



# Asia-Pacific Centre for the Responsibility to Protect

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## **Cyclone Nargis and the Responsibility to Protect**

### **Myanmar/Burma Briefing No. 2**

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## Background

On 2 May 2008, Cyclone Nargis struck Myanmar/Burma devastating the Irrawaddy delta region and leaving much of the region under water. Early estimates suggested that over 43,000 people were killed but some independent observers have put the potential death toll at closer to 100,000. Around 2.5 million people were affected by the cyclone.<sup>1</sup>

Despite the massive scale of the humanitarian catastrophe confronting Myanmar/Burma and the government's obvious inability to respond in an effective and timely fashion, the country's military regime has allowed only limited humanitarian access. The disaster happened shortly before a constitutional referendum planned for 10 May and the regime decided to go ahead with that referendum despite the humanitarian crisis in the country's south. During that crucial period, it appears that the Myanmar/Burma military was more focused on the constitutional referendum than the delivery of assistance to the Irrawaddy delta region. In the midst of the humanitarian crisis, it reported that 92% of those who participated in the referendum supported the proposed new constitution.<sup>2</sup>

Organizations already present in the country, such as Medecins sans Frontieres and Save the Children were able to get relatively small numbers of aid workers into the affected areas but have reported a tightening of restrictions.<sup>3</sup> Other NGOs, UN agencies and states have offered assistance but the Myanmar/Burma government has been slow to issue visas for foreign aid workers and UN personnel, and insists on distributing the aid itself. It is also insisting on restricting aid workers' movement. However, UN agencies, including the World Food Programme, World Health Organization, the UN Children's Fund (UNICEF) and the Office for the Coordination of Humanitarian Affairs (OCHA) were able to launch a 'major effort' to distribute supplies and by 16 May had delivered assistance to approximately 100,000 affected people.<sup>4</sup> Independently of one another, some ten days after the cyclone struck, the UN Office for the Coordination of Humanitarian Affairs and Oxfam reported that, at the most, only a quarter of the required aid was being allowed into Myanmar/Burma and the aid that did arrive was not being effectively distributed. There were also reports of military officers hoarding aid for themselves and selling it on the black markets.<sup>5</sup> One report suggested that military officers were keeping foreign supplied high energy biscuits for themselves and distributing ordinary, locally produced, biscuits in their place.<sup>6</sup>

Frustrated by the lack of progress, on 7 May the French Foreign Minister, Bernard Kouchner proposed that the UN Security Council invoke the 'responsibility to protect' to authorise the delivery of aid without the consent of the Myanmar/Burma government. This proposal was reiterated by the French Ambassador to the UN and repeated by commentators, analysts and politicians, primarily in Europe and North America. Kouchner's proposal was flatly rejected out of hand by the Chinese government, which argued that the responsibility to protect did not apply to natural disasters. In similar vein, John Holmes, the UN's Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator described Kouchner's call as unnecessarily confrontational. The British Minister for International Development Douglas Alexander rejected it as 'incendiary' and Britain's UN ambassador, John

Sawers, agreed with the Chinese view that R2P did not apply to natural disasters.<sup>7</sup> Britain later backtracked somewhat, indicating that it would welcome ‘discussion’ of the Responsibility to Protect.<sup>8</sup>

On 12 May, UN Secretary-General Ban Ki-moon expressed his ‘deep concern and immense frustration at the unacceptably slow response to this grave humanitarian crisis’ and warned of the threat of infectious disease taking hold if urgent assistance was not delivered. The Secretary-General also indicated that he had tried to contact the head of Myanmar/Burma’s military regime, Than Shwe, but that his calls had gone unanswered.<sup>9</sup>

On 13 May, OCHA reiterated the Secretary-General’s concern that infectious disease would break out unless more assistance was allowed into the region. OCHA observed that less than one-third of those affected by the cyclone had received assistance.<sup>10</sup>

The EU met to discuss its response to the cyclone and the French proposal to invoke the Responsibility to Protect. ‘We have called for the ‘responsibility to protect’ to be applied in the case of Burma’, France’s junior Minister for Human Rights, Rama Yade, told reporters.<sup>11</sup> Although the EU ministers failed to reach a consensus on the French proposal, the EU’s High Representative for the Common Foreign and Security Policy, Javier Solana, declared that the international community ‘should use all possible means to get aid through to victims of Myanmar’s cyclone’.

