The challenges and limitations of R2P's applicability in the aftermath of the natural disaster in Myanmar

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What should be the response of the international community when faced with situations of catastrophic human rights violations within states, where the state in question claims immunity from intervention based on longstanding principles of national sovereignty? When, if ever, it is right for states to take coercive action, in particular military action, against another state for the purpose of protecting people at risk within it?[1]

[1] Gareth, Evans (2006), p.1.

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List of Abbreviations

ASEAN	Association of Southeast Asian Nations
ASEAN-ERAT	Association of Southeast Asian Nations Emergency Rapid Assessment Team
CAT	Convention against Torture
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal of Rwanda
ICTY	International Criminal Tribunal of Former Yugoslavia
IDRL	International Disaster Response Law, Rules and Principles programme
IFRC	International Federation of Red Cross and Red Crescent Societies
IHL	International Humanitarian Law
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
NGO	Non Governmental Organizations
NLD	National League for Democracy (opposition party in Myanmar)
OCHA	UN Office for the Coordination of Humanitarian Affairs
R2P	Responsibility to Protect
SPDC	State Peace and Development Council (Myanmar's official party)
UK	United Kingdom
UN	UN
UNHCR	High Commissioner for Human Rights and for Refugees
UNSC	UN Security Council
US(A)	United States (of America)
USD	United States Dollar
WFP	World Food Programme

Introduction

The denial of the Myanmar Military Junta in 2008 to let international aid organizations enter the country after cyclone Nargis started a big discussion within the international community whether the destruction of Nargis and the human suffering that followed, could be regarded as a crime against humanity. If so, the relatively new concept of Responsibility to Protect could be applicable. This discussion is the starting point for this research.

Before diving into the topic, some aspects must be clarified. I am aware of the fact that there is a political discrepancy in identifying the country as Burma or Myanmar and I want to make clear that this discrepancy will not be reflected in this research. It is unfortunately unavoidable to definitively identify the country, so throughout this thesis the country will be named Myanmar.

The central research question of this thesis is: *what can be done if a state refuses aid in the aftermath of a disaster, such as in Myanmar, and could R2P be useful in this respect?*

The concept of R2P, which was adopted at the UN's World Summit Outcome in 2005, relates to the basic obligations of states to prevent its citizens from gross human rights violations that result from genocide, war crimes, crimes against humanity, or ethnic cleansing. R2P also includes a responsibility to react if the above mentioned crimes are occurring – if necessary also with coercive military intervention – and to rebuild stability and peace in the conflict area. If a state is not willing or able to stop emerging gross violations the responsibility to protect shifts to the international community, as stated in paragraphs 138 and 139 of the UN World Summit Outcome.[2] Therefore, a state which fails to take its responsibility cannot claim its sovereignty to be violated if the international community is acting on the states' behalf. This thesis will underline the basic human rights aspects of R2P, looking further into the crimes which have to be committed in order to fall under the concept of R2P, and to find out if the consequences of Nargis can be related to a crime against humanity from a legal perspective.

One major problem herby lies in the great discrepancy within the international community about applying R2P in natural disasters. Some states argue that the rejection of international relief in Myanmar is clearly crime against humanity and therefore falls under the concept of R2P. They argue that the denial of access of international relief organizations aggravated the humanitarian situation for the victims of the cyclone. Other states claim that

[2] UNGA/RES/60/01, paragraphs 138 and 139.

the concept of R2P was designed to apply to gross atrocities only, and cannot therefore be applicable to natural disasters.

Another major problem within the international community is that there is no consensus on the applicability of R2P and how to put it into practice.[3] Looking back to the example of Myanmar, the French Minister of Foreign Affairs, Bernhard Kouchner, urged the United Nations Security Council to make use of R2P by providing aid without the consent of the Military Junta in Myanmar. He was supported in this initiative primarily by European and North American countries. Disagreement came from another side, claiming that this approach would bypass the UNSC. China as well as Russia did not support the idea of forcibly aiding Myanmar without the government's approval, and also argued that R2P is not applicable in cases of natural disasters.[4]

In this research it will be considered what the political reasons are behind the discrepancy, as far as Myanmar is involved. Nevertheless, it is more interesting to analyze from a legal point of view whether the international community should have applied R2P when good cause showed that a crime against humanity had been committed, and in general this thesis examines the challenges and limitations of R2P in practice, as the example of Myanmar will illustrate.

A further analysis will be prepared about international legal framework on disaster response. I want to find out whether R2P is included or adds value to the existing framework of international disaster response laws, however, the scope of the laws of international disaster response will be limited to its legal framework, its legal development and regional agreements connected to the problems already describes above. The ASEAN Agreement on Disaster Management and Emergency Response is a regional agreement which will also be looked at in this thesis.

As already mentioned above, the aftermath of Myanmar 2008 can not only be looked at from a legal point of view, but also from a political angle. The focus of this research will have a strong legal aspect, but I combine that with a political one. Politics played a major role in terms of the denial of international relief by the Military Junta. ASEAN, as the regional organization in Southeast Asia and Myanmar being a member state to it, has been under international criticism for its slow response to cyclone Nargis.[5] The political aspect focuses on the reaction of the Military Junta and the role of ASEAN, as well as how the concept of R2P relates to international politics.

[3] Haacke, Jürgen (2009), p. 5.
[4] Bellamy, Alex (2010), p. 10.
[5] Amador, Julio Santiago III (2009), p.3.

The ultimate aim of this legal and political research is to determine whether the reaction of the Military Junta in Myanmar led to a crime against humanity by analyzing the legal grounds for a crime against humanity and, furthermore, to analyze if the international community should have been able to apply the concept of R2P in this case. I will provide the challenges and limitations of the concept of R2P and also research the difficult perception of humanitarian intervention. However, the primary idea is not to try to find differences in the concepts of R2P and humanitarian intervention nor to prove whether humanitarian intervention would have been more effective in the case study of Myanmar, but to determine the applicability of the concept of R2P in the aftermath of cyclone Nargis in Myanmar and whether or not a crime against humanity did occur from a legal point of view.

Research method

The research method used for this scholarly legal and political research is essentially an examination of literature related to the topic in order to provide a possible solution to the stated problem. It will utilize legal and political documents as well as related instruments. Furthermore, the purpose is to find an answer to the central research question as well as the sub-questions by dissecting the relevant concepts and the case study of Myanmar is used for this research. The central research question and the sub-questions can be seen as guidelines throughout the chapters of this thesis.

Chapter 1
Responsibility to Protect

The first chapter of this thesis aims at introducing the concept of R2P based on its theoretical context. This will not include an analysis of practical problems; such an analysis will follow in chapter three. One of the most important sources for this chapter was the report of the creators of the concept – the International Commission on Intervention and States Sovereignty (ICISS).

The primary purpose is to find an answer to the sub-questions: *under what circumstances can the international community execute the concept of R2P?* and *to what extent play crimes against humanity and human rights a role in the concept of R2P?* I will achieve this by starting with a small introduction of humanitarian intervention and the problems that it is facing in order to understand the development and concept of R2P. Furthermore, I would like to provide the source of R2P in international law in order to find out who is able to decide upon an intervention according to R2P, as well as introduce the committed crimes that fall under the scope of R2P. The crimes that invoke R2P are also referred to as core international crimes which are genocide, ethnic cleansing, war crimes, and crimes against humanity. Crimes against humanity will be explained further because it is essential in the further chapters of this thesis, and for the central research question. Finally, I will also introduce the human rights aspects of R2P and link it to the core international crimes.

1.1 Humanitarian intervention

The overall purpose of humanitarian intervention is the protection of the individuals of any state from grave human rights violations. Therefore, it is applicable in situations where large scale human rights violations are occurring or when the situation in a country is a threat to international peace and security. Humanitarian intervention can be conducted with or without the authorization of the UNSC.[6] However, there is no legal background for humanitarian intervention conducted without the authorization of the Security Council.

[6] Advisory Council on International Affairs and Advisory Committee on Public International Law, Humanitarian Intervention, advisory report, The Hague, April 2000.

1.1.1 The dilemma of humanitarian intervention

Looking at the legal instruments dealing with humanitarian intervention, Articles 2(4) and 2(7) of the UN Charter set out a prohibition on the use of force by states on territories outside their own as well as the principle of non-intervention in matters within their domestic jurisdiction.[7] This is based on the idea that sovereign states have an individual responsibility to exercise law within their territories, to promote human rights, and to prevent human rights violations if they are a party to human rights treaties. In practice, states are sometimes not willing or able to fulfill their responsibility.

Even though the UNSC has the power to approve military intervention in a state based on Article 39 of the UN Charter it is often not able to take prompt effective measures. In the past, in situations of gross human rights violations, another state or a group of states took the initiative to end these violations by using force (authorized or unauthorized by the UNSC) without the consent of the state that violated human rights.[8]

1.1.2 Legitimacy of humanitarian intervention

Humanitarian intervention can be justified politically and morally, therefore sometimes it can be legitimate. However, theoretically the concept of humanitarian intervention is illegal. Within the international community this concept has a negative connotation when it comes to coercive measures, because humanitarian intervention *can be invoked as a cover for military operations of a different nature [and] the position of international law may be […] undermined if it does not provide for intervention in cases of […] violations of universally accepted human rights.*[9]

The dilemma we are facing here is, on the one hand, the non-existing legal foundation of humanitarian interventions, the principle of non-intervention, and the respect for territorial sovereignty.

[7] UN Charter, Article 2(4) and 2(7).
[8] Advisory Council on International Affairs and Advisory Committee on Public International Law, Humanitarian Intervention, advisory report, The Hague, April 2000, introduction.
[9] cit. Advisory Council on International Affairs and Advisory Committee on Public International Law, Humanitarian Intervention, advisory report, The Hague, April 2000, introduction.

1.1.3 An alternative to humanitarian intervention

Kofi Annan points to the problem: *[…] if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?*[10]

Even though there is an incompatibility with Article 2(4) and 2(7) of the UN Charter, humanitarian interventions by states or group of states without authorization of the Security Council takes place in practice. Note the case of Kosovo, in 1999, where the Security Council was unable to adopt a resolution. NATO member states decided to forcibly enter Kosovo without consulting with the Security Council first. Under the UN Charter, the humanitarian intervention of NATO was illegal, but could be legitimate because of the purpose of their actions.[11] Because of the problems humanitarian intervention is facing, the Canadian government issued the ICISS to avoid another Kosovo or Rwanda from occurring.[12] In 2001, the ICISS established a new concept that could overcome the legal obstacles of humanitarian intervention – R2P.[13] Considering the problems humanitarian intervention is still facing, the relatively new concept of R2P changed the debate about responding to challenges such as gross human rights violations.

We have seen so far that humanitarian intervention is in a dilemma because of its lacking legal foundation, the principle of non-intervention, state sovereignty, and its negative connotation within the international community. The next part of this chapter introduces the theoretical concept and the development of R2P.

[10] cit. Kofi Annan, after: ICISS Report, p. VII.
[11] Henkin, Louis (1999), p. 824.
[12] Bellamy/Wheeler (2008), p. 22.
[13] ICISS report, „Responsibility to Protect“, 2001, p. 11.

1.2 The development of R2P

The Responsibility to Protect (R2P) is a new international security and human rights norm to address the international community's failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity.[14]

Because of the changing international environment which brings the arrival of new actors, security issues, demands, and expectations with a new legal and political context the international community has to react to new opportunities with a common action for human protection purposes. Because of the changing patterns within the international community since 1945, it is crucial to find new ways to deal with these emerging demands and expectations regarding how countries treat their citizens. Sovereignty certainly still matters, but its efficiency is questionable if its unlimited power will be abused in human rights matters.[15]

The difficulties of humanitarian intervention, as discussed above, prompted the Canadian Government to issue the ICISS and to formulate a report in 2001 presenting the concept of R2P.[16] This report combined the legal, moral, political, and operational problems that arose facing the military intervention for human protection, and created the concept of R2P.[17]

Four years after the ICISS report, the concept of R2P was welcomed by more than one hundred and fifty countries at the World Summit Outcome in 2005. Paragraphs 138 and 139 of General Assembly Resolution 60/1 provide the responsibility each state has concerning the protection of populations from gross human rights violations.[18] It has been accepted that when one sovereign state fails in that responsibility, whether that country is not willing or able, *the responsibility falls upon the wider international community to take whatever action is appropriate, including in the last resort, and if the Security Council agrees, military action*.[19]

As written in the ICISS report, R2P was seen to provide a better conceptual framework than humanitarian intervention. Furthermore, the development of the concept of R2P has refreshed people's eyes when it comes to military intervention, and provides a new

[14] cit. webpage: International Coalition for the Responsibility to Protect.
[15] ICISS Report, p. 7.
[16] Evans Gareth/Mohamed Sahnoun (2002), p. 2.
[17] ICISS Report, p. 7.
[18] UNGA Res. 60/1 2005, World Summit Outcome.
[19] cit. Gareth, Evans (2008), p. 284, after: 'World Summit Outcome 2005', UNGA/RES/60/1, 24 October 2005, paras 138, 139.

re-conceptualization of sovereignty.[20] But *both concepts are […] expressed in universal terms […] that external intervention may be justified.*[21]

1.3 The concept of R2P

The concept and the development of R2P are not only based on the experiences and aftermaths of authorized and non-authorized military interventions such as Kosovo, Somalia, Bosnia or Rwanda, it also brings a new way of looking at the debate. Instead of talking about "the right to intervene" the term has changed to "responsibility to protect". There are two key aspects that make it clear that it was only through changing the language and providing a new way of looking at the debate that the whole debate improved. First, the focus is not only on the beneficiaries of the action, but also on the intervening state by focusing on their prerogatives and rights. Second, it is possible to provide follow-up assistance.[22]

This new perspective was developed even further. Now the centre of attention is not the intervening state(s), it is the people seeking protection or support. This is a rather important point, because the focus shifts back to the people that are victims of human rights violations. Furthermore, states are the primary duty bearer of the responsibility to protect and only if the state concerned is unwilling or unable, or even the perpetrator, its responsibility will fall to the international community. The concerned state is more likely to seek cooperation with the international community because R2P can be seen as a linkage between intervention and sovereignty.

