Mitigating NATURAL DISASTER: Conceptualization and Implementation of an International RESPONSIBILITY TO PROTECT

by

Jennifer Lauren McCulloch Gamble

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Faculty of Law
University of Toronto

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Abstract

This Note asserts that natural disaster-affected populations have a right to call on the international community to protect basic subsistence interests where their sovereign government is unable or unwilling to do so in the wake of a catastrophic natural disaster. First, this Note situates the right to international humanitarian assistance following a natural disaster as a legitimate right under modern international human rights law, using the normative framework set out by renowned political theorist Charles Beitz. This Note then illustrates how the international humanitarian law doctrine of the Responsibility to Protect provides a clear and coherent way to operationalize the right to post-natural disaster humanitarian assistance, by providing a previously-determined structure for a definitive, yet circumstantially-flexible, determination of first- and second-level responsibilities for eligible international actors to take action in defence of this right.
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It has been noted that “little work has been done theorizing the relationship between law and catastrophe.”¹ This is especially true when considering whether and how an international human right to humanitarian assistance in the event of a natural disaster can be said to occupy a place in today’s international legal order. With the ongoing challenges posed by climate change and the increased incidence of severe weather events across the globe, the question as to whether natural disaster-affected populations have a right to call on the international community to protect their basic subsistence interests where their own government has failed to do so, is becoming increasingly relevant. To begin this endeavour, two principal concerns must be addressed: First, whether such a right can be said to exist under the modern doctrine of international human rights law, such that there are those who can assert it, and identifiable actors upon whom obligations to give effect to this right then arise; and second, if such a right does exist, what is the best way in which to go about operationalizing it?

In answering the first question, it is useful to turn to the normative framework elucidated by renowned political theorist Charles Beitz to demonstrate that, despite some remaining ambiguities about how best to enforce it, the right to humanitarian assistance is indeed an international human right deserving of more attention and commitment at the international level to give it meaningful and reliable effect. With respect to the second question, various ideas have been proffered for how the obligation for international actors to address a population’s right to receive humanitarian assistance should be framed. One prominent school of thought holds that an extension of international humanitarian law’s doctrine of the Responsibility to Protect (R2P) to situations of natural disaster could provide a viable means for foreign entities to justify delivery of life-saving humanitarian assistance to vulnerable populations within the borders of a sovereign state when the state fails to meet the basic subsistence needs of disaster-affected populations. Moreover, R2P in the context of natural disasters can be useful in providing a means for international support and resource-sharing to pursue preventative measures to save lives in the event of future disasters.

¹ Austin Sarat et al., eds., Law and Catastrophe (Stanford: Stanford University Press, 2007) at 3.
There has been much resistance to the extension of R2P beyond the four international war crimes to which it is now applicable, and it has not yet received sufficient consensus in that context to become the subject around which broad agreement between states can be initiated in other areas of global concern, such as international disaster response law. Nonetheless, it will be shown that the framework of the Responsibility to Protect currently being developed in the context of grave war crimes lends itself particularly well to operationalizing the right to humanitarian assistance in the event of a natural disaster, especially in cases where the affected state is unable or unwilling to provide lifesaving humanitarian assistance to populations within its borders. Under Charles Beitz’s framework of international human rights, it is particularly evident that to give effect to this right, the international community must turn its collective attention to creating a structure of second-level responsibilities which would allow disaster-affected populations to claim this right in an effective and lifesaving manner.