**This briefing seeks to clarify whether the blocking of humanitarian assistance by the government of Myanmar/Burma triggers the Responsibility to Protect principle. The Asia-Pacific Centre for the Responsibility to Protect shares the Special Adviser to the UN Secretary-General’s view that it does not, because placing restrictions on the delivery of aid does not constitute a prima facie breach of one of the four crimes that the Responsibility to Protect applies to: genocide, war crimes, crimes against humanity and ethnic cleansing.**

International attention should be focused on finding the quickest and most effective way of delivering assistance to the victims of Cyclone Nargis. As such, the final part of this brief outlines alternative pathways for delivering relief that do not require tenuous legal arguments about the scope of crimes against humanity. The pathway most likely to deliver tangible results is international assistance with the consent and cooperation of the authorities in Myanmar/Burma. This can be achieved bilaterally, but a massive operation is best achieved by the UN working with regional organizations such as ASEAN and regional powers such as India and China, though the latter’s capacity to assist has been greatly inhibited by the earthquake in Sichuan province. The starting point should be an assessment of needs by those agencies that are already on the ground in the Irrawaddy Delta region. Consensus in the Security Council is now very unlikely due to residual opposition, careless use of the Responsibility to Protect, and talk of military intervention. Moreover, those that have invoked Responsibility to Protect in relation to Cyclone Nargis should also be aware that by misapplying the principle they have damaged efforts to strengthen international consensus on the principle, especially in Asia. This will make it more difficult in the near future to build agreement on institutional reforms necessary to better prevent and protect populations from genocide, war crimes, crimes against

humanity and ethnic cleansing and mobilize the political will to act in cases where those four crimes are committed.

## **Cyclone Nargis and the Responsibility to Protect: The Global Debate**

On May 7, French Foreign Minister Bernard Kouchner called for the UN to invoke R2P in relation to Cyclone Nargis in order to secure the delivery aid without the approval of the government of Myanmar/Burma. Kouchner told reporters that:

"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 U.N. resolution which authorizes the delivery (of aid) and imposes this on the Burmese government".

In the days that followed this proposal was widely taken up, especially in Europe and North America. Media commentators in the US, UK and Australia especially have argued that the international community should live up to its responsibility to protect, proclaimed at the 2005 World Summit and deliver aid without the government's consent. The commentators disagree, however, about the most appropriate model. Many of them suggest that the responsibility to protect could be invoked to bypass the Security Council, which is unlikely to authorise the delivery of aid due to opposition from China, Russia, Indonesia and South Africa.

Some point to the international relief efforts in Iraqi Kurdistan in 1991, when the UK, France and US established 'safe havens' to protect Kurds from Saddam's army without UN sanction. One academic pointed to Kosovo as an example, arguing that the West should invoke the responsibility to protect as a way of bypassing the Security Council and be prepared to fight their way into Myanmar/Burma just as NATO fought its way into Kosovo.<sup>12</sup> These academic viewpoints were beyond the scope of what was actually being proposed. For their part, the French government merely asked for the Security Council to be briefed by the UN's Emergency Relief Coordinator and proposed a resolution calling on Myanmar/Burma to permit unfettered humanitarian access. The furthest the US has gone has been to suggest that it might consider aerial relief drops to cyclone affected areas without government consent.

The first question we need to ask is whether Myanmar/Burma's reluctance to accept unfettered international aid triggers the Responsibility to Protect.

### **What is Responsibility to Protect?**

World leaders unanimously adopted R2P at the United Nations World Summit in 2005. Paragraphs 138 and 139 of the Summit's Outcome Document declared:

138. 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, including their incitement, through appropriate and necessary means. We accept that responsibility and will act

in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

From these two paragraphs it is clear that the Responsibility to Protect entails four solemn pledges:

1. All states accept that they have a responsibility to protect their own citizens from genocide, ethnic cleansing, war crimes and crimes against humanity.
2. The international community will encourage and assist states in the fulfillment of their responsibility, including by helping states to build the necessary capacity and assisting states under stress.
3. The international community has a responsibility to use diplomatic, humanitarian and other peaceful means to protect people from genocide, ethnic cleansing, mass atrocities and war crimes, through either the UN or regional arrangements.
4. The UN Security Council stands ready to use the full range of its Chapter VII powers, with the cooperation of regional organizations where appropriate, in cases where peaceful solutions are inadequate and national authorities manifestly fail to protect their citizens from genocide, war crimes, ethnic cleansing and crimes against humanity.

A year later, in 2006, the Responsibility to Protect was unanimously reaffirmed by the United Nations Security Council in Resolution 1674, which stated the Council's determination to protect civilians.

## **What types of acts does R2P apply to?**

Responsibility to Protect deals with four specific crimes that are defined in international humanitarian law. The principle document for understanding the nature of these crimes is the Rome Statute of the International Criminal Court.