The responsibility to protect lies first on the state whose citizens are affected by human rights violations. Nevertheless, international law and the modern state system are involved in this concept, but it is in the interest of the population of the concerned country to charge grievances more effectively, and to prevent conflicts from occurring. Finally, the concept of R2P includes not only a reaction of the responsibility to protect, but also the responsibility to prevent and rebuild.[23]

[20] ICISS Report, p. 9.
[21] Newman, Michael (2009), p. 7.
[22] ICISS Report, p. 16.
[23] ICISS Report, p. 17, 18.

1.4 Three pillars of R2P

1.4.1 Responsibility to Prevent

The first pillar of R2P is the responsibility to prevent. This responsibility lies in the sovereign states itself to prevent conflicts or other man-made disasters from happening, and to make intervention invalid. A states commitment to prevent conflicts ranges from fair treatment to all citizens to uphold accountability, good governance, respect for human rights and to provide social and economic development.[24]

However, it is also a fact that conflict prevention is not only a national task, it is within the interest of the international community to uphold international peace and security and therefore also to prevent conflicts. The international community can support a state in many ways, and it has to be said at this point that it always depends on the situation in a state. But generally speaking it can support a state by providing development assistance, strengthen rule of law and human rights, or by supporting local initiatives to enhance good governance. In order to gain credibility from a state, the international community has to show commitment. That is especially crucial in cases where prevention failed and the use of armed forces is necessary.

Responsibility to prevent is of great importance to stop human suffering. It is crucial to start conflict prevention at all levels and not to wait for a disaster to occur.[25]

1.4.2 Responsibility to react

The pillar "responsibility to react" is essential for this thesis in order to provide a qualitative answer to the central research question, and the sub-question of this chapter. I would like to give a more precise understanding of the second pillar of R2P because it deals with military intervention.

The second pillar of R2P is responsibility to react, and this implies a situation where preventive measures failed. Military intervention is seen as a last resort in cases of extreme human rights violations. Other coercive measures may be related to political, judicial, or economic sanctions. Before considering coercive action, one has to be certain that there is no other way to resolve the conflict than through the use of sanctions. Particularly in cases of

[24] ICISS Report, p. 19.
[25] ibid. p. 27.

military intervention, the situation has to be grave, and the decision to take military action has to be weighed against other forms of intervention. When it comes to the question of military intervention, the international community is divided into states that seek more intervention and states that prefer less intervention, but for the sake of human suffering it is crucial to find a common action for preventing or reacting to gross human right violations.[26]

To undertake intervention means to interfere in the operations of a domestic authority, and the intervention may not cause more harm to the civilian population.[27] The power of the decision-making organs, such as the UNSC, should be decreased whereas the population should not be further harmed by the sanctions. Sanctions can be imposed in the military, economic and political (diplomatic) areas by imposing arms embargos, ending military training or cooperation, freezing assets (in cases of rebel movement or terrorist organizations), restrictions on income and access (oil or petroleum), restrictions on diplomatic representations or travel, and suspending memberships or refusing a country membership.[28] For this thesis the use of military intervention is most interesting option but also the most difficult to apply.

In extreme cases, military intervention is acknowledged under responsibility to react. In order to decide what constitutes a case so extreme that the use of armed forces is justified, the principle of non-intervention must be the starting point. The perspective of this principle is that all states have an interest in maintaining order and stability, and to respect other states' sovereignty. Under special circumstances, and within the interest of the international community it is justified to react if one state does not live up to maintaining order and stability. In practice, this is the case when conflicts or repressions are threatening civilian lives with genocide, ethnic cleansing, or large scale massacres. The principle of non-intervention contains exceptions in cases of emergencies.[29]

The ICISS provided six criteria for military intervention which can each be seen as exceptions to the non-intervention principle: right authority, just cause[30], right intention, last resort, proportional means and reasonable prospects.[31] When all six criteria are met, military intervention for human protection purposes can be justified. Moreover, these criteria help to understand under what circumstances the exceptions to the principle of non-intervention are justified, and when the concept of R2P can be applied. Because of their relevance in this thesis the criteria "right authority" and "just cause" will be presented in more detail. I will

[26] ICISS Report, p. 28.
[27] ICISS Report, p. 29.
[28] ibid. p. 30, 31.
[29] ibid. p. 31.
[30] the „just cause" principle refers to a wrongdoing of a state, which legitimizes war as a response. The two main just causes were unprovoked attacks on either one's state or another state. see also: Larry May (2009), p. 94-116.
[31] cit. ICISS Report, p. 32.

discuss right authority in the sub-chapter "source of R2P in international law" and the just cause criterion following.

Military intervention for human protection is limited to two circumstances under which just cause is satisfied if either or both of these circumstances occur.

- Large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation or
- Large scale "ethnic cleansing", actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.[32]

Additionally, those two circumstances include crimes defined in the 1948 Geneva Convention. Large scale loss of life does not have to be only genocidal, and it can also involve state action. Ethnic cleansing involves the

> systematic killing of members of a particular group in order to diminish or eliminate their presence in a particular area; the systematic physical removal of members of a particular group from a particular geographical area; acts of terror designed to force people to flee, and the systematic rape for political purposes of women of a particular group.[33]

Also crimes against humanity (important in this thesis) and violations of the laws of war are included. Furthermore, state collapse, mass starvation, civil war and especially interesting for this research, *overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened* are included.[34]

It is hard to say any specific quantity in terms of large scale loss of life or large scale ethnic cleansing, and the ICISS report does not specify this further. Military intervention can be seen as an anticipatory act before large scale killings are occurring. Without the option of anticipatory action, the international community would have to wait until genocide is occurring in order to take action. In this regard is does not make any difference whether the human protection is needed in a failed or collapsed state, or in a state with governmental representation. The moral perspective is of great importance when it comes to the question of

[32] cit. ICISS Report, p. 32.
[33] cit. Ibid. p. 33.
[34] cit. ICISS Report, p. 33.

military intervention. Based on the UN Charter, the Security Council can authorize any intervention as long as there is a threat to international peace and security.[35]

The criterion of just cause excludes other circumstances that are not seen as an exception of the non-intervention principle. Human rights violations such as systematic racial discrimination, systematic imprisonment, or other political oppressions provide grounds for military intervention. Also, the overthrown of a democratic government, and the use of military force of a state in order to rescue its citizens on foreign territory, are not part of the exceptions. The latter would be within the scope of Article 51 of the UN Charter, which states the right to self-defence.[36]

What remains now is to look at the question of evidence. It is essential to receive reliable and credible information. The ICISS proposes in its report that UN organs fulfil this role. The UNHCR is a candidate for evidence gathering, because of its close work with NGOs, the media, and other credible international organizations. Another suggestion would be fact-finding missions from the UNSC or the Secretary-General.[37]

From what we have seen under responsibility to react, it is difficult to find one structure for coercive military intervention when it comes to the protection of civilians. It has to be said that each intervention will have other obstacles and challenges, and there is no one-size-fit-all solution. This reality has to be taken into account in each individual case.

1.4.3 Responsibility to rebuild

The last pillar of R2P is responsibility to rebuild. After a military intervention, it falls within the concept of R2P to also help *rebuild peace, promote good governance and sustainable development*.[38] The most crucial priority after military intervention is to provide sufficient funds for rebuilding, and to work closely with the local authorities and to provide public safety and security in order to reach stability in the region.

For a post-intervention mission, it is very important that whatever was causing the trouble in the first place will not be repeated. This could be to help reconstruct infrastructure, housing, or other development efforts. In its 1998 report *The Causes of Conflict and the*

[35] ICISS Report. p. 33, 34.
[36] ibid. p. 34.
[37] ibid. p. 35.
[38] cit. ICISS Report, p. 39.

Promotion of Durable Peace and Sustainable Development in Africa the UN Secretary-General formulated a structure for post-conflict peace building missions.[39]

To provide security is one of the crucial jobs in a post-intervention mission. Local security forces have to be disarmed, demobilized, and, finally, reintegrated.[40] Also, police and military forces have to be rebuilt and reintegrated. Furthermore, a functioning judicial system has to be implemented in order to bring justice to the conflict area. This is not an easy task. The intervening force has to prevent human rights violations from happening. Non-governmental bodies have developed a standard penal code, among others, which can be applied immediately after an intervention in order to protect human rights, and this would also allow intervening state(s) to detain persons who committed crimes.[41]

Chapter XII of UN Charter provides guidelines for intervening states behaviour in military intervention and peace building missions. Article 76 deals with the promotion

> political, economic, social and educational advancement of the people in the territory in question; to encourage respect for human rights; to ensure the equal treatment of all peoples in the UN in social, economic and commercial matters; and also to ensure equal treatment in the administration of justice[42].

In the foregoing pages we saw how the concept of R2P was developed. It seems that it was time to change the debate about humanitarian intervention and look at it from a new, more promising angle. The three pillars or the cornerstones of R2P have been presented, and next, the source of R2P in international law and the crimes that invoke R2P will be presented. As promised under responsibility to react, the missing criterion right authority will be presented in the next pages.

1.5 Source of R2P in international law

The criterion of right authority is the most delicate one because it deals with who is deciding to intervene with military forces and intrude in another state's sovereignty which of course implies that people are dying.[43]

From a legal point of view, the UN Charter provides an answer to that question in Articles 2(4) and 2(7), as already mentioned above, in that it prohibits the UN from

[39] for further information about this report visit the UN webpage.
[40] ICISS Report, p. 41.
[41] Ibid. p. 42.
[42] cit. ICISS Report, p. 43.
[43] ibid. p. 47.

interfering in another states' domestic jurisdiction. Contrary to Article 2 there is Article 24 of the UN Charter, which describes the action to be taken by the UN (legitimatized by the Security Council) in order to protect international peace and security. Article 39 also describes the action of the Security Council in cases of *threats to the peace, breach of the peace, or act of aggression*.[44] This action falls under use of force, and could be in form of sanctions, embargos or other diplomatic consequences, like Article 41 of the UN Charter implies. Finally, Article 42 includes the use of military force. Article 51 describes the right of (collective) self-defence against a UN member state.[45]

In general, Chapter VII and VIII of the UN Charter form the source of authority that deal with all types of security issues. It is not only the Security Council which deals with security issues; Article 10 and 11 of the UN Charter also give the General Assembly the responsibility to make non-binding recommendations for the maintenance of international peace and security.[46]

The UN is the principle authority of the international community, and the UN Charter provides the legal basis in terms of intervention. However, the UN should not be understood as the provider of coercive power but as the *applicator of legitimacy*.[47] In general, the UN can be seen as the only international law enforcement system that is universally agreed upon by the member states for intervention operations. [48] However, a restriction of the UN is that it cannot enforce intervention, as there is no independent UN armed force, and, therefore, it is dependent on the resources of member states, and their willingness to approve to action. It has happened in the past that through this unwillingness of member states to provide sufficient resources, missions had limited capacities.[49]

The role of the Security Council is crucial when looking at the right authority for interventions. As stated in the ICISS report, the Security Council is the organ most appropriate for making decisions about overriding sovereignty in a state because of its power role within the international community. Therefore, the Security Council has to authorize military intervention, and it should also react promptly in cases of atrocities. The veto power of the permanent five members can be problematic however, as one veto can overrule the others.[50]

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[44] cit. ICISS Report, p. 47, after UN Charter Article 39.
[45] ibid. p. 47.
[46] ICISS Report, p. 48.
[47] cit. ICISS Report, p. 48.
[48] Ibid. p. 49.
[49] Advisory Council on International Affairs and Advisory Committee on Public International Law, Humanitarian Intervention, advisory report, The Hague, April 2000.
[50] ICISS Report, p. 51.

