack.

#### C. *Did an Attack Take Place?*

It is now generally agreed that the customary international law definition of crimes against humanity requires that crimes against humanity take place in connection with a widespread or systematic attack on a civilian population. Initially, as the requirement of a nexus with armed conflict was disappearing from the customary international law definition of crimes against humanity, there was some uncertainty about what jurisdictional requirement would take its place.<sup>152</sup> Consequently, some of the statutes of the international tribunals that were negotiated in the early 1990s include elements different from or in addition to an

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150. See Rome Statute, *supra* note 47, art. 7(1); SCSL Statute, *supra* note 47, art. 2; ICTR Statute, *supra* note 47, art. 3; ECCC Law, art. 5.

151. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 190 (Nov. 30, 2005); Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 100 (Dec. 17, 2004); Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 99 (Jun. 12, 2002).

152. See generally Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125 (2007) (describing the early development of crimes against humanity and the transition from requiring a nexus with armed conflict to the modern requirement of a nexus with a widespread or systematic attack on a civilian population).

attack on a civilian population.<sup>153</sup> For example, the ICTY Statute requires the attack to be committed during an armed conflict,<sup>154</sup> but ICTY jurisprudence acknowledges the customary requirement that the crimes take place as part of an attack on a civilian population.<sup>155</sup> The ICTR and the ECCC both require that the attack be “on national, political, ethnic, racial or religious grounds,”<sup>156</sup> but this discriminatory purpose is not part of the customary definition of the attack.<sup>157</sup> The Rome Statute, which was negotiated in 1998 and has now been ratified by 108 states,<sup>158</sup> is generally accepted to state the customary international law definition of the contextual requirement.<sup>159</sup>

‘crime against humanity’ means any of the following [enumerated] acts when committed as part of a widespread or systematic attack directed against any civilian population.<sup>160</sup>

This attack requirement is often referred to as a jurisdictional or contextual element because the existence of the attack is a prerequisite to charging crimes against humanity, but the prosecution does not have to prove that the accused caused the attack or intended the attack. The prosecution only needs to show that the accused was aware of the facts that constituted the attack and knew that his or her acts formed part of the attack.<sup>161</sup> The motive of the perpetrator is irrelevant<sup>162</sup> and it is not necessary to show that the perpetrator approved of or desired the attack.<sup>163</sup> Nor does the perpetrator need to know all the details of the attack. It is sufficient if the perpetrator knows the attack is taking place.<sup>164</sup>

153. *See id.* at 173-79 (describing the lingering uncertainty in the definition of crimes against humanity and its affect on the drafting of the Rome Statute, the ICTY Statute and the ICTR Statute).

154. ICTY Statute, *supra* note 47, art. 5.

155. *Limaj*, Case No. IT-03-66-T, ¶ 181; *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, ¶ 541 (Jan. 17, 2005); *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶ 130 (Sept. 1, 2004); *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgment, ¶ 37 (Oct. 17, 2003); *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, ¶ 621 (Jul. 31, 2003); *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 410 (Jun. 12, 2002).

156. *See* ICTR Statute, *supra* note 47, art. 3; ECCC Law, *supra* note 47, art. 5.

157. *See* *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 287-292 (Jul. 15, 1999) (discussing the customary international law definition of crimes against humanity and concluding that it does not require a discriminatory intent for all crimes against humanity and that a discriminatory intent is only required for the underlying crime of persecution); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment, ¶¶ 464-466 (Jun. 1, 2001) (concluding that a discriminatory purpose is not a component of the customary international law definition of all crimes against humanity).

158. *See* The States Parties to the Rome Statute, <http://www.icc-cpi.int/Menus/ASP/states+parties> (last visited Oct. 30, 2009).

159. *See* Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L.J. 73, 140-42 (2004).

160. Rome Statute, *supra* note 47, art. 7(1).

161. *See supra* note 148.

162. *See supra* note 73.

163. *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-A, Judgment, ¶ 99 (Dec. 17, 2004) (“[T]he accused need not share the purpose or goal behind the attack.”); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶ 124 (July 29, 2004); *Prosecutor v. Kunarac*, IT-96-23/1-A, Judgment, ¶ 103 (June 12, 2002); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, ¶ 548 (Jan. 17, 2005); *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, ¶ 138 (Sept. 1, 2004); *Prosecutor v.*

## 1. The Meaning of Attack

An attack is generally defined by the ICC and the ICTR as an unlawful act or series of acts of the kind enumerated in the definition of crimes against humanity.<sup>165</sup> In other words, 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. It may seem circular to require proof of the commission of the underlying acts in order to try someone for commission of the underlying acts; but it is not because the attack has to be widespread or systematic. Thus, to charge someone for one of the underlying acts that constitute crimes against humanity, the prosecutor must show that the charged acts took place as part of a widespread or systematic commission of similar acts. The purpose of the “attack” requirement is to prevent single, random, or limited acts from being categorized as crimes against humanity.<sup>166</sup> While the underlying acts that can constitute the attack are often carried out through violence, the attack does not have to be violent<sup>167</sup> and may involve other inhumane mistreatment of the civilian population.<sup>168</sup>

The ICTY and the SCSL adopt a somewhat different approach but ultimately arrive at a similar result. They have held that an attack is different from an armed conflict and that, while an attack may take place during an armed conflict, it need not be part of the armed conflict.<sup>169</sup> As a result, the attack “is not limited to the use

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Galić, Case No. IT-98-29-T, Judgment, ¶ 148 (Dec. 5 2003).

164. *Kunarac*, Case No. IT-96-23/1-A, at ¶ 102; *Blagojević & Jokić*, Case No. IT-02-60-T, at ¶ 548; *Brđanin*, Case No. IT-99-36-T, ¶ 138; *Galić*, Case No. IT-98-29-T, ¶ 148; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 59; *see also* ICC Elements of Crimes, *supra* note 71, art. 7(2) (noting that the Rome Statute “should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack”).

165. Rome Statute, *supra* note 47, art. 7(2) (describing an attack as a “course of conduct involving the multiple commission of acts referred to in paragraph 1 [of Article 7]”); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 581, (Sept. 2, 1998) (“The concept of ‘attack’ may be defined as a [sic] unlawful act of the kind enumerated in Article 3(a) to (I) of the Statute, like murder, extermination, enslavement, etc.”); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment, ¶ 70 (Dec. 6, 1999); *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment, ¶ 205 (Jan. 27, 2000); *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment, ¶ 327 (May 15, 2003).

166. *Akayesu*, Case No. ICTR-96-4-T, ¶ 579; *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 194 (Nov. 30, 2005) (“It has been emphasised, repeatedly, that the contextual element required for the application of Article 5 serves to exclude single, random or limited acts from the domain of crimes against humanity.”); *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Judgment, ¶ 215 (June 10, 2007) (“Proof that the attack occurred either on a widespread basis or in a systematic manner is sufficient to exclude isolated or random acts.”). *See also* Ford, *supra* note 152, at 157-58 (noting that the International Law Commission debated removing the contextual requirements from the definition of crimes against humanity during the 1950s but ultimately decided that some sort of contextual requirement was necessary to prevent too many ordinary domestic crimes from being treated as crimes against humanity).

167. *Akayesu*, Case No. ICTR-96-4-T, ¶ 581 (noting that apartheid is a crime against humanity and imposing such a system can constitute an attack, even if done without violence); *Rutaganda*, Case No. ICTR-96-3-T, ¶ 70; *Musema*, Case No. ICTR-96-13-A, ¶ 205.

168. *Semanza*, Case No. ICTR-97-20-T, ¶ 327.