### *Genocide*

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a. Killing members of the group;
- b. Causing serious bodily or mental harm to members of the group;
- c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d. Imposing measures intended to prevent births within the group;
- e. Forcibly transferring children of the group to another group.

### *War Crimes*

Because R2P is primarily concerned with the responsibility of a state to protect its own citizens, the following definition of war crimes is limited to acts in armed conflicts that take place within the territory of a state. They do not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature, but to protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Any of the following acts in grave breach of the Geneva Conventions:

- a. Committing murder, mutilation, cruel treatment and torture;
- b. Committing outrages of personal dignity, including humiliating and degrading treatment;
- c. Taking hostages;
- d. Passing sentences and carrying out executions without fair trial and due recognition of judicial guarantees.

Any of the following acts as part of a non-international armed conflict:

- a. Intentionally directing attacks against civilians, humanitarian workers or peacekeepers;
- b. Intentionally directing attacks against facilities, transport and personnel using the distinctive emblems of the Geneva Convention in conformity with international law;
- c. Intentionally directing attacks against buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals or areas where sick and wounded are collected;
- d. Pillaging a town;

- e. Committing rape, sexual slavery, enforced prostitution or forced pregnancy or enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- f. Conscripting or enlisting child soldiers;
- g. Ordering the displacement of the civilian population for reasons related to the conflict;
- h. Killing or wounding treacherously a combatant adversary;
- i. Declaring that no quarter will be given;
- j. Subjecting persons in power of another party to the conflict to torture or mutilation;
- k. Destroying or seizing the property of an adversary unless it is an imperative demanded by the necessities of the conflict.

### *Ethnic Cleansing*

The policy of a particular group to systematically displace or deport another group from a particular territory on the basis of religious, ethnic or national origin. Ethnic cleansing differs from genocide in that the intent of the perpetrator may not be to destroy in whole or in part a group, but to create an ethnically homogenous territory.

### *Crimes Against Humanity*

Any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law,
- i. Enforced disappearance of persons;
- j. The crime of apartheid;
- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

For acts to be considered crimes against humanity they must be more than isolated or sporadic commissions of the above abuses. Rather, acts constitute crimes against humanity when they are part of an established pattern of cruelty. Although crimes against humanity overlap with genocide and war crimes, crimes against humanity differ from genocide in that they do not implicate the intent to “destroy in whole or in part” a group, and they differ from war crimes in that they may occur in times of peace as well as war.

## **Does this Apply in Myanmar/Burma in Relation to Humanitarian Access after Cyclone Nargis?**

Understood properly, it is clear that at present 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. The Responsibility to Protect should not, therefore, be invoked at this time. As Edward Luck, Special Adviser to the Secretary-General suggested:

*'...it would be a misapplication of responsibility to protect principles to apply them at this point to the unfolding tragedy in Myanmar...the Outcome Document of the 2005 [World] Summit limited their application to four crimes and violations: genocide, crimes against humanity, war crimes and ethnic cleansing. We must focus our efforts on implementing these principles in these four cases, as there is no agreement among the Member States on applying them to other situations, no matter how disturbing and regrettable the circumstances'.*

It has been suggested that if the Myanmar/Burma government is deliberately withholding aid to people who are facing the immediate risk of death, it may be guilty of 'crimes against humanity'. Recall that according to the Rome Statute a 'crime against humanity' includes: 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'. Writing in *The Guardian* newspaper, Director of the International Crisis Group, Gareth Evans, wrote that it might be time to consider invoking the Responsibility to Protect because, 'there is at least a prima facie case to answer for their [the government of Myanmar/Burma] intransigence being a crime against humanity – of a kind which would attract the responsibility to protect principle'.<sup>13</sup> In a similar vein, John Virgoe, the International Crisis Group's Southeast Asia Director told reporters that whilst his organization "was not setting out a blueprint for international intervention – we're one step earlier than that – it is getting close to an R2P situation' presumably because of the potential commission of crimes against humanity.<sup>14</sup>

At the present time, this is a tenuous line of argument.

Crimes against Humanity involve acts that are committed as part of a widespread or systematic attack directed against any civilian population. It is not the case that the government of Myanmar/Burma is engaged in such attacks in the Irrawaddy Delta region. Furthermore, it is not the case that the government of Myanmar/Burma is denying *all* aid, or preventing aid agencies already deployed in the region. Therefore, at present, there is no evidence of widespread intent by the authorities to cause great suffering. As such, this condition for a crime against humanity is not yet satisfied.