It has to be pointed out that the UNSC is a political organ, and its functioning is therefore limited; its authority is based on carrying out the provisions of the UN Charter. Moreover, it has the role of building confidence in the international community; the role the permanent members of the Security Council play on world politics has to be acknowledged as well. Bearing this in mind, it should not be surprising that the Security Council is not taking action in situations where it would be appropriate.[51]

In case the Security Council fails to react to grave humanitarian violations, the General Assembly, if it is supported by the majority of its member states (two-thirds), has the legitimacy to decide upon intervention missions. Another possibility is regional organizations for collective intervention. It has happened that in cases of human disasters, neighbouring states have an interest (because of refugee flows or rebel groups) to provide humanitarian support. Article 52 of the UN Charter provides the legal background for such regional organization missions. Intervention by individual states or a group of states which were not based on the UN decisions, occurred in the past, but those were exceptional cases and UN authority would be preferable. However, the problem of the Security Council to deal with political reality effectively, and to find unanimously consensus, shows us that those exceptions are sometimes necessary if it is conducted for the right reasons (moral perspective).[52]

The concept of R2P in general, and because of its great success at the World Summit Outcome in 2005, can be seen as a developing international legal norm.[53] Its source in international law is treaty and custom based and can be applied to the core international crimes (war crimes, crimes against humanity, ethnic cleansing, and genocide). These crimes are recognized as peremptory norms of *jus cogens*[54]. It is a binding norm under international law that every state must prevent these crimes from occurring, no matter whether states have signed or ratified any treaty. With the exception of ethnic cleansing, all crimes are defined and codified in core international criminal law documents.[55] What we have seen so far, was the debate of who decides upon intervention, and the source of R2P in international law. Next, I will present the crimes that invoke R2P.

[51] Advisory Council on International Affairs and Advisory Committee on Public International Law, Humanitarian Intervention, advisory report, The Hague, April 2000.
[52] ICISS Report, p. 53-55.
[53] Barbour Brian/Brian Gorlick (2008), p. 541.
[54] *jus cogens*: compulsory law; every state is compulsory bind and international law will get supranational.
[55] Barbour Brian/Brian Gorlick (2008), p. 541.

1.6 International core crimes and R2P

In this sub-chapter I first underline which crimes invoke R2P and then I will put more focus on the legal aspects of crime against humanity.

The concept of R2P can be applied in cases of *threatened or actual mass atrocities such as genocide, large scale ethnic cleansing, war crimes and crimes against humanity*[56]. Beyond these crimes R2P cannot be applied because this was not the intention of the creator of R2P and, as Axworthy and Rock describe in their text, *…to do so would be plainly wrong and damaging to R2P itself.*[57] The concept of R2P has been limited to these crimes because of their broad agreement and the generally acknowledged need to prevent these crimes.[58]

For this thesis, examining crimes against humanity is essential because it deals with the case of Myanmar. Due to the limitation of R2P to the four core international crimes, crime against humanity is the only relevant crime in the context of disasters, as I will explain in the next sub-chapter.

1.6.1 Crime against Humanity

Crime against humanity implies mass atrocities and can therefore be found in several international criminal law treaties, such as the Charter of the International Military Tribunal of Nuremberg, the Statute of the ICTY, the Statute of the ICTR and the Rome Statute ICC.[59]

Within the Rome Statute of the ICC, crime against humanity is defined in Article 7 as […] *a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*[60] A crime against humanity involves acts such as murder, torture, rape, sexual slavery, persecution or other related acts, which are further developed in Article 7 of the Rome Statues. To distinguish a crime against humanity from a war crime, it *must be part of a widespread or systematic attack directed against a civilian population*.[61] A further definition of the enumerated crimes can be found in the ICC Elements of Crimes or in national or international jurisprudence.[62] Initially, this crime filled gaps in the law of war crimes, but because several parameters were left out, especially the fact that a government commits crimes against its own population, crimes against humanity was separated from war

[56] cit. Axworthy/Rock, (2008), p. 64.
[57] cit. Axworthy/Rock, (2008), p. 64.
[58] Barbour Brian/Brian Gorlick (2008), p. 541.
[59] Barbour Brian/Brian Gorlick (2008), p. 547.
[60] cit. Rome Statute, International Criminal Court, Article 7.
[61] cit. Cryer and others (2010), p. 230.
[62] Cryer and others: (2010), p. 233 and in the Elements of Crime of the ICC.

crimes. The law of crimes against humanity protects victims no matter nationality, and it concerns primarily crimes that are directed against civilians. Genocide, to distinguish it from crime against humanity, requires *intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.*[63] A crime against humanity can be committed on different grounds such as national, ethnic, racial, or religious, and there is no need for a discrimination animus moreover, crimes against humanity do not require an armed attack.

I will provide a more detailed legal analysis of this crime in chapter four, when I will deal with the question of whether the refusal of aid constitutes a crime against humanity in the case of Myanmar. To finalize the first chapter, I would like to present the human rights aspects of R2P before providing a small conclusion and answering the sub-questions of this chapter.

1.7 R2P and human rights

When it comes to human rights, the Universal Declaration of Human Rights from 1948 and the ICCPR and ICESCR from 1966, provide a benchmark within international law for state's conduct for the protection and promotion of human rights. Also Article 1(3) of the UN Charter refers to […] *respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion...*[64]

The concept of R2P is linked to human rights in the sense that the increasing interest to realize universal justice after mass atrocities is reflected in the creation of special international tribunals and the ICC, and the creation of several treaties with universal jurisdiction, such as the Geneva Convention*s*.[65] This universal jurisdiction can be applied by any sovereign state against the accused. It is most effective to maintain human rights standards and the rule of law in national judicial systems in case the national judicial system *either cannot or will not act to judge crimes against humanity that universal jurisdiction and other international options should come into play,*[66] such as R2P.[67]

[63] cit. Cryer and others (2010), p. 234.
[64] cit. Article 1(3) of the UN Charter.
[65] the Geneva Convention of 1949 and its Additional Protocols provide the core points of international humanitarian law and regulate armed conflicts; they protect people who are no longer taking part in hostilities or those who are not taking part at all.
[66] cit. ICISS Report, p. 14.
[67] ICISS Report, p. 14.

When it comes to humanitarian catastrophes, attention must be paid that national sovereignty does not underpin human rights. It is the promise of R2P to protect civilians from their own governments if they fail in their responsibility to protect.[68]

Conclusion

This first chapter of the thesis aimed to introduce the theoretical concept of R2P. In this conclusion, I would like to provide an answer to the stated sub-questions. The first sub-question of this chapter was: *under what circumstances can the international community execute the concept of R2P?* As presented above, the crimes committed to invoke R2P are genocide, ethnic cleansing, war crimes, and crimes against humanity. The circumstances under which R2P can be executed have been presented under the second pillar of R2P, namely responsibility to react. We have seen that there are six criteria to the non-intervention principle, and that the main and only authority that takes the decision of whether to intervene with military force or not is the UNSC based on the UN Charter. The Security Council itself needs the support of its member states to enforce an intervention.

The second sub-question of the first chapter was: *to what extent play crimes against humanity and human rights a role in the concept of R2P?* Because of its importance for the next chapters, the focus was on crimes against humanity as the only relevant crime in context of disasters and R2P. The core international crimes play a big role in the concept of R2P because of their international recognition and their *jus cogens* nature; the core international crimes are binding norms for every state. Beyond the scope of these mentioned crimes the concept can not be applied. The idea was based on bringing an end to mass atrocities and universal justice to victims. The respect for human rights is of crucial importance in the concept of R2P because it promises to take action if a government fails to respect human rights.

[68] Axworthy/Rock, (2008), p. 57.

Chapter 2
International legal framework on disaster response

The second chapter provides general information about international disaster response and its legal framework. In this chapter, I will take a look at what exists besides the concept of R2P, which could be of relevance in disaster response. Therefore, the second chapter aims at figuring out how and if R2P is related to the international legal framework on disaster response, and whether the concept of R2P can provide an added value in disaster response. In this case I will underline the disaster that resulted from cyclone Nargis in Myanmar in 2008. The sub-question that is relevant here is: *what else is besides R2P in the international legal framework on disaster response that could be of use in disaster situations?*

I start with providing an understanding of disasters in general, and relief in natural disasters, followed by the fields of international disaster response. This implies IHL (International Humanitarian Law; the Geneva Conventions) and relevant human rights laws, especially ICCPR (International Covenant on Civil and Political Rights) and ICESCR (International Covenant on Economic, Social and Cultural Rights).

Finally, I introduce the regional disaster response agreement that is most interesting for this thesis because of the case study of Myanmar, ASEAN's Agreement on Disaster Management and Emergency Response. There are many other legal instruments and documents in the fields of international disaster response, but only the parts relevant for this thesis will be examined.

2.1 Understanding disasters

Before providing the legal instruments of international disaster response in international law, I will present an understanding of disasters. First of all, disasters are understood here as emergency situations where urgent international relief is needed in order to stop human suffering. A distinction has to be made between man-made and natural disasters because of the differences in legal consequences. Man made disasters can happen accidentally (such as industrial or technological disasters) or by deliberate action (armed conflict situations). There are rules of conduct in armed conflicts within international law and if those rules are violated, legal consequences can follow. Natural disaster can be seen as a result of natural phenomena. The occurrence of disasters is either slow (resulting from political instabilities in a country, such as famine) or sudden (from tsunamis or hurricanes).

In practice, disasters can be partly natural and partly man-made,[69] such as cyclone Nargis in Myanmar in 2008 and the government's refusal to access international relief organizations. Also current events in Haiti or Japan could be related in that regard however, I will not go into further detail on those cases. Moreover, it has to be mentioned here, that to some extent, natural disasters are linked to *mankind's relationship with the environment*[70]. This means that a disaster which is caused by natural phenomena does not remain only a natural disaster, in the case that authorities of the affected country, or the international community, refuse to provide proper relief. There are multiple causes therefore for disasters which derive from natural or man-made actions.[71] It is crucial for governments to have early developed relief action in case a natural disaster strikes. The Red Cross is a precursor in that aspect as it does not only focus on armed conflicts, but also on peacetime relief activities. Even today the Red Cross offers peacetime relief work to its national societies.[72]

The key activities for disaster relief action are disaster prevention and mitigation, disaster preparedness and early warning, improving of capacities, providing funding, and request assistance if necessary as well as to provide cooperation, coordination and leadership in disaster relief.[73]

2.2 Legal framework

In this section I will present the legal instruments in disaster response. International law is relevant for disasters as disasters often do not only affect one country; within international law there are different legal frameworks providing clear references for disasters. Furthermore, disasters usually threaten a large number of civilian lives, and in the aftermath of a disaster human rights are at risk. Therefore, on the international level, two fields of law are essential for disaster response. First, IHL, including the Geneva Conventions, and, second, human rights laws such as ICCPR and ICESCR. IHL is involved in disaster response in that sense that IHL is customary international law, which makes it mandatory for all states. Human rights law is essential as disasters have a serious impact on several human rights which must be protected. Moreover, there are several regional agreements on the laws of disaster response; however, I will only focus on ASEAN's Agreement on Disaster Management and Emergency Response.

[69] Macalister-Smith, Peter (1985), p. 3.
[70] ibid, 1985, p. 3.
[71] ibid, 1985, p. 3.
[72] Macalister-Smith, Peter (1985), p. 17.
[73] ILC, UN Doc. A 61/10, 2006, Paragraph 256 ff.

2.2.1 International law

2.2.1.1 International humanitarian law

The basic purpose of IHL is to set rules of conduct during hostilities within a state or between states, and to protect those who are not, or no longer, participating in the hostility. This covers the treatment of prisoners of war, civilians in occupied territory, and sick and wounded persons.[74] IHL can be divided into two main parts: the law of The Hague, which includes provisions that affect armed conflicts (*ius ad bellum*), and the law of Geneva (Geneva Conventions or *ius in bello*), which is a body of rules for the protection of victims in war.[75] The law of Geneva is of importance for this thesis, because this legal instrument provides among others the law related to humanitarian aid, and states that persons that are not actively engage in armed conflicts should be treated humanly. Therefore, the law of Geneva is primary concerned with the protection of persons affected by armed conflicts.[76]

Today, all states are bound to the Geneva Convention *concerning Armed Conflicts, Protection of Wounded, Sick Members of Armed Conflicts and Prisoners of War and Civilians*[77] because the Geneva Convention of 1949 has been ratified universally. Yet, not all provisions in the Additional Protocols of the Geneva Convention are customary international law, and not all treaties related to IHL are ratified universally.[78]

When it comes to humanitarian aid, the Fourth Geneva Convention contains provisions in that regard. Article 23 and 38 of the Fourth Geneva Convention states the duty of a state to provide humanitarian aid to the population under control of the state, and to allow third parties to provide aid if this state is not able to do so.[79] However, those Articles require that the aid is truly humanitarian, and that three principles of humanitarian relief have to be taken into account: humanity, neutrality and impartiality.[80] In the case of Myanmar IHL can not be used, because there was no armed conflict, as I will explain further in chapter four.

