



SEEKING JUSTICE FOR BURMA

A Case for Revoking the Credentials of the SPDC

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On behalf of:

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EXECUTIVE SUMMARY

On 2 May 2008, Cyclone Nargis made landfall in Burma, destroying everything in its path and killing thousands. The State Peace and Development Council (SPDC) knew it was coming and failed to issue an adequate warning to the people in harm's way. Civilized people were shocked in subsequent days by the countless accounts of official interference and outright obstruction of the international efforts to aid survivors. Even as it blockaded humanitarian relief, the junta was unable to squelch press reports of misappropriated supplies, aid flowing only where local officials were bribed, and starving refugees whose plight was worsened by their own government. The world stood ready and waiting to help, but its aid was left rotting on docks and airstrips.

These actions constitute crimes against humanity. The failure to warn and the withholding and abuse of humanitarian aid, both of which substantially increased the death toll, amount to the crime against humanity of murder. The widespread withholding of supplies and obstruction of aid workers, which created a man-made catastrophe in the wake of a natural disaster, undoubtedly fall under the crime against humanity of extermination. The SPDC's removal of refugees from aid shelters and its compulsory return of these people to dangerous areas constitute the crime against humanity of forced transfer. Finally, all of these actions, as well as the distribution of tainted supplies and the conditioning of aid allocation on votes, pledging military service, and forced labor rise to the crime against humanity of inhumane acts. This deplorable conduct by the SPDC when its people were in need must not be tolerated.

Hugo Grotius once concluded that a state cannot conduct "atrocities against its subjects which no just man can approve."

No just man, looking at the conduct of the military government in Burma could approve or allow such behavior. The international community must act when a purported government abuses its power and condemns its own people.

A crucial first step in righting the numerous wrongs in Burma is the rejection of the credentials of the military junta's representatives to the U.N. General Assembly. The legitimate and democratically-elected government, elected in 1990, should represent the people of Burma before the nations of the world.



UNITED NATIONS CREDENTIALS

At its very core, the United Nations cannot function without valid representation of the people and governments of member nations. Article 1 of the U.N. Charter commits the organization to “achiev[ing] international cooperation in solving international problems of an economic, social, cultural, or humanitarian character.” However, the U.N. avoids infringing upon sovereignty and passing judgment on the legitimacy of member states’ governments. Consequently, there exists no systematic process of assessment of a regime’s legal capacity to assert rights, incur obligations, and authorize acts on behalf of that member state. Despite this reluctance, the U.N. is often confronted with situations where it has no choice but to determine such legitimacy.

The submission and consideration of credentials to the U.N. General Assembly is addressed by Rules of Procedure 27 through 29. However, these rules leave a great deal of discretion to the Credentials Committee, requiring only that the Committee “examine the credentials of representatives and report without delay.”¹ In the case where the legitimacy of the issuing authority is in question, Resolution 396(V), 14 December 1950, provides that

whenever more than one authority claims to be the government entitled to represent a Member State in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case.²

¹ Rules of Procedure of the General Assembly, G.A. Res. 173 (II), art. IV, rule 28, U.N. Doc. A/520/Rev. 15 (17 Nov. 1947).

² Recognition by the United Nations of the Representation of a Member State, G. A. Res. 396 (V), ¶ 1 (14 Dec. 1950).

These purposes and principles include a determination to “reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women of nations large and small.”³

The State Peace and Development Council (SPDC), the self-proclaimed government of Burma, has a demonstrated record of undermining these purposes and principles, which, as a member of the U.N., it has pledged to uphold.

Traditionally, the Credentials Committee has considered control of the capital and state apparatus to be a determining factor in assessing the legitimacy of the issuing authority. In the 1990s, however, the Committee began to exhibit a willingness to recognize the interests of governments not in physical control.⁴ This is particularly true when the government claiming primacy, though not in territorial control, was democratically elected.⁵ Thus, the Credentials Committee has come to consider other factors in determining legitimacy of the issuing authority, such as the means by which that government achieved and retains power as well as its human rights record.

RISE OF THE STATE PEACE AND DEVELOPMENT COUNCIL

Creation of the State Law and Order Restoration Council

Burma became an independent state on 4 January 1948. In 1962, left-wing general Ne Win staged a successful coup, banned political opposition, suspended the constitution, and introduced the “Burmese

³ U.N. Charter pmb1.

⁴ For example, see the case of Haiti in 1991-94. S.C. Res. 940, ¶ 2, U.N. Doc. S/RES/940 (31 July 1994).

⁵ For example, see the case of Haiti, *supra* note 4, and that of Sierra Leone in 1996-97. General Assembly, Credentials Committee, *First Report of the Credentials Committee*, ¶ 7 (1997).

Way of Socialism.” After 25 years of economic hardship and oppression, the Burmese people held massive demonstrations in 1987 and 1988.⁶

In September 1988, the military responded to the citizens’ unrest by deposing Ne Win’s Burmese Socialist Program Party (BSPP), suspending the constitution, and establishing the State Law and Order Restoration Council (SLORC), now referred to as the State Peace and Development Council (SPDC). Seeking to regain control, the SLORC sent the army into the streets to suppress the ongoing protests. According to estimates, the army killed at least 3,000 people and pushed thousands of others into hiding and exile.⁷ In 1989, the military government officially changed the name of the country to Myanmar.⁸ The SLORC ruled by martial law until national parliamentary elections were held in May 1990.

The SPDC’s Disregard of the 1990 General Election

In the contemporary history of Burma, the 1990 General Elections have been recognized as a significant landmark. After 26 years of military dictatorship, the people of Burma had an opportunity to vote for a government of their choice. The results of the May 1990 elections were an overwhelming victory for Aung San Suu Kyi’s National League for Democracy (NLD) party, which won 392 of the 485

seats, even though she had been placed under house arrest by the SPDC one year prior to the elections.⁹

However, the military junta refused to transfer power to the NLD. The junta had initially promised when they took control in September 1988 that whichever party won the elections could form the new government. After the NLD victory, however, the regime reaffirmed in a formal declaration its pre-election stance that the main purpose of the new assembly must be to draft a new constitution.¹⁰

Despite the promises of General Saw Maung, then head of the SLORC, that the military would go back to the barracks after the election, the SLORC refused to honor the results or call the parliament into session, instead imprisoning many political activists. While heralding democratic reforms, the junta had actually been launching a major offensive upon the opposition NLD party since the 1990 election results materialized.