Even if there were, albeit tenuous, grounds for arguing that Myanmar/Burma had 'manifestly failed' to fulfill its Responsibility to Protect because it had committed crimes against humanity by restricting the inflow of foreign assistance – and we should reiterate that the Asia-Pacific Centre for the Responsibility to Protect sees no such grounds at present – there would still be compelling reasons to think that this would be an inappropriate path to take.



### *Opposition in the Security Council*

Several Security Council members have made it clear that they would block any attempt to use the Council to impose assistance against the wishes of the Myanmar/Burma government. China argues that the situation in Myanmar/Burma is a natural disaster and not a matter of ‘international peace and security’, which places the crisis outside the remit of the Security Council. There are other UN avenues, China argues, that are more appropriate for coordinating the delivery of international assistance. Some critics of the Chinese position point to the fact that in 1992, China permitted the passage of Resolution 794 (3 Dec. 1992) which identified human suffering in Somalia as a threat to international peace and security.<sup>15</sup> In that case, however, China argued that because the Somali state had collapsed, sovereignty did not apply. Obviously, the same cannot be said of Myanmar/Burma.

China’s position is supported by several influential non-permanent members. Indonesia shares China’s view and has stated that ‘there are other better forums to discuss the humanitarian dimension of the Myanmar situation’ and that ‘the last thing we would want is to give a political spin to the technical realities and the situation on the ground’.<sup>16</sup> It can be safely assumed that Asia’s other non-permanent member of the Security Council, Vietnam, shares Indonesia’s view on this matter. South Africa has also indicated its scepticism about the effectiveness and appropriateness of a Security Council resolution on this matter.

It is likely that China, Indonesia and Vietnam would have been skeptical about involving the Security Council in the international response to Cyclone Nargis irrespective of the proposals actually put on the table. However, it is clear that their positions have hardened since Kouchner’s proposed invocation of the Responsibility to Protect because they do not believe that the principle applies in this case and are concerned about the potential for its scope to be broadened. At the time of writing, there is little chance of mobilizing the Security Council on this matter and it is fair to conclude that the misapplication of the Responsibility to Protect has made consensus in the Council much less likely, harming rather than helping aid efforts in Myanmar/Burma. This result is deeply unfortunate but was entirely predictable.

### *Damage to the Responsibility to Protect Principle*

It is too early to tell what the consequences of misapplying the Responsibility to Protect will be for the principle itself, but given that the principle was already coming under attack in the General Assembly, that Asian governments are among those most skeptical, and that the principle is likely to be on the Agenda of the 2008 General Assembly, there are good grounds for thinking that the misapplication of the Responsibility to Protect to Cyclone Nargis will damage the principle itself.

Ramesh Thakur, a prominent member of the International Commission on Intervention and State Sovereignty and key advocate of the principle, put it best when he observed that:

*“I can think of no better way to damage R2P beyond repair in Asia and most of the rest of the developing world than have the humanitarian assistance delivered into Burma backed by Western soldiers fighting in the jungles of Southeast Asia again. If*

*France has soldiers ready to spare for serious combat, perhaps they could assist of relieve beleaguered Canadian soldiers in southern Afghanistan”.*

Paragraphs 138 and 139 of the 2005 World Summit Outcome Document were carefully negotiated over more than six months and reflect international consensus. They insisted that the Responsibility to Protect applies only to the four crimes described above and that coercive measures must be authorized by the Security Council. To apply the principle to humanitarian catastrophes other than the four specified in 2005 is not only a misapplication but it comes with serious consequences. Concerned that Western states will make a habit of expanding the principle’s scope, it is likely that Asian and other developing states will seek to backtrack from the commitments they made in 2005. They are likely to have the opportunity to do this at this year’s General Assembly and they now have good reason to launch a conceptual assault on the 2005 commitment and efforts to translate it ‘from words into deeds’.

This is more than an idle theoretical problem. If the international community were to backtrack on the commitments in made in 2005, this would have practical consequences for the populations that are victims of genocide, war crimes, crimes against humanity and ethnic cleansing. It will make it harder to forge consensus on the preventive and protective measures needed in those cases; more difficult to appropriate political will and material resources to enact the institutional reforms thought necessary to better prevent these crimes – such as the improvement of the UN’s early warning capacity that was specifically referred to by the World Summit; and it will slow progress on doctrinal thinking about the practical steps that can be taken to better protect threatened populations. Progress has been made on all these fronts since 2005 – albeit at a snail’s pace – and clearly cases such as Darfur, the Ituri province in Congo, the continuing abuses perpetrated by the Lord’s Resistance Army in Uganda, and systematic attacks on civilians by insurgents and terrorists in Iraq and Afghanistan remind us that much more needs to be done. Misapplying the Responsibility to Protect will stall this progress (if it has not already) without actually improving the situation for humanitarian corridors with respect to Cyclone Nargis in Myanmar/Burma.