[74] Malcolm, Shawn (2003), p. 1045.
[75] cp. webpage of ICRC.
[76] Malcolm, Shawn (2003), p. 1055, 1056.
[77] cp. webpage of ICRC.
[78] Henckaerts, Jean-Marie (2009).
[79] Fourth Geneva Convention, Articles 23 and 38.
[80] Dungl, Joakim (2011), p. 12.

2.2.1.2 Human Rights Laws

In a disaster situation many human rights are at risk. These human rights are economic, social, and cultural rights, including the right to food, water, health and housing but also civil and political rights, such as the right to life. Article 2 of the ICCPR states the responsibility of each state to ensure the rights for all individuals within its territory, and for people under their jurisdiction. Article 2(1) of the ICESCR implies that state parties should undertake progressive steps, if necessary with international assistance and cooperation, to the maximum of state's available resources in order to fulfil their obligations.[81]

Some human rights treaties include the possibility of a state of emergency which relates to the derogation of certain rights. A state of emergency could be proclaimed when a disaster strikes and the affected state party may derogate its obligation from those human rights treaties which include a derogation clause. However, not all treaties include derogation clauses. Article 4(2) ICCPR presents a number of Articles that are not subject to derogation. The ICESCR is an untypical human rights treaty because it does not specify any derogation clauses or the scope of human rights obligation. It is not acceptable to derogate people from their right to food in disaster situations. Article 2(2) of CAT, for example, does not allow any exceptional circumstances to justify torture. In general, the core contents of human rights are non-derogable.[82] Human rights law is only useful when the state in question is a party to human right treaties. Therefore, in the context of disasters, human rights law lacks possibilities.

2.2.2 Regional agreements

2.2.2.1 ASEAN's Agreement on Disaster Management and Emergency Response

In 2005, ASEAN adopted the Agreement on Disaster Management and Emergency Response to

> intensify co-operation in addressing problems associated with, inter alia, disaster management in the region to enable individual members to fully realize their development potentials to enhance the mutual ASEAN spirit;[83]

[81] Article 2 ICCPR and Article 2 ICESCR.
[82] Alston, Philip/Gerard Quinn (1987), p. 9, see also: Article 4(2) ICCPR and Article 2(2) CAT.
[83] cit. ASEAN Agreement on Disaster Management and Emergency Response, preamble.

This agreement aims at facilitating disaster response, cooperation, and legal assistance within the member states. It can be seen as a framework for developing responses to disasters, and also provides a disaster relief fund.[84]

Article 1 describes the use of terms, whereby ASEAN defines disaster as *a serious disruption of the functioning of a community or a society causing widespread human, material, economic or environmental losses.*[85] Furthermore, it focuses on disaster management, disaster risk reduction, and disaster emergency. It is written in the agreement that the risk of a disaster should be limited by prevention and the objective of the agreement, as written in Article 2,

> is to provide effective mechanisms to achieve substantial reduction of disaster losses in lives and in the social, economic and environmental assets of the Parties, and to jointly respond to disaster emergencies through concerted national efforts and intensified regional and international co-operation. This should be pursued in the overall context of sustainable development and in accordance with the provisions of this Agreement.[86]

Article 3 describes the principles of the agreement, which are respect for other states' sovereignty and territorial integrity. Each affected state should have the primary responsibility for disasters occurring in its territory, and external assistance should only be provided upon request or with the consent of the affected state.[87]

What we have seen from this regional agreement is that it does not mention what happens in the event a state is not willing to provide relief after a disaster strikes the country.

2.3. Legal developments

In this section I will introduce projects of the ICRC and the UN regarding laws of international disaster response. I will take a closer look at the "International Disaster Response Laws" of the IFRC and the "Protection of Persons in the Event of Disasters" by the UN's International Law Commission.

[84] ASEAN Agreement on Disaster Management and Emergency Response.
[85] cit. ASEAN Agreement on Disaster Management and Emergency Response, Article 1.
[86] cit. ASEAN Agreement on Disaster Management and Emergency Response, Article 2.
[87] ASEAN Agreement on Disaster Management and Emergency Response, Article 3.

2.3.1 International Disaster Response Laws

The IFRC, which was established to respond to natural disasters and focuses on humanitarian situations in peacetimes developed an International Disaster Response Law, Rules and Principles programme (IDRL). The purpose of IDRL is to find out the role of national laws in disaster response, especially in international disaster relief. The programme has been established in 2001 and aims to reduce *human vulnerability by promoting legal preparedness for disasters.*[88] While the IFRC does not have a legal basis, it has formed non-binding norms for peaceful disaster relief, and is relevant as such.[89]

The programme works on three fields. IDRL provides technical assistance to National Red Cross and Red Crescent Societies in order to strengthen domestic legislations for disaster preparedness. Another field is capacity building of National Red Cross and Red Crescent Societies to advise governments about disaster management law. The last field is advocacy, dissemination, and research in order to build cooperation on international and region levels.[90]

IDRL describes humanitarian assistance in disasters during peacetime, and it applies when states need support in disaster assistance.[91] The IDRL is currently promoting a *Guideline for the domestic facilitation and regulation of international disaster relief and initial recovery assistance* with the primary purpose of reducing restrictions or delays in international disaster aid operations and to strengthen domestic efforts. The programme intends to set forth its work in technical assistance and training projects. Furthermore, it wants to prevent *ad hoc* approaches in sudden emergency cases, due to the fact that most states sort out their disaster mechanisms only when disaster strikes.[92] Awareness building among local levels is therefore important. One obstacle of IDRL is that it offers its technical assistance only to states upon request.[93] IDRL would therefore not be of great use in the case of Myanmar after cyclone Nargis because, from a political point of view, it is doubtful that the Military Junta would have requested technical assistance to protect its citizens.

[88] cit. IFRC webpage.
[89] IFRC webpage.
[90] IFRC webpage.
[91] Hoffman, (2003), p. 15.
[92] IFRC webpage.
[93] Fischer, (2003), p. 34.

2.3.2 Protection of Persons in the Event of Disasters

The International Law Commission[94] included a project 'Protection of Persons in the Event of Disasters' in its long term work programme in 2006.[95] A Codification Division prepared and assisted the ILC in this regard. In 2007, a Special Rapporteur, Mr. Eduardo Valencia-Ospina, was appointed to this topic.[96]

In July 2010, the ILC established Draft Articles concerning the protection of persons in the event of disasters. Draft Article 6 concerns humanitarian principles in disaster response, such as humanity, neutrality, and impartiality. Article 7 describes human dignity; Article 8 the respect of human rights for persons in disasters. Article 9 concerns the role of the affected state and reads as follows:

> 1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.
> 2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance. [97]

It does not specify what should be done in case the affected state is not able or willing to fulfil its primary role. However, the ILC Protection of Persons in the Event of Disasters is related to the concept of R2P, and adds value to the international framework of disaster response laws because of its focus on the protection of human dignity and human rights but it is not yet finalized.

Conclusion

In this chapter I introduced the legal framework of international disaster response as it is today. The sub-question stated at the beginning of this chapter was: *what else is besides R2P in the international legal framework on disaster response that could be of use in disaster situations?* I provided the legal development of the international framework on disaster response; however, considering the general problem of this thesis, regarding the unwillingness of some states to provide proper relief for their civilian population I came to the

[94] The object of the International Law Commission of the UN is the progressive development of international law and its codification. It is therefore, the UN's instrument to draft international laws. see more: on ILC's webpage.
[95] ILC, UN Doc. A/61/10, 2006, Paragraph 256 ff.
[96] ILC, UN Doc. A/62/10, 2007, Paragraph 375.
[97] cit. Draft Article 9, UNGA Doc. A/CN.4/L.776.

conclusion that the present international legal framework about disaster response does not solve the problem in a satisfactory way.

R2P should be scrutinized further to see if it adds anything to the existing legal framework of disaster response. Only the ILC's project 'Protection of Persons in the Event of Disasters' would provide an answer, however, it is not finalized yet.

In the selected legal instruments, nothing is specified in case the affected state is unwilling or unable to respond to the disaster. In the ASEAN's Agreement it was stated that international assistance has to be within the consent of the affected state and sovereignty and territorial integrity have to be respected. This raises the question of why would the affected state in case of disasters not want to request international aid or accept offers for international relief? I will try to find an answer to this question in Chapter three, as it focuses more on international politics and the denial of the Myanmar Military Junta to allow international relief organizations to enter the country.

Chapter 3
The aftermath of cyclone Nargis in Myanmar – a political perspective

The third chapter of this thesis provides a more political perspective regarding the aftermath of cyclone Nargis in Myanmar in 2008. I will highlight the political decision of the Military Junta in not allowing international aid to enter the country, and also what role ASEAN played in this international debate that resulted from this denial. The aftermath of this natural disaster started a discussion within the international community, and led to political discrepancies between states which went even further than the case of Myanmar. Some countries related the occurrences in Myanmar to a natural disaster that resulted in a man-made disaster because of the denial of international aid, and finally aggravated the situation to a crime against humanity. As the first chapter already introduced, the concept of R2P can be invoked in the case of crimes against humanity. Other states however are not going so far as to call the aftermath of cyclone Nargis a crime against humanity.

Nonetheless, the question of whether it was crime against humanity or not will be answered in chapter four. I look at this political discrepancy in the international community, but focus on why the Military Junta denied access of international aid organizations and which role ASEAN played. The two sub-questions for this chapter are: w*hat was the rationale behind the decision of the government of Myanmar to deny access to humanitarian relief organizations?* and t*o what degree did ASEAN play a role in the aftermath of cyclone Nargis?*

I answer these questions by first giving a short introduction to what happened during the cyclone Nargis in Myanmar in 2008 and its consequences. More importantly, I relate the case of Myanmar to the previously introduced concept of R2P, because, especially when it comes to R2P, international politics play a crucial role.

3.1 Cyclone Nargis and its aftermath – Some Facts

On May 2 and 3, 2008, cyclone Nargis, a Category 3 tropical storm, struck the southern part of Myanmar on the Irrawaddy Delta and Yangon (capital city), leaving a trail of death and destruction. Approximately 130 000 people were killed by this cyclone, according to UN Office for the Coordination of Humanitarian Affairs. It was one of the deadliest storms in

history, destroying millions of acres of rice paddies and hundreds of thousands of homes in the delta.[98] The storm caused a meter high surge which flooded the most affected areas and killed many people. Fishery, which was a great source of income for many people living in that area, suffered great losses.[99] The SPDC, the official party of Myanmar, declared a state of emergency in five administrative regions: Yangon, Ayeyarwady (or Irrawaddy), Bago Division, Kayin, and Mon States. The UN Food and Agriculture Organization stated that 65% of the countries rice and 80% of agriculture production came from those five regions.[100] In total 2.4 million people were affected by this cyclone. The damage cyclone Nargis caused is an estimated 10 billion USD.[101] This natural disaster was the biggest disaster in Myanmar's history. Cyclone Nargis had a big social (rice prices increased dramatically and caused a shortage) and political impact.[102]

3.1.1 Myanmar's reaction to cyclone Nargis

In May 2008, after the devastating cyclone, the international community expected Myanmar to react quickly. However, as a developing country, Myanmar could not live up to the international communities' expectations, especially because its transport and infrastructure sector were not well developed. Taking into consideration the devastation of cyclone Nargis, even highly developed countries would face problems in the aftermath of such a natural disaster.[103] Gordon Brown, the British Prime-Minister, stated shortly after the cyclone: *a natural disaster is being made into a man-made catastrophe by the neglect and the inhuman treatment of the Burmese people by a regime that is failing to act.*[104]

In the days after the cyclone, the Military Junta of Myanmar lacked the capacity to effectively respond to the catastrophe, and the authorities of Myanmar were overwhelmed by the devastation.[105] UN agencies such as OCHA, but also NGOs, feared the outbreak of disease[106] such as malaria, dengue fever, cholera, or dysentery due to the lack of shelter, water, food, and medicine.[107] Because of the impact of cyclone Nargis, immediate assistance was needed, and throughout the international community it was clear that Myanmar could not

[98] NY Times Article from April 30, 2009.
[99] Seekins M. Donald (2009), p.717.
[100] Selth, Andrew (2008), p. 386.
[101] Wong, Jarrod (2009), p. 242.
[102] Seekins, M. Donald (2009), p. 718.
[103] Selth, Andrew (2008), p. 387.
[104] cit. Gordon Brown, after: Selth, Andrew (2008), p. 388.
[105] Haacke, Jürgen (2009), p. 162.
[106] Barber, Rebecca (2009), p. 4.
[107] Haacke, Jürgen (2009), p. 162.