169. *Kunarac*, Case No. IT-96-23/1-A, ¶ 86; *Limaj*, Case No. IT-03-66-T, ¶ 182; *Brima*, Case No. SCSL-04-16-T, ¶ 214; *Prosecutor v. Fofana & Konewa*, Case No. SCSL-04-14-T, Judgment, ¶ 111



of armed force; it encompasses any mistreatment of the civilian population.”<sup>170</sup> A line of ICTY cases suggests that an attack is a “course of conduct involving the commission of acts of violence,”<sup>171</sup> but this line of cases implicitly accepts that the attack can be broader than just violence because the decisions always note that the attack is not limited to the use of armed force and also includes any mistreatment of the civilian population.<sup>172</sup> Thus the ICTY and the SCSL agree that any mistreatment of the civilian population can constitute an attack if it is widespread or systematic.

The definition adopted by the ICTY and SCSL – any mistreatment of the civilian population – is arguably broader than the definition used by the ICTR and ICC because the concept of mistreatment might well cover acts that could not be the underlying crimes. The broadest of the underlying crimes, other inhumane acts, still requires severe mental or physical suffering or a serious attack on human dignity. Mistreatment generally means “to treat badly,”<sup>173</sup> which does not seem to require severe suffering. Consequently, the definition of attack used by the SCSL and the ICTY may be broader than that used by the ICTR and ICC. However, it seems possible that if the ICTY or SCSL were forced to define mistreatment that they would conclude that it involves the commission of other inhumane acts.<sup>174</sup>

No matter which definition one uses, the denial of aid to the survivors of Cyclone Nargis did constitute an attack. As noted above, in May 2008 there was reason to believe that the government’s actions in refusing aid, limiting the amount of aid, and controlling how that aid was distributed constituted murder,

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(Aug. 2, 2007).

170. *Kunarac*, Case No. IT-96-23/1-A, ¶ 86; *see also* Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, ¶ 623 (July 31, 2003); *Brima*, Case No. SCSL-04-16-T, ¶ 214; *Fofana & Konewa*, Case No. SCSL-04-14-T, ¶ 111.

171. Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 543 (Jan. 17, 2005); *Limaj*, Case No. IT-03-66-T, ¶ 182; Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 131 (Sept. 1, 2004); Prosecutor v. Galić, Case No. IT-98-29-T, Judgment, ¶ 141 (Dec. 5, 2003).

172. *Blagojević & Jokić*, Case No. IT-02-60-T, ¶ 543; *Limaj*, Case No. IT-03-66-T, ¶ 182; *Brđanin*, Case No. IT-99-36-T, ¶ 131; *Galić*, Case No. IT-98-29-T, ¶ 141.

There are forms of mistreatment of the civilian population that do not necessarily involve violence, like deprivation of food, water, shelter and medical care, which suggests there is an inherent inconsistency between the statement that an attack involves acts of violence and the recognition that mistreatment of the civilian population can also constitute an attack. The emphasis on violence appears to be a result of the fact that the ICTY requires that crimes against humanity take place in connection with an armed conflict. *See* ICTY Statute, *supra* note 47, art. 5. This requirement is unique to the ICTY and does not form a part of the modern customary international law definition of crimes against humanity. *See supra* notes 152-58 and accompanying text. The ICTY is thus in the odd position of requiring two jurisdictional elements: an attack and an armed conflict. Consequently, all of the crimes against humanity cases that have come before the ICTY have also involved an armed conflict. This appears to have led to the line of cases that suggests that an attack involves acts of violence.

173. *See Oxford American Dictionary and Thesaurus* 957 (2003).

174. For example, a Trial Chamber at the ICTR suggested that mistreatment might have to be inhumane when it said that an attack “could also involve other forms of inhumane mistreatment of the civilian population.” Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment, ¶ 327 (May 15, 2003).

extermination, and other inhumane acts.<sup>175</sup> These actions could constitute both a course of conduct involving the commission of the underlying acts of a crime against humanity and the mistreatment of the civilian population of the Irrawaddy Delta.

## 2. Widespread and Systematic

The attack was probably both widespread and systematic. It was widespread because it was large-scale and it affected a large number of people.<sup>176</sup> According to a report prepared by the United Nations and the government of Myanmar, more than 2.4 million people throughout the Irrawaddy Delta were severely affected by the cyclone.<sup>177</sup> 75 percent of them did not receive any aid within the first three weeks of the crisis.<sup>178</sup> This means that approximately 1.8 million people throughout the Irrawaddy Delta were victims of the attack. Given the information that was available to the international community in May 2008, there was probably sufficient information to conclude that there was a widespread attack.<sup>179</sup>

The contextual element would also be present if the attack was systematic. There is evidence that the attack was systematic because it consisted of an organized pattern of non-accidental repetition of criminal conduct.<sup>180</sup> The underlying crimes – denial of food, water, shelter, and medical care – occurred repeatedly throughout the Irrawaddy Delta and were the result of a deliberate policy of denying aid to the victims. This policy emanated from the highest levels of the Myanmar government and was systematically enforced by officials of that government at all levels.

## 3. Directed Against a Civilian Population

There is little doubt that the attack was directed against a civilian population.<sup>181</sup> Many crimes against humanity occur in the context of armed conflicts, and the definition of civilian is geared towards distinguishing between civilians and combatants during an armed conflict. In general, a civilian is any person who is not taking an active part in hostilities, even including members of the armed forces if they are *hors de combat*.<sup>182</sup> In the case of Cyclone Nargis,

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175. See *supra* Section II(B)(4).

176. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Judgment, ¶ 94 (Dec. 17, 2004); *Limaj*, Case No. IT-03-66-T, ¶ 183; *Blagojević & Jokić*, Case No. IT-02-60-T, ¶ 545.

177. See *supra* note 2.

178. See *supra* note 27.

179. Courts have previously found that attacks on much smaller groups are widespread. See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶¶ 1, 37, 61, 482 (Aug. 2, 2001) (concluding that the attack on the Srebrenica safe area, which held approximately 40,000 Bosnian Muslims, was a widespread and systematic attack).

180. *Kordić & Čerkez*, Case No. IT-95-14/2-A, ¶ 94; Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶ 101 (July 29, 2004); *Limaj*, Case No. IT-03-66-T, ¶ 183.

181. *Limaj*, Case No. IT-03-66-T, ¶ 185 (“The attack must be directed against a civilian population.”); Prosecutor v. Galić, Case No. IT-98-29-T, ¶ 143 (Dec. 5, 2003).

182. Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment, ¶ 544 (Jan. 17, 2005) (“The term ‘civilian’ refers to persons not taking part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds detention or any other cause.”).

there was no armed conflict going on in the Irrawaddy Delta and no suggestions that there were any people who could be called combatants among the victims. Consequently, there is little doubt that the victims should be considered almost entirely civilians. The attack was directed against the civilian population of the Irrawaddy Delta because the survivors were the primary object of the attack.<sup>183</sup> As noted above, the government committed the acts that constitute the attack knowing that it was probable they would result in the commission of crimes and also knowing that the victims would be almost entirely civilian. There seems to be little doubt that the attack was directed against a civilian population.

#### 4. Natural Disasters as *Per Se* Attacks

The author had originally intended to argue that Cyclone Nargis was a *per se* attack on a civilian population, and that natural disasters that resulted in large scale losses of life should always be “attacks” for purposes of determining whether a crime against humanity had been committed. However, the author has concluded that treating natural disasters as *per se* attacks is both unnecessary and bad policy. As demonstrated above, the existing definition of crimes against humanity is sufficient to cope with the consequences of Cyclone Nargis. Although the cyclone itself is not treated as an attack, the consequences of the government’s disastrous policy of refusing aid can be considered an attack. Thus, crimes against humanity extends to cover the suffering that the international community was most concerned about – that which resulted from the government’s refusal to allow aid into the Irrawaddy Delta. Given that the existing understanding of crimes against humanity is flexible enough to be applied to the consequences of a natural disaster, there seems to be little need for a broader definition of an attack. If the traditional definition of an attack had been incapable of accommodating the terrible man-made consequences of Cyclone Nargis, a much stronger argument could be made that the definition should be expanded.

