

Article

An Offer You Cannot Refuse?

Natural Disasters, the Politics of Aid Refusal and Potential Legal Implications

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Abstract

After Cyclone Nargis struck Myanmar in early May 2008, the ruling regime imposed conditions upon the receipt and entry of disaster relief. This was met by a significant amount of international condemnation, which was often bolstered by invocations of the Responsibility to Protect (R2P) doctrine. The legalities of disaster aid refusal very quickly became a serious topic of academic and practitioner discourse. While the politics of aid donation is a much-studied terrain, the politics of aid refusal has, until recently, received less attention. However, a recent strain of research in political science has sought to remedy this imbalance. This article considers what international lawyers can draw from this discourse and whether such a perspective can inform legal reforms, notably those being currently proposed by the International Law Commission (ILC). As well as questioning assumptions regarding the apoliticism of disaster aid, this article also considers the links between humanitarianism and regime change, utilising the case study of Cyclone Nargis. The role of R2P and its muscular humanitarianism is also examined, as is the extent to which it informs the current ILC proposals. The final section of the article considers humanitarian perspectives and the waning influence of 'new humanitarianism', which challenged fundamental legal concepts of impartial, neutral, needs-based aid.

"nothing terrifies a repressive regime quite like a natural disaster".¹

"To drive men from independence to live on alms, is itself great cruelty."²

I. Introduction

Immediately after Cyclone Nargis struck Myanmar in May 2008, the governing regime refused to unconditionally allow entry of international aid. Restrictions imposed upon visas for aid workers and the insistence upon self-distribution prompted anxieties regarding the unmonitored destinations of such aid and the increasing vulnerability of stricken populations.³ Discussions among international lawyers elicited several legal conundrums. Was there an obligation to seek, accept, or offer aid? Could intentional impediments to aid distribution entail legal consequences? Much discussion concerned the existence of legal obligations (via

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¹ N. Klein, "In the wake of catastrophe comes the whiff of unrest", *The Guardian*, 16 May 2008, at: <http://www.guardian.co.uk/commentisfree/2008/may/16/cyclonenargis.chinaearthquake> (last accessed on 18th March 2013).

² E. Burke, *Reflections on the Revolution in France*, 1790 (The Harvard Classics, 1909-14), para 182

³ M. Weaver, "Cyclone Nargis relief effort in Burma", at: <http://www.guardian.co.uk/news/blog/2008/may/07/cyclonenargisinburmathere> (last accessed on 18th March 2013); and Human Rights Watch Report, "I Want to Help My Own People", at: <http://www.hrw.org/en/reports/2010/04/29/i-want-help-my-own-people> (last accessed on 18th March 2013)

international human rights law and humanitarian law) to facilitate aid access. The varying values to be attributed to General Comments of the human rights treaty body committees, and multifarious, but cautiously formulated, General Assembly Resolutions were analysed. Another portion of the academic literature considered whether the actions of the Myanmar military regime could be characterised as criminal - could an inadequate response to a natural disaster's aftermath constitute crimes against humanity,⁴ entailing possible references to the International Criminal Court?⁵ Still others pondered the relevance of the newly emerged doctrine of Responsibility to Protect (R2P)⁶ in the somewhat unforeseen context of natural disasters. None of the discourse much contemplated justifiable aid refusal. This is possibly explicable given the Myanmar regime's unattractiveness.

It is important to clarify at the outset that, on the basis of available information, neither author is sympathetic to the current Myanmar regime, its history, its ideology, its human rights record, its xenophobia, its conduct of hostilities or its general *modus operandi*. Nor does this article suggest a return to some hyper-Westphalian conception of sovereignty, which reifies and exalts Article 2(7) of the UN Charter, effectively immunising Myanmar from criticism. However, despite generally offending democratic eyes, Myanmar's resistance to humanitarian aid in 2008 may have been based on paranoid, but genuine, fears of foreign intervention aiming at regime change. Of course, traditional opponents who criticised Myanmar, even before 2008, were not responsible for thousands starving. Nevertheless, such negativity informed the context in which aid-refusal took place, fuelled the rhetorical invocation of Responsibility to Protect (R2P) and merits mention. Finally, while analysing the politics of aid rejection is perhaps primarily a political question, it nevertheless upturns the dominant, intuitive and easy legal conclusions regarding state criminality or neglect. It is thus worthy of legal analysis.

As noted, there was little sophisticated discussion regarding Myanmar's motives in refusing to unconditionally admit aid in 2008. Indeed, there is a *general* paucity of analysis regarding aid-refusal. While the *realpolitik* of aid *donation* is almost taken as an analytical given,⁷ in the twin area of aid-refusal, sophisticated analysis is generally absent. The political function of aid-donation and withdrawal has been considered time and again and notorious examples abound. For example, after Yemen voted against UN Security Council (UNSC) resolution 678 (authorising the use of force against Iraq's invasion of Kuwait) US Ambassador James Baker III informed the Yemeni delegation that it had cast its most expensive vote. Aid was cut off almost immediately. Further, escalating US aid in Central America in the 1980s was clearly

⁴ S. Ford, 'Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility To Protect And Individual Criminal Responsibility In The Aftermath Of Cyclone Nargis', *Denver Journal of International Law & Policy* 2010-38, p. 227.

⁵ A Report by Emergency Assistance Team-Burma and the Center for Public Health and Human Rights at Johns Hopkins Bloomberg School of Public Health on human rights violations in the wake of Cyclone Nargis, "After the Storm: Voices from the Delta", at: http://www.jhsph.edu/research/centers-and-institutes/center-for-public-health-and-human-rights/_pdf/AfterTheStorm_Fullreport_2ndEd_May09.pdf; and I. MacKinnon, "Burmese regime blocked international aid to cyclone victims", *The Guardian*, 27 February 2009 at: <http://www.guardian.co.uk/world/2009/feb/27/regime-blocked-aid-to-burma-cyclone-victims> (last accessed on 18th March 2013).

⁶ T. R. Saechao, 'Natural Disasters and the Responsibility to Protect: from Chaos to Clarity', *Brooklyn Journal of International Law* 2007-32, p. 663; and Comm. T. R. Jackson, 'Bullets for Beans: humanitarian intervention and the responsibility to protect in natural disasters', *Naval Law Review* 2010-59, p. 1.

⁷ M. Tan-Mullins, J. Rigg, L. Law, & C. Grundy-Warr, 'Re-mapping the politics of aid: the changing structures and networks of humanitarian assistance in post-tsunami Thailand', *Progress in Development Studies* 2007-7(4), p. 327.

geared towards facilitating *contras*' activities.⁸ Such behaviour led to legal discussions regarding retorsions, countermeasures and that such acts can only really be understood in their political contexts. Indeed, law regularly maps out the context for politics. However, when it comes to critiques of aid-refusal, commentators generally focus on a zero-sum analysis: criminal versus legitimate, solidarity versus victimisation, lady bountiful versus brutality. Nevertheless, an interesting strain of discourse has recently emerged in political science, which considers whether rejection of international disaster aid represents a political act with complex motives.⁹ Such analysis is bolstered by evidence of refusals to accept or request aid. For example, China actively withheld news of the 1976 Tangshan earthquake (discussed subsequently) and it actually never sought any international assistance until 1991. Bangladesh refused international aid to help with Myanmarese refugees in 1992 for fear of antagonising that regime.¹⁰ Sudan often resisted and obstructed international aid efforts in the late 1980s. Iran was hesitant to ask for international assistance after the 1990 Manjil-Rudbar earthquake and, notoriously, Somalia's obstruction of aid delivery ultimately prompted UN action in 1992. North Korea also resisted international aid during the famines of 1997 and 1998. Even more examples will be offered subsequently as illustrations for comparison with Myanmar's position in 2008. If it is acknowledged that aid donation/non-donation is often political yet entails few legal consequences, then surely the refusal of aid can be equally politicised even in natural disasters. If refusal is to entail legal consequences, the full context must be considered. The political context of Myanmar in 2008 both internally and in an international context will be considered subsequently.

Notwithstanding the complexity of aid refusals, perceptions remain that such behaviour is perverse and anomalous, entailing legal liabilities. Underpinning such notions of perversity is a certainty that aid donation is always assuredly purely humanitarian. An alternative perspective, which considers the politics of aid refusal, might more accurately capture the dynamics at play. Rather than providing a solution, this third perspective will force actors to reconsider blunt condemnation, which only seems to lead to international brinkmanship - a rather unhelpful *cul de sac*. It also acknowledges the perils of creating bold legal obligations of cooperation, which admit no nuance. This latter point has become more significant in the light of the International Law Commission's study regarding the protection of persons in the event of disasters.¹¹ Although this study was already underway by 2008, both Cyclone Nargis and R2P have undoubtedly influenced ILC discussions and the text of the emerging Draft Articles. Both evidence a strong persuasive trend towards international co-operation, to the extent of proposing legal consequences for "unjustifiable" or "arbitrary" aid refusals. The details of the ILC study will be considered closely in this article.

This article initially questions assumptions regarding the apoliticism of international aid in the context of disasters. It then ponders the links between humanitarianism and regime change,

⁸ M. Barnett & T. Weiss, *Humanitarianism Contested: Where Angels Fear to Tread*, New York: Routledge 2011, p. 65.

⁹ T. Nelson, 'Rejecting the gift horse: international politics of disaster aid refusal', *Conflict Security & Development* 2010-10(3), p. 379.

¹⁰ D.J. Scheffer, 'Toward a Doctrine of Humanitarian Intervention', *University of Toledo Law Review* 1992-23, p.253, see footnote 66 for examples.

¹¹ 2006 Report of the International Law Commission on its fifty-eighth session, A/CN.4/577. For analysis of the ILC's work see C. Allan & T. O'Donnell, 'A Call to Alms?: Natural Disasters, R2P, Duties of Cooperation and Uncharted Consequences', *Journal of Conflict & Security Law* 2012 - 17(3), p. 337; and D. Cubie, 'An Analysis of Soft Law Applicable to Humanitarian Assistance: Relative Normativity in Action?', *International Humanitarian Legal Studies* 2011-2, p. 177. The report of Special Rapporteur Eduardo Valencia-Ospina of April 2012 sought to clarify the duty of co-operation and was debated in the Summer 2012 meetings of the ILC (2012 International Law Commission, 64th session: Fifth report on the protection of persons in the event of disasters A/CN.4/652).

arguing that Myanmar's intransigence in 2008 might be explained by Nargis' occurrence at a particularly fragile historical moment. The article considers the context of the Saffron Revolution in August 2007 and the fact that a number of key international actors had already approached the UN Security Council regarding Myanmar. Shortly after the cyclone, the French Foreign Minister, Bernard Kouchner referred to the R2P doctrine in order to force the Myanmar regime to accept relief. The doctrine's boundaries were still uncharted and Cyclone Nargis apparently presented a (fraught) legal testing ground. If the international community had a responsibility to intervene in the face of state neglect or inability regarding a suffering populace, what might that entail? The charged exchanges following Nargis, and the persisting controversy as regards the role of law in the field of disaster assistance, increased the pressure on the ILC study to resolve the tensions in this area and this article evaluates the ILC's efforts hitherto. The final section of the article ponders the link between emergency aid and longer-term development/stabilisation programmes and the role of 'new humanitarianism'. One final caveat relates to terminology in this article. The leaders of the exiled democracy movement prefer the name of the state as 'Burma', maintaining that the military regime has no right to change the official name of the country to suit its own ends. However, the official name of the state as represented at the United Nations is 'Myanmar'. Consequently, and purely as a matter of formality, the authors of this article have chosen this characterisation of the state's name.

II. Is Humanitarian Aid Always Apolitical?

II.1 Legal Importance of Apoliticism

When it comes to humanitarian aid, the cardinal principles of impartiality, neutrality, humanitarian purpose and non-discrimination are regularly stressed in the patchwork of instruments which comprise the hard and soft architecture of international disaster response law.¹² The patchiness of this area lies not only in the varying concreteness of instruments but also in the influence drawn from, for example, the laws of peace, *jus ad bellum*, *jus in bello* and human rights law. Non-discrimination principles outlaw discrimination based on race, colour, sex, language, nationality, religion, birth status, and can cover political affiliation. Indeed, the *Nicaragua* merits judgment (which itself had to consider a scenario of non-international armed conflict - *contras* vs. Nicaragua - and those of an international conflict regarding the US actions vs. Nicaragua¹³) clarified that for US aid to be legitimately humanitarian, it was not only to be given to the *contras* and their dependents.¹⁴ The 1984 Draft Convention on Expediting the Delivery of Emergency Assistance also stressed the importance of relief consignments being of an exclusively humanitarian and non-political character.¹⁵ The landmark 1995 Red Cross Code of Conduct emphasised that aid should be prioritised solely on the basis of objective need, without being used to further particular political or religious standpoints or acting as an instrument of government foreign policy.¹⁶ The ILC draft Articles similarly emphasise this

¹² 1991 United Nations General Assembly Resolution 'Strengthening of the coordination of humanitarian emergency assistance of the United Nations', A/RES46/182 Annex I paras.2, 5 and in the context of armed conflicts AP II Art.18.