### *Impractical*

Those who have attempted to invoke the Responsibility to Protect have not considered the practicalities of what they propose. At the most extreme end of the scale, it is difficult to see how Andrew O’Neil’s proposal for a full-scale invasion would improve the lot of the victims of Cyclone Nargis.<sup>17</sup> Such an invasion would take weeks to mobilize, would be opposed by most states globally and every state in the region, and would ultimately be counter-productive—an invasion would increase rather than mitigate the number of civilian casualties, pose greater risk to humanitarian workers and hinder efficient aid delivery. If infectious disease is likely – as the UN and NGOs say it is – then an armed intervention would also be too little, too late and would exert a massive humanitarian toll. Proposals like this are not helpful. They damage the Responsibility to Protect principle and offer no practical suggestions for saving lives in the aftermath of Cyclone Nargis.

At the more sensible end of the scale are proposals for air drops of aid or for relief workers to be dispatched into the region without the approval of the government of Myanmar/Burma.<sup>18</sup> The US government has been associated with proposals for non-

consensual air drops, but US Defence Secretary Robert Gates, has intimated that the US recognizes the potential need to operate with the government's consent. The most urgent needs are food, drinking water, and medical supplies – food can be dropped from aircraft, but water purification kits and medical supplies need to be distributed by people on the ground. Air drops are notoriously imprecise and there is a strong chance in this case that a substantial portion of the aid would end up in the water or seized by the authorities. Without people on the ground to ensure that the aid gets to the neediest, aid dropped from the air tends to find those members of the affected population who are strongest and most mobile. Furthermore, it is unlikely that air drops could deliver sufficient assistance and acting without the government's consent is likely to make it more difficult to persuade the regime to permit more international aid workers on the ground. It would make cooperation between NGOs and the military regime all but impossible, hindering rather than helping the small amount of international relief work that is already underway.<sup>19</sup>

The proposed dispatch of aid workers without government consent could get around some of these problems. Indeed, Medecins sans Frontieres has been able to operate in the affected areas only because it deployed there before the military was able to mobilize its response. However, this strategy comes with other additional problems. Most notably, it would be impossible to get the volume of assistance required into the affected areas without government cooperation. It may also harm the efforts by aid agencies such as Medecins sans Frontieres and Save the Children, if the government decided to demand the withdrawal all foreign aid workers in retaliation. It should be remembered that the government has already shown itself willing and able to deport relief workers who enter without visas.

The main problem with both of these approaches is that they threaten to divert attention away from the delivery of humanitarian relief, making cooperation with the local authorities more difficult, regional support less forthcoming and ultimately delaying assistance to those who need it most.

## What Can Be Done?

Alexander Woollcombe, a spokesperson for Oxfam argued that:

*“At this crucial stage of the response, the theoretical debate about the application of R2P needs to take a back seat to the overwhelming imperative to get more aid to people as quickly as possible”.*<sup>20</sup>

The primary objective for the international community and NGOs is to deliver the necessary assistance to vulnerable populations as quickly as possible. In the previous section we argued that not only was it inappropriate to apply the Responsibility to Protect to this case, but that its invocation was never likely to improve humanitarian access and, if anything, it has made access and consensus more problematic.

In his important contribution to the debate, Ramesh Thakur identified four potential avenues for securing improved humanitarian access to the affected areas of Myanmar/Burma.<sup>21</sup> Advocates seeking to improve humanitarian access ought to focus their attention on these four pathways, instead of misapplying the Responsibility to Protect.

### *Bilateral engagement with the government of Myanmar/Burma*

The quickest way of getting aid into Myanmar/Burma is through bilateral agreements with the government. Although UN/ASEAN initiatives are vitally important, at this stage of the crisis, multilateral approaches are likely to take too long to get off the ground to ensure delivery of the most urgently needed relief supplies.<sup>22</sup>

Those countries and agencies that have secured access have done so through bilateral agreements with the government of Myanmar/Burma and by complying with the government's demands. Agencies such as Medecins sans Frontieres, Save the Children, World Vision, UNICEF, the World Health Organization and World Food Programme are present in the affected areas. Myanmar/Burma has accepted aid flights from Australia, US, India and China and has granted visas for aid workers from Bangladesh, China, India and Thailand as well as a small number of visas for aid workers of other nationalities. The World Health Organization reports that it has distributed water purification kits in six of the seven most affected areas. Where progress has been made – and there is no denying that progress is too slow – it has come through bilateral negotiation with the authorities. Because this approach is working better than any other, a good place to start would be to enhance and expand bilateral dialogue between donors, NGOs and the government.