Moreover, it would be bad policy to extend the definition of attack to encompass all natural disasters that result in large scale loss of life. By focusing on a definition of attack that depends on the commission of a widespread or systematic pattern of crimes, the existing definition ensures that crimes against humanity will only be applied in situations of sufficient gravity. If every natural disaster was an attack, then many ordinary and unrelated crimes that occurred in conjunction with natural disasters would constitute crimes against humanity. This would vitiate one of the main purposes of the jurisdictional element, which is to prevent random, single, or isolated acts of violence from being treated as crimes against humanity.<sup>184</sup> For these reasons, the author is convinced that the existing definition of the attack is adequate and does not need to be expanded.

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183. *Blaškić*, Case No. IT-95-14-A, ¶ 106; *Kordić & Čerkez*, Case No. IT-95-14/2-A, ¶ 96; *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, ¶ 91 (June 12, 2002).

184. *See supra* note 164.

## 5. The Junta's Awareness of the Attack

One final element of a crime against humanity is the perpetrator's knowledge. The perpetrator must be aware that the attack is occurring and that his or her criminal acts constitute a part of the attack.<sup>185</sup> In this case, at least for the leaders of the military government of Myanmar, it seems almost certain that they knew about the attack. The denial of aid resulted in a lots of news coverage and a huge amount of political pressure on the government to admit aid.<sup>186</sup> It would be difficult for the leaders of the Myanmar government to claim that they were unaware of the crisis and its effect on the civilian population of the Irrawaddy Delta. In addition, the alleged criminal acts that give rise to the underlying crimes – the denial of aid – are the exact same acts that give rise to the attack, and it has already been shown that the government must have been aware of the attack. Consequently, the leaders must have been aware that their acts were part of the attack.

## 6. Conclusion

The preceding sections have demonstrated 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. There was a widespread and systematic attack on a civilian population, and the Myanmar government was aware of this attack. There is also reason to believe that crimes were being committed, including murder, extermination, and inhumane acts. In short, there was reason to believe that the Myanmar government's response to Cyclone Nargis constituted a crime against humanity. But what should the international community have done about it? Could it have invoked the responsibility to protect? If so, what actions could or should have been taken to protect the population of the Irrawaddy Delta?

### III. THE RESPONSIBILITY TO PROTECT

The responsibility to protect doctrine was initially developed by the International Commission on Intervention and State Sovereignty (ICISS) in an attempt to lay the foundation for an international consensus on the legality of humanitarian interventions<sup>187</sup> at a time when the legality and legitimacy of such

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185. See *supra* note 149.

186. See *supra* Section I.

187. See INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 1-2 (International Development Research Centre 2001), available at <http://www.iciss.ca/pdf/Commission-Report.pdf> [hereinafter RESPONSIBILITY TO PROTECT REPORT]. The ICISS was a response to a call by Secretary-General Kofi Annan for the international community to reach agreement about how to balance state sovereignty against humanitarian concerns during so-called "humanitarian interventions." *Id.* at 2. As the report notes, the international community was criticized both when it did intervene (Somalia, Kosovo and Bosnia) and when it did not intervene (Rwanda). *Id.* at 1. The Secretary-General identified the need for common agreement on a set of principles that would guide the international community in deciding when humanitarian intervention would be appropriate. *Id.* at 1-3. Gareth Evans provides a useful overview of the development of the responsibility to protect doctrine. See Evans, *supra* note 36, at 707-08.

interventions was a very contentious issue.<sup>188</sup> The ICISS's major innovation was reframing the debate from one about the right of states to intervene, which was controversial, to one about the obligation of states to protect their own citizens, which enjoyed far broader acceptance.<sup>189</sup> Thus, the ICISS concluded that the primary responsibility to protect populations lies with the concerned state.<sup>190</sup> However, where a population is "suffering serious harm" as a result of war, insurgency, repression, or state failure, and the concerned state is "unwilling or unable" to prevent that harm, the "principle of non-intervention yields to the international responsibility to protect."<sup>191</sup> Although the ICISS acknowledged that military intervention to protect populations would be an "exceptional and extraordinary measure," it nevertheless identified situations where such intervention would be appropriate, including large-scale loss of life and large-scale ethnic cleansing.<sup>192</sup> The ICISS stressed that intervention would be a last resort<sup>193</sup> and that it "should" be authorized by the United Nations Security Council.<sup>194</sup>

The ICISS equivocated on the key question of whether humanitarian interventions would be legal in the absence of Security Council authorization.<sup>195</sup> This was a very important issue that had been highlighted by NATO intervention in Kosovo in 1999 despite the lack of Security Council authorization.<sup>196</sup> The Kosovo intervention had subsequently been described by the Independent International Commission on Kosovo as "legitimate, but not legal."<sup>197</sup> The ICISS noted that "[t]here is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes" and stressed that Security Council authorization "should in all cases" be sought before any military intervention occurred.<sup>198</sup> Although nothing in the "principles" formulated by the ICISS expressly states that some humanitarian interventions might be legal in the absence of Security Council authorization, the use of "should" rather than "must" indicates that Security Council authorization may not be mandatory. Similarly, the ICISS rather obliquely suggested that if the Security Council does not authorize a legitimate request for humanitarian intervention,

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188. See Joyner, *supra* note 52, at 698-700 (describing the acute failures of and bitter disputes over humanitarian intervention during the 1990s).

189. See Evans, *supra* note 36, at 708; Max W. Matthews, *Tracking the Emergence of a New International Norm: The Responsibility to Protect and the Crisis in Darfur*, 31 B.C. INT'L & COMP. L. REV. 137, 140-41 (2008).

190. RESPONSIBILITY TO PROTECT REPORT, *supra* note 187, at XI. See also Joyner, *supra* note 52, at 708.

191. RESPONSIBILITY TO PROTECT REPORT, *supra* note 187, at XI.

192. *Id.* at XII.

193. *Id.* at XII ("Military intervention can only be justified when every non-military option for prevention or peaceful resolution of the crisis has been explored . . .").

194. *Id.* at XII ("Security Council authorization should in all cases be sought prior to any military intervention being carried out.").

195. See Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 99-100, 104 (2007).

196. See Evans, *supra* note 36, at 711-12.

197. See Evans, *supra* note 36, at 707.

198. RESPONSIBILITY TO PROTECT REPORT, *supra* note 187, at XII.

“concerned states may not rule out other means to meet the gravity and urgency” of the situation.<sup>199</sup>

In the substance of the report, the ICISS addresses this question in slightly more detail. Although the text once again stresses the desirability of prior Security Council authorization, it also suggests several alternatives. One suggestion is that a General Assembly resolution in favor of intervention “if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention.”<sup>200</sup> This is essentially a suggestion that the General Assembly ratify unilateral interventions as a way to provide political cover for states that intend to act without Security Council authorization. Next the report suggests that action could be taken by a concerned regional organization with the Security Council authorizing the intervention after the fact.<sup>201</sup> There is some precedent for this approach. For example, the Security Council authorized the intervention in Sierra Leone by ECOWAS forces after the fact.<sup>202</sup> Finally, the report avoids offering an opinion on whether a state can intervene unilaterally and simply asks which would be worse, a unilateral intervention which may or may not be legal or allowing large numbers of people to die because the Security Council is unable to act.<sup>203</sup>

The concept of the responsibility to protect went through several iterations<sup>204</sup> before a narrower version was unanimously adopted by the United Nations at the 2005 World Summit.<sup>205</sup> The language of the responsibility to protect has subsequently been used by the Security Council<sup>206</sup> and one of the co-founders of the doctrine suggests that it is now a “broadly accepted international norm.”<sup>207</sup> The heads of states and governments present at the Summit acknowledged that

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199. *Id.* at XIII. This is probably a reference to NATO’s intervention in Kosovo. See Evans, *supra* note 36, at 711-12 (describing the situation in Kosovo as a “clear case” for the application of the responsibility to protect that was blocked by the threat of a Russian veto in the Security Council).