¹³ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Merits, Judgment of 27 June 1986, para. 219.

¹⁴ *Ibid.*, para. 243.

¹⁵ 1984 Draft Convention on Expediting the Delivery of Emergency Assistance, Article 1(a).

¹⁶ K. Beeckman, 'International Response to Non-armed Conflict Disasters: legal challenges encountered in light of the current regulatory framework', *Refugee Survey Quarterly* 2006-25(4), p. 129 & 132. See also 2007 Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (hereinafter 2007 IDRL Guidelines) Part 1, 4(2).

trope of apoliticism in draft Article 6.¹⁷ Stricken populations are to be the prime focus of relief efforts, and international actors are cautioned against “committing acts which might constitute interference in the internal affairs of the domestic State, so as to ensure an adequate and effective response”.¹⁸ Further, in drawing upon International Humanitarian Law (IHL) and its key principle of neutrality, the ILC ordained such purity of motive,¹⁹ considering it to be “the operational mechanism to implement the ideal of humanity”.²⁰ Notwithstanding the usual specificity of IHL’s applicability, Special Rapporteur Eduardo Valencia-Ospina considered that principles of neutrality and non-discrimination could equally apply to non-armed conflict disaster victims.²¹

Statements denying the right of affected states to arbitrarily refuse international aid, when they are unwilling or unable themselves to respond to disasters, sound intuitively correct. However, establishing standards against which to test the arbitrariness of aid-refusals and divining the consequences which might flow from an affected state’s ‘breach’ raise issues regarding the material edge of international solidarity, and the perilous nature of forcible aid delivery. Even those within the ILC who advocate a duty of cooperation (which might ultimately morph into a duty to accept aid) acknowledge that there are circumstances of ‘legitimate’ refusal – for example when the aid offered is inappropriate or when the situation is under control.²² Indeed, affected states operating an ‘open door’ policy as regards foreign actors have encountered problems of supply-driven thinking, non-professional relief workers (often with their own particular goals) and the blocking of appropriate aid.²³ Determining when a situation is or is not under control is also extremely complex and it remains uncertain as to where the burden of proof could or should lie. It is the position of this article that any burden should rest with those wishing to donate aid and not upon the stricken state.²⁴

II.2 Presumptions

As noted, only apolitical, needs-directed aid comports with international law. This apoliticism is generally presumed despite the challenging evidence of the EU’s prioritisation of Balkans’ aid-receipt over the claims of Angola and DRC (despite the needs of the latter two arguably being greater)²⁵ and various studies on US disaster assistance.²⁶ Equally, aid-refusal can also be highly political even in the context of an immediate natural disaster like a tsunami or cyclone.²⁷ Even Japan refused US aid regarding the damage at the Fukushima nuclear

¹⁷ “Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.”, in 2011 Report of the International Law Commission, 63rd session, A/66/10, p. 254.

¹⁸ 2010 Report of the International Law Commission, 62nd session, A/65/10, para. 302.

¹⁹ *Ibid.*, para. 311; See the First Geneva Convention 1864

²⁰ 2010 Report of the International Law Commission, 62nd session: provisional summary record of the 3054th meeting, A/CN.4/SR.3054, p.18.

²¹ 2010 Report of the International Law Commission, A/65/10, *supra* note 18, para. 327.

²² J. Benton Heath, ‘Disasters, Relief and Neglect: the Duty to Accept Humanitarian Assistance and the Work of the International Law Commission’, *New York University Journal of International Law & Politics* 2011-43, pp. 419, 450.

²³ Beeckman 2006, *supra* note 16, pp. 133-134.

²⁴ For further discussion of this, see Allan & O’Donnell 2012, *supra* note 11, p. 337.

²⁵ Barnett & Weiss 2011, *supra* note 8, p. 31. See Alex de Waal’s discussion of “institutional cruelties” in ‘The humanitarians’ tragedy: escapable and inescapable cruelties’, *Disasters* 2010-34(2), pp. 130, 132-133.

²⁶ A. Cooper Drury, R. Olson & D. Van Belle, ‘The Politics of Humanitarian Aid: US Foreign Disaster Assistance, 1964-1995’, *The Journal of Politics* 2005-67(2), p. 454.

²⁷ Selth – it is a matter of politics (“Burma Aid is about Saving Lives, not about Politics, Rice says”, *America.com*, 8 May 2008, at <http://www.america.gov/st/peacesec-english/2008/May/20080508142931dmslahrellek0.4292414.html> (last accessed on 18 March 2013)). Nelson 2010, *supra* note 9, p. 388.

power plant following the March 2011 earthquake and tsunami maintaining that it could resolve its own difficulties.²⁸ Iran refused Israeli aid following the December 2003 earthquake (having also previously refused aid from Israel and South Africa after the 1990 earthquake²⁹). Pakistan did likewise following the October 2005 earthquake. Such refusals are obviously animated by politics, and the particularity of rejection is clear.

Nevertheless, strong presumptions regarding apoliticism persist and are reinforced when aid-flows occur between historical enemies such as India and Pakistan, Greece and Turkey, Iran and Iraq³⁰ Indeed, post-Nargis, former US Secretary of State Condoleeza Rice commented categorically: "It is not a matter of politics, it's a matter of a humanitarian crisis." Similarly in a contemporaneous piece published in *Le Monde*, both Bernard Kouchner and David Miliband, then Foreign Ministers of France and the UK respectively, opined that their differences with the Burmese regime were "well known", but that their most urgent task was humanitarian. They maintained they would resist democratic impulses to try to improve the local political situation, particularly as regards human rights. This verbal eschewal of 'politics' is useful to key actors. Institutional actors apparently suspend self-interest, humanitarian workers take centre-stage, stricken populations are assisted and for a moment "history is suspended and pure humanity is briefly in focus".³¹ It may be a necessary fiction, but it remains a fiction.

In addition to urging the "notoriously isolationist" junta to trust the international community, Kouchner and Miliband also mentioned Myanmar's "political tragedy".³² They criticised the decision to continue with the referendum on 10th May, 2008 (regarding the draft constitution) noting that the process excluded Aung San Suu Kyi, the opposition and representatives of different ethnic groups.³³ Such broadening references seemed unnecessary. The eternal oscillation between 'pure' humanitarianism and wider political comment compromised the 'pure' humanitarian focus of the two Ministers, implying questionable motives underlying the aid programme. Indeed, during ILC deliberations it was noted that the eventual exclusion of natural disasters from the purview of R2P was conscious because the "historical experience of weaker countries" urged wariness regarding mixed motives.³⁴

III. The Link between Humanitarianism and Regime Change and the Importance of Perceptions

III.1 Myanmar and Transition

Nelson's analysis of 25 years of disaster relief (comprising 77 disasters) concluded that autocracies were no more or less likely to refuse aid offered than democracies, that aid refusal was most likely in serious disasters and that states that had recently undergone substantial regime transition were more likely to reject some or all international aid. The latter two conclusions were inter-linked since the symbolism of asserting (democratic) control and maintaining legitimacy was more crucial and potent in extreme disasters because in such moments "domestic and international eyes are particularly fixed on the stricken regime".³⁵

²⁸ 'Japan rejects U.S. help bids' at: www.anunews.com/1845/japan-rejects-u-s-bids.

²⁹ L. Beyer, 'Iran: the politics of humanitarianism', at: <http://www.time.com/time/magazine/article/0,9171,970582,00.html> (last accessed at 18 March 2013)

³⁰ Nelson 2010, supra note 9, p. 382.

³¹ De Waal 2010, supra note 25, p. 135.

³² B. Kouchner & D. Miliband, 'Tragédies birmanes' *Le Monde*, 9 May 2008.

³³ See also S. Mydans, 'Myanmar reels and junta looks to vote' *International Herald Tribune*, 9 May 2008.

³⁴ Mr. Vasciannie in 2010 Report of the International Law Commission, 62nd session, Provisional Record of the 3057th meeting A/CN.4/SR.3057, p.7.

³⁵ Nelson 2010, supra note 9, pp. 394-395.

Myanmar's unpopularity should not preclude analysis of its action. Its refusal of international aid could still be a political act with complex motives. Although not classically appearing as a regime in transition in 2008, it had nevertheless undergone significant internal turmoil in the preceding two years, particularly during the 'Saffron Revolution' of August/September 2007. Further, as will be highlighted, the language of significant international actors immediately pre-Nargis had been firmly condemnatory and hostile. Indeed, the US and others had proposed condemnation of Myanmar by the UN Security Council, denouncing it as a threat to international peace and security,³⁶ which is traditionally a prelude to the imposition of Chapter VII enforcement measures. As noted, Myanmar was also in the process of drafting a new constitution in 2008, indicating a transition process. In fact, during a UN Security Council meeting of September 2006, China acknowledged various initiatives being undertaken by Myanmar to accord with its international obligations noting that encouragement, not intervention, from the international community would "accelerate the completion of the democratic process".³⁷ Thus, in two respects, Myanmar had anxieties. Nationally, it could not tolerate appearing weak so shortly after the 2007 upheavals. In an international context, it may have worried that relief workers could smuggle arms to opposition groups.³⁸ As one ILC delegate has previously noted: "States that [appeal] to the international community should not be vulnerable on the pretext of disaster relief".³⁹ To argue that cynical *mala fide* interventions, which have political, economic or social objectives might be avoided by favouring collective aid donation and distribution (e.g. via the UN or the International Federation of the Red Cross (IFRC)) over that from individual states is fairly cold comfort - such bodies still depend upon state contributions and donor preferences.

IV. Humanitarianism, Trojan Horses and Perceptions

"In the eyes of sharp critics ... a humanitarian Trojan horse [remains] a Trojan horse for imperial meddling, nonetheless."⁴⁰

Writing shortly after UN resolution 688 (1991) (which urged the protection of the fleeing Iraqi Kurds and Shiites) Scheffer noted the capacity of both the UN Security Council and individual states to exert pressure on recalcitrant states not to obstruct the delivery of humanitarian assistance. Acknowledging that "[p]erceptions still matter" and urging the avoidance of unnecessary antagonism, he suggested removing impressions that force was inevitable by emphasising non-forcible measures.⁴¹ Attempting to assuage a besieged government's anxieties is laudable and pragmatically wise, but may be misleading. Resolution 688 was actually mentioned by US ambassador John Bolton during the September 2006 UNSC meeting regarding Myanmar when he invoked it as a precedent for the principle that human rights situations within states could threaten international peace and security.⁴² Leaving aside the issue of whether this resolution is in fact a correct precedent for that principle, its invocation neither removed the option of military force, nor alleviated Myanmar's anxieties. This was especially the case given that resolution 688's terms had been expansively interpreted by some states, indeed the same ones seeking to condemn Myanmar, to facilitate Iraqi no-fly zones. Moreover, the invocation of human rights goals is attractive

³⁶ See letters of 1st and 15th September, 2006

³⁷ 2006 Report of the United Nations Security Council, 5526th meeting, S/PV.5526.

³⁸ Nelson 2010, *supra* note 9, p. 399 at footnote 53.

³⁹ Mr. Vasciannie in 2010 Report of the International Law Commission, A/CN.4/SR.3057, *supra* note 34, p.7.

⁴⁰ Barnett & Weiss 2011, *supra* note 8, p. 84.

⁴¹ Scheffer 1992, *supra* note 10, p. 270.