Since then, the junta has repeatedly targeted the NLD and its supporters. In 2003, as Aung San Suu Kyi traveled around Burma to rally her supporters, the junta harassed her convoy and regularly sought to hamper her progress. In the culmination of the regime’s persecution, on 30 May 2003, Aung San Suu Kyi and a convoy of her supporters were attacked by a group of regime-affiliated thugs in what is now known as the Depayin Massacre. As many as 70 people were killed in the attack and over 100 people arrested. Aung San Suu Kyi and other members of her party were detained, and the military government

⁶ U.S. Department of State, *Background Note: Burma*, <http://www.state.gov/r/pa/ei/bgn/35910.htm> (last updated June 2008). [hereinafter *Background Note: Burma*]

⁷ Global Security, *SLORC Coup in Burma*, <http://www.globalsecurity.org/military/world/war/slorc.htm>; National Coalition Government of the Union of Burma, *A Brief History*, <http://www.ncgub.net/staticpages/index.php/history> (last visited 19 Sept. 2008) [hereinafter NCGUB, *A Brief History*].

⁸ Although the SPDC changed the name of the country to “Myanmar,” the democratically elected but never convened parliament of 1990 does not recognize the name change, and the democratic opposition continues to use the name “Burma.” Out of support for the democratically elected leaders, the U.S. Government likewise uses “Burma.”

⁹ *Background Note: Burma*, *supra* note 6.

¹⁰ Derek Tonkin, *The 1990 Elections in Myanmar (Burma) Broken Promises or a Failure of Communications?*, <http://www.burmalibrary.org/docs/DT-Elections.html> (last visited 19 Sept. 2008).

forcibly closed the offices of the NLD.¹¹ Aung San Suu Kyi has spent a total of more than 12 years under house arrest. Today, only the NLD headquarters in Rangoon is open, as all the other offices remain closed, and Aung San Suu Kyi and NLD Vice Chairman U Tin Oo remain under house arrest.¹²

The Unsuccessful Attempt at Drafting a Constitution

More than 1,000 delegates gathered in December 2005 to begin drafting a constitution, which the junta claimed was a step toward democracy.¹³ The convention adjourned in late January 2006 with little progress. In September 2007, representatives to the convention revealed a draft constitution that ensures that the military will continue to control the ministries and legislature and will have the right to declare a state of emergency. The document also limits the rights of opposition political parties, which had been excluded from the convention.

The delegates, who were hand-selected by the junta, had been meeting on and off since 1993 for the sole purpose of creating a constitution. It took over 14 years to produce even a draft, a strategic move on the part of the SPDC meant to delay the transfer of power to the legitimate winners of the 1990 elections.

Inhibiting Free Speech through Governmental Violence

In a stunning show of defiance, widespread pro-democracy protests—prompted by a sharp increase in fuel prices—erupted throughout the country in August 2007. Participation in the peaceful protests ballooned over several weeks, and

Buddhist monks joined the throngs of protesters when government troops used force against demonstrators in early September. The monks emerged as the leaders of the protest movement and gained international sympathy and support.

On 26 September 2007 the military cracked down on the protesters, firing into crowds, raiding pagodas, and arresting monks. The protests were by far the largest in the country in 20 years, with as many as 100,000 people marching. At least nine people were killed by the junta-controlled military. Between 3,000 and 4,000 political prisoners were detained, including children and pregnant women, 700 of whom were believed still in detention at the end of 2007. At least 20 were charged and sentenced under anti-terrorism legislation in proceedings which did not meet international fair trial standards. In a statement, the United Nations Security Council condemned the crackdown, saying it “strongly deplores” the violence unleashed on the protesters.¹⁴

CYCLONE NARGIS

Picture of the situation

On 2 and 3 May 2008, Tropical Cyclone Nargis struck Burma, battering the country with 209 kilometer per hour (130 mph) winds and a 3.7 meter (12 foot) storm surge.¹⁵ It devastated most of southern Burma, especially the densely populated Irrawaddy (Ayeyarwady) Delta and the country’s most populous city, Rangoon (Yangon). The U.N. estimated that the death toll from the cyclone could be “in the

¹¹ The Burma Campaign UK, *About Burma*, <http://www.burmacampaign.org.uk/aboutburma.html> (last visited 19 Sept. 2008) [hereinafter The Burma Campaign UK].

¹² Tonkin, *supra* note 10.

¹³ NCGUB, *A Brief History*, *supra* note 7.

¹⁴ The Burma Campaign UK, *supra* note 11

¹⁵ Reuters, *VIDEO: Cyclone devastates Myanmar*, 3 May 2008, http://www.reuters.com/article/homepageCrisis/idUS120991853412_CH_2400.



Victims of the cyclone
(courtesy of the National League for Democracy)

region of 100,000 or even more,”¹⁶ with 220,000 people believed missing.¹⁷ The Red Cross offered an even higher estimate, approximating as many as 128,000 deaths.¹⁸ Both figures far surpassed the SPDC’s tally,¹⁹ which stands at 84,530 dead and 53,836 missing.²⁰ The U.N. further estimated that the storm had left 2.4 million people in urgent need of assistance.²¹

Even those who were able to survive the initial impact of the storm are suffering immensely. Aid agencies working in the region report that hundreds of thousands of people are now homeless.²² Data shows that up to 800,000 were forced to flee their

homes.²³ Some are moving from place to place in search of very basic needs: food, water, medical care for injuries sustained during the cyclone and plastic sheeting to protect them from continuing seasonal rains. On 18 May, at least 150,000 people in the Irrawaddy Delta region remained displaced in a mixture of 120 official and unofficial temporary settlements.²⁴

The Post-Nargis Joint Assessment, a report prepared by the Tripartite Core Group (the SPDC, ASEAN, and the U.N.) estimated that by 24 June, Nargis had caused about \$1.75 billion in damage to physical assets in Burma, including the destruction of 450,000 homes, damages to another 350,000 and the loss of thousands of schools, health centers, and religious buildings.²⁵ About 1.5 million acres of farmland were destroyed, with the cyclone affecting 14,597 square kilometers (9,070 mi²) of the Irrawaddy Delta.²⁶ Victims also lost an estimated \$2.3 billion in income, bringing total losses to about 21 percent of Burma’s gross domestic product for the last fiscal year.²⁷ The report also pointed out that Cyclone Nargis was the worst natural disaster in the history of Burma and the most devastating to strike Asia since 1991.²⁸

¹⁶ CNN India, *U.N.: Myanmar deaths could exceed 100,000*, 15 May 2008,

<http://www.cnn.com/2008/WORLD/asiapcf/05/15/myanmar>.

¹⁷ Reuters India, *U.N. says 220,000 reported missing in Myanmar Cyclone*, 11 May 2008,

<http://in.reuters.com/article/topNews/idINIndia-33519920080511>.

¹⁸ *expressindia.com*, *Up to 128,000 dead in Myanmar cyclone: Red Cross*, 15 May 2008, <http://www.expressindia.com/latest-news/Up-to-128-000-dead-in-Myanmar-cyclone-Red-Cross/309997/>.

¹⁹ MSNBC, *Red Cross: Myanmar deaths could top 127,000--U.N. warns of 'second wave' unless military allows more outside help*, 14 May 2008, <http://www.msnbc.msn.com/id/24607348/>.