200. RESPONSIBILITY TO PROTECT REPORT, *supra* note 187, at 53.

201. *Id.* at 54.

202. See generally Lee F. Berger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 IND. INT’L & COMP. L. REV. 605, 622-23 (2001).

203. RESPONSIBILITY TO PROTECT REPORT, *supra* note 187, at 55.

204. See Evans, *supra* note 36, at 713-14 (describing the appearance of the responsibility to protect doctrine in the report of the High-Level Panel on Threats, Challenges and Change in 2004 and again in the Secretary-General’s 2005 report entitled *In Larger Freedom: Towards Development, Security and Human Rights for All*, which served as the basic working document for the 2005 World Summit); Stahn, *supra* note 195, at 99-101, 105.

205. 2005 World Summit Outcome Document, *supra* note 45. Stahn discusses the debates that occurred prior to the World Summit about the inclusion of the responsibility to protect. See Stahn, *supra* note 195, at 108.

206. See Matthews, *supra* note 189, at 148-50 (arguing that the Security Council implemented some aspects of the responsibility to protect in responding to the humanitarian crisis in Darfur); Stahn, *supra* note 195, at 100.

207. Evans, *supra* note 36, at 715. But see Matthews, *supra* note 189, at 147-48 (arguing that the responsibility to protect is on its way to becoming a binding international norm but that it has not reached that stage yet); Stahn, *supra* note 195, at 110-116 (arguing that while parts of the responsibility to protect rest on traditional legal concepts, other parts are radical and largely unaccepted).

“[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing<sup>208</sup> and crimes against humanity.”<sup>209</sup> This is a narrower understanding of the responsibility to protect than that articulated by the ICISS because the responsibility only arises in response to specific crimes, rather than to large-scale human suffering.<sup>210</sup> While it is certainly true that the four crimes listed are often accompanied by large-scale human suffering, it is not true that every case of humanitarian disaster constitutes one of the enumerated crimes. Consequently, the inclusion of the enumerated crimes limited the application of the responsibility to protect during humanitarian disasters.

The UN’s articulation of the responsibility to protect was also narrower than the ICISS’s proposal because it rejected the possibility that interventions could occur without the approval of the Security Council. The document produced by the World Summit noted that the international community also has the responsibility to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, but stressed that the duty would be implemented “through the United Nations.”<sup>211</sup> The international community also indicated that it was prepared to take collective action, but only “through the Security Council, in accordance with the [United Nations] Charter, including Chapter VII.”<sup>212</sup> This is a rejection of the possibility that states could unilaterally act to enforce the responsibility to protect.<sup>213</sup>

The use of international crimes as the trigger for the responsibility to protect was probably intended to limit its application. However, it might have had an unintended consequence. The broader criteria proposed by the ICISS were vague and political. The idea of a large scale loss of life is not an inherently legal concept. This would have left the international community with considerable

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208. The inclusion of ethnic cleansing in the list of crimes that can trigger the responsibility to protect doctrine is somewhat odd. While ethnic cleansing was a hallmark of the conflicts in the former Yugoslavia, it is not generally considered a separate crime under international law. Rather, it is a series of physical acts that can constitute different crimes, depending on the circumstances under which they are committed. Forcible deportations or transfers of protected persons are prohibited as grave breaches of the Geneva Conventions. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 49, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Similarly, deportations or forcible transfers of populations can be a crime against humanity. ICTY Statute, *supra* note 47, art. 5(d); Rome Statute, *supra* note 47, 7(d); ICTR Statute, *supra* note 47, art. 3(d). No international tribunal has jurisdiction over ethnic cleansing as a separate crime, although its inclusion in the World Summit Outcome Document may be the first step on its journey to becoming a separate crime. 2005 World Summit Outcome Document, *supra* note 45, ¶¶ 138-39.

209. 2005 World Summit Outcome Document, *supra* note 45, ¶¶ 138-39.

210. The ICISS had proposed that the threshold for military intervention be either large scale ethnic cleansing or “large scale loss of life.” RESPONSIBILITY TO PROTECT REPORT, *supra* note 187, at XII.

211. 2005 World Summit Outcome Document, *supra* note 45, ¶ 139.

212. *Id.* Chapter VII of the United Nations Charter governs the use of coercive force. In particular, Article 42 gives the Security Council the power to authorize the use of force to maintain or restore international peace and security. See U.N. Charter art. 42; Joyner, *supra* note 52, at 701-02 (describing the operation of Chapter VII of the Charter).

213. *But see* Stahn, *supra* note 195, at 109 (indicating that some states took the position that the Outcome Document did not preclude humanitarian interventions in the absence of Security Council authorization).

discretion when invoking the responsibility. The use of explicit crimes as triggers may have narrowed the scope of the doctrine's application, but it made its application turn on an inherently legal concept. There are well-established legal rules that are applied regularly by international courts to determine whether a particular situation is a war crime, crime against humanity, or genocide.<sup>214</sup> This has effectively removed some of the political "wiggle room" and may ultimately serve to constrain the actions of the international community. One important consequence is that international criminal law experts can now make reasoned arguments about when the criteria for the application of the responsibility to protect are present.

*A. Applying the Responsibility to Protect to the Aftermath of Cyclone Nargis*

"Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes . . ." <sup>215</sup> Once there is reason to believe that a crime against humanity is occurring, the first duty falls on the state in which the crime is occurring to protect its own population by preventing the commission of the crimes. The international community is supposed to encourage and help states exercise this responsibility.<sup>216</sup>

This paradigm works in cases where the government is not at fault for the situation that leads to the invocation of the responsibility to protect, but is less effective in situations where a state itself is committing the triggering acts. It seems futile to rely on the state to prevent crimes that it is committing, and encouragement by the international community is unlikely to be of much use either. Indeed, in the aftermath of Cyclone Nargis, there was reason to believe that the crimes against humanity were being committed by the state against its own population. Nevertheless, despite immense political pressure from the international community, the government persisted in refusing aid in the weeks immediately after the cyclone.

When the state fails in its responsibility to protect, the burden shifts to the international community. The 2005 World Outcome document indicates that the international community should first try to use "diplomatic, humanitarian and peaceful means" to help protect the targeted population.<sup>217</sup> The international community did this. A humanitarian response was organized quickly by the United Nations, and both the United Nations and many of the individual member states used diplomatic means to try and convince the Myanmar government to accept the humanitarian aid.<sup>218</sup> However, these methods were initially unable to overcome the Myanmar government's intransigence.

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214. See, e.g., *supra* Sections II(B) and II(C).

215. 2005 World Summit Outcome Document, *supra* note 45, ¶ 138.

216. *Id.*

217. *Id.* ¶ 139 (noting that the international community will use "appropriate diplomatic, humanitarian and other peaceful means" to protect populations at risk).