⁴² 2006 Report of the United Nations Security Council, S/PV.5526, *supra* note 37.

but the consequences are not entirely foreseeable. What will constitute humanitarian goal-achievement is not necessarily knowable, static or immutable, and target governments may have (justifiable) anxieties regarding humanitarian decoys concealing unfriendly stratagems.⁴³ Further, separating humanitarian purposes from the political objectives of eliminating a regime adjudged responsible for tragedies, “and perhaps for other conduct (or ideological aims) deemed unacceptable by the intervening state”, is exceedingly difficult.⁴⁴

The toppling of a recalcitrant regime may represent an additional silver lining of humanitarian aid for some. Indeed, the benefits of ‘disaster diplomacy’ have been cited, most recently, in the context of peace in Aceh being the result of the 2004 tsunami.⁴⁵ However, if messages of political change penetrate a target regime’s mindset, which then obstructs aid-delivery, the counter-productive effect of entangling multiple imperatives is clear. The 2002/2003 debates over what the 1990 and 1991 Security Council resolutions permitted illustrated the uncontrollability of political desire. The debacle over Somalia in 1992 showed the peril of confused mandates, prompting the 1995 *Supplement to an Agenda for Peace* to urge extreme caution.⁴⁶ Both episodes occurred in the supposedly more controlled climate of UN-authorized interventions. Constructing a “humanitarianism with fringe benefits” dismantles the tight constraints of “genuine, authentic, impartial” humanitarian intervention. It becomes humanitarianism without end, an intervention with confused aims and planning that is not necessarily humanitarian. Potentially, it is used to surround strategy with an obscuring cloak of serendipity. There is no such thing as humanitarian intervention with only humanitarian outcomes – there will almost always be (unknowable and uncontrollable) political outcomes. Even the donation of completely apolitical, impartial aid may contribute to unforeseeable consequences such as internal strife, revolution, or governmental upheaval in an affected state. That does not necessarily mean that the aid-givers have malign intent. It does mean, at the very least, that their actions have consequences entailing responsibilities. Immediately after Cyclone Nargis, the language of humanitarianism became inter-mingled with the language and history of regime change. Why would Myanmar not be nervous?

V. Why Would Myanmar Not Be Nervous?

This section considers the immediate pre-Nargis political landscape and the move from explicitly unfriendly language characterising Myanmar as a rogue regime to discussions of humanitarianism as an instrument of change.

V.1 International Initiatives

US antipathy towards the Myanmar regime had existed since the military coup of 1988. The US had imposed sanctions,⁴⁷ which included a bar on investments in Myanmar. The 2003 US Burmese Freedom and Democracy Act followed and, among other measures, banned financial transactions and imports.⁴⁸ Leaving aside the fact that sanction regimes are often less effective at precipitating change than strategies which engage with transitioning states,⁴⁹ there

⁴³ See A. Bellamy, ‘The Responsibility to Protect – Five Years On’, *Ethics & International Affairs*, 2010-24(2), pp. 143 & 152.

⁴⁴ Scheffer 1992, supra note 10, drawing on the work of Lillich, Behuniak, Verwey and Bazylar, p. 291.

⁴⁵ Nelson 2010, supra note 9, p. 383.

⁴⁶ 1995 Supplement to an agenda for peace: position paper of the Secretary-General on the occasion of the fiftieth anniversary of the United Nations, A/50/60-S/1995/1.

⁴⁷ L. A. Niksch & M. A. Weiss, ‘Burma: Economic Sanctions’, at: <http://www.fas.org/sgp/crs/row/RS22737.pdf> (last accessed on 18 March 2013).

⁴⁸ These would be further extended in 2006.

⁴⁹ N. A. Englehart, ‘Is Regime Change Enough for Burma: the problem of state capacity’, *Asian Survey* 2005-45(4), p. 622.

was a clear US desire for regime change. Denunciation of Myanmar in 2005 as an “outpost of tyranny” was accompanied by President Bush stating that “[t]he Burmese people...want their liberty-- and one day, they will have it”.⁵⁰ In February 2006, Eric John, Deputy Assistant Secretary of State for the Bureau of East Asian and Pacific Affairs, asserted at a Harvard University seminar that “All of us have an interest in seeing change in Burma.”⁵¹

The US had already legislated to the effect that UN Development Program activities be pre-approved by Aung San Suu Kyi and her party, the NLD.⁵² This effectively “outsourc[e]” US Myanmar policy - recognising, if not creating, a parallel Myanmar government.⁵³ Indeed, the Chairman of a US Congressional hearing indicated that following Aung San Suu Kyi’s approval, Congress was extending sanctions, thus indicating policy-dependence upon the views of a single foreign leader.⁵⁴ The US also supported Thai-based Myanmar dissident groups and their activities, both for humanitarian reasons and as lobbying groups. There appeared a tacit assumption that with a change of government, these individuals would assume leadership roles in the new regime.⁵⁵ Indeed, in response to the 2006 US sanctions-renewal, Prime Minister Sein Win of the exiled National Coalition Government of the Union of Burma credited the US with empowering the democracy movement and said that efforts should continue “until the democratization process is irreversible in Burma”.⁵⁶

The US was not alone. In November 2005, the European Parliament adopted a resolution asking the UN Security Council both to address the situation in Myanmar as a matter of urgency⁵⁷ and to empower the UN Secretary-General to mediate “to bring about national reconciliation and a transition to democracy”.⁵⁸ As noted, the US re-animated this endeavour in the UNSC in September 2006,⁵⁹ a move described by a former US Military Intelligence analyst as only the beginning “towards evolving a cohesive international action plan to restore democracy in Myanmar.”⁶⁰ This despite the fact that in July 2006 the Non-Aligned Movement had written to the UNSC categorically opposing the inclusion of Myanmar on the UNSC’s agenda, instead requesting cooperation between the international community and the regime.

⁵⁰ President Discusses Freedom and Democracy in Kyoto, Japan, released by the White House Office of the Press at: <http://2001-2009.state.gov/p/eap/rls/rm/2005/56945.htm> (last accessed on 18 March 2013).

⁵¹ A. Powell, ‘U.S. pushes for regime change in Burma’, at: <http://www.news.harvard.edu/gazette/2006/02.23/09-burma.html> (last accessed on 18 March 2013).

⁵² Section 1106 ‘Limitation on the United States Voluntary Contributions to the United Nations Development Program’ of the Foreign Affairs Reform and Restructuring Act 1998.

⁵³ D. I. Steinberg, ‘The United States and its Allies: the problem of Burma/Myanmar Policy’, *Contemporary Southeast Asia* 2007-29(2), p. 219.

⁵⁴ D. I. Steinberg, ‘Burma Strategic Dialogue: Responses’ at: http://www.ips-dc.org/articles/burma_strategic_dialogue_responses (last accessed on 18 March 2013)

⁵⁵ Steinberg 2007, supra note 53, p. 219 .

⁵⁶ BurmaNet News, “National Coalition Government of the Union of Burma: NCGUB applauds renewal of U.S. sanctions on Burma”, at: <http://www.burmanet.org/news/2006/08/02/national-coalition-government-of-the-union-of-burma-ncgub-applauds-renewal-of-us-sanctions-on-burma/> (last accessed on 18th March 2013)

⁵⁷ Drawing on the report commissioned from Vaclav Havel and Archbishop Desmond Tutu, “Threat to the Peace – A Call for the UN Security Council to Act in Burma”, at: <http://www.dlapiper.com/files/News/8bcac83e-c5b9-4a8b-924e-a72ca16d5c1c/Presentation/NewsAttachment/39f15335-da9d-40f3-af49-ac9ff2c98c1e/BurmaReport.pdf> (last accessed on 18 March 2013)

⁵⁸ 2005 European Parliament Resolution, P6_TA(2005)0444.

⁵⁹ Letter dated 15 September 2006 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2006/742; 2006 Report of the United Nations Security Council, S/PV.5526, supra note 37. The US had failed in its previous attempts.

⁶⁰ Col. R. Hariharan (ret.), “Myanmar: U.N. Security Council's Move to Tackle the Military Regime”, at: <http://www.southasiaanalysis.org/%5Cpapers20%5Cpaper1955.html>

China also objected that recent improvements in Myanmar were gains hard won and UNSC intervention would both complicate, and negatively impact upon, future interaction between Myanmar and the UN.⁶¹

V.2 UN Security Council Action

The context was thus created for further impetus to be given to US calls that the non-democratic situation in Myanmar threatened international peace and security *per* Article 39 of the UN Charter, opening the door to UN enforcement action.⁶² Undoubtedly, natural disasters like Cyclone Nargis can create severe hardships which potentially prompt internal upheaval and international instability (particularly as regards neighbouring states), thereby presenting threats to peace. However, as early as January 2007 the US and UK attempted to obtain a resolution characterising the Myanmar situation as such a threat.⁶³

The eventual draft UNSC resolution indicated mixed and confused objectives by conflating the language of force, humanitarianism and regime change.⁶⁴ While welcoming the efforts of both UN agencies engaged in Myanmar and those of the Association of South East Asian Nations (ASEAN) to expedite a peaceful transition to democratic rule, it expressed deep concern both at the “slow pace of tangible progress” in the national reconciliation process and the continued detention of political prisoners, “including the house arrest of Aung San Suu Kyi”. The draft recalled previous UN General Assembly action⁶⁵ and, citing the September 2006 report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro,⁶⁶ called on the government to cease military attacks against civilians in ethnic minority regions, and in particular to end associated human rights and humanitarian law violations against persons belonging to ethnic nationalities. Besides calling for an end to governmental restrictions upon humanitarian actors, the resolution urged the regime to begin a substantive dialogue with all political stakeholders, including representatives of ethnic nationality groups and political leaders, which would lead to a genuine democratic transition. Release of all political prisoners and the removal of constraints on all political leaders and citizens were also demanded to allow the National League for Democracy (NLD) and other political parties to operate freely. Perhaps of most interest is the preambular reference to a general context, which stressed that there existed a need for tangible progress in Myanmar’s overall situation in order to “minimize the risks to peace and security in the region”. The US was not alone in its antipathy. Indeed the Slovakian representative pointed to Myanmar’s deteriorating human rights situation as growing into “an intra-State conflict with consequences for the entire region”. Similarly, the French representative referred to “repercussions beyond [Myanmar’s] borders”. In April 2007 the EU would renew its Common Position, making clear that loosening of the sanctions depended upon political change.⁶⁷

Ultimately, the draft resolution was unsuccessful, with both Russia and China exercising their vetoes. Both were clear in their opinions that the situation within Myanmar was purely

⁶¹ 2006 Report of the United Nations Security Council, S/PV.5526, *supra* note 37.

⁶² E. de Wet, *The Chapter VII Powers of the UN Security Council*, Oxford: Hart Publishing 2004.

⁶³ 2007 Provisional Report of the United Nations Security Council, 5619th meeting, S/PV.5619.

⁶⁴ 2007 United Nations Security Council, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, S/2007/14.

⁶⁵ 2006 United Nations General Assembly Resolution, 61st session, A/RES/61/232.

⁶⁶ 2006 United Nations General Assembly, Situation of Human Rights in Myanmar, A/61/369.

⁶⁷ 2006 Council of the European Union, Council Common Position 2006/318/CFSP. See also measures of other US allies in the region.

internal in nature,⁶⁸ and were supported in this opinion by Myanmar's neighbours who also did not consider an international threat to exist. Although the ASEAN Inter-Parliamentary Myanmar Caucus in December 2005 had called for the UNSC to discuss Myanmar, on the day prior to the UNSC vote, ASEAN explicitly stated that Myanmar was not an international threat.⁶⁹ Even post-Nargis, ASEAN's position seemed relatively steadfast. While the UNGA's Third Committee passed a resolution in November 2008 condemning Myanmar's human rights record,⁷⁰ none of the affirmative votes came from its neighbours or ASEAN members. Notably on that very same day another resolution was passed, which criticised the use of human rights as a unilateral coercive measure "implemented in contravention of international law" and the UN Charter "with negative consequences to economic development".⁷¹ Affirmative votes came from Myanmar, fellow ASEAN states and NAM members.

Although the rationale for US action may have lain more in the realm of theatre than reality,⁷² it nevertheless displayed a gathering US mindset as regards Myanmar matters. The draft resolution having been unsuccessful, there was evidence shortly thereafter of a tactical change and a move from 'threats' to 'security' to 'R2P'. In April 2007 a prominent article appeared in the *Washington Post* which acknowledged human rights abuses in Myanmar but doubted the effectiveness of sanctions. It complained about the ostensible absence of R2P's application to Myanmar's people, and that moral indignation was "the practical extent of Western responses to these atrocities". Described as representing a "major shift in thinking in influential Washington circles"⁷³ this article moved the discourse from punitiveness to humanitarianism and from the generals to the populace. Although acknowledging anxieties regarding co-operation with the junta, misuse of humanitarian resources, and the cost of aid (potentially \$1 billion annually), and notions that massive and sustained increases in humanitarian aid could facilitate political change might be overly-hopeful, nevertheless it maintained that it was incumbent upon the US to "improve the lives of millions and avert further human disaster". Even if the R2P reference is accepted, it is unclear why such incumbency fell particularly and substantially upon the US. Nevertheless, the Myanmar political situation was in flux and events were about to strengthen notions of international intervention to benefit the Myanmar people.