²⁰ U.N. News, *Efforts to help Myanmar cyclone victims still in relief phase, says top U.N. official*, 21 July 2008,

<http://www.un.org/apps/news/story.asp?NewsID=27438&Cr=Myanmar&Cr1>.

²¹ U.N. News, *Hundreds of thousands may need assistance in cyclone-hit Myanmar – U.N.*, 6 May 2008,

<http://www.un.org/apps/news/story.asp?NewsID=26568&Cr=myanmar&Cr1>.

²² Associated Press, *US increases cyclone aid for Myanmar*, available at Support Myanmar, <http://supportmyanmar.com/>.

²³ *Efforts to help Myanmar cyclone victims still in relief phase*, *supra* note 20.

²⁴ Gregory C. Gottlieb, *Burma in the aftermath of Cyclone Nargis*, 20 May 2008, available at <http://foreignaffairs.house.gov/110/got052008.htm>.

²⁵ Tripartite Core Group, *Post-Nargis Joint Assessment*, July 2008, at 23, available at

http://yangon.unic.org/index.php?option=com_content&task=view&id=260&Itemid=73.

²⁶ Nicky Black, *The humanitarian Response to Cyclone Nargis-No.8*, Applied Research Centre in Human Security, 8 August 2008.

²⁷ Raphael Minder & Amy Kazmin, *Burma Cyclone "caused \$4bn in damage"*, Financial Times, 21 July 2008,

<http://www.ft.com/cms/s/0/f9704fd2-5747-11dd-916c-000077b07658.html>; *Myanmar cyclone damage at a glance*, International Herald Tribune, 21 July 2008,

<http://www.iht.com/articles/ap/2008/07/21/news/Myanmar-Cyclone-Glance.php>.

²⁸ Tripartite Core Group, *supra* note 25, at 1.

Deplorable Actions of the SPDC

Insufficient Warning

There has been widespread criticism of the military junta's failure to issue a timely warning to its citizens in the path of a deadly cyclone.²⁹ The SPDC first learned that a cyclone was brewing in the Bay of Bengal nearly a week before it slammed into Burma, but the SPDC chose to ignore—or even suppress—all warnings.³⁰ The Indian Meteorology Department said it dispatched an initial advisory to the Burmese authorities on 26 April, nearly a week before the cyclone struck land.³¹ “We continuously updated authorities in Myanmar and on Apr. 30 we even provided them details of the likely route, speed, and locations of landfall,” IMD director B.P. Yadav told IPS correspondent in New Delhi, Ranjit Devraj.³²

Although Burma's Meteorology and Hydrology department posted a warning on its official website on 27 April, the information was not widely disseminated. The department only said that a cyclone was forming in the Bay of Bengal and was heading towards Burma.³³ According to MIZZIMA, the state-run media did not issue a cyclone alert until the afternoon of Friday, 2 May.³⁴ Despite a warning being issued, it grossly under-reported the danger of the cyclone, offered only vague warnings, and

gave no instructions on how people should prepare for its landfall. *The New Light of Burma*, a state-run newspaper, only ran a back page article on the day the cyclone struck, which stated that a “severe cyclonic storm” was forecasted to reach the coast of Burma within the next 36 hours and that “under the influence of this storm, rain, or thunderstorms [would] be widespread.”³⁵

Although the state-run television network claimed that “[t]imely weather reports were announced and aired through television and radio in order to keep the people safe and secure nationwide,”³⁶ many Burmese people complained that these notices failed to indicate the severity of the approaching storm or provide instructions on how to prepare for the cyclone's arrival.

Obstructing and Abusing Humanitarian Aid

After Cyclone Nargis hit Burma on 2 May, various states and international aid organizations swiftly mobilized relief operations. By 25 May, the international community had pledged more than \$100 million in aid and technical support.³⁷ For instance, the U.N. Country Team developed a “Flash Appeal” for emergency financial assistance.³⁸ The U.N.'s Central Emergency Response Fund (CERF) also made available \$10 million for projects identified by the Country Team.³⁹ Many nations offered to send doctors and disaster relief teams. Non-governmental organizations and private donors responded generously with cash and in-kind assistance.

²⁹ Michael F. Martin & Rhoda Margesson, *CRS Report for Congress: Cyclone Nargis and Burma's Constitutional Referendum*, 9 May 2008, available at fpc.state.gov/documents/organization/105169.pdf.

³⁰ Mungpi, *Burma knew of cyclone nearly a week before it hit*, MIZZIMA, 06 May 2008, <http://www.mizzima.com/nargis-impact/18-nargis-impact/445--burma-knew-of-cyclone-nearly-a-week-before-it-hit>

³¹ *Id.*

³² Larry Jagan, *BURMA: Cyclone Nargis Exposes Junta's Anti-People Attitude*, IPS, 7 May 2008, <http://ipsnews.net/news.asp?idnews=42272>.

³³ Mungpi, *supra* note 30.

³⁴ Nuwan Waidyanatha, *Cyclone "Nargis" – Time Series Before, During, and After*, LIRNEasia, 9 May 2008, <http://lirneasia.net/2008/05/cyclone-nargis-%E2%80%93-time-series-before-during-and-after/>.

³⁵ *Storm News*, THE NEW LIGHT OF BURMA, 5 May 2008, at 15.

³⁶ Steve Jackson, *Was Burma's Cyclone Predicted?*, BBC NEWS, 6 May 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7386695.stm>.

³⁷ *Donor nations pledge \$100 million in Burma aid*, USA TODAY, 25 May 2008, http://www.usatoday.com/news/world/2008-05-25-burma-sunday_N.htm.

³⁸ United Nations Department of Public Information, *Press Conference on Myanmar Humanitarian Situation*, 6 May 2008.

³⁹ *Id.*

The SPDC appeared at first to welcome the humanitarian assistance.⁴⁰ However, various international organizations have reported that SPDC officials failed to respond to offers for assistance. On 9 May, for example, the U.N. World Food Programme flew into Burma with 38 tons of food, enough to feed 95,000 people per day, but the SPDC impounded the materials.⁴¹ On 12 May, Doctors Without Borders (“MSF”) sent their first aircraft to deliver medical assistance and relief supplies. Though some MSF water and sanitation specialists had been granted visas to enter the country, they were still not allowed into the disaster area.⁴² Until 25 May, nearly the end of the crucial time to rescue victims, hundreds of disaster experts were left stranded outside the country, waiting for visas. Most of those foreigners already inside Burma were confined to Rangoon, prevented by military checkpoints from entering the stricken Irrawaddy Delta.⁴³

The SPDC not only severely restricted international aid but also denied private donors and non-SPDC-affiliated doctors access to the disaster areas.⁴⁴ Officials even blocked government-affiliated doctors from accessing areas outside of Rangoon for the first eight days after the cyclone. One eyewitness reports that as late as 18 May, authorities in Rangoon halted a number of

private relief efforts that had originated in Mandalay.⁴⁵ Furthermore it is estimated that, at best, 20 percent of the 2.4 million people affected had received any aid as of 19 May. Only 250,000 people had received food aid through the World Food Program.⁴⁶