It is also important to recognize that the effective and timely delivery of assistance is best managed with the cooperation and consent of the local authorities. The facts on the ground are that the authorities have the local knowledge and networks, the authority and the infrastructure necessary to affect timely and effective delivery. Trying to operate without the consent and cooperation of the government would significantly increase the costs associated with delivering aid, hamper aid effectiveness, cause major delays and contribute to further suffering.

### *Regional assistance coordinated by ASEAN*

The countries and regional associations best placed to assist vulnerable populations in Myanmar/Burma are those closest to it. Myanmar/Burma is a member of ASEAN and therefore we should look to ASEAN for leadership. To date ASEAN has enjoyed more access than any other international or regional organization. It is noteworthy that whilst the UN Secretary-General was unable to contact the military leadership in Myanmar/Burma, ASEAN ministers have had high-level discussions and Myanmar/Burma have agreed to brief a meeting of ASEAN foreign ministers in Singapore. The impetus for ASEAN to take a lead on this matter is coming from within the Association itself, with one Singapore-based analyst commenting that ‘ASEAN risks being viewed as an ineffective regional body’ if it fails to take the lead.<sup>23</sup> ASEAN will be careful not to overreach its principle of non-interference in relations with Myanmar/Burma but its adherence to this principle may also explain why the Burma/Myanmar government is likely to be more receptive to working with ASEAN than it is to working with the UN, EU or other external bodies.

On 12 May, the government granted access to an ASEAN disaster assessment team, which was dispatched to investigate the nature and scale of the problem and make recommendations about how ASEAN might assist Myanmar/Burma.

On 14 May, Thai Prime Minister, Samak Sundaravej, visited Myanmar/Burma but failed to secure an agreement on easing visa and access restrictions for foreign aid workers. Although a specific agreement was not reached, in the days that followed the government has accepted more foreign aid and agreed to grant visas to 160 disaster relief experts from Bangladesh, China, India and Thailand.

On 15 May, ASEAN members met with the UN Secretary-General, Ban Ki-moon. Ban assured ASEAN that the issue of aid for Myanmar/Burma would not be politicised and that he would lead the effort in ‘a purely, genuinely humanitarian fashion’. The UN and ASEAN discussed appointing a joint UN/ASEAN humanitarian coordinator, establishing a regional hub for aid supplied outside Myanmar, and hosting a high-level pledging conference.<sup>24</sup>

ASEAN foreign ministers will meet on 19 May in Singapore to discuss ways to help Myanmar/Burma. The meeting will focus on the report of the ASEAN disaster assessment team.<sup>25</sup> Relatively early on in the crisis, several ASEAN members – including Singapore, Thailand, Indonesia and Malaysia – expressed their willingness to make a significant contribution to the emergency relief effort. In the meantime, ASEAN has been working with the World Bank and OCHA to develop a long-term rehabilitation plan.

ASEAN’s Secretary-General, Surin Pitsuwan, has also been working hard to assist. On the one hand, he has been trying to coordinate the organization’s relief effort and secure funds from multiple sources. He has also communicated with the Myanmar/Burma Ministers for Foreign Affairs and Social Welfare, Relief and Resettlement, appealing for quick admission for more ASEAN relief and rescue teams.<sup>26</sup> He told an audience in Washington that ‘we are trying to work around a very, very strict resistance and mentality and mindset that have been there for a long, long time’.<sup>27</sup> Despite the slow progress, the Myanmar/Burma government appears more receptive to ASEAN’s initiatives than they are to offers of assistance from the West.

The government of Myanmar/Burma has responded cautiously and slowly to Surin's overtures but ASEAN has achieved more than other governments or international organisations. It has conducted assessments and persuaded the government to discuss cooperation and assistance. For this reason, at present the ASEAN initiative stands as the best opportunity for improving access and quickening the delivery of humanitarian relief. External actors should therefore focus on addressing two issues:

1. How can they best support Surin's effort to persuade the government to loosen restrictions on aid?
2. How can they best contribute to ASEAN's capacity to manage the delivery of the massive amounts of aid required?