To begin, this Note describes the circumstances that arose following Cyclone Nargis in Myanmar in 2008, to show how a critical instance of the need for greater human rights protection following a natural disaster may arise. The events following Cyclone Nargis illuminate the dire need for an advance plan of action among members of the international community regarding how to respond to catastrophic natural disasters. Part I examines the right to humanitarian assistance to protect subsistence rights following a natural disaster in light of Charles Beitz’s normative framework of international human rights, and concludes that the right to receive humanitarian assistance in the event of a catastrophic natural disaster is indeed a distinct and viable human right under international law. In Part II, attention is paid to how best to operationalize this right to post-disaster humanitarian assistance, describing first the historical origins of the doctrine of R2P and its development to present in its traditional form. Then, the existence of the right to humanitarian assistance and the facts from Cyclone Nargis are overlaid to demonstrate that the

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2 International consensus on the application of R2P in the limited context of the Responsibility to Protect civilians from the four enumerated war crimes of genocide, war crimes, ethnic cleansing and crimes against humanity has been achieved in the broadest sense, yet the exact circumstantial parameters and measures that may be employed under the doctrine are still hotly debated among states. Thus, the “traditional” (albeit still emerging) conceptualization of R2P has not yet been sufficiently concretized so as to be extended to other circumstances, outside of the four enumerated crimes. However, some of the main objections to extending R2P beyond the four crimes are dealt with in Part II, Sections II and III, in an effort to show the doctrine’s apt applicability in the context of international natural disaster response law.
emerging norm of the Responsibility to Protect lends itself particularly well to framing protection of the right to humanitarian assistance.

In line with the doctrine of R2P as currently defined in the context of grave war crimes, the responsibility to fulfill the obligations concomitant with the right to humanitarian assistance in support of the protection of subsistence interests following a natural disaster falls first to the state in which the affected population is located, and, if the state is unable or unwilling to protect this right, then it gives rise to an obligation to take action falling to the international community of states to act to ensure that basic humanitarian assistance is provided. This is in keeping with the central goal around which foundational consensus of R2P has been built: the protection of innocent lives based on the concept of sovereignty as responsibility. Using the Beitz theory to demonstrate the right of disaster-affected populations to international assistance where their own state is unable or unwilling to provide protection of vital subsistence interests, the need to develop coherent legal justification for the delivery of neutral humanitarian aid across sovereign borders in such a case is starkly apparent. This Note aims to demonstrate that dynamic and effective tools for states to protect this right are already being employed in other international law contexts, namely the international humanitarian legal concept of the Responsibility to Protect.

**Cyclone Nargis, Myanmar, 2008**

In May of 2008, Cyclone Nargis struck Myanmar, causing the destruction of the largest city and leaving devastation along the country’s coast, affecting an estimated 2.4 million people, particularly those in the remote Irrawaddy Delta region. The storm itself immediately killed tens of thousands of people, submerged villages and destroyed housing, polluted water sources and contaminated or destroyed food stocks. But human suffering increased exponentially when the

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3 A joint report by the United Nations, ASEAN and the Maynmar government concludes that 450,000 homes were destroyed and found that 57% of the household in affected areas reported their housing totally destroyed, with another 25% reporting their houses partially destroyed. The report also found more than 60% of people in affected areas had inadequate access to safe drinking water, and that more than half the households in the most affected areas reported having lost all their food stocks during the cyclone: The Tripartite Core Group, Post-Nargis Joint Assessment, July 2008, as cited by Stuart Ford, “Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis” (2010) 38 Denver Journal of International Law & Policy 227, at 3.
military junta government of Myanmar, lacking the resources to respond effectively itself and compounded by an under-appreciation of the extent of the damage, initially rejected offers of humanitarian aid from outside actors including foreign states, international organizations and non-governmental organizations (NGOs). French and U.S. naval ships arrived shortly after the cyclone and waited off the coast, stocked with food and medical supplies, water purification systems, boats and helicopters available to deliver aid to isolated areas most affected; however, after several weeks of being denied access by the military junta, they withdrew without delivering the aid donations. By late June, 2008, the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) estimated the number of dead or missing at more than 130,000, and was actively warning of potential outbreaks of infectious disease epidemics in light of poor sanitation and lack of safe drinking water. The UN World Food Programme had only been able to reach 30% of affected people needing food, and Save the Children warned that thousands of children remained at risk of death from starvation.