On 25 May, at an international donor conference in Rangoon, the SPDC finally agreed to discuss allowing access to all international relief agencies.⁴⁷ Although SPDC agreed to allow some international assistance, the access it actually granted remained uneven and inadequate. The junta insisted that all aid money and materials be distributed through the Burmese military.⁴⁸ The aiding organizations were still restricted from entering the Irrawaddy Delta, which was the worst-affected area. Supplies only slowly reached affected areas, if at all. Because the door for supplies was opened reluctantly, slowly, and narrowly, this natural disaster has been turned into a man-made catastrophe.⁴⁹

There have also been reports of government-appointed relief personnel abusing the little aid that was accepted.⁵⁰ On 13 May, a resident of Bogalay Township reported that foreign aid was not reaching victims because it had been misappropriated by SPDC supporters who sold the supplies in Bogalay markets.⁵¹ Directors of several relief organizations also reported that some

⁴⁰ *Burmese Storm Toll “Tops 10,000”*, BBC NEWS, 6 May 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7384041.stm>.

⁴¹ Kent Klein, *Aid Groups, Governments Appeal for More Access to Burma*, Voice of America, 9 May 2008, <http://www.voanews.com/english/archive/2008-05/2008-05-09-voa57.cfm>.

⁴² Press Release, Medecins Sans Frontieres, MSF Teams Delivering Aid to the Delta Call for Immediate and Unobstructed Escalation of Relief Operations in Myanmar (16 May 2008), <http://www.msf.org/msfinternational/invoke.cfm?objectid=F15F1F34-15C5-F00A-259D545A936826A4&component=toolkit.pressrelease&method=full.html>.

⁴³ Jonathan Head, *Will Burma keep its word on aid?*, BBC NEWS, 25 May 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7417203.stm>.

⁴⁴ *Myanmar Government Still Blocking Relief*, N.Y. TIMES, 14 May 2008, <http://www.nytimes.com/2008/05/14/world/asia/14myanmar.html>.

⁴⁵ Amnesty International, *Myanmar Briefing: Human rights concerns a month after Cyclone Nargis*, at 2, <http://www.amnesty.org/en/library/info/ASA16/013/2008/en>.

⁴⁶ Gregory C. Gottlieb, *supra* note 24, at 2.

⁴⁷ *Id.* at 3.

⁴⁸ Seth Mydans, *Myanmar Seizes U.N. Food for Cyclone Victims and Blocks Foreign Experts*, N.Y. TIMES, 10 May 2008, <http://www.nytimes.com/2008/05/10/world/asia/10myanmar.html>.

⁴⁹ *Burma in the Aftermath of Cyclone Nargis: Death, Displacement, and Humanitarian Aid* Before the Subcomm. on Asia, the Pacific, and the Global Environment of the H. Comm. on Foreign Affairs, 110th Cong. (20 May 2008) (statement of Scot Marciel).

⁵⁰ NCGUB, *Cyclone Watch-Burma*, 11-14 May 2008, www.ncgub.net/mediagallery/download.php?mid=20080516105120169.

⁵¹ *Relief supplies appropriated by officials in Bogalay*, Burma News, <http://myanmarnews.blogspot.com/2008/05/relief-supplies-appropriated-by.html> (14 May 2008).

international aid was stolen, diverted, or warehoused by Burma's military rulers.⁵² On two occasions in Labutta, one of the hardest-hit towns in the Irrawaddy Delta, U.N. staff caught authorities trying to confiscate or divert a portion of the aid.⁵³ Also during that period, an international NGO noted that the rice the authorities had given it for distribution, supposedly from U.N. stocks, was old and rotten. This raised concerns as to where the high-quality rice was going.⁵⁴ Anecdotal reports also reveal that private donations were abused. In Bogale, a volunteer relief worker said that local officials refused a private donor bringing a truckload of relief goods. They demanded "one third" of whatever was on the truck as their share before the truck would be allowed to continue.⁵⁵ Minister Soe Tha donated three bags of rice, 1,000 eggs, two crates of tomatoes, two boxes of cigarettes, and two boxes of Thai instant noodles, but after Soe Tha had left the area, two firefighters arrived at the shelter and demanded half of what the minister had donated.⁵⁶

Reports also show that the SPDC had conditioned the provision of cyclone-related aid and assistance on people working for or joining the army.⁵⁷ During the week of 11-18 May, authorities sent displaced survivors from Labutta to Myaungmya town and told them that they would not receive food unless they worked.⁵⁸ Around 16 May, SPDC officials ordered people in Set Su village, Bogalay Township, to break rocks and level a field for the construction of a helicopter landing pad in exchange for the U.N. World



UNHRD Aid Sitting on an Airstrip
(Photograph by Peter Casier, May 10, 2008)

Food Programme's biscuits.⁵⁹ During the same period, authorities elsewhere in Bogalay Township gave people rice, soup, and shelter on the condition that they cleared debris and constructed an official camp.⁶⁰ In Pathein on 22 and 23 May, officials visited households and shelters and told people that if they joined the army they would be fed and cared for.⁶¹

Incidents similar to the examples above are taking place throughout the country. Because of the SPDC's deplorable actions, the survivors in Burma are desperate. They live without basic necessities like food, clean water, and shelter. They are forced into hard labor in exchange for humanitarian aid, intended to be given unconditionally, that they so direly need. Thousands of refugees are scattered throughout the country or are attempting to escape illegally to neighboring states. The simple truth is that if they stay inside Burma, they will die.⁶²

⁵² *Aid Groups Say Myanmar Food Stolen by Military*, N.Y. TIMES, 15 May 2008, available at

<http://www.nytimes.com/2008/05/15/world/asia/15myanmar.html>.

⁵³ Amnesty International, *supra* note 45, at 7.

⁵⁴ *Id.*

⁵⁵ *Id.* at 8.

⁵⁶ NCGUB, *A Brief History*, *supra* note 7, at 6.

⁵⁷ Amnesty International, *supra* note 45, at 8.

⁵⁸ *Id.*

⁵⁹ Brian McCartan, *Relief as war in Myanmar*, ASIA TIMES ONLINE, 20 May 2008,

http://www.atimes.com/atimes/Southeast_Asia/JE20Ae01.html.

⁶⁰ Singapore Institution of International Affairs, *Myanmar: Cyclone Nargis Timeline*, 6 June 2008,

<http://www.siiionline.org/?q=programmes/insights/myanmar-cyclone-nargis-timeline>.

⁶¹ Amnesty International, *supra* note 45, at 8.

⁶² *Burma: Men made Disaster took over Natural Disaster*, posting of Htun Aung Gyaw Burma Digest,

<http://burmadigest.wordpress.com/2008/05/15/burma-men-made-disaster-took-over-natural-disaster/> (May 15, 2008, 1:11 EST).