218. See *supra* Section I.



When peaceful means are “inadequate and national authorities are manifestly failing to protect their populations,” the international community has committed itself to “tak[ing] collective action, in a timely and decisive manner,” including use of Chapter VII of the United Nations Charter.<sup>219</sup> The aftermath of Cyclone Nargis appears to be the sort of situation that the member states of the United Nations had in mind when they signed the 2005 World Summit Outcome Document and agreed to the responsibility to protect. Peaceful means had proven to be inadequate, the Myanmar government was manifestly failing to protect the cyclone survivors, and it appeared that the lives of millions of survivors were at risk. Yet the Security Council was unable to act. Some Western states discussed the introduction of a Security Council resolution that would compel Myanmar to accept the humanitarian aid, but it was clear that China would veto any Chapter VII resolution.<sup>220</sup>

This left the international community in exactly the situation that the responsibility to protect was supposed to avoid. A crime against humanity was apparently occurring, a civilian population was being harmed, and the government was manifestly unwilling to prevent it; however, the international community did nothing because the Security Council was paralyzed by the threat of a Permanent Member veto.<sup>221</sup> According to the version of the responsibility to protect adopted by the United Nations, this effectively ends all chance of coercive action. The World Summit Outcome Document does not contemplate any fallback position if peaceful means are inadequate and the Security Council fails to act.

The only option remaining would be for a state or group of states to intervene unilaterally without Security Council authorization, one of the things that the codification of the responsibility to protect was meant to prevent. But as the ICISS noted, “where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by.”<sup>222</sup> This is an implicit suggestion that, in some cases, the consequences of a unilateral humanitarian intervention would be a lesser evil than doing nothing. However, in the aftermath of Cyclone Nargis, no state was willing to engage in unilateral intervention, even though several countries had military forces in position,<sup>223</sup> and the intervention probably could have been done while limiting the scope of any direct conflict with the Myanmar military.<sup>224</sup>

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219. 2005 World Summit Outcome Document, *supra* note 45, ¶ 139.

220. *See supra* note 39.

221. This outcome is not surprising. As the ICISS noted when it first proposed the responsibility to protect, “[m]any of our interlocutors regarded capricious use of the veto, or threat of its use, as likely to be the principal obstacle to effective international action in cases where quick and decisive action is needed to stop or avert a significant humanitarian crisis.” RESPONSIBILITY TO PROTECT REPORT, *supra* note 187, at 51. *See also* Evans, *supra* note 36, at 716 (noting the potential for Security Council paralysis); Joyner, *supra* note 52, at 715.

222. RESPONSIBILITY TO PROTECT REPORT, *supra* note 187, at 55.

223. *See supra* note 16.

224. Although some commentators raised the specter of Western militaries fighting their way into Myanmar, it is unlikely there would have been much direct confrontation. *See* Thakur, *supra* note 41

Three factors seemed to prevent such intervention. First, if there had been a unilateral intervention, the Myanmar government would probably have terminated the United Nations-run relief effort. While the relief effort was only reaching a small percentage of the population of the Irrawaddy Delta, that small percentage still represented hundreds of thousands of people. Those people would probably have stopped receiving aid. Intervention might actually have made the humanitarian situation worse. Second, it is not clear how effective a unilateral intervention would have been. At most, it would have involved dropping off relief supplies by helicopter or boat. It is unlikely that any of the countries with military forces in position would have established a permanent presence in the Irrawaddy Delta because of the risk of armed conflict with the Myanmar military.<sup>225</sup> However, it was not clear how much aid could actually have been delivered without the cooperation of the Myanmar government, nor was it clear how the aid could be coordinated if the Myanmar government expelled all of the United Nations staff members who were managing the U.N. aid effort.<sup>226</sup> Finally, there was a lack of political will on the part of the United States, Great Britain, and France.<sup>227</sup>

The decision not to intervene unilaterally may well have been the correct one under the circumstances because of the risk that the hundreds of thousands of people receiving aid through the UN-run relief effort would actually have been worse off if that aid was cut off following an intervention.<sup>228</sup> It is possible, but by no means guaranteed, that some sort of intervention would have taken place if the Myanmar government had been blocking all aid. At that point, there would have been little downside to bringing in relief supplies by helicopter from the waiting US, French, and British ships, particularly if the risk of confrontation with the Myanmar military could be minimized. However, the Myanmar government let in just enough aid to make risking the interruption of that aid during a unilateral intervention too risky.

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(suggesting that Bernard Kouchner was advocating “Western soldiers fighting in the jungles of Southeast Asia again.”). Given the geography of the Irrawaddy Delta, much of the area was inaccessible except with helicopters. *See supra* note 9. Thus, it seems likely that those nations with military forces in the area, like Great Britain, France and the United States, could have delivered humanitarian aid to the Irrawaddy Delta while largely avoiding confrontations with Myanmar forces.

225. *See, e.g.,* Kaplan, *supra* note 41 (noting that “an enormous amount of assistance can be provided while maintaining a small footprint on shore, greatly reducing the chances of a clash with the Burmese armed forces”).

226. *See* Evans, *supra* note 41 (noting that efforts to drop relief supplies by helicopter would probably be “hopelessly inefficient”).

227. The problem of lack of political will always be an obstacle to taking decisive action, including non-military action, in support of the responsibility to protect. *See* Evans, *supra* note 36, at 720-21; Joyner, *supra* note 52, at 721-22 (discussing ways to build political will).

228. As the ICISS and others have argued, no implementation of the responsibility to protect should make the situation worse. Any state or group of states considering military intervention should always ask whether the consequences of the intervention are likely to be worse than the consequences of inaction. *See* RESPONSIBILITY TO PROTECT REPORT, *supra* note 187, at XII; Evans, *supra* note 36, at 711, 719; Joyner, *supra* note 52, at 714-15 (“Armed intervention cannot be justified if . . . the action appears likely to produce adverse consequences or suffering greater than if there were no intervention at all.”).

*B. Successes and Failures of the Responsibility to Protect*

Ultimately, the responsibility to protect did not live up to its primary goal of saving lives during a crisis. In this sense, the responsibility to protect was a failure. Nor has it been the only failure of the responsibility to protect since the doctrine was adopted by the United Nations in 2005.<sup>229</sup> Nevertheless, there is some reason for hope for the future. The Security Council has begun adopting the language of the responsibility to protect and will, hopefully, continue to use it as a guide for its actions in the future. In addition, the use of international crimes to trigger the application of the responsibility to protect creates an opening for international criminal law experts to make reasoned legal arguments about when the responsibility to protect should be used. This may lead to a more systematic application of the principle in the future.

The situation in Myanmar exposed a weakness in the responsibility to protect created by the international community's desire not to make the situation worse by intervening. Unscrupulous states could manipulate the severity of the crisis as a way to prevent coercive intervention. Although the author has found no suggestion that Myanmar deliberately calibrated the amount of aid it was willing to accept in order to make sure that the benefits of intervention were outweighed by the risk that Myanmar would terminate the UN-led aid effort, this possibility exists. States that are responsible for creating the situations that necessitate the application of the responsibility to protect may be able to game the system by finely calibrating the scope of the violence or by creating a situation that ensures that the intervention would make the situation worse. The international community must be alert to this possibility and act decisively against states that try to manipulate the system.

Moreover, the situation in Myanmar also highlighted a known weakness in the reliance on the Security Council to take action to prevent the commission of war crimes, crimes against humanity, genocide, and ethnic cleansing. The Security Council is an inherently political body and there is no guarantee that it will act, even if a legal basis exists. However, the Security Council's failure to act gives new impetus to the concept of humanitarian intervention. While no country was willing to intervene unilaterally in Myanmar, when tens or hundreds of thousands of people are dying, there is certain to be public pressure for some countries to act. If one of the Permanent Members uses a veto or threat of veto to paralyze the Security Council, it increases the likelihood that one or more states will act unilaterally.