In the weeks following the cyclone, the Myanmar government initially refused to issue visas to a number of humanitarian aid workers, restricted aid delivery flights and access to affected areas to both international staff and donated aid supplies, allowing emergency relief supplies to

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8 Save the Children Alliance, “Burma Cyclone: Thousands of Children Will Die from Hunger within Weeks unless Reached by Aid” (Press Release, 17 May 2008), as cited in Barber, supra note 6, at 2.
accumulate, undistributed, in the capital.\(^9\) Government officials strictly controlled what aid was admitted, and how it was distributed.\(^10\) Even aid workers who were allowed into the country were, for the first three weeks, barred from travelling to the worst-affected Irrawaddy Delta.\(^11\) The refusal of the government to accept foreign aid proportionate to the needs of the cyclone victims “was so extreme and the resultant avoidable death toll so high” that French and U.S. representatives lobbied their governments for permission to breach Myanmar’s territorial sovereignty in order to deliver aid to the cyclone survivors against the wishes of the government.\(^12\) However, these calls were rendered moot when, slowly, increased amounts of foreign aid began to be accepted by Myanmar from fellow states in the Association of Southeast Asian Nations (ASEAN). The aid from ASEAN states arrived too late for many disaster-affected citizens, but was accepted soon enough that international actors were not forced to fully explore the possibility and implications of forced aid delivery within a sovereign state justified on grounds of respect for international human rights.

Innocent people in Myanmar lost their lives unnecessarily as a result of their government’s decisions following Cyclone Nargis to restrict the amount and access to aid, and “it is virtually

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\(^10\) There were also numerous allegations of the military confiscating aid supplies, diverting them to supporters of the regime, and selling donated aid to cyclone victims at a profit: see Ford, supra note 3, at 6-7.

\(^11\) Ford, supra note 3, at 6.

\(^12\) Many reasons can be imagined for why a state would refuse offers of foreign aid, such as, \textit{inter alia}, political factors (which were a concern of the Myanmar military junta), distrust of “strings attached” to receipt of aid (i.e. North Korea refusing aid from the US during the mid-1990’s famine, which it said was too connected to conditions regarding human rights), and histories between states (such as the USA refusing aid offers from Cuba following Hurricane Katrina): see T.R. Saechao, “Natural Disasters and the Responsibility to Protect: From Chaos to Confusion” (2007) 32 Brooklyn Journal of International Law 663 at 689 and 693.

\(^13\) France’s Foreign Minister, Bernard Kouchner, an early proponent of R2P who helped originate the concept, specifically suggested the Responsibility to Protect be used to forcibly deliver humanitarian aid to affected civilians in Myanmar. These comments were echoed also by Javier Solana, the foreign policy chief for the European Union. T.R. Jackson, supra note 4, at 2. See also Alex J. Bellamy, “The Responsibility to Protect – Five Years On” (2010) 42 Ethics & International Affairs 143, at 152; Ford, supra note 3, at 9.
undisputed that approximately 75% of the 2.4 million people severely affected by the cyclone received no aid at all during the first three weeks of the crisis.” Yet critically, the junta did eventually accept aid assistance from certain UN aid programs and fellow ASEAN states, which helped to avert exponentially greater suffering and loss of life through continued displacement and consequent neglect of subsistence interests, and mitigated the effects of potential epidemics in the wake of the disaster. Therefore, it cannot be said that the government of Myanmar wholly neglected the humanitarian aid needs of the cyclone survivors; the denial of aid in Myanmar was not so complete as to become a focal point to coagulate international opinion around methods to deliver lifesaving humanitarian aid within the state’s borders against the will of the government. However, it is possible to envisage circumstances in which the humanitarian need following a natural disaster might be so extreme and the government’s denial of assistance from international actors so absolute, that a preconceived framework for action would be useful to guide outside agents of the international community to take action to protect innocent lives threatened in the aftermath of natural disaster. Do affected populations have a right to receive humanitarian assistance to ensure their basic subsistence needs are protected following a natural disaster when their government fails in its primary responsibility to provide lifesaving assistance? Can actors of the international community be called upon to take action to defend this right in a practical and legally justifiable way? The remainder of this Note will show that the answer to both of these questions is yes. Furthermore, it will show that the framework provided by the Responsibility to Protect doctrine is a particularly fitting tool to be applied and utilized to ensure the right to humanitarian assistance is realizable for some of the world’s most vulnerable populations in times of crisis caused by natural disaster and compounded by their own government’s inaction.