V.3 The Saffron Revolution and the Return to Security?

Writing in August 2007, Steinberg noted the possibility of an internal dynamic within Myanmar's military which might produce change: "the possibility of violent change in the streets can never be completely discounted, but it would take an economic catastrophe or some egregious act of ignorance or villainy by the authorities at some level to trigger a popular response."

The "Saffron Revolution", which was initially sparked by the removal of fuel subsidies resulting in an exponential increase in the price of petrol and natural gas, occurred almost simultaneously. Somewhat ironically, this demand to establish market energy prices emanated from the IMF and World Bank. Protest involvement by Buddhist monks captured

⁶⁸ 2007 Provisional Report of the United Nations Security Council, S/PV.5619, *supra* note 63.

⁶⁹ See also comments of Qatar in 2006 Report of the United Nations Security Council, S/PV.5526, *supra* note 37.

⁷⁰ 2008 United Nations General Assembly, 63rd Third Committee Meeting: Situation of Human Rights in Myanmar, A/C.3/63/L.33.

⁷¹ 2008 United Nations General Assembly, 63rd Third Committee Meeting: Human Rights and Unilateral Coercive Measures, A/C.3/63/L.31. See generally 2008 United Nations General Assembly, 63rd session of the Third Committee: Draft resolutions address Human Rights situations, GA/SHC/3940, at: <http://www.un.org/News/Press/docs/2008/gashc3940.doc.htm> (last accessed on 18th March 2013)

⁷² Steinberg 2007, *supra* note 53, p. 219.

⁷³ *Ibid.*

international attention, as did the brutal methods employed by the regime to crush protests.⁷⁴ Following a UNSC closed-door meeting in September 2007, the US ambassador Zalmay Khalilzad characterised the escalating tensions in Myanmar as posing “a threat to regional peace and stability.”⁷⁵ In a subsequent UNSC meeting of November 2007,⁷⁶ where Ibrahim Gambari, the Secretary-General’s Special Adviser, reported on his recent visit to Myanmar, the US representative stated that the ruling generals were being offered a constructive means of engagement. In order to retain international support, this engagement had to gain momentum, show real resolve (a purely formal process was unacceptable) and should be accompanied by “appropriate pressure” with both levels being calibrated according to actual progress. A UNSC Presidential Statement on November 14th, 2007 stressed the need for the Myanmar regime to create conditions for dialogue and reconciliation by relaxing Aung San Suu Kyi’s detention conditions, and by pursuing the release of political prisoners and detainees.⁷⁷ Perhaps in recognition of Myanmar anxieties, a UNSC Presidential Statement on May 2nd 2008 (the very day Nargis struck) expressed its support for the work of both ASEAN and the UN Secretary-General’s good offices. It concluded by affirming its commitment to Myanmar sovereignty and territorial integrity, reiterating that Myanmar’s future lay in the hands of “all of its people”.⁷⁸ Hawkish rhetoric thus provided the context within which humanitarian aid programmes would be urged upon Myanmar. Such urgings inevitably carried overtones of muscular humanitarianism,⁷⁹ and that unhappy history in its wake.

VI. R2P and Natural Disasters

Requests for disaster aid are often made to the ‘international community’ by senior figures within the affected state. The clear implication is that the overwhelmed state is unable to cope on its own.⁸⁰ Despite the fact that even strong, resource-rich states can struggle to cope with natural phenomena (witness US management of Hurricane Katrina), there is uneasiness regarding the messages (unintentionally) emitted by calls for aid. Aid appeals may fuel internal perceptions that external actors, rather than the affected government, are responding to the tragedy. Passive relief-acceptance equally communicates weakness and at least a partial loss of basic domestic authority. This becomes particularly problematic if organisations associated with political opposition provide aid and appear as first responders.⁸¹

As Naomi Klein notes, natural disasters terrify repressive regimes: once fear and the aura of total control seem absent or disorganised - subjects “can become dangerously emboldened.”⁸² Outsiders may see the very provision of aid as implying state failure, sharpening the external gaze. Indeed, following the March 2011 Japanese earthquake and tsunami, international

⁷⁴ J. McCurry & J. Watts & A Duval Smith, ‘How Junta Stemmed a Saffron Tide’, *The Guardian*, 30 September 2007, at: <http://www.guardian.co.uk/world/2007/sep/30/burma.justinmccurry> (last accessed on 18th March 2013)

⁷⁵ ‘UN envoy warns of Myanmar crisis’, at: <http://english.aljazeera.net/news/asia-pacific/2007/09/200852512370678540.html> (last accessed on 18th March 2013).

⁷⁶ 2007 United Nations Security Council meeting, S/PV.5777.

⁷⁷ 2007 United Nations Security Council Press Statement on Myanmar, SC/9171.

⁷⁸ The day after Nargis struck, and following claims of forced voting, President Bush froze the assets of Myanmar companies.

⁷⁹ A. Orford, “Muscular Humanitarianism: reading the narratives of the new interventionism”, *European Journal of International Law* 1999-10, p. 679.

⁸⁰ Japanese Defence Minister, “Japan earthquake: Military rescue effort doubled”, at: <http://www.bbc.co.uk/news/world-asia-pacific-12725736> (last accessed on 18th March 2013).

⁸¹ Nelson 2012, supra note 9, pp. 386-387.

⁸² Klein 2008, supra note 1, p. 2.

comment bemoaned the absence of a “strong voice” and that the crisis highlighted a leadership vacuum.⁸³ Doubts were expressed about Japan’s threat assessment regarding the damaged nuclear reactors⁸⁴ and its damage-limitation measures were disparagingly referred to as “low-tech”.⁸⁵ The Japanese Prime Minister eventually resigned on 26th August 2011, partly explained by reference to his perceived management of the crisis and accusations of a lack of leadership.⁸⁶ If such critical arrows were slung at a powerful, developed democracy, what hope had Myanmar? Myanmar’s human rights record had long been a source of condemnation. Combined with the regime’s perceived failure to manage the Nargis crisis, the allure of the R2P doctrine became irresistible to some.

The original 2001 R2P document drafted by the International Commission on Intervention and State Sovereignty (ICISS) dictated that when a state was unable or unwilling to protect its population in the face of serious hardships, the international community should assume this responsibility.⁸⁷ Despite their mention in early ICISS drafts, by the time of the 2005 UN World Summit Outcome document, natural disasters *per se* did not appear as scenarios which could prompt R2P’s application. It mentioned only such situations as crimes against humanity, ethnic cleansing, war crimes and genocide.⁸⁸ Nevertheless, as natural disasters are potentially equally calamitous events leading to massive numbers of deaths and displacements, and can be aggravated by state (in)action, they seemed theoretically consonant with R2P’s ethos. Further, given the level of support for R2P and its reflection of pre-existing understandings of the relevant law, R2P appeared to exert a general “pull towards compliance.”⁸⁹ If affected states forcibly resisted the provision of aid, then threats to international peace and security would arise, and the UNSC could consider other options including Chapter VII action.⁹⁰ Interestingly however, R2P was not received with particular enthusiasm by NAM members⁹¹ and, ironically, suspicions of neo-colonialism united both abusive and democratic Southern countries.⁹²

R2P conceptualised “sovereignty as responsibility” with states having “primary responsibility” for protecting those within their borders. Ostensibly, this traditional Keynesian welfarist model privileges sovereignty. However, sovereignty is made conditional upon both acting responsibly and adhering to duties. State incapacity or ill will in protecting citizens from “avoidable catastrophe – from mass murder and rape, from starvation”,⁹³ could result in a secondary responsibility to protect falling upon the international community.⁹⁴ An affected

⁸³ K. Belson & N. Onishi, ‘Crisis highlights Japanese leadership vacuum’, *International Herald Tribune*, 17 March 2011.

⁸⁴ N. Onishi, D. E. Sanger & M. L. Wald, ‘U.S. Disputes Japan’s Threat Assessment’, *International Herald Tribune*, 18 March 2011.

⁸⁵ K. Belson, ‘Crisis of Confidence in Japan, too’, *International Herald Tribune*, 19 March 2011.

⁸⁶ J. McCurry, ‘Naoto Kan resigns as Japan’s prime minister’, *The Guardian*, 26 August 2011, at: <http://www.guardian.co.uk/world/2011/aug/26/naoto-kan-resigns-japan-pm> (last accessed on 18th March 2013)

⁸⁷ 2001 International Commission on Intervention and State Sovereignty (ICISS), ‘*The Responsibility to Protect*’, at: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last accessed at 18th March 2013).

⁸⁸ 2005 World Summit Outcome, A/RES/60/1, paras.138-139.

⁸⁹ T. Franck, *The Power of Legitimacy Among Nations*, Oxford: Oxford University Press 1990; Bellamy 2010, supra note 43, pp. 160-162.

⁹⁰ Scheffer 1992, supra note 10, pp. 265, 270-271, 289.

⁹¹ A. Bellamy, “Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit”, *Ethics & International Affairs* 2006-20 (143), p. 152.

⁹² A. Donini, “The far side: the meta functions of humanitarianism in a globalised world”, *Disasters* 2010-34(2), pp. 220 & 228.

⁹³ 2001 International Commission on Intervention and State Sovereignty (ICISS), supra note 87, VIII.

⁹⁴ G. Evans, *The Responsibility to Protect*, Washington: Brookings Institution Press 2008, p. 42.

state's ceding to international authority⁹⁵ would highlight how sovereignty's central concept of control had been replaced by responsibility.⁹⁶ While entirely in tune with human rights discourse, this re-characterisation held the potential to upturn central tenets of international law. Not only did R2P create expectations of intervention, it also provided a powerful new rhetorical tool for would-be interveners.

Further, the language of "unwilling or unable" reflected that of the International Criminal Court Statute, with its imputations of malign intent or criminal neglect.⁹⁷ As suggested already, such lexemic construction precludes any excavation of the dynamics which can underlie or motivate aid-rejection. Diplomatic perspectives geared towards resolution become blurred. Alternatively, such language perhaps foreshadowed the strict limits of application eventually imposed upon R2P, which would confine it to classic international crimes (genocide, crimes against humanity).⁹⁸ However, in 2008 the jury was still out, the boundaries of R2P still undecided, and the opportunities presented by Cyclone Nargis awaited exploration.

VII. R2P and Nargis

By May 6, 2008, in New York, the Myanmar Government formally asked the UN for help, but made clear that it would prefer state-to-state aid on a bilateral basis and, as the UN Joint Logistics Center noted, seemed hesitant to issue visas to aid workers. Given that Myanmar had made no immediate request for international assistance, this hesitancy was unsurprising.

In addition to intergovernmental organisations (IGOs) such as UNOCHA, the EU and ASEAN offering assistance, an initial tranche of funding from the UN Central Emergency Response Fund was approved within one day of receipt of the grant request,⁹⁹ enabling agencies to provide assistance quickly. Standard non-state entities and NGOS such as IFRC, MSF, World Vision, Save the Children and a number of other international actors also rushed to donate aid. Australia, Bangladesh, India, Italy, the UK, Thailand, Malaysia and the US were among the most prominent. Following a declaration on May 5, 2008 from Shari Villaros the US Chargé d'Affaires in Rangoon, the U.S. Agency for International Development (USAID) deployed a disaster assistance response team and provided approximately \$251,000 to various UN specialised agencies including UNICEF, WFP and UNHCR for emergency food, water and sanitation, and shelter assistance. On May 6, an additional \$3 million from USAID was allocated for the provision of emergency relief assistance, including \$1 million to the American Red Cross and \$2 million for NGO partners with another \$13 million in food aid and logistics assistance through the World Food Programme being forthcoming by May 12. USAID and the US Department of Defense coordinated the air delivery of nearly \$1.2 million

⁹⁵ 2001 International Commission on Intervention and State Sovereignty (ICISS), *supra* note 87, XI.

⁹⁶ C. Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", *American Journal of International Law* 2007-101, pp. 99, 102-103.

⁹⁷ 1998 Rome Statute of the International Criminal Court, adopted 17 July 1998, A/CONF.183/9, Article 17.

⁹⁸ The 2005 World Summit Outcome Document did not mention natural disasters as triggering subject-matter and ultimately the UN Secretary General in his 2009 Report *Implementing the Responsibility to Protect* expressly rejected R2P's inclusion of natural disasters *per se*, as did the ILC in 2009, considering such inclusion would dangerously extend R2P beyond the 2005 consensus and operational utility. 2009 United Nations General Assembly, 63rd session: Report of the Secretary-General A/63/677, Part I para. 10(b); 2009 Report of the International Law Commission, 61st session A/64/10, para. 164; 2010 Report of the International Law Commission, A/65/10, *supra* note 18, para. 318.