The only way to truly eliminate the need for unilateral humanitarian intervention would be for the Security Council to act in every situation where the legal basis for acting exists. Until such time as the Permanent Members accept some limitations on the use of the veto power, the doctrine of humanitarian intervention is likely to persist. An agreement on the limitation of vetoes does not

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229. While the United Nations used some of the mechanisms of the responsibility to protect in responding to the crisis in Darfur, ultimately the Security Council was unwilling to authorize coercive military action and the crisis continued unabated. *See* Matthews, *supra* note 189, at 148-150.

appear likely soon.<sup>230</sup> Consequently, in the short term, there are likely to be situations where such interventions occur and are considered legitimate, even if not everyone agrees they are legal.<sup>231</sup>

#### IV. THE CONSEQUENCES OF A CRIME AGAINST HUMANITY

The existence of crimes against humanity is not simply a predicate for the invocation of the responsibility to protect. They are international crimes in their own right, for which individuals can be held criminally liable. If the Security Council were to invoke the responsibility to protect to authorize coercive action during a future crisis, this would act as a finding that one of the triggering crimes was occurring. What consequences would flow from this finding? Does the invocation of the responsibility to protect doctrine impose on the Security Council an obligation to find some way to investigate and prosecute the “crimes” that form the basis for the Security Council’s action? Are there other entities that could initiate investigations, either with or without Security Council approval?

This section will examine the possible consequences of a determination that there is reason to believe that crimes against humanity were committed. It will discuss the possible venues for any trials, including the possibility of creating a new hybrid tribunal for Myanmar. It will also briefly discuss the proposed scope of such a hybrid tribunal.

##### *A. Possible Venues for Trials*

As noted above, there is reason to believe that crimes against humanity were committed in Myanmar in the aftermath of Cyclone Nargis.<sup>232</sup> This reason to believe is sufficient to initiate a criminal investigation at any of the international criminal tribunals.<sup>233</sup> One implication of the linking of the responsibility to protect doctrine and international criminal law is that any resolution by the Security Council that invokes the responsibility to protect to justify coercive action constitutes a finding that sufficient evidence exists to initiate a criminal investigation of the acts that triggered the resolution. But this raises the question: who could or would investigate these alleged crimes? Usually, when crimes are committed, the state where the crimes occurred has the first claim on prosecuting them.<sup>234</sup> The government of Myanmar could initiate investigations and prosecute people. However, it is extremely unlikely that the present government of Myanmar will investigate because the evidence suggests that senior members of the government are the individuals most likely to be investigated.

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230. See Evans, *supra* note 36, at 716-17 (noting that the reference to criteria for when intervention was appropriate was removed from the World Summit Outcome Document in part because certain members of the Security Council did not want any constraints on their decision-making).

231. See *supra* notes 195-199.

232. See *supra* Section II(C)(6).

233. See *supra* notes 53-57 (discussing the threshold necessary to initiate an investigation). The threshold this article has used to determine whether the responsibility to protect should be invoked is a higher threshold than any of the international courts use to initiate an investigation.

234. See KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 38 (2001) (“Jurisdiction over criminal matters is primarily territorial.”); M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 712-13 (2003).

There is universal jurisdiction for crimes against humanity,<sup>235</sup> which means that theoretically any country could investigate and possibly try the leaders of the Myanmar government for their actions in the aftermath of Cyclone Nargis. However, there are significant practical limitations on the application of universal jurisdiction. Some countries, including Belgium, have attempted to implement universal jurisdiction,<sup>236</sup> but this has not been a smooth process.<sup>237</sup> In practice, few countries have attempted to charge people with international crimes that are unrelated to the country in which the person is being charged.<sup>238</sup> In addition, there is always a problem obtaining the suspects. Most countries are reluctant to enforce arrest warrants directed against heads of state or senior government officials.<sup>239</sup> Obtaining the necessary evidence for a formal investigation would also be extremely challenging.<sup>240</sup> Consequently, universal jurisdiction seems an unlikely mechanism to investigate the leaders of the Myanmar government.

The next possibility is an international court of some kind. The ICTY, SCSL, ICTR and ECCC are all limited in their jurisdiction and could not exercise jurisdiction over crimes committed in Myanmar.<sup>241</sup> The ICC is a possibility because the crimes were committed after the Rome Statute entered into force.<sup>242</sup> However, Myanmar is not currently a member of the Assembly of States Parties,<sup>243</sup> which means that the ICC could only obtain jurisdiction over the alleged crimes if the Security Council referred the matter to the ICC<sup>244</sup> or Myanmar voluntarily accepted ICC jurisdiction over the crimes.<sup>245</sup> Neither is likely to happen. The Security Council could not pass a resolution ordering the Myanmar government to accept humanitarian aid because of the threat of a Chinese veto, and it seems unlikely that the Security Council would agree to conferring jurisdiction on the

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235. See KITTICHAISAREE, *supra* note 234, at 39.

236. See *id.* at 62, n.72 (discussing Belgium's attempts to use universal jurisdiction to try "grave violations of international humanitarian law" irrespective of whether Belgium has any direct connection to the crimes); BASSIOUNI, *supra* note 234, at 713 n.158.

237. See generally Malvina Halberstam, *Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?*, 25 CARDOZO L. REV. 247 (2003) (describing Belgium's difficulties in attempting to implement universal jurisdiction in the face of charges that the process was being abused to bring politically-motivated charges against heads of state).

238. Usually, countries only exert extraterritorial jurisdiction over crimes committed in another country if nationals of the prosecuting country were victims of the crime, the crime was carried out by nationals of the prosecuting country or it affects the security of the prosecuting state. KITTICHAISAREE, *supra* note 234, at 39.

239. See KITTICHAISAREE, *supra* note 234, at 39-41 (discussing the many difficulties in obtaining custody over the accused); see also *id.* at 62 n.72 (noting that the Democratic Republic of Congo (DRC) filed a request before the International Court of Justice (ICJ) asking the ICJ to discharge a Belgium arrest warrant for the arrest of the DRC's Minister for Foreign Affairs).

240. See *supra* note 64.

241. See ECCC Law, *supra* note 47, art. 2; ICTY Statute, *supra* note 47, art. 1; SCSL Statute, *supra* note 47, art. 1; ICTR Statute, *supra* note 47, art. 1.

242. See Rome Statute, *supra* note 47, art. 11(1).

243. See The States Parties to the Rome Statute, *supra* note 158 (listing the current States Parties to the Rome Statute).

244. See Rome Statute, *supra* note 47, art. 13(b).

245. See Rome Statute, *supra* note 47, art. 12(3).

ICC. It seems just as unlikely that the current Myanmar government would voluntarily agree to ICC jurisdiction. Moreover, the ICC appears to have reached the limits of its capacity with the criminal investigations it already has underway.<sup>246</sup> It does not seem to have the capacity to take on the situation in Myanmar in the near future.

However, even if there is little likelihood that the ICC will investigate the situation in Myanmar, the responsibility to protect doctrine still has important implications for the ICC. If the Security Council were to use the responsibility to protect doctrine to authorize coercive action, it could and should simultaneously refer the situation to the ICC under Article 13(b) of the Rome Statute. Of course, there is no way to compel the Security Council to refer a situation to the ICC. Nevertheless, if it has made a finding that one of the triggering crimes for the responsibility to protect is occurring it has at least a moral obligation to also refer that matter to the ICC for investigation.

The analysis is a little different if the situation that is the subject of a Security Council resolution invoking the responsibility to protect doctrine is taking place on the territory of an ICC member state. In that case, the Security Council resolution should be viewed as *prima facie* evidence that the Prosecutor should initiate an investigation on his or her own authority under Article 15 of the Rome Statute. It would also probably constitute *prima facie* evidence that Article 17 of the Rome Statute is satisfied and that the target of the resolution is unable or unwilling to genuinely carry out an investigation or prosecution of the matter on its own.