Part I: Framing Humanitarian Assistance as a Human Right under International Law

Understanding the Right to Humanitarian Assistance in light Charles Beitz’s Normative Theory of Human Rights

As a starting point in asking whether there is a right to receive humanitarian assistance in the event of a natural disaster, it must be considered why any assertion of such a right is so

14 Ford, supra note 3, at 26.
controversial. Humanitarian assistance is closely linked to the right to life embodied in the Universal Declaration of Human Rights.\textsuperscript{15} More specifically with respect to a right to humanitarian assistance, the Universal Declaration of Human Rights provides:

\textit{Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.}\textsuperscript{16}

Although originally adopted as a non-binding resolution, the Declaration is generally accepted to constitute customary international law. It establishes human rights norms that states have incorporated into their domestic legal structures, and thus represents legal obligations developed from the general and consistent practice of states.\textsuperscript{17}

In a similar vein, other intentional agreements also point to such a right. For example, the \textit{International Covenant on Civil and Political Rights} asserts that “No one shall be arbitrarily deprived of his life,”\textsuperscript{18} which right may not be suspended by any state, even in times of “a public emergency that threatens the life of the nation.”\textsuperscript{19} This non-derogable right to life – even during a public emergency – has been interpreted to mean that the state must take affirmative measures

\begin{footnotes}
\item[16] Universal Declaration of Human Rights, supra note 15, art. 25(1) [emphasis added]. The General Assembly has reaffirmed the primary importance of the Universal Declaration, as well as the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights to the framework of international human rights in Setting International Standards in the Field of Human Rights, G.A. Res. 41/120, UN GAOR, UN Doc. A/RES/41/120 (1986) cited in Saechao, supra note 12 at 700.
\item[18] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171 (1967), art 6(1).
\item[19] International Covenant on Civil and Political Rights, supra note 18, art 4.
\end{footnotes}
to protect the lives of people within its territory.\textsuperscript{20} Moreover, these affirmative measures may extend to an obligation on the affected state to consent to international humanitarian assistance where civilian lives are threatened by the state’s own inability or unwillingness to provide adequate disaster relief assistance.\textsuperscript{21} Furthermore, Article 11 of the \textit{International Covenant on Economic, Social and Cultural Rights} encourages respect for the right to humanitarian assistance in the wake of disaster and the necessity for international cooperation to give effect to this right:

\begin{quote}
The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.\textsuperscript{22}
\end{quote}

In expanding on states’ obligations, its provisions require each state’s compliance “to the maximum of its available resources,”\textsuperscript{23} and the drafting history indicates this to include not only domestic resources, but international resource assistance as well.\textsuperscript{24} These sources indicate that

\textsuperscript{20} Although non-binding, the Human Rights Committee has set out a state’s obligations to take affirmative measures to ensure protection of the right of life of people within its borders in other contexts. See Human Rights Committee, General Comment No. 6, online: <http://www.unhchr.ch/tbs/doc.nsf%28Symbol%29/84ab9690cc81fc7c1256ed0046fae3?Opendocument>, at ¶ 5 encouraging states to take positive “measures to reduce infant mortality and increase life expectancy”, as cited in Benton-Heath, supra note 4, at 436.