Governmental Agenda Takes Precedence over Humanitarian Agenda

In February 2008, the government had announced that it had completed its draft of a new constitution and would hold a referendum in May to be followed by multi-party elections in 2010. While the referendum procedural law provided for a secret ballot, free debate was not permitted and activities considered “interfering with the referendum” carried a three-year prison sentence.⁶³

Despite the major humanitarian disaster precipitated by Cyclone Nargis, the regime insisted on carrying out this rubber-stamp referendum to approve a new and deeply flawed constitution.⁶⁴ The SPDC ordered significant numbers of victims to return to their villages to vote on the referendum even though they were still traumatized and without food, shelter or other aid to help them once they returned.⁶⁵ An eye-witness confirmed that on 10 May in Rangoon, the authorities forced displaced persons staying in schools to leave so that the schools could be used as polling stations.⁶⁶ On 20 May, the SPDC even declared the end of the rescue and relief phase of the response to Cyclone Nargis in order to facilitate execution of the referendum.⁶⁷

Although the world may never know the exact details of the referendum procedure, it is undeniable that the voting procedure was rife with irregularities: voters arriving at polling stations were advised that their ballots had already been cast; officials

distributed ballots that had previously been completed; vote counts in most areas were conducted in secret; and voters were intimidated by officials to vote in support of the constitution. Additionally, an eye-witness stated that the authorities told the cyclone survivors that more aid would be distributed if their votes were affirmative in the referendum.⁶⁸ On 27 May, the SPDC falsely announced that 92.4% of voters approved the constitution, with a 98% voter turnout.⁶⁹

This referendum was not welcomed by the world. Even China, the so-called “Brother of Burma,” expressed disapproval. *Xinhua News*, the state-run news agency of China, offered two explanations of the overwhelming approval for the constitution: (1) the referendum was under the control of the junta, thus limiting the NLD’s influence; and (2) the SPDC used its executive power to force acceptance of the proposed constitution.⁷⁰

International Condemnation

Because of the SPDC’s obstruction and abuse of both international and private aid, the situation in Burma must now be considered a man-made, government-induced catastrophe.⁷¹

The international community has made its condemnation of the SPDC’s response to Cyclone Nargis clear. On 12 May, U.N. Secretary-General Ban Ki-moon expressed his “deep concern and immense frustration

⁶³ Background Note: Burma, *supra* note 6.

⁶⁴ Larry Jagan, *The U.N. at dead-end in Myanmar*, ASIA TIMES ONLINE, 27 Aug. 2008,

http://www.atimes.com/atimes/Southeast_Asia/JH27Ae01.html. Though the original 10 May date was cancelled, the referendum was subsequently held on 24 May. *Id.*

⁶⁵ Amnesty International, *supra* note 45, at 1.

⁶⁶ *Id.* at 4.

⁶⁷ NCGUB, *Burma Cyclone Update*, 16-27 May 2008, http://www.burmalibrary.org/docs5/NCGUB_Cyclone_News_2.pdf.

⁶⁸ Amnesty International, *supra* note 45, at 8.

⁶⁹ NCGUB, *A Brief History*, *supra* note 7; Asia-Pacific Centre for the Responsibility to Protect, *Cyclone Nargis and the Responsibility to Protect—Myanmar/Burma Briefing No.2*, 16 May 2008,

<http://www.responsibilitytoprotect.org/index.php?module=uploads&func=download&fileId=539>.

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新华网仰光, 张云飞: “新闻分析: 透过新宪法看缅甸未来走向”, 2008年5月17日, 详见

http://news.xinhuanet.com/newscenter/2008-05/17/content_8193165.htm.

⁷¹ Tom Rivers, *British Prime Minister Criticizes Burma Over Failure to Allow in Foreign Aid*, Voice of America, <http://www.voanews.com/english/2008-05-17-voa21.cfm>.

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.⁷² On 13 May, U.S. President George W. Bush denounced Burma’s military rulers over their response to a devastating cyclone stating, “[T]he world ought to be angry and condemn the junta. ... There’s no telling how many people have lost their lives as a result of the slow response.”⁷³ In Canada, members of Parliament unanimously agreed to a motion, introduced by House Leader Peter Van Loan, that “denounce[d] the Burmese military regime’s deplorable response to the crisis.” The House also condemned the regime’s “unprecedented seizure” of aid shipments and urged the junta to allow unrestricted access to aid agencies and non-governmental organizations.⁷⁴ Even China, while it remains Burma’s ally, expressed its desire that the SPDC reinforce communication and negotiation with the international community so that “international institutions and other countries could negotiate the measures of providing aid to Burma.”⁷⁵

Frustrated by the lack of any progress, French Foreign Minister Bernard Kouchner proposed on 7 May that the U.N. Security Council invoke the “Responsibility to Protect” to authorize the delivery of aid without the consent of the SPDC.⁷⁶ The

⁷² *U.N. frustrated at Burma response*, BBC NEWS, 13 May 2008 <http://news.bbc.co.uk/1/hi/world/asia-pacific/7397012.stm>.

⁷³ *Bush denounces Burma aid response*, HERALD SUN, 13 May 2008, <http://www.news.com.au/heraldsun/story/0,21985,23689684-23109,00.html>.

⁷⁴ *MPS condemn Burma’s ‘deplorable’ cyclone response*, CBC NEWS, 9 May 2008, <http://www.cbc.ca/canada/story/2008/05/09/burma-motion.html>.

⁷⁵ 多倫多星島日報 Sing Tao Daily (Toronto), “死亡人數可能高達50萬 美救災飛機將降落 布殊擬邀胡錦濤施壓緬,”中國常駐聯合國副代表劉振民9日在紐約聯合國總部發言,2008年5月9日,詳見,<http://www.singtao.ca/tor/2008-05-10/1210400974d1016253.html>.

⁷⁶ In 2005, world leaders unanimously adopted “responsibility to protect” at the United Nations World Summit. In 2006, the Responsibility to Protect was unanimously reaffirmed by the

EU’s High Representative for the Common Foreign and Security Policy, Javier Solana also declared that the international community “should use all possible means to get aid through to victims of Myanmar’s cyclone.”⁷⁷ It is time that the world act on Mr. Solana’s directive.

CRIMES AGAINST HUMANITY: THE LETTER OF THE LAW

Introduction

When 120 nations voted to adopt the Rome Statute of the International Criminal Court on 17 July 1998, governments willing to abuse their authority were put on notice: conduct that rises to the level of crimes against humanity cannot be lawfully justified.⁷⁸ The Rome Statute states in unequivocal terms that Article 7, which defines and explains the various manifestations of crimes against humanity,

must be strictly construed, taking into account that crimes against humanity ... are among the most

United Nations Security Council in Resolution 1674. The “Responsibility to protect” resolution puts forward the idea that each state has a responsibility to protect its people from genocide, war crimes, ethnic cleansing and crimes against humanity and that human rights violations committed in one state are the concern of all states. It is an agreement in principle that speaks to the obligations of a state to protect its own people and the obligations of all states when that fails. This proposal was reiterated by the French Ambassador on 7 May 2008 to the U.N. and repeated by commentators, analysts, and politicians, primarily in Europe and North America. Kouchner’s proposal was rejected by the Chinese Government, who claimed that Cyclone Nargis was a natural disaster and therefore, “Responsibility to Protect” cannot apply to it. However, the SPDC’s subsequent actions severely aggravated the situation, making the aftermath of Cyclone Nargis a man-made catastrophe rather than natural disaster.