provide this efficiently. Despite the fact that other countries, the UN, and other humanitarian relief programmes offered their aid, the government of Myanmar relied on their own relief activities from its National Natural Disaster Preparedness Central Committee, which provided relief in camps outside the affected delta.[108]

Soon, the 2.4 million affected people faced death, stemmed from starvation and diseases; nevertheless, the government of Myanmar imposed restrictions on foreign humanitarian aid.[109] Shipments with foods from the UN were seized, and the government refused to allow foreign aid workers to distribute the packages. Airplanes with supplies were not allowed to land because they included foreign aid workers and international press. The WFP stated that food aid and other equipment had been confiscated by the Military Junta.[110] The country clearly aggravated the human suffering of the survivors of cyclone Nargis by denying international relief and rejecting foreign military assistance to deliver aid to the affected regions. Even though the Military Junta realized the impact of this natural disaster, and actually welcomed supplies from the international community (Thailand and Italy were the first countries that got a permission to deliver aid), the most crucial challenge for international aid organizations was that Myanmar refused to issue visas for foreign aid workers because it did not want foreign international aid organizations to enter the country.[111] The restriction of the Military Junta was not only for humanitarian workers, but also for foreign media; journalists were not allowed to enter the country.[112]

The SPDC considered the ruling Military Junta and its response to the disaster was highly concerning.[113] In short, Myanmar's Military Junta did little to help the survivors, and delayed and even blocked the attempts of other countries to provide international relief.[114] Three weeks after the cyclone, General Than Shwe declared that the relief action had ended, and that the reconstruction phase would begin, even though bodies were still laying in the most affected areas and survivors were still waiting for assistance.[115]

[108] Haacke, Jüren (2009), p. 162.
[109] ibid, p. 4.
[110] Wong, Jarrod (2009), p.242, 243.
[111] Haacke, Jürgen (2009), p. 162.
[112] Honda, Miki (2009), p. 5.
[113] Haacke, Jürgen (2009), p. 157.
[114] Abramowitz, Morton and others (2008), p. 1.
[115] Selth, Andrew (2008), p. 389.

3.1.2 Reaction of the international community after cyclone Nargis

The international community was frustrated with Myanmar's slow acceptance of international aid, and Western powers as well as Myanmar's neighbouring countries tried to persuade the government to open the way for international relief.[116] UN Secretary-General Ban Ki-moon urged the junta to provide assistance after the cyclone and also John Holmes, UN Humanitarian Relief Coordinator, suggested that the government of Myanmar should facilitate international humanitarian aid.[117]

To not breach the principles of international law, the international community could not provide any aid to the most affected areas without the consent of Myanmar's government; with one exception – humanitarian intervention.[118] These circumstances led to a heavy discussion within the international community about applying the newly established concept of R2P in Southeast Asia. A number of Western nations, first and foremost French's Foreign Minister Bernhard Kouchner, proposed the UNSC adopt a resolution to authorize relief delivery and impose this on Myanmar's government unless the Military Junta was willing to cope. This suggestion raised immense debates about legal and diplomatic consequences. If a state is not willing to protect its citizens, can the international community invoke R2P to protect the citizens?[119] In the case of Myanmar: can R2P be invoked in a natural disaster that results in a core international crime, and was it a core international crime? Before going into more detail to answer these questions, which I do in chapter four of this thesis, I will go back to the question of why the Military Junta did not allow international relief after cyclone Nargis.

3.2 Political perspective in the aftermath of cyclone Nargis

After providing the facts about the occurrences of cyclone Nargis, this sub-chapter delivers an answer to the question why the government of Myanmar refused international aid. The answer to this question is politically motivated. Therefore, I will provide a short insight in the political system into Myanmar. Afterwards, I will take a look at the role ASEAN played in the aftermath of the cyclone.

[116] Honda, Miki (2009), p. 1.
[117] Haacke, Jürgen (2009), p. 163.
[118] Haacke, Jürgen (2009), p. 157.
[119] Barber, Rebecca (2009), p. 4.

3.2.1. Myanmar's political system

Burma, as it was originally called, was part of the Indian Empire until 1937, when Burma reached its independency as a separate colony of the British Empire. In 1948, it was independent from the Commonwealth and General Ne Win dominated the government from 1962 to 1988. He was a military leader and declared himself president of Burma. In September 1988, the military displaced Ne Win and established a Military Junta changing the name of the county to Myanmar. In 1990, multi-party legislative elections took place, but despite the winning of the opposition party, the Military Junta refused to leave office. In January 2011, the former Military Junta had changed to a multiparty democracy that opened the two-chamber Parliament, however, this democracy is not unfettered[120] because even though the former Prime Minister Thein Sein was elected president, the majority of the seats in the Parliament are reserved for members of the former military regime.[121]

Myanmar is known in the international community for its gross human rights abuses, including forced labour and child labour. The military regime lacks democracy and peace.[122] One of Myanmar's most famous individuals is Aung San Suu Kyi, from the opposition of the Military Junta. As a result of her political work, the Military Junta put her under house arrest for 15 years.[123]

3.2.2 The reasons of the Military Junta in Myanmar to deny international aid after the devastating cyclone Nargis

Myanmar's unwillingness or inability to provide adequate relief to the survivors of the cyclone has several political reasons.[124] One of the main reasons why the Military Junta denied visas for foreign aid workers, and in general to allow access on its territory for the purpose of providing support to the survivors of cyclone Nargis, is fear of invasion.

Myanmar's fear of invasion and external interference is clearly linked to its history, and the invasion of several external powers such as China, India, Thailand (in the 13th century) and the British Empire (in 1826, 1852 and 1885). Looking at the history, it is not surprising that these invasions had an impact on the country and its people in the 1988 pro-democracy uprising. Demonstrations provoked a high level of international attention and

[120] NY Times Article from January 31, 2011.
[121] CIA Factbook on Burma.
[122] Haacke, Jürgen (2009), p. 177.
[123] BBC Country Profile Burma.
[124] Wong, Jarrod (2009), p. 243.

greater concern of the military rulers. The concern of the Military Junta rose after the deployment of a US vessel which officially evacuated US embassy staff members during the 1980s. This incident left a deep impression on the military regime. During the military operations in Iraq in 1990-91, Myanmar placed anti-aircraft artillery just to prevent an invasion like Iraq; similar incidents happened until 2008.[125]

In the aftermath of the cyclone, it is hard to understand the military regimes policy. However, its reaction can also be related to social instability. In the rural areas, it is difficult to monitor foreign aid workers and journalists. Due to international media, it also would be harder to restrict people's thoughts about the policies of the Military Junta. Further, aid supplies with foreign labels would emphasise the regimes failure to protect its citizens and provide aid effectively.[126]

Another reason for denying access of foreign aid was that the regime thought that foreigners would smuggle weapons and would give it to the civilian population and cause an uprising from civilians. Even though this was not the case, the Military Junta imagined that dissident groups would use the situation of having foreign aid workers in the country, and, in case of a riot, UN intervention would be justified. Also, as in Indonesia in 2004, the presence of foreign aid workers would take a long period of time, and the Military Junta did not want foreigners for a long period of time in Myanmar because of the junta's plan to introduce a discipline-flourishing democracy by 2010. Nonetheless, as stated above what the military regime of Myanmar feared the most was an invasion on a disaster relief basis by the USA or its allies. Myanmar's news channels reported that it did not allow US, UK, or France naval forces to enter the country because of the fear that the USA would use the disaster to invade and take Myanmar's oil. The USA answered that the deployment of vessels was not based on policy matters but rather on humanitarian matters.[127]

In general, cyclone Nargis posed a challenge for the Military Junta, not only based on relief or reconstruction, but also for Myanmar's independence and sovereignty. Particularly, as a result of the high interest of the international community in providing aid, the military regime reawakened its fear of invasion.[128]

[125] Selth, Andrew (2008), p. 380-386.
[126] ibid. p. 391.
[127] Selth, Andrew (2008), p. 392, after Condoleeza Rice (former US Secretary of State).
[128] ibid. p. 394.

3.2.2.1 Myanmar's strategic thinking

Myanmar's strategic thinking about security perceptions changed after the 1988 uprising. Before 1988, the general perception about security was the fear from internal insurgences, whereas after the uprising, the military regime feared external threats in forms of invasion as main domestic concern. After cyclone Nargis the regime's strategic thinking was basically concerned with external threats. From the point of view of political observers, Myanmar's fear of external invasion is mainly focused on the United States; however, as long as China and Russia are supporting Myanmar (with a veto in the UNSC in case of a resolution to take coercive action against Myanmar), such an invasion is not likely to occur. Neither is it likely that the UNSC endorse on attacking Myanmar initiated by the US because of the fact that Myanmar has two backups – China and Russia. Later on I will talk about the role ASEAN played during cyclone Nargis, but to also mention it here from the perspective of political observers, it is unlikely that ASEAN endorses an armed intervention against one of its member states.[129]

As it already happened before in other countries such as Iraq, the US could go on its own behalf to interfere in Myanmar's business. However, the US is dependent on China's support in handling North Korea (China is cooperating with the US sanctions on arms sales and putting pressure against the nuclear programme of North Korea). Therefore from a political point of view it is not likely that Myanmar is invaded in the near future. But, to take up on former Israeli Prime Minister Golda Meir's quote "even paranoids have enemies", the SPDC for several reasons, still fears external intervention. Let us find out why. Even before 1988, the US shows a long record of interventions into other states' internal affairs and the US never made a secret out of the fact that it was not satisfied with Myanmar's regime and would like to replace it. Myanmar had to face economic and other sanctions and also NGOs and other activist groups pushed to the regime's downfall.[130]

Public protests have been organized and armed insurgent groups in Myanmar have received support from foreign countries and challenged therefore the regime's authority. Foreign activists have even called for an invasion, however, they lack influence but receive support from powerful countries. Myanmar's government suspects that the US want to support the NLD to install a "puppet government" in Myanmar in order to contain China, as

[129] Selth, Andrew (2008), p. 394.
[130] ibid. p. 395.

the US already have Taiwan, India, Thailand, Japan and South Korea on their side. Therefore the US is supporting Myanmar's opposition party because the US could then encircle China.

Until today there are speculations why Myanmar joined the ASEAN in 1997, but one factor might be to protect against an intervention of the US or other Western powers. As a result of the military regimes threat perception, other countries have to consider their policy formulation in order to not weaken the diplomatic relations more and also for the sake of the people of Myanmar. From a political point of view, it is important to try to understand the SPDC's intentions, as future policies to interact with the military regime regarding humanitarian assistance will have to consider Myanmar's general perspectives.[131]

I have presented so far why the Military Junta refused international aid. The reason for this denial, besides the fear of invasion, is that Myanmar's government is highly suspicious of the world outside and very protective about its sovereignty. In the aftermath of cyclone Nargis, Myanmar made its citizens believe that it controlled the situation by providing only government-run newspapers and media.[132]

Finally, another reason why Myanmar's government denied access to international aid organizations was that in the midst of cyclone Nargis the junta held a referendum on a new constitution. Myanmar urged its citizens to vote in favour of the referendum which would give even more power to the Military Junta.[133] The referendum was scheduled for May 10, 2008, and, because of cyclone Nargis, was postponed until May 24, 2008. The purpose of this referendum was to shift power to the military regime.[134] The military regime went ahead with the referendum, despite the devastation of cyclone Nargis, and was more focused on voting than on providing assistance to the survivors.[135]

In this section of the third chapter I focused on the political reasons of why the Military Junta denied access to international aid organizations. I provided an understanding of Myanmar's strategic thinking, which is deeply related to its actions in the aftermath of cyclone Nargis. Following, I will examine role ASEAN played in the aftermath of cyclone Nargis.

[131] Selth, Andrew (2008), p. 394-399.
[132] Honda, Miki (2009), p. 5, 6.
[133] Honda, Miki (2009), p. 6.
[134] Jarrod, Wong (2009), p. 243.
[135] Bellamy Alex J. (2010), p. 9.

3.2.3 The role of ASEAN after cyclone Nargis

I will not provide much information about ASEAN as a regional organization[136] but focus on its role after the natural disaster in Myanmar 2008 because the denial of access to foreign aid organizations was based on political reasons and ASEAN's action in the aftermath of the cyclone were essential.