\textsuperscript{23} \textit{International Covenant on Economic, Social and Cultural Rights}, supra note 22, arts. 11-12.

there is a strong legal basis from which it could be asserted that a legal right to humanitarian assistance exists; however, these sources have been thus far insufficient to generate international consensus on the right to international humanitarian assistance in the wake of natural disaster and the response required if such a right is claimed.\textsuperscript{25}

There is also a moral basis for recognizing such a right, given that the interests it protects are, as renowned author and theorist Charles Beitz has emphasized, “among the most uncontroversially urgent of all human interests and the least open to variation by culture,” and which interests, under a variety of reasonably likely circumstances, can be threatened by the actions and omissions of governments.\textsuperscript{26} Looked at from the point of view of the beneficiaries then, where, following a natural disaster, a domestic government is unable or unwilling to provide adequate assistance to its population, presenting a moral or legal case for assertion of the human right to humanitarian assistance seems self-evident. The problem, however, is determining to whom the legal duty to protect this right attaches, and under what circumstances the reasons to act will be strong enough to generate the necessary commitment to act in light of potential costs. Despite the complexities involved in effectuating international human rights, Beitz affirms the notion that “[e]veryone has human rights, and responsibilities to respect and protect these rights may, in principle, extend across political and social boundaries.”\textsuperscript{27}

For the purposes of applying R2P to structure the permissible means and circumstances to deliver humanitarian assistance in the event of natural disaster where the affected state does not consent to, or refuses to accept, foreign offers of assistance, the predominant values competing with the protection of human rights are non-intervention and respect for state sovereignty. While the relationship between these two international legal norms and the emerging norm of R2P will be discussed in Part II, suffice to say that it is now commonly recognized that sovereignty does

\textsuperscript{25} One author suggests that this is due to two factors: interpretations by non-binding treaty bodies flesh out the most persuasive of the general rules, and the two central human rights covenants having received “less than universal” ratification: Benton-Heath, \textit{supra} note 4, at 437.

\textsuperscript{26} Charles Beitz, \textit{The Idea of Human Rights} (Oxford: Oxford University Press, 2009), at 163 speaking in regard to anti-poverty rights, which, it will be shown, shares an applicable normative framework with the right to humanitarian assistance.

\textsuperscript{27} Beitz, \textit{supra} note 26, at 1.
not entail absolute non-interference, but requires states to exercise responsibility to protect populations within its borders.

The notion of sovereignty as responsibility has been asserted as a justification for humanitarian intervention generally and R2P specifically. However, as Beitz argues, when it is not clear which responsibilities attach to an asserted right, on which agents these responsibilities fall, and what reasons should motivate the agents to give effect to the right, the operation of the right in practice is hindered due to its indistinct nature.28 It appears that an assertion of the right to humanitarian assistance in the event of natural disaster in its current form succumbs to this peril of indistinctiveness. Yet the remedy might be found in the extension of R2P principles to cover catastrophic natural disasters, such that R2P could provide sufficiently distinct parameters within which international actors could act to give effect to the right. That is, establishing a structure for international disaster relief cooperation that embraces R2P principles would clarify when and to whom obligations attach and the motivating reasons for action. Using Beitz’s framework, articulated in the context of anti-poverty rights – which are particularly analogous to the right to humanitarian assistance as both aim to protect basic subsistence interests – the right to humanitarian relief in the event of a natural disaster can be asserted as a valid international human right, generating reasons sufficient to motivate outside “eligible” actors to act, even if who should act, and in what manner, remains circumstantially dependent. Beitz describes human rights as a practice which “exists within a global discursive community whose members recognize the practice’s norms as reason-giving and use them in deliberating and arguing about how to act.”29 Thus, his work proposes a normative structure of international human rights that seeks to bring these rights into a reasonable relationship with other values with which they might conflict.30

28 Beitz, supra note 26, at 2, noting the problem of a right being “indistinct” includes “the elasticity of the permissions to interfere that human rights seem to generate, and the potential costs of acting consistently to protect human rights against abuse and to promote adherence to them.”