⁹⁹ 2008 United Nations General Assembly, 63rd session: Central Emergency Response Fund: Report of the Secretary-General, A/63/348.

of U.S. relief commodities to Rangoon. The US President George Bush made a direct appeal to the Myanmar regime, urging it to open up to foreign aid and offered the assistance of the US Navy, which had two ships within days' sailing time. While a White House spokesperson emphasised that there was no ulterior political motive at work, President Bush simultaneously signed legislation awarding the Congressional Gold Medal to Aung San Suu Kyi "in recognition of her courageous and unwavering commitment to peace, nonviolence, human rights, and democracy in Burma." This may have been coincidental but, as noted already, perceptions matter, especially given the fact that a week later Bush stated that an angry world should condemn the way the regime was handling the cyclone's aftermath and its unwillingness to "allow ... the full kind of might of a compassionate world to help them".¹⁰⁰

If, as R2P maintains, sovereignty is contingent on the exercise of responsibility, then a *perceived* 'failure' in responsibility (even if it is the justifiable refusal/limiting of aid) may imperil the subject's sovereignty.¹⁰¹ For example, when aid is not provided by the affected state it becomes somehow "less of a state". Alternatively, if external aid does arrive, the affected state is perceived as not being in a position to coordinate distribution and to oversee the necessary logistics.¹⁰² There can be a corresponding diminution in the power of Articles 2(7) and 2(11) of the UN Charter, increasing the examined subject's sense of vulnerability. By the time of Myanmar's request for aid, reference was being made to a "crack" emerging in the "wall" of the "isolated regime".¹⁰³

During one UNSC meeting, Bernard Kouchner, one of the founders of *Médécins sans Frontières*, argued that the Myanmar population's suffering was being exacerbated by governmental action. He argued for R2P's invocation to impose an obligation upon Myanmar to accept the delivery of foreign assistance.¹⁰⁴ Although his UK counterpart, Foreign Secretary David Miliband, had sympathised with this application of R2P,¹⁰⁵ the UK Minister for Development dismissed Kouchner's invocation as "incendiary". Edward Luck, the UN Special Adviser with particular duties regarding responsibility to protect, also criticised Kouchner's "erroneous application". Manufacturing "headlines" was said to hamper R2P advocates in their efforts both to convince developing countries that the goal was not to impose a Western interventionist human rights, and to "inspire confidence" in the concept.¹⁰⁶ Although some NGOs supported the French position, Amnesty International avoided R2P, instead referring to Myanmar's obligations under the 1989 Convention on the Rights of the Child and its commitments under the 2005 ASEAN agreement on disaster management and emergency assistance. Although Chinese and Russian vetoes blocked Kouchner's endeavours, R2P

¹⁰⁰ 'Bush says world should condemn Myanmar', *The Jakarta Post*, 13 May 2008, at: <http://www.thejakartapost.com/news/2008/05/12/bush-says-world-should-condemn-myanmar.html> (last accessed on 18th March 2013)

¹⁰¹ See Benton Heath 2011, *supra* note 22, p. 435 for a discussion of Nolte's work 'Sovereignty as Responsibility', *American Society of International Law Proceedings*, 2005-99, pp. 389-392.

¹⁰² *Ibid.*, pp. 442-443.

¹⁰³ S. Mydans, 'Storm Opens a Crack in Myanmar's Wall Isolated Regime Forced to Ask for Help', *International Herald Tribune*, 8 May 2008.

¹⁰⁴ N. Nougayrède, P. Bolopion and T. Ferenczi, 'Birmanie: vif débat', *Le Monde*, 15 May 2008. See also F. Adimi et R. Krieger, 'A Paris, l'opposition birmane évoque "une tragédie créée par l'homme"', *Le Monde*, 19 May 2008.

¹⁰⁵ A. Brown, 'Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?', *House of Commons Research Paper*, 2008 – 08 (55), pp. 51, 52.

¹⁰⁶ Nougayrède et al. 2008, *supra* note 104. See also E. Luck, Briefing on 'International Disaster Assistance: Policy Options' to the Subcommittee on International Development, Foreign Assistance, Economic Affairs and International Environmental Protection Committee on Foreign Relations of the United States, 17 June 2008, at: <http://208.43.245.180/asset/file/370/disaster.pdf> (last accessed on 18th March 2013).

rhetoric almost certainly fuelled Myanmar's anxieties while simultaneously emboldening others.

Indeed, by May 14th, after Kouchner's attempted invocation of R2P, a piece by Robert D. Kaplan appeared in the *New York Times*, pointing to the availability of US forces engaged in multinational military exercises in Thailand. Fate had seemingly bestowed an advantage. Troops and supplies could be deposited via a carrier strike group (or a small Marine-dominated expeditionary strike group headed by an amphibious ship) and air force aid-drops could occur without militarily occupying any Myanmarese airports. This "small footprint on shore" reduced potential military clashes yet dealt "a hard political blow to the junta". While urging that such an action be carried out by the US as part of a coalition, the article's main concern seemed to be the worrying aftermath that the US might be expected to "fix".¹⁰⁷ On May 17th, Dr Thaug Htun, the UN representative for Burma's government in exile, urged action - this was not a request for "drawing pretty shapes on a map, or for finding squared-off, bureaucratised solutions to fit the round hole of disaster that exists in post-Nargis Burma". The intent was explicit: only force would suffice.¹⁰⁸

Into this context came a French navy ship, *Le Mistral*, carrying aid in international waters off Myanmar's coast. Myanmar's UN ambassador accused France of sending a warship to the area. His French counterpart retorted that refusals to allow aid delivery could potentially lead to crimes against humanity and angrily disputed accusations of aggression.¹⁰⁹ Nevertheless, on May 19th, Bernard Kouchner urged the UN to intervene by force.¹¹⁰ His rhetoric employed a clear doing something/doing nothing binary. He seemed to confusingly characterise the "R" of R2P not as a "responsibility" (to protect) but as a "right" (to invade).¹¹¹

As noted, the US and various other key international actors that wanted to supply aid had also endorsed a number of opposition groups. Arguably, it was a leap of faith to assume that the two imperatives –to help and to change– could be extricated one from the other. The absence of Myanmarese certitude manifested itself in its insistence on managing the crisis as a sovereign state. The tense standoff persisted for a fortnight. Against a naval presence and R2P discourse, President Bush's urgings of "Let us help" were viewed with suspicion. The confusing context led a veteran UN aid coordinator to opine that the resource-rich but hyper-critical West was unlikely to convince Myanmar away from its course of action.

¹⁰⁷ R.D. Kaplan, 'Aid at the Point of a Gun', *The New York Times*, 14 May 2008, at: http://www.nytimes.com/2008/05/14/opinion/14kaplan.html?_r=0 (last accessed on 18th March 2013).

¹⁰⁸ Dr. T. Htun, 'Obstacles of shadows: It seems Burma's natural disaster is not enough to provoke an intervention. Only a war would suffice.', *The Guardian*, 17 May 2008, at: <http://www.guardian.co.uk/commentisfree/2008/may/17/cyclonenargis.burma> (last accessed on 18 March 2013).

¹⁰⁹ 'France angered by Burmese delays', 17 May 2008, at: <http://news.bbc.co.uk/2/hi/asia-pacific/7405998.stm> (last accessed on 18 March 2013); 'Tension entre la Birmanie et la France autour de la mission humanitaire du "Mistral"', *Le Monde*, 17 May 2008.

¹¹⁰ B. Kouchner, 'Birmanie: morale de l'extrême urgence', *Le Monde*, 19 May 2008.

¹¹¹ T. Garton-Ash, 'We have a responsibility to protect the people of Burma. But how?', *The Guardian*, 22 May 2008, at: <http://www.guardian.co.uk/commentisfree/2008/may/22/burma.cyclonenargis> (last accessed on 18th March 2013). See also the comments of the Nicaraguan President of the General Assembly at the Opening of the Thematic Dialogue of the General Assembly on the Responsibility to Protect, 23 July 2009, at: <http://www.un.org/ga/president/63/statements/openingr2p230709.shtml> (last accessed on 18 March 2013)

Responsibility instead fell upon influential local actors (China, India and ASEAN neighbours) to overcome deficits in trust and persuade the regime to allow international access.¹¹²

VII.1 Eschewing R2P for Regional Saviours?

During this post-Nargis brinkmanship, the UN Under-Secretary-General and Executive Secretary of Economic and Social Commission for Asia and the Pacific (UNESCAP), Dr Noeleen Heyzer, called on ASEAN's Secretary-General Dr Surin Pitsuwan, to advocate for its intervention. ASEAN quickly convened an emergency meeting of Foreign Ministers in Singapore, which produced an agreement for collaboration among ASEAN, the Government, the UN, regional and international agencies to respond to the disaster in a "systematic, efficient and responsible manner" and permit aid-flow¹¹³ (although foreign aid was not given uncontrolled entry¹¹⁴). It was the first time that ASEAN took the helm of a large-scale humanitarian operation in a collective manner.¹¹⁵ The ASEAN Humanitarian Task Force for the Victims of Cyclone Nargis was launched and its co-ordinating office remained in place for two years employing seasoned expert staff. Against the background noise urging forcible aid-delivery, John Holmes the UN Under-Secretary-General for Humanitarian Affairs and Emergency Relief Co-ordinator was clear that among those actually engaged in the operation, "persistent negotiation and dialogue" was the optimum strategic course - no other approach would have facilitated aid more quickly.¹¹⁶ Any evidence that the spectre of force galvanised Myanmar to accept this agreement was anecdotal.¹¹⁷ However, events simultaneously occurring beyond Myanmar's borders were also influencing the rhetoric as regards the extent of Myanmar's moral and legal obligations.

VII.2 Chinese Whispers, False Comparisons and Non-evolution of Customary International Law

In disasters, as in life, timing is everything. On May 12, 2008, an earthquake struck Sichuan in China.¹¹⁸ The apparently diametrically opposite responses of the Chinese and Myanmar regimes were highlighted in the media with criticism of Myanmar aggravated by contrasting footage of rapidly deployed Chinese aid workers. The language of R2P continued to be invoked during this crisis and the Chinese episode was cast as a case-study of model behaviour by a state willing and able to care for its stricken population. For international lawyers this was a potential metamorphosis of customary understandings regarding standards of care and due diligence, all taking place in a context under the influence of R2P. However, closer analysis of the Sichuan earthquake offers an alternative, and less simplistic, narrative and

¹¹² 'Bush to Myanmar: "Let us help"', 6 May 2008, at <http://burmadigest.info/2008/05/06/bush-to-myanmar-let-us-help/> (last accessed on 18 March 2013); Egeland in Barnett & Weiss 2011, supra note 8, p. xix.

¹¹³ 'Charting a New Course: ASEAN-UN Post-Nargis Partnership', at: <http://www.scribd.com/doc/111878500/CHARTING-A-NEW-COURSE-ASEAN-UN-POST-NARGIS-PARTNERSHIP> (last accessed on 18 March 2013), pp. 20 & 27.

¹¹⁴ I. MacKinnon & J. Borger, 'Burmese junta allows neighbours to provide cyclone aid', *The Guardian*, 20 May 2008, at: <http://www.guardian.co.uk/world/2008/may/20/burma.cyclonenargis> (last accessed on 18 March 2013).

¹¹⁵ 'Charting a New Course: ASEAN-UN Post-Nargis Partnership', supra note 113, pp. 27 & 29.

¹¹⁶ J. Holmes, 'Disaster Lessons', *The Washington Post*, 6 August 2008, at: http://articles.washingtonpost.com/2008-08-06/opinions/36918277_1_irrawaddy-delta-myanmar-cyclone-nargis (last accessed on 18 March 2013).

¹¹⁷ Bellamy 2010, referring to Luck & Hacke, supra note 43, p. 152.

¹¹⁸ B. Emmott, 'Burma and China - Reacting to their Natural Disasters', 28 May 2008, at: www.billemmott.com/article.php?id=218 (last accessed on 18 March 2013).

should be read in the context of a much earlier Chinese response to the 1976 Tangshan earthquake.