The ASEAN was established in 1967 in Bangkok, and is a regional organization which aims at accelerating economic growth, social progress, and cultural development through partnership and joint endeavours among member states. ASEAN promotes peace and security, and stands for the respect for justice and the rule of law, as well as to hold close cooperation with international and other regional organizations. Other member states include Thailand, Indonesia, Malaysia, Philippines, Singapore, Brunei Darussalam, Vietnam, Lao, and Cambodia. One of the fundamental principles of ASEAN is the mutual respect for independence and sovereignty, and the non-interference in the internal affairs of another member state. Disputes should be settled by peaceful means, and every member state has the right to exist free from external interference or coercion.[137]

3.2.3.1 ASEAN's role as facilitator

After the occurrences of Nargis and the refusal of Myanmar to accept foreign humanitarian aid, ASEAN member states suggested the government of Myanmar to accept foreign aid because of the scale of the natural disaster and the high death toll. The ASEAN- Emergency Rapid Assessment Team[138] observed the situation and found that humanitarian aid from foreign countries was necessary. The behaviour of Myanmar was in contrast with ASEAN's community engagement in the Southeast Asian region, as stated in the *ASEAN Charter*. There was frustration over the Military Junta's decisions and Myanmar embarrassed ASEAN, not only because of its unwillingness to accept international aid, but also because of Myanmar's *refusal to allow ASEAN a constructive role in its political transition*.[139]

However, ASEAN's role in the aftermath of cyclone Nargis was that of a facilitator for relief action, although Myanmar was suspicious of the international community as

[136] for further information about ASEAN please visit the webpage.
[137] ASEAN Webpage.
[138] The ASEAN-ERAT's mission in the post Nargis era had the primary objection to gather and analyze assessment findings and after that to provide recommendations on support for the government. The mission was held from 9-18 of May 2008.
[139] cit. Haacke, Jürgen (2008), p. 353.

described above.[140] ASEAN's response to cyclone Nargis started an immediate call from the ASEAN Secretary-General Dr. Surin Pitsuwan to all member states to provide relief to Myanmar's citizens. The Association sent experts to the UN Disaster Assessment and Coordination Team. ASEAN's Secretary-General also called upon the government of Myanmar to allow the Association's relief and rescue teams to enter the country and fulfill the 2005 ASEAN Agreement on Disaster Management and Emergency Response, which Myanmar had already ratified. ASEAN's Secretary-General met with the president of the World Bank to discuss a collaboration of relief action, which the World Bank refused because of Myanmar's default on its debts, although technical assistance was promised in the form of human resources.

An ASEAN Humanitarian Task Force under the presidency of ASEAN's Secretary-General was created. This task force met with representatives of the World Bank, Red Cross and Red Crescent, UN, other private sector relief groups, and representatives of the government of Myanmar to discuss the details about activities and assessments in the aftermath of the cyclone. At the end of May 2008, the task force under the Association's auspices reported the first progressions in the relief process. In June 2008, further progress was reached. Assessment teams were sent to Myanmar, the World Bank provided a grant of 850,000 USD from the Global Facility for Disaster Reduction and Recovery to the ASEAN Secretariat for the relief operation. The ASEAN Humanitarian Task Force discussed a post-Nargis roundtable and decided to extend the task force's mandate until July 2010.[141]

ASEAN's role in the aftermath of cyclone Nargis was therefore that of a facilitator in starting relief action in the affected regions. The Association made it possible to work with the government of Myanmar in disaster relief through diplomacy and regional pressure. ASEAN was able through negotiations to organize effective aid. Surin created a Coalition of Mercy for the relief action in Myanmar. ASEAN could persuade Myanmar to allow entry to the ASEAN-ERAT.[142] Myanmar may have accepted foreign aid in the end because of the fact that ASEAN would not agree to a foreign intervention in Myanmar. The international community had already considered a humanitarian intervention in Myanmar, however ASEAN persuaded Myanmar to allow them to act as a facilitator. Myanmar finally accepted the role of ASEAN as a bridge between the international community, as a direct result of the international pressure.[143]

[140] Amador, Julio Santiago III (2009), p. 4.
[141] Amador, Julio Santiago III (2009), p. 7-10.
[142] Haacke, Juergen (2008), p. 370.
[143] Haacke, Juergen (2008), p. 371.

3.2.3.2 Criticism about ASEAN's action

Nevertheless, there is also criticism about ASEAN's action above all its inability to guide its member states' actions.[144] There are two institutional lessons that ASEAN learned from the disaster of cyclone Nargis and Myanmar's response. The first one is positive, because the ASEAN secretariat showed that it is a successful instrument for the administration and coordination of relief efforts. Even though member states should provide more financial support, and not only refer to ASEAN as policy facilitator with monitoring functions. ASEAN needs more implementation power to have great fiscal flexibility.[145]

The second lesson is that *the policy of non-interference creates problems in responding to natural crisis and disasters which are beyond the capacity of a given state to manage.*[146] Political consensus played a big role in the aftermath of Nargis because member states had to agree to provide relief action and negotiate with Myanmar. Therefore it took more than two weeks after the cyclone struck before relief action of ASEAN started. The Association is an intergovernmental organization, and needs states competencies. ASEAN was successful in the aftermath of cyclone Nargis, however, the Association needs to shift away from the traditional state-focused approach towards a more policy-focused approach, and it needs to adopt norms that allow *regional intervention in the event of state incapacity during natural disasters.*[147]

I have presented so far the aftermath of cyclone Nargis from a political perspective involving ASEAN, and the dynamics behind the denial of the military regime to accept foreign aid organizations.

3.3 How R2P relates to politics in the case of Myanmar

In the following sub-chapter I relate the concept of R2P to the case of Myanmar and also, I underline the political discrepancies among the international community about R2P and its use in Myanmar. However, the main focus of this sub-chapter is to relate R2P to politics and not to its applicability in natural disasters.

[144] Amador, Julio Santiago III (2009), p. 10.
[145] Ibid, p. 12.
[146] cit. Amador, Julio Santiago III (2009), p. 13.
[147] cit. Amador, Julio Santiago III (2009), p. 14.

3.3.1 R2P and the lack of international consensus

In general, the concept of R2P, which I presented in the first chapter, lacks normative consensus among the international community with regard to its applicability and practice. Legal references to drawing on R2P are found in the UNSC Resolution 1674, adopted in April 2006, about the protection of civilians in armed conflict. However, invoking R2P in practice is difficult, for several politically motivated reasons.

The practical implementation of R2P is problematic because developing countries fear that Western powers carry out interventions that are humanitarian only on paper. Considering the absence of decision-making power of developing countries in the UNSC this fear is understandable.[148] Furthermore, in Southeast Asian countries, the concept of R2P remains suspicious as some countries in the area opposed to human security, and place emphasis on sovereignty and non-interference.[149] To overcome this lack of consensus, it is necessary to understand the positions of governments around the world, especially in the Asian Pacific region because of their traditional focus on state sovereignty.[150] It is also important to understand that measures which may be popular in Western countries, such as sanctions, intervention, or early warnings, should not be privileged over other, perhaps more effective, programmes that focus on development. Myanmar and other countries in the Asia Pacific region are concerned about R2Ps justification as a coercive interference from the West.[151] Even though a very important question is how to reach international consensus for invoking R2P, it is not the main research question for this thesis, and therefore I only touch upon it as far as Myanmar is concerned.

3.3.2 Invoking R2P in the case of Myanmar – a political perspective

In the aftermath of cyclone Nargis and after the moment the military regime made it clear that foreign aid was not wanted in the country, Bernard Kouchner (French Foreign Minister and founder of Médecins san Frontières) called upon the international community to invoke R2P. He urged the UNSC to authorize the delivery of aid and impose it on Myanmar's government without their consent. This request from France did not reach agreement within the

[148] Haacke, Jürgen (2009), p. 160, 161.
[149] Haacke, Jürgen (2009): p. 161.
[150] Bellamy, Alex J./Sara E. Davies (2009), p. 547.
[151] Bellamy, Alex J./Sara E. Davis (2009), p. 567.

international community. States such as China, Vietnam, South Africa and Russia did not want the UNSC to get involved.[152]

The French UN ambassador, Jean-Maurice Ripert, stated about the Myanmar case:

> the primary responsibility is with the government of Myanmar, but if it fails or if it cannot, we have to do something. If we do not do anything, people will continue to die, epidemics will spread out, and it will be a disaster.[153]

France was supported by the US and Australia among others. US permanent representative to the UN, Zalmay Khalizad, pinpoints the matter:

> a government has responsibility to protect its own people, to provide for its people. And since it's not able to, you would expect the government to welcome assistance from others. It should be a no-brainer to accept the offer made by the international community, by states, by organizations, by international organizations,[154]

Myanmar countered France's request as a politicization of a serious humanitarian crisis, and that it would begin a precedent. Furthermore, from the point of view of Myanmar, the applicability of R2P is focused on genocide, war crimes, ethnic cleansing, and crimes against humanity, not natural disasters.[155] This point raised a discussion among different states. For the UK and others, the refusal of the Military Junta to let aid enter the country constituted a crime against humanity. However, the Council of the European Union argued that without the consent of the military regime a worse tragedy would happen. Nevertheless, the EU was not reluctant towards a humanitarian intervention if the UNSC would authorize it. Nonetheless, no coercive delivery of humanitarian supplies took place.[156]

3.3.3 The difficulty to put R2P into practice

The most difficult aspect in the concept of R2P is implementation; there are also differences in two important documents about the concept of R2P. The ICISS report, which was presented in the first chapter, is built on the idea of human protection in civil wars, state collapse, or state repression, whereas the World Summit Outcome Document limits R2P explicitly to the core international crimes. The ICISS report sets up criteria for military

[152] Wong, Jarrod (2009), p.244, 245.
[153] cit. France UN ambassador, Jean-Maurice Ripert, after: Haacke, Jürgen (2009), p. 163.
[154] cit. US permanent representative to the UN Zalmay Khalizad, after: Haacke, Jürgen (2009), p. 164.
[155] Wong, Jarrod (2009), p. 245.
[156] Haacke, Jürgen (2009), p. 165, 166.

intervention, whereas the World Summit Document does not and leaves the decision about invoking R2P with the UN General Assembly. These points make it clear why there is a huge discrepancy in putting the doctrine into practice, and it also makes it clear why there is no normative consensus within the international community.[157] Furthermore, different interpretations from states show how R2P is related to politics. In the case of Myanmar, these problems were present. In 2005, several states resisted to appoint a UN special advisor for R2P; and after much struggle Edward Luck was appointed however, the notion R2P is not to be found in his job title. Regarding the case of Myanmar, Bellamy stated that: *without consensus among governments, there is little chance of translating R2P from words to deeds.*[158]

Critics, who oppose R2P in the case of Myanmar, argued that according to the World Summit Outcome Document, R2P is only applicable in cases of core international crimes and not natural disaster. R2P cannot be justified for all manners of humanitarian intervention as this would destroy the legitimacy of R2P. On the other hand, supporters of R2P in the case of Myanmar argued that, in large-scale life-threatening situations, legal niceties are against morale and *refraining from employing R2P simply because natural disasters are involved will in fact neuter the doctrine and turn it into a meaningless catchphrase.*[159] Both sides provided convincing argumentation; however, what remains at this point is to examine R2P's applicability in natural disasters, and in the case of Myanmar, which I do in the following chapter.

Conclusion

The third chapter of this research focused on the political perspective of R2P and the case of Myanmar. I answered the question why the government of Myanmar denied access to international aid organizations as well as tried to give an understanding of Myanmar's action from a political point of view. One sub-question presented in the introduction was: w*hat was the rationale behind the decision of the government of Myanmar to deny access to humanitarian relief organizations?* The dynamics of the Military Junta are politically motivated, and relate from its fear of external interference or intervention, especially from the USA or its allies, but also fear of an insurgency from the civilian population instigated by the foreign aid workers; that is why the military regime feared the presence of foreigners. Another

[157] Haacke, Jürgen (2009), p. 160.
[158] cit. Bellamy, Alex J. (2009), p. 549.
[159] cit. Wong, Jarrod (2009), p. 245.

reason why the Military Junta did not want more international attention can be related to its constitutional referendum, which would have given the Military Junta more power.

The inaction of Myanmar clearly increased the human suffering of the civilian population, and provoked the international community to discuss military action for coercive aid and impose it on Myanmar without its consent. As a result of the diplomatic pressure and the threats of military intervention, ASEAN, as a regional organization, was able to convince the government of Myanmar to accept international aid. This brings us to the second sub-question stated at the beginning of this chapter: t*o what degree did ASEAN play a role in the aftermath of cyclone Nargis?* ASEAN played a crucial role in the aftermath of cyclone Nargis. The Association was a facilitator or bridge between Myanmar and the international community because of the regimes suspicions of the outside world, its adherence of sovereignty, and the fear of external intervention it was not easy to deal with Myanmar. However, ASEAN reached progress in the aftermath of Nargis because it would not have approved a military intervention in Myanmar.

The discussion among the international community to invoke R2P was another factor why Myanmar accepted international aid in the end. In the introduction of this chapter I mentioned that the discussion about R2P that broke out in the aftermath of cyclone Nargis was going beyond the case of Myanmar. This is because R2P is strongly related to politics as we can see in the discrepancy between the states. Myanmar's case showed that R2P lacks international consensus and that it is difficult to put into practice. The question that still remains is whether R2P is applicable in natural disasters which I will answer in the final chapter of this thesis.