Although every organisation and country will answer these questions differently. It is important that governments focus on ways of maximising ASEAN's capacity, be it through cash contributions marshalled through an ASEAN/UN pledging conference, the provision of supplies to be delivered by ASEAN teams, or the provision of specialist equipment, airlift and other transport capabilities. Many of the larger NGOs also have branches based in Southeast Asia. Working through these branches, alongside ASEAN's efforts, may prove to be a fruitful addition to bilateral communication with the government. Finally, the international community should encourage and the establishment of joint ASEAN/UN initiatives, such as the creation of a joint humanitarian coordinator and aid supplies hub.

#### *Measures supported by regional powers*

India and China are the region's major powers. Both have economic and strategic interests in Myanmar/Burma and whilst they cannot determine Myanmar/Burma government policies, they both have significant influence. As such, concerned governments and NGOs should establish communications with China and India and consider ways in which those two countries might assist. To date, international attention has focused on efforts to persuade India and China 'to put pressure' on the government of Myanmar/Burma. Some suggest 'shaming' China into action.<sup>28</sup> Not only is 'shaming' an ineffective strategy - not least when China's position enjoys widespread global and regional support - it is a very narrow agenda, made harder by attempts to invoke the Responsibility to Protect. Such a strategy is disingenuous – and rather arrogant – to seek Indian and Chinese help whilst threatening to invoke international principles without their support.

There are clear signs that Chinese and Indian support can achieve important results. It is no surprise that the single largest granting of visas to disaster relief experts went to Bangladeshi, Indian, Chinese and Thai nationals. Moreover, the US was able to persuade the Myanmar/Burma government to accept military American aid flights because Secretary of State Condoleezza Rice chose to seek out Chinese support rather than grandstand at the UN.<sup>29</sup>

In addition to diplomatic leverage, China and India both have substantial relief resources to contribute – though Chinese resources have been stretched by the Chengdu earthquake. Recently, China has recognized its responsibilities as a permanent member of the Security Council and as a global power in making a large and effective contribution to UN peace operations. Of course, India has a long and

proud tradition of support for the UN's activities throughout the world. The international community should call upon China and India to show leadership and – just as importantly – demonstrate a preparedness to follow their lead. This means working with these governments – as the Americans have done – rather than adopting a confrontational attitude as the French have done.

*Alternative measures through the UN*

It seems clear that although the engagement of the Security Council was always a remote possibility, this avenue is now almost entirely closed off due to the dispute about the applicability of the Responsibility to Protect. There are also concerns that engaging the Security Council on this matter would complicate the Council's on-going concern with the human rights situation in Myanmar/Burma.<sup>30</sup>

An important pathway lies in the potential for joint ASEAN/UN initiatives and these initiatives should be widely supported.

Amidst the furor about the Responsibility to Protect, it has been overlooked that China has argued that there are alternative pathways by which the UN could be engaged with the provision of humanitarian relief. Clearly, the most obvious pathway lies in OCHA's ability to oversee a large UN relief effort comprising the World Food Program, UNICEF and other UN agencies. Given that China itself has pointed to these alternative pathways, OCHA in Geneva should work hard to develop a plan in consultation with the Chinese government.

## Conclusion

At present, the post-Cyclone Nargis situation in Myanmar/Burma falls outside the scope of the Responsibility to Protect. The use of the Responsibility to Protect in this context is a misapplication. The attempt to expand the scope of R2P beyond the World Summit consensus has predictably made it more difficult to secure improved humanitarian access to the affected areas of Myanmar/Burma and more difficult to forge an international consensus on the most appropriate form of assistance. Misapplication of the Responsibility to Protect also damages the principle and makes it less able to contribute to better prevention and protection of vulnerable populations from genocide, war crimes, crimes against humanity and war crimes.

Rather than focusing on the Responsibility to Protect, the international community should be focused on those measures that are likely to improve access and contribute to the delivery of life-saving assistance. There are four principal ways of doing this:

- a. Through bilateral agreements with the government.
- b. By supporting regional solutions sponsored by ASEAN.
- c. By seeking and following the leadership of China and India.
- d. By exploring alternative pathways for mobilizing UN agencies.



## Notes

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<sup>1</sup> On 14 May, the government of Myanmar/Burma put the death toll at 43,318. 'Myanmar Cyclone Death Toll soars Above 43,000', *Los Angeles Times*, 15 May 2008 and Aung Hla Tun, 'Foreign Powers Lean on Myanmar to Open up Aid', *Reuters*, 15 May 2008.

<sup>2</sup> Aung Hla Tun, 'Foreign Powers Lean on Myanmar to Open up Aid', *Reuters*, 15 May 2008

<sup>3</sup> 'World Fears for Plight of Myanmar Cyclone Victims', *New York Times*, 13 May 2008.

<sup>4</sup> 'Ban Ki-moon to Send UN's Humanitarian Chief to Myanmar', *UN News*, 16 May 2008.