Finally, there is the possibility of creating a new *ad hoc* international tribunal or hybrid tribunal<sup>247</sup> to investigate serious violations of international law in Myanmar. A new *ad hoc* tribunal is unlikely. The ICTY and ICTR have proved to be extremely expensive and very slow, and there appears to be little appetite in the international community to create new *ad hoc* tribunals.<sup>248</sup> Hybrid tribunals will probably be preferred going forward because they are perceived as being cheaper and quicker than fully international tribunals, while still meeting international standards.<sup>249</sup> A hybrid tribunal could only be created in Myanmar with the

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246. The ICC only has the capacity for three simultaneous investigations and two or three trials per year. See William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J., 53, 54, 66-67 (2008); see also Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 303, 308 (2003) (predicting that the ICC would be able to try only a "handful" of the most egregious cases and that the number of possible cases was likely to "far outstrip" the ICC's ability to try them).

247. Hybrid tribunals combine elements of national and international courts in their structure, procedural rules and subject matter jurisdiction. See Dickinson, *supra* note 246, at 297-300. The best-known examples of hybrid tribunals are the SCSL and the ECCC, although courts that have combined some national and international elements have also taken place in Kosovo and East Timor. See *id.* at 296-301.

248. See Dickinson, *supra* note 246, at 303 (noting that "calls for a [fully] international court in Sierra Leone were resisted because such a tribunal would be too expensive and time-consuming to create.").

249. See Suzannah Linton, *New Approaches to International Justice in Cambodia and East Timor*, 84 INT'L REV. OF THE RED CROSS, 93, 113 n.845 (2002) (noting that hybrid tribunals have the potential

cooperation of the Myanmar government. It would be staffed by a mix of international and national staff and would probably be largely funded by the international community. It would likely have subject matter jurisdiction over violations of international law plus any violations of domestic law that seem appropriate.<sup>250</sup> Like all of the suggestions discussed previously, this is unlikely to happen while the current government is in power.

The obvious drawback to all of these proposals is that they require the cooperation of the Myanmar government, and the current government is unlikely to cooperate with any investigation of its own activities. Consequently, any prosecutions for crimes against humanity are not likely to occur until there is a change in the government of Myanmar. The current regime is not particularly popular, and the last time there was an election the people voted overwhelmingly in favor of Aung San Suu Kyi and the National League for Democracy, which won the 1990 election by a "landslide."<sup>251</sup> Therefore, it seems possible that a regime change will occur at some point in the future. There is no statute of limitations for crimes against humanity,<sup>252</sup> so the international community and the people of Myanmar could wait until a more accountable government comes to power.

#### *B. The Scope of a Hybrid Tribunal for Myanmar*

Of the venues discussed above, a new hybrid tribunal seems to be the most likely location where investigations and trials could take place, although it would still depend on some sort of regime change in Myanmar. Apart from being quicker and cheaper than fully international courts like the ICC, ICTY, and ICTR,<sup>253</sup> hybrid tribunals are also thought to: (1) be perceived as more legitimate by the local population than either distant international courts, which usually have their headquarters and trials far away from where the atrocities occurred, or discredited domestic courts, which may well have been complicit in the atrocities; (2) offer useful opportunities for capacity-building for local legal staff, including judges,

to be more cost-effective and expeditious than ad hoc international tribunals while operating in accordance with international human rights standards), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/3e02cd6224ce0af6012568b20048a62f/7b6428d7e40dd0d3c1256ba7003477ce/\\$FILE/093-120\\_Linton.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/3e02cd6224ce0af6012568b20048a62f/7b6428d7e40dd0d3c1256ba7003477ce/$FILE/093-120_Linton.pdf); but see Sarah Williams, *The Cambodian Extraordinary Chambers – A Dangerous Precedent for International Justice?*, 53 INT'L & COMP. L.Q. 227, 243-44 (2004) (discussing the difficulties that hybrid tribunals have in meeting international standards).

250. See ECCC Law, *supra* note 47, arts. 3-8 (giving the ECCC jurisdiction over certain violations of the 1956 Cambodian Penal Code and various international crimes); SCSL Statute, *supra* note 47, at arts. 2-5 (giving the SCSL jurisdiction over certain national and international crimes).

251. See *Defeated Pro-Government Party Calls Myanmar Elections a Fraud*, L.A. TIMES, June 16, 1990, at A20; *Opposition Claims Wide Lead in Myanmar Elections*, L.A. TIMES, May 28, 1990, at A7. The military junta initially indicated that it would step down after losing the election. *Myanmar Junta Vows to Step Down*, TORONTO STAR, May 29, 1990, at A13. However, later that year, the military government "outlawed" the National League for Democracy. *Party Outlawed*, GLOBE & MAIL (Canada), Dec. 21, 1990. It has remained in power ever since.

252. See Ford, *supra* note 152, at 159-69 (describing the 1968 Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity and the 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes Against Humanity and War Crimes).

253. See *supra* note 249.

lawyers, and court clerks; and (3) do a better job of embedding international legal norms regarding mass atrocities in the local consciousness.<sup>254</sup> These potential benefits, combined with a lack of capacity at the ICC, suggest that a new hybrid tribunal would be the best choice.

There are two issues related to the scope of a possible hybrid tribunal for Myanmar that are worth considering: the tribunal's subject matter jurisdiction and its personal jurisdiction. When the ICTY and the ICTR were created in the early 1990s, their personal jurisdiction was written quite broadly. They were given jurisdiction over "persons responsible for serious violations of international humanitarian law" that were committed in the former Yugoslavia and in Rwanda.<sup>255</sup> However, the trend has been to narrow the jurisdiction of international trials and focus on those senior leaders who are responsible for planning and implementing large scale international crimes.<sup>256</sup> This trend has carried over into the jurisdiction of hybrid tribunals as well. The ECCC is limited to prosecuting "senior leaders of Democratic Kampuchea and those who were most responsible" for the crimes,<sup>257</sup> while the competence of the SCSL is described as covering only "persons who bear the greatest responsibility."<sup>258</sup> Clearly, the trend is towards prosecuting a narrower and narrower group of people and to focus on those most responsible for the crimes. It is likely that this trend would be carried over into any hybrid tribunal for Myanmar.<sup>259</sup> Thus, the trials would likely focus on those individuals who planned and implemented the Myanmar government's policy of denying aid to its own population. Low-level perpetrators would probably not be pursued.<sup>260</sup>

The tribunal's subject matter would obviously include the aftermath of Cyclone Nargis, but there is no reason to limit it to only those crimes committed in

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254. See Dickinson, *supra* note 246, at 306-07; Helen Horsington, *The Cambodian Khmer Rouge Tribunal: The Promise of a Hybrid Tribunal*, 5 MELB. J. INT'L L. 462, at 480-82 (2004); Linton, *supra* note 249, at 118 (noting that "[m]eaningful local involvement in the process is one of the potential strengths of" hybrid tribunals); Williams, *supra* note 249, at 245.

255. ICTY Statute, *supra* note 47, art. 1; ICTR Statute, *supra* note 47, art. 1.

256. For example, the ICTY has been instructed to concentrate on the prosecution of "the most senior leaders suspected of being most responsible" for crimes within the jurisdiction of the ICTY. See S.C. Res. 1534, ¶¶ 5-6, U.N. Doc. S/RES/1534 (March 26, 2004); see S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003). It now transfers cases that do not meet this criterion to national jurisdictions. See ICTY Rules of Procedure and Evidence, *supra* note 51, Rule 11 (describing the process for transferring cases to competent national courts).

257. ECCC Law, *supra* note 47, art. 2.

258. SCSL Statute, *supra* note 47, art. 1.

259. In 2003, Laura Dickinson suggested that hybrid tribunals might focus on low-level perpetrators while the ICC would focus on high-level perpetrators. In practice it appears that the ICC simply cannot handle even all the high-level perpetrators that could be referred to it, and that there exists a niche for additional hybrid courts to supplement the limited capacity of the ICC. These new hybrid courts are likely to focus on high-level perpetrators as well because all trials that comply with international standards are expensive and time-consuming and it does not make sense to devote a hybrid tribunal's limited resources to low-level perpetrators. See Dickinson, *supra* note 246, at 309.