Chapter 4
Applicability of R2P in Myanmar – A legal analysis

The focus of the last chapter of this thesis is based on the question of whether the refusal of aid could be considered a crime against humanity in the case of Myanmar. Therefore, this chapter will have a strong legal focus in order to determine if R2P could have been applied in the case of Myanmar. In the fourth chapter I present the elements that are required for crimes against humanity and analyze whether the reasons for the government's denial relates to these requirements.

Before going into more detail in the legal analysis I focus on the applicability of R2P in natural disasters, considering the big political uncertainty. I provide different opinions from both scholars and the creators of the concept of R2P to underline the difficulty to put it into practice, especially in the case of Myanmar. However, the ultimate aim of this chapter is to find out whether or not R2P can be invoked in the case of Myanmar when a crime against humanity was committed because of the refusal of aid.

4.1 Applicability of R2P in natural disasters

The third chapter already reflected the political discrepancy within the international community. However, I would like to present two quotes which address the main gaps that still exist when discussing the applicability of R2P in natural disasters. Therefore, I refer back to the first chapter when I cited that, *overwhelming natural or environmental catastrophes, where the state concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened*[160] is also included in the exception of the non-intervention principle. On the other side, Alex Bellamy makes his point clear:

> [...] it is important to stress that R2P applies only to the four sets of crimes identified by the World Summit Outcome Document and not other sources of human insecurity, such as natural disasters, generalized human rights abuse and armed conflict in general.[161]

[160] cit. ICISS Report, p. 33.
[161] cit. Bellamy, Alex J./Sara Davies (2009), p. 567.

The question that should be asked here, and which Gareth Evans points out, is:

> if what the generals are now doing, in effect denying relief to hundreds of thousands of people at real and immediate risk of death can itself be characterised as a crime against humanity, then the responsibility to protect principle does indeed cut in.[162]

Next, I will provide arguments and facts about the applicability of R2P in the case of Myanmar as well as whether the refusal of aid by the military regime contributed to a crime against humanity.

4.1.1 The international community's uncertainty about the application of R2P in Myanmar

Even though Bernhard Kouchner urged the UNSC to invoke R2P after the cyclone, it was also the French Foreign Minister who later realized that R2P cannot be invoked in the case of Myanmar because the post-Nargis situation was not an armed conflict (later on I will prove that this is not a requirement). The ambivalence of the two main documents, the ICISS report and the World Summit Outcome Document is crucial for this problem.

The argument for invoking R2P in Myanmar would be that

> the Military Junta's apparent reckless indifference was close enough to the equivalent of intentionally causing great suffering" and "when a government default is as grave as the course on which the Burmese generals now seem to be set, there is at least a prima facie case to answer for their intransigence being a crime against humanity of a kind which would attract the responsibility to protect principle.[163]

The members of the UNSC had different opinions about the situation in Myanmar, and three reasons for not using R2P in Myanmar were stated by Gareth Evans. First of all, the Military Junta's paranoia would be increased concerning foreign invasion; second, R2P could be diminished for future purposes, and, third, a military intervention including the dropping of bombs would be ineffective for the situation of the civilian population.[164] Thakur Ramesh, one of the ICISS commissioners, stated:

[162] cit. Gareth Evans, after: Barber, Rebecca (2009), p. 4.
[163] cit. Gareth Evans, after: Haacke, Jürgen (2009), p. 167.
[164] Haacke, Jürgen (2009), p. 168.

> There would be no better way to damage R2P beyond repair in Asia and the developing world than to have humanitarian assistance delivered into Myanmar backed by Western soldiers fighting in the jungles of Southeast Asia again.[165]

Also Edward Luck, the appointed UN Secretary-General's R2P advisor, believed that R2P can not be invoked in the case of Myanmar, arguing that R2P should strictly focus only on the four core international crimes.[166] UN Secretary-General, Ban Ki-moon, believed that the case of Myanmar was a humanitarian crisis and it should be dealt with it that way.[167]

The points provided made it clear that a lot of people agreed that R2P did not apply in the case of Myanmar.[168] Thakur Ramesh states that invoking R2P is justified to stop large-scale killings or ethnic cleansing; however it cannot be invoked in cases of natural disasters.[169]

Roberta Cohen had a different approach to the case of Myanmar and R2P's applicability. She stated that the aftermath of cyclone Nargis is a case for R2P because what started as a natural disaster turned into a man-made disaster, and the crime committed could constitute a crime against humanity. Yet, this does not mean that military intervention would have been necessary. Cohen argues that *the Security Council should have met to consider what steps to take and should have used the R2P umbrella to galvanize political and humanitarian action...*[170]

According to Cohen, natural disasters fit into the doctrine, however in the case of Myanmar, it should not have been ruled out so quickly. The general problem for her lies in the lacking of clear lines of application of R2P, when the UNSC should react and what happens in case it fails to react. R2P needs more regional agreements and accountability among the civilian population.[171]

We can see from this sub-chapter that there is a missing link between the case of Myanmar and the discrepancy among the international community about the limitation of R2P to the four crimes and it's invoking in situations of natural disasters. The last part of this chapter examines whether the refusal of aid can be considered a crime against humanity, which will also answer the question about R2P's applicability in Myanmar. Furthermore, this

[165] cit. Thakur, Ramesh (2008), p. 1.
[166] Haacke, Jürgen (2009), p. 168; see as well: ICC Rome Statute, Article 7(1).
[167] Haacke, Jürgen (2009), p. 168, 169.
[168] Bellamy, Alex J./Sara Davies (2009), p. 567.
[169] Thakur, Ramesh (2008), p. 1.
[170] cit. Roberta, Cohen (2008), p 3.
[171] Roberta, Cohen (2008), p 3-5.

can also be seen as the missing link; when a disaster situation falls under one of the four crimes.

4.2 Is the refusal of aid a crime against Humanity? – A legal analysis

In this sub-chapter, I analyze whether the refusal of aid in the case of Myanmar constituted a crime against humanity by providing a legal analysis of the most important elements of crime against humanity, and then applying them to the aftermath of cyclone Nargis.

4.2.1 Elements of crime against humanity

In the first chapter I provide a more detailed definition of what crime against humanity is. I would like to repeat the definition found in the Rome Statute because of its importance in this chapter. *"Crime against humanity" [is] a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*[172]

We can find three important elements in this definition, and these elements must be met in order to be considered a crime against humanity. First, the act must have been committed as a widespread or systematic attack; second, the attack must be directed against a civilian population, and, third, the perpetrators must be aware of the attack. What is also crucial is that one or more of the following enumerated crimes/acts must have been committed: murder, extermination, enslavement, deportation and forcible transfer of population, imprisonment, torture, rape and sexual violence, persecution, or other inhuman acts,[173] as mentioned in Article 7 of the ICC.

Let us take a closer look at the definition of those elements. The term "widespread" implies a *large-scale nature of the attack and the number of victims*[174], whereas the term "systematic" has several definitions, but in general it refers to a common policy or plan. The term "attack" is interesting for this research because it does not refer to the use of armed forces, but the mistreatment of a country's population. The term "any civilian population" relates to every human being that does not take part in combats in a larger group or a collective.[175]

[172] cit. Rome Statute, Article 7.
[173] Ford, Stuart (2009), p. 12.
[174] cit. Cryer and others, (2010), p. 236, after: *Tadic* ICTY, T.Ch.II 7.5.1997 para. 206.
[175] Cryer and others (2010), p. 236- 241.

What is also of great interest when looking at crimes against humanity is the mental element of the perpetrators; the intent or mental element (*mens rea)* requires the perpetrators to be aware of the fact that the act is prohibited, and that it is part of a broader attack directed against the civilian population. This is the most important part, that only the attack but not the acts of an individual must be widespread and systematic, as this is what makes it a crime against humanity.[176]

Following, I provide an analysis of the enumerated crimes such as murder, extermination, and other inhuman acts. The other crimes enslavement, imprisonment, torture, persecution, rape and sexual violence will not be dealt with here because there is no evidence that such crimes were committed on a widespread basis in Myanmar.[177]

4.2.2 A legal analysis of selected enumerated crimes in the case of Myanmar

I begin this legal analysis by first taking a closer look to the definitions of the three selected crimes starting with murder, followed by extermination, and presenting other inhuman acts at last. The aim is to find evidence that a crime against humanity was committed in the aftermath of cyclone Nargis.

Murder as a crime against humanity is defined as:

> (1) the death of a person;
> (2) that was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and
> (3) the act was done, or the omission was made, by the accused, or a person or persons for whose acts or omissions he/she bears criminal responsibility, with an intent to kill or to inflict grievous bodily harm or serious injury, in the reasonable knowledge that such act or omission was likely to cause death.[178]

The fact is that people died because of the refusal of aid; however, there is no real number of victims that died because of that refusal. As described in chapter three, the WFP delivered food and other supplies which were confiscated by the Military Junta and also shipments with food were seized. After the struck of the cyclone, the UN estimated that 75% of the victims did not receive aid because of the refusal of the government of Myanmar. 60%

[176] Cryer and others (2010), p. 243, 244.
[177] ibid, p. 18.
[178] cit. Ford, Stuart (2009), p. 21, after: *Brdjanin* Trial Judgment para. 381.

of the victims did not have shelter, clean water or sufficient food.[179] It was internationally known what was occurring in Myanmar, regardless, the Military Junta did not accept international aid, even though it was available. Consequently, because of the restriction of international aid, the Military Junta contributed to the death of victims.

In the third chapter, I already provided the motive of why the Military Junta did what they did and this is however, irrelevant from the intent. Intent refers to the *mens rea* of the perpetrator during the time the crime was committed.

Possible allegations for a crime against humanity in Myanmar were that the government did not warn the people in the most affected areas of cyclone Nargis. The government furthermore, refused to offer aid, limited foreign aid, and restricted visa issuance. As a result of this refusal, the Military Junta increased death tolls and created inhuman living conditions. The strongest argument for a crime against humanity in Myanmar is that the Military Junta's unwillingness to accept aid resulted in the death of people who had survived the surge but died subsequently due to the lack of aid.[180]

As to the intent under the enumerated crime of murder, it seems that the case of Myanmar is an example of indirect aid, which is similar to the recklessness standard. A perpetrator is legally considered to have committed murder, when they are aware of the fact that death was a probable consequence of their actions. In the case of Myanmar, it was widely known that a lot of people are in need of humanitarian aid, and that these people would probably die if they did not receive aid. Humanitarian aid was available; however, the Military Junta rejected it, or rather only allowed it on a very small scale. The motive of the government of Myanmar, as already presented, is not relevant.

Putting all those arguments together, there is reasonable basis to believe that murder as crime against humanity was committed in Myanmar in the first weeks after cyclone Nargis.[181]

The next selected crime, extermination, is defined as:

> (1) that an act or omission resulted in the death of persons on a massive scale; and
> (2) the accused intended to kill persons on a massive scale or to create conditions of life that lead to the death of a large number of people.[182]

[179] Ford, Stuart (2009), p. 21.
[180] Ford, Stuart (2009), p. 21.
[181] Ford, Stuart (2009), p. 22, 23.
[182] cit. Ford, Stuart (2009), p. 24.

The difference between murder and extermination is that extermination requires crimes to be on a massive scale. I already provided in the third chapter that the UN estimated 2.4 million people were affected by the refusal of aid, and 75% of those 2.4 millions did not receive aid in the first three weeks after the cyclone struck. The determination of whether the deaths occurred on a massive scale is rather difficult; however, in the *Brdjanin Trial Judgment* the court concluded that the death of 1669 people was sufficient for extermination on a massive scale.[183] The numbers in Myanmar are therefore sufficient to believe that people were dying on a massive scale, and extermination can therefore be considered a crime against humanity in the case of Myanmar.[184]

The last selected crime that will be analyzed here is other inhuman acts. As to the definition, acts are inhumane when:

(1) the victim suffered serious bodily or mental harm or a serious attack on human dignity;
(2) the suffering was the result of an act or omission of the accused or someone for whom the accused bears criminal responsibility; and
(3) the accused or the person for whom the accused bears criminal responsibility intended to inflict the suffering upon the victim.[185]

Different from murder and extermination, other inhuman acts is not focused on killings, but rather *on other acts of similar gravity to those that are specifically enumerated in the definition of crimes against humanity*.[186]

The restrictions of aid lead to starvation, lack of housing, and medical assistance. The immediate need for humanitarian aid after cyclone Nargis was immensely high, and 65% of households suffered from health problems, such as fever or dysentery. The government refused access to medical supplies to those people, and the Military Junta must have been aware of the high international interest in this case and consequently intended to refuse aid to the survivors of cyclone Nargis.[187]

[183] Ford, Stuart (2009), p. 25, see also: Prosecutor v. Brdjanin, ICTY Trial Chamber, Case No. IT-99-36-T, Judgment dated 1 Sept. 2004, para. 465. The Brdjanin Trial Judgment also noted that extermination had been found in other cases when as few as 733 persons had died. *Id.* at fn. 926.
[184] Ford, Stuart (2009), p. 25.
[185] cit. Ford, Stuart (2009), p. 26, after: *Kordic* Appeal Judgment, para. 117; *Vasiljevic,* (Appeals Chamber), February 25, 2004, para. 165; *See also Blagojevic and Jokic*, (Trial Chamber), January 17, 2005, para. 626; *Galic*, (Trial Chamber), December 5, 2003, para. 152. *See also* ICC Elements of the Crimes, Art. 7(1)(k).
[186] cit. Ford, Stuart (2009), p. 26, after: *Blagojevic* Trial Judgment, para. 624; *Kordic* Appeal Judgment, para. 117; *Galic* Trial Judgment, para. 152.
[187] Ford, Stuart (2009), p. 27.