Approximately 250,000 people died in the 1976 Tangshan earthquake. Although other states were aware of the earthquake's occurrence (due to seismograph readings) the extent of damage caused or the number of casualties was not grasped. When China finally admitted to the earthquake's occurrence, it refused aid, urging citizens to "[r]esist the earthquake and rescue ourselves". The context of this response is important. The combined effect of the earthquake, the reformist Chinese Premier's Zhou Enlai's death in January 1976 (marked by significant mourning, despite warnings from the Gang of Four that this should be downplayed) the ending of the Cultural Revolution and the death of Chairman Mao in September of the same year, led to a national psychodrama. The closed door after the disaster evidenced a siege mentality despite the fact that Chang and Halliday considered that foreign help would have actually "greatly lowered death toll".¹¹⁹

Although by 2008, China was no longer anxious regarding foreign intervention, it still had other dragons to slay. Domestic protest was one such dragon and has been identified as one of the key reasons for China's robust and highly publicised response to the Sichuan earthquake. Taking China's response as validation of a legal benchmark of care below which Myanmar clearly fell (and for which it might bear international consequences) is a poorly informed conclusion. In fact, China initially balked at foreign help¹²⁰ and put off requesting help from the international community for almost 72 hours. International aid eventually came from 19 countries including China's colleagues on the permanent membership of the UNSC (France, Russia and US) and four IGOs. However, a huge amount of the aid provided came from within China, notably from the Chinese public, the Red Cross Society of China, multinational firms located in China, the top ten richest people in mainland China and the Chinese government.

As noted, China's dynamic post-disaster reaction may be explained by paranoia regarding domestic protest against central rule. Five million buildings were estimated to have collapsed and the Communist regime was facing blame for (corruptly or negligently) allowing new buildings to be constructed without meeting the official standards.¹²¹ The huge extent of deaths and destruction was being laid at the administration's door. As one commentator noted, both the Chinese Premier and the President rushed to the quake scene so quickly to sympathise with victims, it would have been easy to mistake them for elected politicians.¹²² One final point also clarifies that even in this apparently perfect case study of state responses to disasters, there are politics at play. After the earthquake, the Chinese government had agreed to allow Japanese military planes to bring in tents and other relief supplies. This was a huge step between these historical enemies, as it would have represented the first time that Japanese military planes had landed on Chinese soil since World War II. The outcry from ordinary Chinese on the Internet was so intense that the plan had to be abandoned. It is difficult to envisage a more explicit assertion of sovereignty and politics.

The Chinese establishment's media was extremely canny in encouraging patriotism, thus pre-empting more testing enquiry into damage-precaution measures. In terms of international legal duties, it is important to stress that what the Sichuan earthquake did *not* reveal was state practice testifying to the recognition or assumption of a legal duty in relation to the disaster-

¹¹⁹ J. Chang & J. Halliday, *Mao: The Unknown Story*, New York: Random House 2005, p. 746.

¹²⁰ E. Lederer, 'Two Natural Disasters, Two Different Responses', 14 May 2008, at: http://www2.irrawaddy.org/article.php?art_id=12014 (last accessed on 18 March 2013).

¹²¹ Klein 2008, *supra* note 1, p.2.

¹²² Emmott 2008, *supra* note 118.

struck Chinese victims. This was not custom supporting R2P and it said nothing legally conclusive about Myanmar's post-Nargis reaction. Of course, even if R2P had been explicitly invoked in the UNSC as regards the Sichuan earthquake, the Chinese veto would almost certainly have prevented any intrusion onto its sovereignty. From this perspective, aid-refusal seems challengeable only depending on the identity of the refuser, not the strength of the emerging doctrine.

VIII. ILC Draft Articles

Desires to avoid states abusing their discretion motivate certain restrictions on aid-refusals. Rivals of sovereigntist positions suggest that consent should "not unreasonably be withheld", arguing that affected states are under an obligation not to reject *bona fide* humanitarian aid offers. Via its draft articles on the protection of persons in the event of disasters, the ILC is developing a duty of international co-operation. Draft Article 5, as provisionally adopted, states that

In accordance with the present draft articles, States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.

Ostensibly this reflects existing understandings regarding expectations of cooperation in assistance between third states and organisations.¹²³ However, taken in the overall context of the Draft Articles, this co-operative duty is more clearly articulated and extended to disaster-affected states. Despite recent acknowledgements of the affected state's sovereign initiative to control and terminate post-disaster aid provision,¹²⁴ the ILC draft articles clearly evidence an impetus towards fettering such initiative.

Draft Article 5's inclusion of the phrase "as appropriate" is meant to eschew expectations of co-operation and make allowances for when cooperation may not be adjudged appropriate.¹²⁵ However, this is more of a sea change than it first appears and may entail significant changes as regards the capacity of an affected state to refuse emergency aid. For example, does an affected state have to establish the *bona fide* nature of its refusal, and will a justifiable reason include political differences with the donor? Alternatively, will a prospective donor be required to establish the *bona fide* credentials of the offer? It seems that the ILC has, more clearly than other legal developments hitherto, moved us into an era where the political act of aid-refusal will entail legal consequences. This article critiques such a move and questions the capacity of legal duties to effectively capture and resolve the complex questions in play as they relate to sovereignty and humanitarianism. The language of human rights is powerful but can be misplaced. Short-termist aid-drops and suchlike capture headlines but oftentimes fuel political tension and operate counter-productively to the needs of stricken populations.

In an early incarnation, the Draft Article, which considered the role of affected states (then Draft Article 8(2)) impliedly noted the possibility of unwelcome and unacceptable offers of assistance. The Special Rapporteur acknowledged that the co-operative duty did not permit

¹²³ Institute de Droit International, *Humanitarian Assistance*, Paris: Pédone 2003, Article I(2) (hereinafter Bruges Resolution) Part VI

¹²⁴ See 2012 Report of the International Law Commission: 64th session, A/67/10 and the 2012 Fifth Report on the protection of persons in the event of disasters by the Special Rapporteur, A/CN.4/652, *supra* note 11.

¹²⁵ 2010 Report of the International Law Commission, A/65/10, *supra* note 18, p. 330.

unilateral responses by IGOs or states,¹²⁶ but nevertheless considered the principles of non-intervention and sovereignty as merely points “of departure not ... conclusion”. At least one ILC delegate even suggested that exceptionally, it might be appropriate “to allow for the urgent deployment of external assistance, without prejudice to the option of halting such assistance if the State had sound reasons for doing so”.¹²⁷ This is quite a considerable step. Normally, if a state needs to undertake otherwise illegal action, it can argue a situation of necessity.¹²⁸ However, that intervening state must establish *its* right to intervene.

While Draft Article 5 evidenced caution as regards duties to cooperate, the revised Draft Article on duties of affected states (now Draft Article 9) seems to clearly prioritise duty over sovereign initiative. The Special Rapporteur defended this prioritisation by citing its reflection and resonance in a number of instruments, including the 2003 Bruges Resolution of the Institut de Droit International¹²⁹ and the African Charter, which he saw in turn as reflecting Article 11 of the Disabilities Convention, the (widely critiqued) terms of UNCESCR General Comment 12, paragraph 17 (which was never repeated in treaty form) and ICESCR Article 11. Still others have argued that primary responsibility only allows a “margin of appreciation”¹³⁰ as regards needs and responses. This language of human rights law presumes that states bear international responsibility for refusals to accept assistance “if such refusal undermined affected individuals’ rights under international law”.¹³¹ This effectively dispenses with consent and reverses the burden of proof. Given that sovereignty prevails in the context of aid-donation (with no international law obligation to offer) creating obligations as regards aid acceptance produces asymmetry.¹³² This asymmetry seems likely to continue into the foreseeable future given the General Assembly’s Sixth Committee’s response to a question posed by the ILC as to whether the duty to cooperate with an affected state included a duty to provide assistance when requested by that state. Many states on the Sixth Committee answered the ILC’s question in the negative on the basis that the duty had no basis in existing international law.¹³³ There seems little appetite for developing such a duty.

The ILC Special Rapporteur has identified three exculpatory principles guiding aid refusals: firstly, an able and willing state refusing assistance; secondly, a weakened state accepting help from elsewhere; thirdly, if the relevant offer is not extended in accordance with humanitarian principles. The first scenario raises evidential questions regarding state capacity. The third scenario clearly reflects the *Nicaragua* judgment (and ICRC principles) requiring impartiality, neutrality and universality in aid-provision. The ILC Special Rapporteur has acknowledged that determining arbitrary refusals will be circumstance-dependent and done on a case-by-case basis. During ILC deliberations regarding Draft Article 12 (concerning the right to offer assistance) some members proposed clearer definitions regarding valid aid-rejections,¹³⁴ although they generally retreated to uncontroversial examples (where the aid-offer held

¹²⁶ It was also the case that the affected state’s consent was required and applied throughout the period of relief activities provided by external actors. *Ibid.*, paras. 306-307.

¹²⁷ Mr. Candiotti in 2010 Report by the International Law Commission, A/CN.4/3057 supra note 34, p.3.

¹²⁸ See the 2001 ILC Articles on State Responsibility in Yearbook of the International Law Commission 2001, A/CN.4/SER.A/2001/Add.1 (Part 2).

¹²⁹ Bruges Resolution, supra note 123, Article III, para 1.

¹³⁰ 2010 Report by the International Law Commission, A/CN.4/SR.3054, supra note 20 and 2011 Report by the International Law Commission, A/66/10, supra note 17, Part C.

¹³¹ 2010 Report by the International Law Commission, A/65/10, supra note 18, para. 318.

¹³² Mr. Vasciannie in 2010 Report by the International Law Commission, A/CN.4/SR.3057, supra note 34, p. 6.

¹³³ 2012 Report by the International Law Commission, A/67/10, supra note 124, p. 86 and Valencia-Ospina, in his Fifth Report of 2012, A/CN.4/652, supra note 11, para. 52.

¹³⁴ 2011 International Law Commission: summary records, A/CN.4/SR.3102 - 3105 and 3107.

unacceptable conditions or the aid-offer or delivery was made on a discriminatory basis¹³⁵). However, in previous debates on the 2003 Bruges Resolution, a more controversial suggestion had been that state aid-refusals could initially be presumed to be for valid reasons, including political or ideological differences.¹³⁶ Classic historical examples would have included refusals of aid from South Africa during apartheid. It seems essential to ponder the validity of such a refusal, especially if the affected state advanced a “(non)clean hands” argument. Indeed, if an assisting entity has a history of human rights abuses and/or discrimination,¹³⁷ this would seem particularly pertinent. As well as shifting the burden of proof away from the stricken state to less-pressed external actors, this approach supports a more holistic, global perspective on a crisis.

In terms of which circumstances will prompt invocation of the ILC duties, it will be essential as a preliminary matter that advocates of rights to humanitarian assistance establish triggering benchmarks of hardship. Evidence of immiseration is more reliable than pre-emptive criteria where certain states are “known to have insufficient supplies”. These could only be reliable criteria if an affected state was in receipt of ongoing international aid immediately prior to a disaster, otherwise intuition and anecdote are in play.¹³⁸ Fundamentally, proving fault on the part of a state requires evidence. If assistance is refused without valid reason (in terms of the ILC draft articles) it will be deemed to be arbitrary. Assessing such arbitrariness entails burdens of proof and questions regarding the appropriate decision-making body. How much time will be available for making determinations in fraught circumstances? What will constitute evidence? What is meant by *bona fide*? Does the obligation to accept *always* extend to offers from IGOs/IFRC/NGOs and even states? Notions of international solidarity imply (sometimes forcible) repercussions - the possible consequences or penalties for unreasonable refusals are potentially extremely drastic.¹³⁹

Combining a factual objective context with a subjective test of state intention makes clear the employment of a common law criminal law paradigm of *mens rea* and *actus reus*. However, analysing an affected state’s characteristics and capacities risks being truncated and superficial. Considering whether aid is offered in good faith or is *primarily* for a humanitarian purpose involves leaps of faith in all but the most egregious cases. Although aid from an international organisation may be more neutral than most, even UN aid may worry states which have been subject to condemnation from bodies such as the UNSC (as Myanmar had been). The UN “trust deficit” was specifically identified during the July 2009 UNGA R2P-implementation debates and the inconsistency pervading UNSC practice noted.¹⁴⁰

Commentators who are uneasy regarding the consequences of the new legal duties are not necessarily heartlessly and mechanically reinforcing Westphalian notions, regardless of human suffering. What they are doing is avoiding telescoping analysis to target particular regimes. Such microscopic, *ad hoc* development is unwise. Instead, these Cassandras are highlighting legal complexities, which could, and most likely will, arise. When the *Nicaragua* case stressed the importance of non-discrimination of aid-dispersal (taking note of Red Cross principles) it

¹³⁵ 2011 Report by the International Law Commission, A/66/10, supra note 17, para. 279.

¹³⁶ Mr. Orrego-Vicuña re the draft Bruges Resolution; Benton Heath 2011, supra note 22, footnote 139.