260. This also means that charges arising out of the alleged diversion of aid would probably not be pursued unless it could be shown that they were part of a systematic policy of diverting aid. There is some evidence this may have occurred, but it is not certain. See *supra* Section II(B)(3)(b).



connection with the cyclone. The Myanmar government has been accused of a number of gross human rights violations in recent years that might constitute violations of international criminal law, including the brutal crackdown on Buddhist monks that occurred in September 2007.<sup>261</sup> Since any new tribunal is only likely to come into existence after the current Myanmar government is no longer in power, the scope of any tribunal should be broad enough to investigate any serious violations of international criminal law committed by the military junta. The temporal jurisdiction of this hypothetical tribunal should probably run from the date the junta lost the 1990 election<sup>262</sup> until whenever it eventually collapses.

#### V. CONCLUSION

There are a number of conclusions that can be drawn from this article. The first is that the modern understanding of crimes against humanity can be seamlessly applied to a government's failure to respond appropriately to a natural disaster. Crimes against humanity started as an adjunct to the laws of war and for much of its early history could only be committed in the context of an armed conflict.<sup>263</sup> Doctrinally, it has been separated from the nexus with armed conflict for some time, but the majority of crimes against humanity charges are still brought in situations that are marked by armed conflicts. Nevertheless, the modern understanding of crimes against humanity is clearly broad enough to be applied in many situations that have no connection with armed conflicts, including the aftermath of Cyclone Nargis. It should be noted that no expansion of the doctrine of crimes against humanity is being advocated in this article. All of the arguments that have been made fall well within the existing jurisprudence of the modern international courts.

This conclusion highlights the flexibility and utility of crimes against humanity in comparison to war crimes or genocide. War crimes, by definition, are

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261. See, e.g., Seth Mydans, *Myanmar Monks' Protest Contained by Junta's Forces*, N.Y. TIMES, Sep. 28, 2007, <http://www.nytimes.com/2007/09/28/world/asia/28cnd-myanmar.html> (noting that the government had broken up protests led by tens of thousands of Myanmar's monks amid brutal attacks by government forces on monasteries and protesting civilians); Amnesty Int'l, *Crimes Against Humanity in Eastern Myanmar*, ASA/16/011/2008, June 5, 2008, available at <http://www.amnesty.org/en/library/asset/ASA16/011/2008/en/d80827f1-3248-11dd-adb0-a55f274f1a5a/asa160112008eng.pdf> (arguing that the government of Myanmar committed crimes against humanity during the course of a military campaign against ethnic Karen civilians in Eastern Myanmar); Human Rights First, *Burma: Crimes Against Humanity in Burma*, <http://www.humanrightsfirst.org/cah/burma/index.asp> (last visited Dec. 3, 2008) (accusing the government of Myanmar of involvement in a number of crimes against humanity, including forced displacements of ethnic minorities, forced labor, the recruitment of child soldiers, rape, enforced disappearances and torture); *Belgium Reopens Myanmar Humanity Crimes Probe Against Oil Giant Total*, AGENCE FRANCE PRESSE, Oct. 2, 2007, available at <http://afp.google.com/article/ALeqM5g84fzhRA8Y6lvW-gmt7YmonfEBKg> (noting that the oil company Total was accused of crimes against humanity for using forced laborers provided by the military government during the construction of a gas pipeline).

262. See *supra* note 247.

263. See generally Ford, *supra* note 152 (describing the evolution of crimes against humanity during the 20th century).

limited in their application to armed conflicts.<sup>264</sup> As this author has noted elsewhere, genocide is exceptionally difficult to prove because of the specific intent requirement and genocide convictions are relatively rare.<sup>265</sup> Crimes against humanity, in contrast, can be applied to a much broader range of situations including many that have not traditionally been prosecuted as violations of international criminal law. It is the most versatile of the three major international crimes and may well become the most frequently used. Genocide will continue to be the “crime of crimes,” but crimes against humanity will probably be used more often. For example, crimes against humanity is the best way to invoke the responsibility to protect during man-made humanitarian disasters that are not marked by armed conflicts.

A second conclusion relates to the efficacy of the responsibility to protect. It is tempting to view the responsibility to protect as a failure. It has been cited by the Security Council, but Security Council paralysis has prevented any Chapter VII enforcement actions to protect civilian populations in the years since the 2005 World Summit. If the primary purpose of the responsibility to protect is to save lives, then it is hard to point to any group of lives that has been saved. Bernard Kouchner was one of the few senior politicians calling for the application of the responsibility to protect to the aftermath of Cyclone Nargis, and no country was willing to intervene unilaterally once it became clear that the Security Council would not act, even though the forces were in the right place at the right time to make such intervention possible.

However, there are other ways to measure success. Even though the responsibility to protect was not applied, the argument was primarily about whether it was appropriate to apply it given the facts in Myanmar. All of the commentators accepted that the responsibility to protect does exist and does require states to protect populations at risk. Thus, it appears that the responsibility to protect has achieved significant acceptance in a few short years. The debate has now shifted from whether the responsibility to protect exists to how to apply it in specific cases.

In this respect, the United Nation’s decision to make the application of the responsibility to protect depend on the existence of violations of international criminal law may prove a blessing in disguise when it comes to determining when to apply the responsibility to protect. International criminal lawyers are well-equipped to offer reasoned advice on whether crimes against humanity, war crimes, or genocide are occurring because there are well-established criteria for the application of international criminal law in the jurisprudence of the international courts. This should result in a much more systematic analysis of when the responsibility to protect should be invoked. Of course, this will not guarantee that

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264. It should be noted that crimes against humanity can also be used to capture much of the mistreatment of civilian populations that has been the hallmark of internal armed conflicts.

265. See Robert Petit, Stuart Ford & Neha Jain, *Exploring Critical Issues in Religious Genocide: Case Studies of Violence in Tibet, Iraq and Gujarat*, 40 CASE W. RES. J. INT’L L. 163, 212-14 (2008).

the international community will act on the advice, but it does inject an element of legal reasoning into what is otherwise an overtly political process.

The use of international criminal law as the triggering mechanism for the responsibility to protect also has important implications for the ICC. In order to invoke the responsibility to protect and use its coercive authority under Chapter VII of the United Nations Charter, the Security Council must make either an explicit or implicit finding that violations of international criminal law are occurring. One consequence of this is that the Security Council then has, at the minimum, a moral obligation to refer that situation to the ICC so that the crimes can be investigated. Of course, there is no guarantee that the Security Council will accompany every invocation of the responsibility to protect doctrine with a referral to the ICC. But this will not always prevent the ICC from acting. If the situation that is the subject of the Security Council resolution is taking place on the territory of an ICC member state, then the Security Council resolution will act as *prima facie* evidence that the Prosecutor should initiate an investigation on his or her own authority.

Finally, the use of international crimes to trigger the responsibility to protect may actually save lives. While the majority of the debate has focused on the questions of when the Security Council should authorize intervention, what form the intervention should take, and whether unilateral intervention is legal, this is not the most important aspect of the responsibility to protect. The most important aspect is the duty to prevent the crimes from occurring in the first place. It is far easier to protect the lives of civilians by preventing a crisis than it is by intervening to try and stop the crisis.

The use of international criminal law to trigger the responsibility to protect may help prevent crimes from occurring in the first place. One of the goals of international criminal law is prevention through deterrence. If a head of state is ever tried and found guilty of crimes against humanity arising out of the denial of international aid to his or her own people, then other leaders in a similar situation might think twice before refusing international aid. This would fulfill the primary goal of the responsibility to protect – saving lives. Thus the pursuit of accountability for violations of international criminal law also helps to promote the underlying goals of the responsibility to protect.