⁷⁷ David Brunnstrom & Ingrid Melander, *World should use “all means” for Myanmar aid: EU*, REUTERS, 13 May 2008, <http://www.reuters.com/article/worldNews/idUSL1249243620080513>.

⁷⁸ Rome Statute of the International Criminal Court art. 7, *opened for signature* 17 July 1998, 37 I.L.M. 999 [hereinafter Rome Statute]. Currently the Rome Statute of the ICC has 139 Signatories and 107 Ratifications. Coalition for the International Criminal Court, *World Signatures and Ratifications*, <http://www.iccnw.org/?mod=romesignatures>.

serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally acceptable international law, as recognized by the principal legal systems of the world.⁷⁹

The Rome Statute does not stand alone in making this message clear. Indeed, numerous declarations and conventions—such as the 2005 U.N. World Summit Outcome Document, U.N. Security Council Resolution 1674, and the Asian Human Rights Charter—have followed suit in condemning crimes against humanity and reasserting the principle that a state has an obligation to protect its citizens from such crimes.⁸⁰ These statutes, resolutions, and declarations are an important source of international law and mandate that governments worldwide respect them in order to prevent their citizens from becoming victims of tyranny and oppression.

The Rome Statute of the International Criminal Court

The Language of Article 7

Article 7 of the Rome Statute defines and explains those actions encompassed by the term “crime against humanity.” It states, in relevant part, as follows:

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when

⁷⁹ Rome Statute, Elements of Crimes Section, Article 7, Introduction, ¶ 1.

⁸⁰ S.C. Res. 1674, U.N. Doc. S/RES/1674 (28 April 2006); 2005 U.N. World Summit Outcome Document, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (24 Oct. 2005) [hereinafter World Summit Outcome]; Asian Human Rights Commission, Asian Human Rights Charter, 17 May 1998 [hereinafter Asian Human Rights Charter].

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

- (a) Murder;
- (b) Extermination;
- ...
- (d) Deportation or forcible transfer of population;
- ...
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Both Article 7 and the “Elements of Crimes” section of the Rome Statute provide further clarification of several key terms used in defining crimes against humanity. Regarding the general term “attack,” as used in Section 1 of Article 7, Section 2 makes clear that the attack can be either active or passive conduct: “‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁸¹ In the same vein, the elements of crimes required by the Rome Statute specify that the “acts *need not constitute a military attack*.”⁸² Thus, “attack” signifies action directed against a population, but not necessarily an overt armed assault.

The SPDC’s Crime of Murder

The Rome Statute declares that the elements of the crime against humanity of murder are satisfied when a perpetrator causes death. The term “killed,” as used in the “Elements of Crimes,” refers to all situations in which death results from the

⁸¹ Rome Statute, *supra* note 78, art. 7, ¶ 2(a).

⁸² *Id.*, Elements of Crimes Section, ¶ 3 (emphasis added); *see also id.* art. 9.

actions of the perpetrators, whether or not that death is meant to be the direct result of the committed acts.⁸³ As such, any death that can reasonably be traced to a perpetrator's actions should be considered a "killing" and, therefore, murder.

The SPDC must be held accountable for the deaths of countless Burmese citizens resulting from actions undertaken before and in the wake of Cyclone Nargis. Simply put, the SPDC engaged in two significant patterns of behavior that directly led to the deaths of numerous citizens: (1) the provision of insufficient and inaccurate information regarding the approach and danger of Cyclone Nargis; and (2) the obstruction and abuse of humanitarian relief aid in the wake of the disastrous storm.



Waiting for Aid in Kaw Hmuu Township
(courtesy of the National League for Democracy)

Approximately one week before Cyclone Nargis made landfall in Burma, the Indian Meteorology Department alerted the SPDC that the storm was approaching, even providing details of the likely speed and path. The SPDC knew that the storm would be extremely severe and powerful enough to cause the deaths of many civilians, but it made no effort to alert the population or carry out precautionary evacuation operations. The only actions taken by the SPDC were the placement on its website of

a poorly-disseminated and inaccurate alert and the publication of a back-page article in the state-run newspaper on the day that the storm hit. The story stated only that the storm would make landfall at sometime in the next 36 hours and would involve severe rain and thunderstorms. The people of Burma simply were not made aware of the true nature of the storm and were not afforded enough time to evacuate, had they been informed of the danger in the first place. Given that the SPDC had advance knowledge of the potentially devastating effects of the storm, their actions constituted a knowing and purposeful suppression of information that directly caused the loss of thousands of lives. While Cyclone Nargis itself might have been a natural disaster, the purposeful deception practiced by the SPDC in the days leading up to the storm was a man-made act.

Since lives could have been saved had the SPDC simply told the Burmese people what it already knew, the action of withholding that information constitutes the crime against humanity of murder under the definition set forth in the Rome Statute.

The SPDC is also responsible for the obstruction and abuse of international and domestic humanitarian aid that could have saved the lives of many malnourished and injured victims of Cyclone Nargis. Various international organizations have reported such obstruction and abuse:

- (a) the sale of relief aid in the Bogalay Township market;
- (b) the diversion of aid away from victims in Labutta;
- (c) the warehousing of various international aid; and
- (d) the demand in the city of Bogale for one-third of the supplies on a relief truck.

⁸³ *Id.*, Elements of Crimes Section, Art. 7(1)(a), ¶ 1, n.7 (“The term ‘killed’ is interchangeable with the term ‘caused death.’”).

This enumeration of attacks upon the people of Burma should not be construed as exhaustive. Many lives were lost as the result of the orchestrated SPDC policy that prevented relief supplies from reaching victims efficiently in the wake of Cyclone Nargis. Once the cyclone made landfall, it was the responsibility of the SPDC to provide its people access to adequate aid so as to limit the fatal effects of the storm. But the SPDC failed to do so. It must, therefore, be held accountable for the crime against humanity of murder since its obstruction and abuse of humanitarian aid caused the unnecessary deaths of countless citizens who had survived the initial impact Cyclone Nargis.