¹³⁷ 1986 Statutes of the Red Cross and Red Crescent Movement <http://www.icrc.org/eng/resources/documents/misc/statutes-movement-220506.htm> (last accessed on 18 March 2013).

¹³⁸ See Mr. Vasciannie’s concerns in 2010 Report by the International Law Commission, A/CN.4/SR.3057, supra note 34, p. 7. See also Transparency International’s least-to-most corrupt index.

¹³⁹ 2010 Report by the International Law Commission, A/65/10, supra note 18, para. 323.

¹⁴⁰ Bellamy 2010, supra note 43, p. 155; Gambia & Cuba in 2009 United Nations General Assembly, sixty-third session: 98th plenary meeting, A/63/PV.98.

recognised problematically implemented interventions and states being denied legal protection.¹⁴¹ Indeed, the 1995 Red Cross Code of Conduct reiterates the illegitimacy of aid being used to further particular political or religious standpoints, or being an instrument of government foreign policy.¹⁴² The pre-eminent 2007 Red Cross Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance (hereinafter the 2007 IDRL Guidelines) further reinforce the needs-based approach, challenging programmes aimed at gathering “sensitive information of a political, economic or military nature”.¹⁴³ Dynamic concepts of law and rights are all very well, but not if they enable a different form of hegemony via the actions of a selfish altruist.

IX. The Humanitarian Perspective

IX.1 The Evolution from Emergency Aid to Development

“It is easy to give alms; it is better to work to make the giving of alms unnecessary.” (Henry Ford)

There are a number of different stages of post-disaster aid including short-term, life-saving emergency aid, recovery measures,¹⁴⁴ reconstruction, and proactive mitigation measures for the future. Although Henry Ford’s thoughts initially seem to favour sophisticated aid programmes which do not trail dependence in their wake, and while the desire to move away from an episodic approach to disasters is understandable, there can be a conditionality to longer-term arrangements which might trouble affected states. The gap between emergency relief and development has become seamless in recent years.¹⁴⁵ The anxieties, which this article has already identified regarding the intertwining of aid and sovereignty, are potentially intensified if there is a seamless transition from emergency aid to long-term development programmes.¹⁴⁶

A number of key soft law guidelines are instructive here and indeed the ILC study itself is contributing to the soft law terrain by producing non-binding guidelines.¹⁴⁷ It has chosen this route both for practicality and to aim at the widest possible acceptance given the number of actors involved.¹⁴⁸ Although earlier attempts distinguished between humanitarian assistance and foreign aid on the basis of the former’s emergency character,¹⁴⁹ the 2007 IDRL Guidelines refer both to disaster relief and initial recovery assistance as strengthening local

¹⁴¹ *Nicaragua v. United States Merits Judgment 1986*, supra note 13, paras. 242-244, see also para.127.

¹⁴² Beeckman 2006, supra note 16, p. 132.

¹⁴³ 2007 IDRL Guidelines, supra note 16, Part. I(4).

¹⁴⁴ *Ibid.*, Introduction 2(3). See also both the Botswana National Policy on Disaster Management 1986 (para. 7 referring to immediate attempts to normalise life and the subsequent phasing introduction of mitigation activity) and Sec. II(2) of the Ethiopian National Policy on Disaster Prevention and Management, October 1993 .

¹⁴⁵ S. Collinson, S. Elhawary, & R. Muggah, ‘States of fragility: stabilisation and its implications for humanitarian action’, *Disasters* 2010-34(275), pp. 286-287.

¹⁴⁶ Indeed during the July 2009 UNGA debates on implementing R2P concerns were expressed that the concept should *not* engender new development conditionalities. 2009 United Nations General Assembly plenary meeting, A/63/PV.98, supra note 140.

¹⁴⁷ Although of course much of the material therein reflects pre-existing customary law.

¹⁴⁸ 2011 International Law Commission: Fourth report on the protection of persons in the event of disasters, by Special Rapporteur E. Valencia-Ospina, A/CN.4/643, para. 25 citing the views of UK and Russia (A/C.6/65SR.24 & A/C.6/65SR.23 respectively).

¹⁴⁹ R. Hardcastle & A.T. L. Chua, ‘Humanitarian Assistance: Towards a Right of Access to Victims of Natural Disasters’, *International Review of the Red Cross* 1998-325, p. 589, at: <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JPJD> (last accessed on 18 March 2013).

disaster risk reduction and reducing future vulnerabilities.¹⁵⁰ Indeed, links are expressly articulated in the 2003 Bruges Resolution, which describes “rapid and efficient assistance” as often “only the first necessary step to rehabilitation, recovery and long-term development.”¹⁵¹ This resolution is repeatedly referenced by the ILC Special Rapporteur. Similarly the 1994 Mohonk Criteria for Humanitarian Assistance in Complex Emergencies (a key reference point in policy debate and practice¹⁵²) refer to a “continuum of responses” proceeding from emergency relief through to sustainable development.¹⁵³ Finally, the 2005 Hyogo Declaration and its associated ten-year Framework for Action focus on building capacity to reduce disaster risks and vulnerabilities, and to that end constitute an ongoing development programme. It is also of note that the influential 2005 ASEAN Agreement on Disaster Management and Emergency Response (to which Myanmar is a party) was concluded at the same time as the Agreement on the Establishment of the ASEAN Development Fund.

Development workers have been anxious that as emergency relief budgets increase, development budgets decrease. They argue that two victims are being pitted against each other, and that sparing emergency relief at the expense of development is likely to increase the number of societies falling into crisis due to impaired national capacity.¹⁵⁴ However, even those advocating for greater attention in disasters maintain the importance of development. The ILC Special Rapporteur has noted that such beliefs in shared responsibility are expressed, albeit in quite different contexts, in a 2008 report of the High Commissioner for Human Rights¹⁵⁵ and Article 3(3) of the 1986 Declaration on the Right to Development.¹⁵⁶ On this basis, development commendably seeks to preserve national sovereignty; however, it does so by involving a long-term relationship and a permanence that is contingent on a state’s evolution. Although this is defensible as a pre-emptive initiative, it arguably (despite claims of building national capacity) questions sovereignty much more, because it recasts states in particular ways.¹⁵⁷ Characterisations of aid donors as “development superpower[s]”¹⁵⁸ and NGOs as “force multiplier[s]”¹⁵⁹ do little to alleviate concerns.¹⁶⁰ Development also highlights

¹⁵⁰ 2007 IDRL Guidelines, supra note 16, Part I 4(3). See also the International Federation of Red Cross and Red Crescent’s 2009 ‘World Disasters Report: Focus on early warning, early action’ at <http://www.ifrc.org/Global/Publications/disasters/WDR/WDR2009-full.pdf> (last accessed on 18 March 2013).

¹⁵¹ 2003 Bruges Resolution, supra note 123, preamble. See also C. Kelly, ‘On the Relief-to-development Continuum’, *Disasters* 1998-22(2), pp.174-175.

¹⁵² The Mohonk Criteria was produced by the Task Force on Ethical and Legal Issues in Humanitarian Assistance formed by the Program on Humanitarian Assistance at the World Conference on Religion and Peace. See J. M. Ebersole, ‘The Mohonk Criteria for Assistance in Complex Emergencies’, *Human Rights Quarterly* 1995-17(1), p. 192.

¹⁵³ *Ibid.*, Preamble.

¹⁵⁴ Ebersole 1995, supra note 152, p. 193.

¹⁵⁵ Referring to cooperation in the realisation of human rights by developing countries and a shared responsibility for their development 2008 Human Rights Council: Report of the independent expert on human rights and international solidarity, A/HRC/9/10.

¹⁵⁶ 2011 Fourth Report by the International Law Commission Special Rapporteur A/CN.4/643, supra note 148, paras. 36-38.

¹⁵⁷ M. Duffield, *Global Governance and the New Wars: the Merging of Development and Security*, London: Zed Books 2001.

¹⁵⁸ A. Mitchell, Transcript of Interview on ‘The Andrew Marr Show’, 12 June 2011, at: http://news.bbc.co.uk/1/hi/programmes/andrew_marr_show/9510941.stm (last accessed on 18 March 2013).

¹⁵⁹ Secretary C. L. Powell, “Remarks to the National Foreign Policy Conference for Leaders of Nongovernmental Organizations”, 26 October 2001, at: <http://2001-2009.state.gov/secretary/former/powell/remarks/2001/5762.htm> (last accessed on 18 March 2013).

¹⁶⁰ E.g. The UK Stabilisation Unit brings together the Foreign & Commonwealth Office, the Ministry of Defence and the Department for International Development and acts as a home of the Civilian Stabilisation Group, at: <http://www.stabilisationunit.gov.uk/> (last accessed at 18 March 2013)

humanitarianism's enmeshing in politics and governance (including a prominent role for the Bretton Woods institutions) and its possible coincidence with "grand strategies of powerful states".¹⁶¹ Given the negative experiences arising out of economic reconstruction in Southeast Asia in the 1990s, notably in Thailand and Malaysia, a resistance to any backdoor involvement would be understandable. Further, although development may enhance the role of civil society in particular states, it can simultaneously empower neo-liberal economic imperatives. Indeed in stabilisation programmes,¹⁶² NGOs are used to provide basic social services in neo-liberal, outsourcing states,¹⁶³ thereby becoming the welfare-provider flipside of 'disaster capitalism'.¹⁶⁴ Unfortunately, as has been seen in Haiti, USAID's development practices have sometimes contributed to the population's vulnerability. Reconstruction can simply reinscribe conditions of vulnerability unless the responsibility of both international and domestic forces is recognised, and reconstructive policies and practices reflect change.¹⁶⁵ Although the ILC has made recent efforts to address the issue of the termination of external assistance,¹⁶⁶ there remains a reluctance to concede the ultimate decision regarding this to the affected state.¹⁶⁷ Further, while the 2007 IDRL Guidelines note an affected state's role in terminating assistance, they indicate that affected states and assisting actors should consult with each other "bearing in mind the impact of such termination on disaster affected communities".¹⁶⁸ This implies that either actor may veto aid termination, fuelling anxieties regarding Trojan horses and "foreign encirclement and subversion".¹⁶⁹

IX.2 New Humanitarianism

"The concept of humanitarianism is fraught with ambiguities. It connotes three separate but overlapping realities: an ideology, a movement and a profession."¹⁷⁰

As regards evolving notions of humanitarianism, three key historical periods have been identified: 1859 to 1945 (roughly referred to as the ICRC era); 1945 to 1989 (the period of growth as regards private aid agencies) and 1989 to the present (the explosion in aid agencies and the era of existential angst as regards the meaning of humanitarianism).¹⁷¹ In the early 2000s a herald's call announced the arrival of the 'new humanitarianism' which was overtly political and in turn raised the question of the kind of politics which should be practised by humanitarians.¹⁷² Historically, aid delivery was impartial, guided solely by a needs-based ethos,¹⁷³ which ordained aid agencies to remain silent regarding the aid-delivery context. In an explicit break from this past (and notably the traditional approach of the ICRC¹⁷⁴ and

¹⁶¹ Barnett & Weiss 2011, supra note 8, pp. 4 & 78.

¹⁶² Collinson, Elhawary & Muggah 2010, supra note 145, pp. 278-281.

¹⁶³ Barnett & Weiss 2011, supra note 8, p. 19.

¹⁶⁴ N. Klein, *The Shock Doctrine: the rise of disaster capitalism*, London: Penguin Press 2007.

¹⁶⁵ A. Oliver-Smith, 'Haiti and the Historical Construction of Disasters', *NACLA Report on the Americas*, p. 32.

¹⁶⁶ See the 2012 Report of the Drafting Committee: Protection of persons in the event of disasters, A/CN.4/L.812.

¹⁶⁷ 2012 Report by the International Law Commission, A/67/10, supra note 124, p. 89.

¹⁶⁸ 2007 IDRL Guidelines, supra note 16, Part III 12.

¹⁶⁹ S. Marks, 'What has become of the right to democratic governance?', *European Journal of International Law* 2011-22, pp. 507 & 515 (referencing Carothers.)

¹⁷⁰ Donini 2010, supra note 92, p. 220.

¹⁷¹ Barnett & Weiss 2011, supra note 8, p. 25.

¹⁷² *Ibid.*, p. 4.

¹⁷³ See for example the Mohonk Criteria's preamble, supra note 152.