<sup>5</sup> 'World Fears for Plight of Myanmar Cyclone Victims', *New York Times*, 13 May 2008.

<sup>6</sup> 'Myanmar Cyclone Death Toll soars Above 43,000', *Los Angeles Times*, 15 May 2008.

<sup>7</sup> Julian Borger and Ian MacKinnon, 'Bypass Junta's Permission for Aid, US and France Urge', *The Guardian*, 9 May 2008

<sup>8</sup> 'World Fears for Plight of Myanmar Cyclone Victims', *New York Times*, 13 May 2008.

<sup>9</sup> Cited in Security Council Report, *Update Report: Myanmar*, no. 4, 14 May 2008.

<sup>10</sup> Security Council Report, *Update Report: Myanmar*, no. 4, 14 May 2008.

<sup>11</sup> 'World Fears for Plight of Myanmar Cyclone Victims', *New York Times*, 13 May 2008.

<sup>12</sup> Andrew O'Neil, 'Kosovo Aid the Model', *The Australian*, 14 May 2008.

<sup>13</sup> Gareth Evans, 'Facing up to Our Responsibilities', *The Guardian*, 12 May 2008.

<sup>14</sup> Leigh Phillips, 'EU Ready to Support "Any Initiative" for Burma', *EUobserver*, 13 May 2008.

<sup>15</sup> S/PV.3145, 3 Dec. 1992.

<sup>16</sup> Security Council Report, *Update Report: Myanmar*, no. 4, 14 May 2008.

<sup>17</sup> Andrew O'Neil, 'Kosovo Aid the Model', *The Australian*, 14 May 2008.

<sup>18</sup> Ivo Daalder and Paul Stares, 'The UN's Responsibility to Protect', *International Herald Tribune*, 13 May 2008.

<sup>19</sup> Hannah Ruth Chia, 'Crisis in Myanmar and the Responsibility to Protect', *RSIS Commentaries (S. Rajaratnam School of International Studies, Nanyang Technical University Singapore)*, 14 May 2008, p. 2.

<sup>20</sup> 'World Fears for Plight of Myanmar Cyclone Victims', *New York Times*, 13 May 2008.

<sup>21</sup> This is adapted from the excellent suggestions put forward by Ramesh Thakur, 'Armed Force Not Part of the Responsibility to Protect', *Canberra Times*, 12 May 2008.

<sup>22</sup> Hannah Ruth Chia, 'Crisis in Myanmar and the Responsibility to Protect', *RSIS Commentaries (S. Rajaratnam School of International Studies, Nanyang Technical University Singapore)*, 14 May 2008, p. 2.

<sup>23</sup> Hannah Ruth Chia, 'Crisis in Myanmar and the Responsibility to Protect', *RSIS Commentaries (S. Rajaratnam School of International Studies, Nanyang Technical University Singapore)*, 14 May 2008, p. 2.

<sup>24</sup> 'Ban Ki-moon to Send UN's Humanitarian Chief to Myanmar', *UN News*, 16 May 2008.

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- <sup>25</sup> Security Council Report, *Update Report: Myanmar*, no. 4, 14 May 2008.
- <sup>26</sup> ‘Redemption Time for ASEAN and Burma’, *The Nation* (Bangkok), 12 May 2008.
- <sup>27</sup> Aung Hla Tun, ‘Foreign Powers Lean on Myanmar to Open up Aid’, *Reuters*, 15 May 2008.
- <sup>28</sup> Ivo Daalder and Paul Stares, ‘The UN’s Responsibility to Protect’, *International Herald Tribune*, 13 May 2008.
- <sup>29</sup> Ramesh Thakur and Thomas G. Weiss, ‘R2P: From Idea to Norm – and Action?’, *Global Responsibility to Protect*, 1 (1) 2009, forthcoming.
- <sup>30</sup> Security Council Watch, *Update Report: Myanmar*, no. 4, 14 May 2008.

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*The Asia-Pacific Centre for the Responsibility to Protect is an Associate of the Global Centre for the Responsibility to Protect. With offices in Brisbane (Australia) and Yogyakarta (Indonesia), the Centre's mission is to conduct research, policy work and engage in advocacy and outreach aimed at furthering acceptance of the Responsibility to Protect within the Asia-Pacific Region and worldwide. The Centre contributes to the development of concrete measures to fulfill the R2P by working in cooperation with the Global Centre for the Responsibility to Protect, the United Nations, regional and sub-regional organizations, government bodies and non-governmental organizations to support and enhance understanding, consensus and practical initiatives.*

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