The SPDC's Crime of Extermination

Section 2 of Article 7 of the Rome Statute states that “‘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.”⁸⁴ The “Elements of Crimes” delineates more specifically that for an extermination to have occurred, the perpetrator must have killed one or more persons, including by the infliction of conditions intended to destroy a certain segment of a population.⁸⁵ As with the crime of murder, the conduct leading to the death “could be committed by different methods of killing, *either directly or indirectly*.”⁸⁶ Echoing Section 2, the “Elements of Crimes” section affirms that conditions calculated to bring about the destruction of a population “could include,” for example, “the deprivation of access to food and medicine.”⁸⁷ The *Report of the International Commission of Inquiry on*

Darfur, prepared pursuant to U.N. Security Council Resolution 1564, applies this example to a current conflict, holding that the Sudanese government has a clearly established legal obligation to prohibit the intentional infliction of “attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission.”⁸⁸ In the language of Article 7, such attacks can be either direct or indirect, as in the case of Burma.

Reports confirm that the SPDC engaged in activities directed against the civilian population of Burma that should be categorized as the “intentional infliction” of conditions of life resulting in thousands of avoidable deaths. First, the SPDC failed to give proper warning of Cyclone Nargis when it knew that withholding accurate information would lead to the destruction of those parts of the population particularly susceptible to the storm. Second, the SPDC’s intentional obstruction and abuse of public and private humanitarian aid must be categorized as the intentional “deprivation of access to food and medicine.” The systematic and purposeful misappropriation of this relief aid, which caused widespread devastation and injury to the Burmese population, above and beyond that which was initially inflicted by the storm itself, includes:

- (a) the impounding of 38 tons of food delivered through the U.N. World Food Programme;
- (b) the barring of MSF doctors from the most heavily-affected disaster areas;

⁸⁴ Rome Statute, *supra* note 78, art. 7, ¶ 2.

⁸⁵ *Id.*, Elements of Crimes Section, Art. 7(1)(b), ¶ 1.

⁸⁶ *Id.*, Elements of Crimes Section, Art. 7(1)(b), n.8 (emphasis added).

⁸⁷ *Id.*, Elements of Crimes Section, Art. 7(1)(b), n.9.

⁸⁸ The International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur*, ¶ 166(v), delivered to the Secretary-General (25 January 2005), available at http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

- (c) the barring of government-affiliated doctors from the most heavily-affected disaster areas;
- (d) the obstruction of private donations and volunteer relief efforts in the affected regions;
- (e) the insistence upon acting as a middle-man for relief efforts and not allowing relief supplies to reach the people directly;
- (f) the restriction of visas for medical experts and other relief organizations; and
- (g) the blockade of domestic aid sent from the Mandalay region in northern Burma.

Once again, this enumeration of attacks upon the people of Burma should not be construed as exhaustive. The Rome Statute specifically categorizes any blockage of access to food and medicine as the crime against humanity of extermination. Furthermore, the International Commission of Inquiry on Darfur has also emphasized the importance of allowing citizens access to humanitarian aid, concluding that the willful deprivation of such access constitutes a crime against humanity. For the foregoing reasons, the SPDC's abandonment of its people, both in the face of the impending cyclone and in the devastating aftermath, clearly constitutes the crime against humanity of extermination.

The SPDC's Crime of Forced Transfer

Article 7, Section 2, of the Rome Statute also addresses the crime against humanity of "deportation or forcible transfer of population." To have committed this crime, a perpetrator must have caused the "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."⁸⁹ The elements of this crime require only that a forcible transfer occurred as part of a widespread and systematic attack against a civilian population and that the victim of the forcible transfer had a lawful right to be in the place from which he or she was forced to move.⁹⁰

In the wake of Cyclone Nargis, despite widespread destruction and persistently fatal conditions, the SPDC was intent on carrying out the planned constitutional referendum. The SPDC even forced Burmese citizens to relocate so that the referendum could take place. Only 17 days after the cyclone made landfall, the SPDC declared the search and rescue phase of relief efforts to be over so that it could dedicate all available resources to the 24 May 2008 referendum. Furthermore, the SPDC forced many cyclone victims to leave relief shelters so that those places could be used as polling stations. Several of these same victims were also forced to return to their destroyed, uninhabitable, and contaminated villages for the purpose of voting. Despite the terrible conditions on the ground, the SPDC inaccurately reported a 98% turnout. This systematic, government-directed transfer of cyclone victims out of shelters and into voting precincts with no regard for those victims' well-being or safety undoubtedly amounts to the crime against humanity of "deportation or forcible transfer of population."

The SPDC's Crime of Inhumane Acts

According to the Rome Statute, the crime against humanity of other inhumane acts includes the infliction of "great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act."⁹¹ According to the case law of the Yugoslavia Tribunal, the crime of

⁸⁹ Rome Statute, *supra* note 78, art. 7, ¶ 2(d).

⁹⁰ *Id.*, Elements of Crimes, Art. 7(1)(d).

⁹¹ *Id.*, Elements of Crimes Section, Art. 7(1)(k), ¶ 1.

other inhumane acts was “designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”⁹² The statute does not specifically delineate all those actions that may constitute the crime against humanity of inhumane acts, but it does note that such an act must be “of a character similar to any other act” set out in Article 7.⁹³ Like all other crimes against humanity denoted in Article 7, the acts must have been committed as part of a widespread or systematic attack.⁹⁴

The numerous widespread and systematic attacks that the SPDC directed against the civilian population of Burma during the periods leading up to and immediately following Cyclone Nargis need not be enumerated again. Not forgetting those attacks noted in the preceding three sections, the SPDC’s (1) distribution of tainted and rotten rice and (2) conditioning of the distribution of relief aid on victims’ willingness to work for or join the military fall clearly within the definition of the crime against humanity of other inhumane acts. Taken together, these systematic “attacks directed against the civilian population” were of the same quality and character of those acts specifically prohibited by Article 7. The world was aghast over the incalculable human suffering caused by the cyclone and exacerbated by the deliberate actions of state officials. As such, although the actions of the SPDC are sufficient to fall into the categories of murder, extermination, and forcible transfer, they may also be properly characterized as constituting the

crime against humanity of other inhumane acts.

The Responsibility to Protect

The 2005 U.N. World Summit Outcome Document and U.N. Resolution 1674

From 14 to 16 September 2005, the U.N. General Assembly convened the 2005 World Summit. One of the obligations of states adopted at that meeting was the “responsibility to protect,” codified in the 2005 World Summit Outcome Document. In that document, the nations attending the summit proclaimed that “[e]ach 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. ... The international community should, as appropriate, encourage and help States to exercise this responsibility.”⁹⁵ Recognizing that certain states may be incapable or unwilling to fulfill this responsibility, the Outcome Document also endows the international community, “through the United Nations, ... [with] the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means ... to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.”⁹⁶ Furthermore, in times when these peaceful means prove inadequate and when “national authorities are manifestly failing to protect their populations from ... crimes against humanity,” the Outcome Document empowers the U.N. Security Council to take collective, forceful action.⁹⁷

Less than one year later, the U.N. Security Council reiterated the words of the

⁹² *Prosecutor v. Kupreskic, et. al.*, IT-95-16-T, Trial Judgment, 14 Jan. 2000, ¶ 563.