¹⁷⁴ See the Introduction to the 2007 IDRL Guidelines, supra note 17, and also the 2003 Stockholm Principles and Good Practice of Humanitarian Donorship at http://www.goodhumanitarianism.org/Libraries/Ireland_Doc_Manager/EN-23-Principles-and-Good-Practice-of-Humanitarian-Donorship.sflb.ashx (last accessed on 18 March 2013).

humanitarian law generally¹⁷⁵) new humanitarians rejected this apolitical, neutral and impartial¹⁷⁶ approach, considering it as sanctified and holy, “naïve and morally questionable”, and “morally self-justifying”.¹⁷⁷ These ‘new humanitarians’ included various NGOs – indeed Bernard Kouchner’s co-founding of MSF sprung from frustration at the ICRC’s neutrality in Biafra.¹⁷⁸ Eschewing the perceived naiveté of traditionalists, “goal-oriented humanitarianism” moved beyond a minimalist aim of saving lives to consider long-term consequences.¹⁷⁹ These pioneers maintained in certain situations that there were clear examples of right and wrong. For instance, they cited that UN aid to Serbs during the Bosnian/Serb conflicts of the early 1990s problematically legitimised Serb claims of victimhood.¹⁸⁰

A number of criticisms might be made here. First, this approach ostensibly appreciates no distinction between a territory’s political leadership and population, and indeed the particular Serbian example is far from clear-cut as regards victims/perpetrators. Further, there is an implicit assumption both that utilitarian calculations can be made, and that this is an acceptable direction for NGOs. Yet, it remains unclear as to its consonance with the otherwise ‘Good Samaritan motives’ of international solidarity, which underpin and inform NGO activities and their donor-attracting advertising. The new humanitarian approach has been criticised as an exercise in “ideological vanity” with political correctness being “polish[ed] in public”.¹⁸¹ The approach demands that aid workers make significant political decisions on which there is collective agreement and which will be implemented in concert. This seems extremely optimistic given evident “deep contradictions, conflicting alignments and power plays” which occupy the various non-profit, for-profit and militarised wings of the humanitarian movement.¹⁸² New humanitarians seem to echo the mixed agendas of states, which might comprise ideology/self-interest/genuine compassion, yet NGOs are subject to much less scrutiny.¹⁸³

Undoubtedly there are particularly vulnerable populations, notably children, the elderly and the disabled whose needs may be greater in an emergency situation. A number of international instruments take cognisance of such increased needs, and preferential treatment is allowable, even urged.¹⁸⁴ These distinctions are, however, drawn on an objective basis, which is quite different from the subjective criteria¹⁸⁵ suggested by new humanitarians. Linking aid-supply with human rights creates a conditionality regarding deserving and undeserving victims, leading to the possibility of withholding aid in certain cases. It also flies

¹⁷⁵ International Institute of Humanitarian Law, ‘Guiding Principles on the Right to Humanitarian Assistance’, San Remo, 1993.

¹⁷⁶ “[I]mpartiality’ allows aid agencies to speak out publicly during a conflict as long as they apply equal terms to all warring sides, neutrality actually demands that agencies remain silent and abstain completely from the politics of a crisis.” F. Fox, ‘New Humanitarianism: Does it provide a moral banner for the 21st century?’, *Disasters* 2001-25(4), pp. 275 at p.277.

¹⁷⁷ *Ibid.*, pp. 275 & 276 referring to evidence from M. Barfod before the UK International Development Select Committee on Conflict and Post Conflict Reconstruction.

¹⁷⁸ Kouchner 2008, *supra* note 110.

¹⁷⁹ Fox 2001, *supra* note 176, p.281 referring to N. Stockton, ‘In defence of Humanitarianism’, *Disasters* 1998-22 (4), paper presented to DEC Conference Emperor’s New Clothes, January.

¹⁸⁰ Letter from F. C. Cuny dated April 13th 1994 to Ebersole 1995, *supra* note 152, p. 194.

¹⁸¹ Fox 2001, *supra* note 176, pp. 279-280.

¹⁸² Donini 2010, *supra* note 92, pp. 220 & 222.

¹⁸³ A. E. Boyle & C.M. Chinkin, *The Making of International Law*, Oxford: Oxford University Press 2007.

¹⁸⁴ 1997 United Nations Committee on Economic, Social and Cultural Rights, General Comment 8, E/C.12/1997/8, para. 13; 2003 Bruges Resolution, *supra* note 123, Article II(3); 1989 Convention on the Rights of the Child, 1577 UNTS 3, Articles 6, 24, 27; 1959 Declaration of the Rights of the Child (preamble and Articles 2, 4 and 5); 2006 International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, Article 11.

¹⁸⁵ 2010 Report by the International Law Commission, A/CN.4/SR.3054, *supra* note 20, p. 19.

in the face of a 'right' to humanitarian assistance (which hitherto has been framed in terms of needs) and thereby creates a paradoxical position for new humanitarians. Arguably, while rights-based and needs-based approaches both focus on basic survival needs (including access to food, water and medicines) rights-discourse really reflects notions of political rights and rights to democracy. Thus, a difference emerges between those who favour survival and those who favour freedom.¹⁸⁶ Both the suspension of aid programmes following the Taliban's issuance of edicts restricting women's rights and the closing of the Zairean refugee camps in 1996 and consequent enforced repatriation of Rwandans evidence the trump of political rights over basic needs.¹⁸⁷ It might be worth remembering that the UN Committee on Economic Social and Cultural Rights (UNCESCR) in its General Comment 12 made the point that while only states are parties to the Covenant, all members of civil society, including NGOs, civil society organisations and private businesses have responsibilities in realising the (universal) right to adequate food.¹⁸⁸ Further, as noted subsequently, any ILC discussions concerning a disaster-stricken population's 'right' to assistance apparently reject conditionality in favour of universalist, needs-based assistance. While the universalist model undoubtedly has its shortcomings, and aid delivery cannot be separated from its political context and controversies, this is entirely different from the self-conscious use of aid by agencies in pursuit of political ends.¹⁸⁹ Further, if new humanitarians such as MSF favour a political conditionality for aid delivery, somewhat detracting from 'pure humanitarianism', then surely that must create space for a possible political conditionality regarding aid-acceptance, which may in turn neutralise certain conclusions regarding illegality.

Arguably the new humanitarians are replacing religion and the 19th century civilising mission with the secular creed of human rights. Following Koskenniemi's invocation of Kundera's notion of *kitsch*, they may be guilty of "telling easy truths and simple certainties". While humanitarians may be perceived as self-consciously working in a field where ethical judgments are constantly employed, it is crucial that ethics and law are not intuitively conflated: after all, what would an ethical approach to law and interventions produce?¹⁹⁰ As a practical example, the much relied-upon 1994 Mohonk criteria were produced by a Task Force on Ethical and Legal Issues in Humanitarian Assistance and consequently exude certain haziness in terms of authority. A further difficulty which emerges involves the decision concerning which ethics - deontological or consequentialist - might prevail. By invoking "the legal paraphernalia" of international law and its institutions, it could be all too easy for humanitarians to lose sight of the fact that they are not necessarily expressing anything universal but are using such instruments in a hegemonic struggle.¹⁹¹ This is particularly clear when humanitarianism is used both as an instrument of containment and where there is a shift from radical change to concepts of management, thereby obscuring key structural considerations.¹⁹² Obviously humanitarians cannot function outside of key superstructures and actors, but neither can they deny their role as power-holders or disempowering agents

¹⁸⁶ Barnett & Weiss 2011, *supra* note 8, p. 79.

¹⁸⁷ Fox 2001, *supra* note 176, p. 287

¹⁸⁸ 1999 United Nations Committee on Economic, Social and Cultural Rights, General Comment 12 'The Right to Adequate Food', E/C.12/1999/5, para. 20.

¹⁸⁹ Fox 2001, *supra* note 179, pp. 287-288.

¹⁹⁰ M. Koskenniemi, 'The Lady doth protest too much: Kosovo, and the Turn to Ethics in International Law', *The Modern Law Review* 2002-65, p. 159.

¹⁹¹ M. Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', *European Journal of International Law* 2005-16, pp. 113 & 122.

¹⁹² Donini 2010, *supra* note 92, pp. 223 & 228 and A. Donini, 'Is Universality Under Threat? Humanitarian Aid and Intervention in the 2000s', in I. Richter *et al* (eds.), *Building a Transnational Society, Global Issues and Global Actors*, Basingstoke: Palgrave Macmillan 2007, p. 217.

simply by invoking a “higher calling” rhetorical trump. Being embedded in global governance produces a schizophrenia¹⁹³ which they must come to terms with.

There is a further problem which new humanitarians may do well to ponder, to do with notions of their status as legitimate attack targets. Visible political adroitness may increase vulnerability. Such was the number of attacks upon aid convoys in the 1990s that this behaviour was criminalised in the ICC statute. References to relevant individuals being “entitled to the protection given to civilians or civilian objects under the international law of armed conflict” implies that those providing humanitarian assistance or peacekeeping do not take an active part in the hostilities or allow themselves to be used for military purposes.¹⁹⁴ Clear expectations of neutrality and impartiality persist, but the increasing connectedness between humanitarianism, militarisation, stabilisation and nation-building can compromise such expectations.¹⁹⁵ The indefensible 2003 attack upon the UN HQ in Baghdad perhaps evidenced a perceived commonality of the UN with certain hegemonic states.¹⁹⁶ Ten aid workers were shot in Afghanistan in 2010 and a particularly sinister incident involved the September 2003 delivery of a bomb to the ICRC’s Baghdad HQ via a white ambulance with a Red Crescent symbol. The perceived affiliation was striking, and the conclusion that it is more dangerous to be a civilian aid worker than a military peacekeeper is extremely depressing.¹⁹⁷

The ILC’s Special Rapporteur ostensibly rejected an ethos of new humanitarianism in his 2010 report. In discussing the principle of humanity (draft Article 6) it was noted that this is a qualitative question (which considers the essential needs of victims to ensure full respect for their rights) and stresses an “obligation not to draw a substantive distinction between individuals based on criteria other than need”. Further, it was also acknowledged that while the principle of impartiality emerged from international humanitarian law it has since migrated into international human rights law where it has become fundamental.¹⁹⁸ The principle acts as an umbrella for the three criteria of non-discrimination, proportionality and neutrality *per se*. Despite such assurances, however, anxieties remain that the ILC-developed duty to cooperate might be read more critically or partially, thereby allowing inconsistent practice as regards interventions.

X. Conclusion

It was hoped that the anxieties which currently bedevil the mindset of stricken pariah states regarding Trojan horses would be less likely to arise from an ILC-developed duty of international co-operation. Ostensibly it moves away from whimsical invocations of R2P by powerful international actors. Further, by avoiding more radical reinventions of sovereignty¹⁹⁹ it sidesteps the minefield of regime change. Unfortunately, while avoiding notions and rhetoric regarding “failed states”, this new duty still fails to fully recognise the politics of aid donation and refusal, and maintains a relationship with R2P via the language of arbitrariness and failure, appearing as R2P-light. The ILC’s approach actually truncates proper analysis of a crisis situation. Forcing aid as a matter of legal compulsion is unhelpful.

¹⁹³ Donini 2010, *supra* note 92, p. 231.

¹⁹⁴ D. McGoldrick, ‘The Permanent International Criminal Court: an End to the Culture of Impunity?’, *Criminal Law Review* 1999, p. 627.

¹⁹⁵ Collinson, Elhawary & Muggah 2010, *supra* note 145.

¹⁹⁶ T. O’Donnell, ‘Naming and Shaming: The Sorry Tale of UN Security Council Resolution 1530 (2004)’, *European Journal of International Law* 2006-17(5), p. 945, p. 962

¹⁹⁷ Barnett & Weiss 2011, *supra* note 8, p. 3.

¹⁹⁸ 2010 Report by the International Law Commission, A/CN.4/SR.3054, *supra* note 20, p. 19.

¹⁹⁹ Benton Heath 2011, *supra* note 22, pp. 425, 443, 449-450.

Instead, by using diplomacy, donor countries could assess potential incentives to overcome recalcitrance, thereby helping “affected States to distinguish the ideological forest from the trees”.²⁰⁰ This approach might result in a preference for regional aid initiatives, thereby ameliorating neo-colonialist anxieties.

Difficulties often arise from what appears to be the perverse and irrational actions of paranoid, pariah regimes. Nevertheless, despite intuitive disinclinations, such states must be engaged with, and their confidence gained, in order for humanitarian aid to reach stricken populations quickly and effectively. This is undoubtedly a key lesson of the Myanmar experience in 2008. The entirely noble endeavour of assisting victims of natural disasters will only be helped if we step away from legally-supported, intuitive assumptions as to certain regimes’ aid-refusals and move towards a clearer engagement with the politics of aid-refusal.

²⁰⁰ Mr Vasciannie in 2010 Report by the International Law Commission, A/CN.4/SR.3057, *supra* note 34, p.7.