Therefore, other inhuman acts also covers the restriction of life-saving humanitarian aid as it occurred in Myanmar. In fact, all the elements that make up inhuman acts are present in the case of Myanmar because, a lot of people suffered because of the refusal of aid.

However, it is unclear whether the lack of food and medicine constitutes a serious bodily or mental harm, or is an attack against human dignity. This must be evaluated on a case-by-case basis. Nevertheless, the government's action constituted a crime of inhumane acts. As 75% of the 2.4 million affected people received no aid after the cyclone in the first few weeks, there is reasonable believe that a large number or people suffered because of the lack of medicine, shelter, and food. If Myanmar would have accepted foreign aid, those people would not have suffered so greatly.[188]

The government's refusal to accept aid by limiting and strictly controlling the distribution of aid provides credible evidence to support the fact that crimes such as murder, extermination, and inhumane acts were committed in the aftermath of cyclone Nargis. However, these facts are not sufficient to invoke R2P, and to come to the final conclusion that a crime against humanity was committed it is essential to look if it was also a widespread and systematic attack on a civilian population that took place, and if the perpetrators were aware of the attack.[189]

4.2.3 Widespread and systematic attack in Myanmar after cyclone Nargis

Within customary international law, it is generally recognized that a crime against humanity does not necessarily require an armed conflict, even though between the different international tribunals and courts there is uncertainty about this fact. Generally speaking, however, the existence of an attack is a prerequisite for crimes against humanity. The crucial point though is that the accused is aware of the fact that their act formed part of the attack. Motive is not important and it is not required for the perpetrator to know every detail of the attack, but the perpetrator must be aware of the fact that an attack took place. An attack defined by the ICC and the ICTR is *an unlawful act or series of acts of the kind enumerated in the definition of crimes against humanity*.[190]

[188] Ford, Stuart (2009), p. 28.
[189] Ford, Stuart (2009), p. 35.
[190] cit. Ford, Stuart (2009), p. 37, after: Rome Statute, Art. 7(2) (describing an attack as a "course of conduct involving the multiple commission of acts referred to in paragraph 1 [of Article 7]"); *Akayesu,* (Trial Chamber), September 2, 1998, para. 581 ("The concept of 'attack' maybe defined as a unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute, like murder, extermination, enslavement etc."); *Rutaganda,* (Trial Chamber), December 6, 1999, para. 70; *Musema,* (Trial Chamber), January 27, 2000, para. 205; *Semanza,* (Trial Chamber), May 15, 2003, para. 327.

Again, within the different international criminal tribunals and courts, definitions about an attack vary, however, relating the case of Myanmar to an attack it has to be said that the denial of the Military Junta did constitute an attack on the survivors of the cyclone because it is reasonable to believe that the volume of international reports produced by diplomats or international press about the situation in Myanmar, also reached the military officials. The Military Junta could not have been unaware of the consequences of the restriction of humanitarian aid.[191]

Some facts relate to the fact that the Military Junta's conduct was a governmental plan. The most striking one is the constitutional referendum; the continuation of the referendum, even though hundreds of thousand civilians still lacked clean water, food, medication, or shelter, is the clearest indication of the military regimes disregard for humanitarian needs. Therefore, there is little doubt that the imposed restrictions were part of a governmental policy.[192] Thus, the conduct of Myanmar's authorities by imposing restrictions on humanitarian aid did constitute an attack.

Now that it is clear that the inaction of the Military Junta constituted an attack against its civilian population, the attack was also widespread because of the large-scale and large number of people affected. There is, furthermore, reason to believe that the attack was also systematic because *it consisted of an organized pattern of non-accidental repetition of criminal conduct*.[193] The crimes occurred repeatedly because of the government's policy to deny aid, and, therefore, also denied access to water, food, and medical care.

To finish this analysis about whether the refusal of aid in the case of Myanmar constitutes a crime against humanity, it must also be made clear that the attack was directed against a civilian population. There was no armed conflict ongoing in Myanmar during the time, and therefore there is no reason to believe that the people in the most affected areas were combatants. Consequently, the victims were all civilians. [194]

The consequence of the reaction of the Military Junta to refuse aid, that was offered, was an attack. The generals of the Military Junta must have been aware of the attack, and that their inaction was part of it.[195]

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[191] Barber, Rebecca (2009), p. 24.
[192] Barber, Rebecca (2009), p. 23.
[193] cit. Ford, Stuart (2009), p. 40, after: *Kordic and Cerkez,* (Appeals Chamber), December 17, 2004, para. 94; *Blaskic,* (Appeals Chamber), July 29, 2004, para. 101; *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 183.
[194] Ford, Stuart (2009), p. 41.
[195] ibid, p. 42.

Conclusion

This chapter focused on the question of whether a crime against humanity was committed in the aftermath of Myanmar due to the refusal of aid. Furthermore, it showed once again that the international community has no clear lines on how to use R2P in practice.

I started the fourth chapter with showing the uncertainty of the international community on how to invoke R2P in the case of Myanmar. This is strongly related to the different perceptions in the ICISS report and World Summit Outcome Document.

The legal analysis of the first few weeks after cyclone Nargis showed that all the important elements constituting a crime against humanity were present. There was a widespread, systematic attack on a civilian population and the Military Junta was aware of the attack. Furthermore crimes such as murder, extermination and inhumane acts were committed.

In short, the analysis of the case of Myanmar shows that the response of the Military Junta constituted in a crime against humanity,[196] and, therefore, it was a breach of a legal obligation. Consequently, despite the political uncertainty and the lack of international consensus in applying R2P, the international community could have invoked the concept of R2P in the case in Myanmar.

[196] Ford, Stuart (2009), p. 42, 43.

General conclusion

At the beginning of this research I provided the main research question, which was: w*hat can be done if a state refuses aid in the aftermath of a disaster, such as in Myanmar, and could R2P be useful in this respect?* In this general conclusion I answer this question by providing a short summary of the main findings throughout this thesis and also its consequences. I end this thesis by presenting some recommendations or rather possibilities.

I started my research based on the central research question and provided in the first chapter the problems that humanitarian intervention is facing because it is morally acknowledged but legally prohibited.[197] I furthermore introduced the relatively new concept of R2P, which is supposed to bring a new and fresh re-conceptualization of humanitarian intervention and is in contrast to humanitarian intervention nothing really new, however, legally embedded in international law. Considering humanitarian intervention I can conclude that it is legally not debatable, however, the concept of R2P is legally applicable but only when certain crimes were committed. The only possible option to invoke R2P is in cases of gross human rights violation that constitute war crimes, genocide, ethnic cleansing and crimes against humanity. In the case of Myanmar, where a devastating cyclone struck the country in May 2008, the Military Junta refused the access of international aid.

Because it was a natural disaster that occurred in Myanmar, I underlined the existing international legal framework of disaster response. I took a closer look to the IHL, which is not useful in the case of Myanmar, because it is only applicable in armed conflicts. On international level I, furthermore, highlighted human rights law, however, no force was found to make a state accept international aid. The ASEAN Agreement on Disaster Management and Emergency Response, which I provided as a regional agreement, does not provide any reference in case of the unwillingness or inability of states in disasters (man-made or natural). The IDRL from the IFRC provides an answer to the legal response to disasters only on national law. The only legal framework that relates to R2P on a very early stage and that might have an answer to the problem would be the ILC's Protection of Persons in the Event of Disasters, however, the ILC Draft Articles are not yet finalized. Therefore, chapter two led to the result that, within the legal framework of international disaster response laws, there is no doctrine that could tackle the problem in a satisfactory way.

In the third chapter, I provided background information about the occurrences in May 2008 in Myanmar and the response of the Military Junta. After the cyclone struck, the

[197] Barber, Rebecca (2009), p. 33, after: Eric Heinze.

international community offered immediately aid to the Military Junta, however, it refused aid and even blocked the issuing of visas for foreign aid workers.

The reaction of the Military Junta is politically motivated, and I provided the main reasons why Myanmar's authorities did not allow international aid. The main reasons were their fear of foreign intervention, social instabilities and the smuggling of weapons by foreign aid workers to the civilian population to cause an uprising from the civilians. I also underlined the fact, that it is important to understand (not share) the intentions of the government in Myanmar for future humanitarian purposes. ASEAN as a regional organization was able to negotiate and cooperate with the military regime, because of the fact that ASEAN would not support a military intervention in Myanmar. ASEAN's role in the case of Myanmar was that of a facilitator. ASEAN as a legal tool does not provide a solution to the problem, but as a political tool it is more functional.

As described in chapter three, the international community was frustrated with Myanmar's response to the cyclone and a heavy discussion broke out about the applicability of R2P in this case. The gaps were that the international community lacked consensus in the applicability of R2P, and it was unclear of how to put it into practice. Looking at the political debate that arose after the refusal of aid, it was clear that one main part of this political discrepancy within the international community was the ambivalence of R2P's main documents, the ICISS report and the World Summit Outcome Document. The ICISS report goes way beyond the World Summit Outcome Document, which limits R2P only to the four sets of crimes. In the ICISS report, R2P is vague, political, and could be invoked in cases of civil wars, state collapse, or state repression. That point shows the relation of R2P with international politics.

The UNSC, the only right authority to legitimate military action to invoke R2P in Myanmar, was handicapped in this case because of the political uncertainties. Further reasons such as the ineffectiveness of a military intervention in Myanmar, the fear that the Military Junta will not allow any aid at all, R2P could be diminished in the future, Myanmar's paranoia against foreign intervention and the lacking of political will, the international community did not invoke R2P.

In the fourth chapter, I focused on the legal analysis whether the refusal of aid could constitute a crime against humanity in Myanmar. I analyzed the legal elements required for a crime against humanity and found that the refusal of aid was a widespread and systematic attack against the civilian population and crimes of murder, extermination, and inhuman acts

were committed in the aftermath of Myanmar. The Military Junta was aware of the attack and did not take action to stop this crime against humanity.

The fact that a crime against humanity was committed in Myanmar brings me to the conclusion that R2P could have been used for this natural disaster. The central research question was: w*hat can be done if a state refuses aid in the aftermath of a disaster, such as in Myanmar, and could R2P be useful in this respect?*

The answer to this question is based on the facts and arguments I provided throughout this research; and R2P would have, indeed, been useful in the case of Myanmar. The international framework of disaster response laws does not, or only to a certain extent, provides an answer to the refusal of aid in the aftermath of a disaster, whereas the relatively new concept of R2P is a useful tool in this respect. However, due to political uncertainties, and the lack of international consensus it is not (yet) clear how to put R2P into practice.

Recommendations and possibilities in the case of Myanmar

In this part of the general conclusion I provide recommendations and possibilities for the international community in the case of Myanmar.

As R2P has a legal requirement due to its limitation to the four core international crimes, the international community could start a criminal investigation. Obstacles remain in how to start a criminal investigation however. It is not likely that Myanmar itself would starts a trial, and since Myanmar is not a state party to the ICC, the UNSC could refer the case of Myanmar to the ICC but China would, most likely, veto the referral.[198] The advantage of starting a criminal investigation in the case of Myanmar for the refusal of aid would be that, in similar situations in the future, a government would probably not refuse aid and human suffering might be prevented.

Another possibility in the case of Myanmar would be a unilateral intervention by one state or a group of states. In this case, no state was willing to start an intervention on a unilateral basis. It was in fact questionable if a unilateral intervention would be effective, and it was not clear how aid should be provided without the consent of Myanmar. The political will was lacking, which made it impossible to act on a unilateral basis. Further, an armed intervention from the international community would have probably caused more human suffering.[199]

[198] Ford, Stuart (2009), p. 47-52.
[199] Ford, Stuart (2009), p. 48.

The overall problem of R2P is that it is not usable in practice because of the lacking consensus and because it is not clear how to put R2P into practice. Therefore, my final recommendation is to make R2P more operational, that's were the international community has to put the focus.

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