⁹³ Rome Statute, *supra* note 78, Elements of Crimes Section, Art. 7(1)(k), ¶ 2.

⁹⁴ *Id.*, Elements of Crimes Section, Art. 7(1)(k), ¶ 4.

⁹⁵ World Summit Outcome, *supra* note 80, at ¶ 138.

⁹⁶ *Id.* at ¶ 139.

⁹⁷ *Id.*

World Summit Outcome Document. Citing the importance of protecting civilians and highlighting the U.N.'s obligation to maintain international peace and security, the Security Council "reaffirm[ed] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."⁹⁸ The Security Council's explicit support for the responsibility to protect thus made clear that a state's duty to shield its citizens from inhumane acts was unequivocally and indelibly a matter of international legal concern.

The SPDC's Failure to Protect Requires an International Diplomatic Response

In the periods leading up to and immediately following the natural disaster that was Cyclone Nargis, the SPDC failed to fulfill its responsibility to protect the civilian population of Burma from crimes against humanity. Indeed, the SPDC itself perpetrated those very crimes. By failing to properly warn the Burmese population of the approaching storm and by obstructing and abusing relief aid intended to reach the victims of the cyclone, the SPDC failed to adhere to the dictates of the 2005 World Summit Outcome Document and U.N. Resolution 1674. In so doing, the SPDC also triggered a required diplomatic response from the international community.

The responsibility to protect has commonly been divided into three tiers. First, the nation in which the crimes against humanity are occurring is given time to address those crimes. Second, if the nation is unable to address those crimes, it is expected to reach out to the nations of the world and request aid. Finally, if the nation does not or cannot reach out to other nations to request

relief, then the international community should come to the aid of the civilians suffering from the crimes against humanity. Put succinctly, "When a state proves unable or unwilling to protect its people, and crimes against humanity are perpetrated, the international community has an obligation to intervene."⁹⁹

In the case of Burma, the SPDC, which claims to be the government of and for the people of Burma, has itself been committing crimes against humanity. Through its obstruction and abuse of humanitarian aid, the SPDC has made abundantly clear that it will neither seek to put an end to those crimes nor reach out to the international community to help stop those crimes. In this respect, the first two tiers of the



Child refugees waiting for relief (courtesy of the National League for Democracy)

responsibility to protect are now moot. It is, therefore, the proper time for the international community to respond and come to the aid of the civilian population of Burma by recognizing that the SPDC has committed crimes against humanity and rejecting the SPDC's General Assembly credentials. As dictated by both the 2005 World Summit Outcome Document and U.N. Resolution 1674, no self-proclaimed government that knowingly and intentionally violates its sacred relationship

⁹⁸ S.C. Res. 1674, *supra* note 80, at ¶ 4.

⁹⁹ Roger Cohen, *Cohen: Change You Can Believe In*, INTERNATIONAL HERALD TRIBUNE, 20 Feb. 2008, available at <http://www.iht.com/articles/2008/02/20/opinion/edcohen.php>.

with its people should be allowed to represent those people before the nations of the world.¹⁰⁰

The Question of Sovereignty and the Asian Human Rights Charter

Echoing the U.N. Declaration of Human Rights, the Asian Human Rights Charter affirms the Asian continent's support for the fundamental rights of all human beings. The Charter places the "[t]he primary responsibility for the promotion of human rights [] with the states."¹⁰¹ Examining those rights more closely, the Charter declares that

[f]oremost among rights is the right to life, ... [which] signifies the right to live with basic human dignity ... and the right to a clean and healthy environment for without these there can be no real and effective exercise or enjoyment of the right to life. The state must also take all possible measures to prevent infant mortality, eliminate malnutrition and epidemics, and increase life expectancy through a clean and healthy environment and adequate preventative as well as curative medical facilities.¹⁰²

The Charter also affirms that, in order for Asian states to protect their citizens' lives, "propagation of war or ethnic conflict or incitement to hatred and violence in all spheres of individual or societal or national or international life should be prohibited."¹⁰³

With the fulfillment of these human rights goals in mind, the Charter sets out the permissible course of action for ensuring that Asian states protect such rights. Most importantly, although the Charter places the responsibility for promoting human rights squarely on states, it also recognizes the validity of international intervention: "The peoples of Asia support international measures for the protection of rights. State sovereignty cannot be used as an excuse to evade international norms or ignore international institutions. The claim of state sovereignty is justified only when a state fully protects the rights of its citizens."¹⁰⁴ If a state fails to do so, however, it becomes the duty of the international community to come to the defense of the oppressed civilian population.

The clear language of the Charter in addressing the relationship between state sovereignty and international intervention must be heeded in the case of Burma. It is likely that the SPDC, when facing the foregoing allegations of crimes against humanity, will cite state sovereignty in order to attempt to prevent international diplomatic intervention (i.e., the revocation of credentials). Notwithstanding any such claim by the SPDC, the Charter is clear in stating that the defense of state sovereignty can never be justified when a state does not fully protect the rights of its citizens. As the SPDC has evaded every international custom by not only failing to protect its people but also directly committing crimes

¹⁰⁰ As noted, *supra* note 76, China has already once rejected the argument that the SPDC failed to uphold its responsibility to protect the citizens of Burma. China argued that the responsibility to protect did not apply in this particular case because the deaths and destruction had been caused by Cyclone Nargis, a natural disaster. Asia-Pacific Centre for the Responsibility to Protect, *Cyclone Nargis and the Responsibility to Protect* (16 May 2008). China's argument, however, ignores the entirety of the circumstances. While it is true that Cyclone Nargis itself caused several deaths in Burma, the SPDC's failure to warn the Burmese people prior to the storm and its obstruction and abuse of humanitarian relief in the aftermath of the storm were events separate and distinct from the storm itself. Numerous deaths, therefore, can be directly traced to the SPDC's attacks on the civilian population of Burma and could have been prevented had the SPDC acted in a manner conforming to the norms of international law. Because it did not, however, the SPDC must be held to have violated the responsibility to protect.

¹⁰¹ Asian Human Rights Charter, *supra* n.80, ¶ 2.7.

¹⁰² *Id.* ¶ 3.2.

¹⁰³ *Id.* ¶ 3.4.

¹⁰⁴ *Id.* ¶ 2.5.

against those same people, any claim of state sovereignty must be rejected. The U.N. must not set a precedent that allows state sovereignty to justify crimes against humanity.

CONCLUSION

The goals of the international community continue to be the reinstatement of a constitutionally-based and democratically-elected government in Burma, justice for its people, and enforcement of the rule of law. The SPDC's

lack of action in the face of Cyclone Nargis constitutes crimes against humanity that render it incapable of representing and protecting the citizens of Burma. Any government that abdicates its core duties to its own people should have no credible voice as the representative of those same people to the international community. The government elected in the 1990 elections is the only is the only legitimate government of Burma and is therefore entitled to represent the Burmese people before the nations of the world.

“Please, use your liberty to promote ours.”
– Aung San Suu Kyi