29 Beitz, supra note 26, at 8.

30 Beitz, supra note 26, at xii.
Generally speaking, Beitz views human rights as a distinct class of norms of international concern, worked out for an international order in which political authority is vested primarily in territorial states, and which need not embrace protection of a single value but may be pluralistic. Beitz illustrates his theory in the context of anti-poverty rights, defined as rights which protect subsistence interests, saying:

There is growing, though hardly unanimous, agreement in the discourse of the practice that [anti-poverty rights] are properly taken to be matters of international concern. [...] The problem is to say how and why these rights can supply reasons for action for agents outside the society in which the rights are violated, given the diversity of causes of severe poverty and the variety of relationships among states and the members of their populations.  

These observations similarly apply to the denial of subsistence interest protection which occurs when a state refuses to provide natural disaster victims with humanitarian relief itself, or by denying or preventing the provision of foreign humanitarian assistance, as was the case immediately following Cyclone Nargis in Myanmar.

Beitz sees anti-poverty rights as a special subset of international human rights because they set threshold standards (instead of importing a standard of equality), they state objectives for policy while leaving the choice of means for local determination, and although an international role is “plainly contemplated” to protect these rights, its details are also left open. A right to humanitarian disaster relief assistance similarly protects subsistence interests, and undoubtedly conforms to the three criteria that Beitz says make such rights distinct. He concludes that for these types of rights, which clearly include a right to humanitarian assistance in the circumstances contemplated, “[t]here is an abstract responsibility to act when a local government fails to achieve the outcomes defined by the rights. This embraces a responsibility to cooperate

31 Beitz, supra note 26, at 160, noting also at 161 that “the same problems might arise in the case of other putative rights as well.”

32 Beitz, supra note 26, at 161-162.
internationally to remove obstacles or disincentives for local governments.”

As such, based on its tight connection to the special category of anti-poverty rights, it appears that Beitz’s conceptualization of anti-poverty rights as international human rights supports the existence of the asserted international right to humanitarian assistance that even engenders an international “responsibility to act when a local government fails.”

In addition, says Beitz, “an explanation of the normativity of human rights needs to show how and why their violation might be action-guiding for outside agents” which requires demonstrating how the right prescribes which outside agents should act, and which kinds of reasons might arise for these agents, and whether they would be weighty enough to require action. The problem is that if a government fails in its first-level response – to protect its people’s subsistence interests in the event of a natural disaster – “human rights doctrine contains no criterion for calibrating and apportioning” second-level responsibilities for international actors to come to their assistance. If states and other international actors were committed to an extension of the R2P principles to natural disaster scenarios in an international forum such as the United Nations, it would give substantial practical effect to the right to receive humanitarian assistance by clarifying how to assess when and why a violation of this right would be action-guiding for outside agents.

Identifying Who Should Act – Eligible International Actors

If it is allowed to remain unclear to whom obligations associated with a right to humanitarian assistance attach, those affected by a failure of their own government to provide disaster relief have no way of knowing which outside agents to claim their right against. Similarly, those outside agents in a position to act in defence of the right have no way to determine if or when they are obligated – or justified – to do so. Query then the value of the right to assistance if there is no way to identify the holders of correlative responsibilities. However, if the Member States of the United Nations were to endorse R2P in the context of natural disasters as

33 Beitz, supra note 26, at 162.
34 Beitz, supra note 26, at 163.
35 Beitz, supra note 26, at 164.
contemplated herein, perhaps by way of a General Assembly resolution, this would provide a starting point for identifying holders of obligations toward disaster-affected populations, and what actions ought to be contemplated when the need to effectuate this right arises.

Furthermore, with respect to identifying eligible actors obligated to act in defence of the right to humanitarian assistance in a given case, any proposed structure for second-level distribution of obligations needs to speak to the fact that action to address local failures will be costly to the agents. “If there is no reason for outside agents to incur these costs, or if the reason is one that would usually be trumped by competing reasons” then one has cause to resist the view that human rights include a right to humanitarian assistance, because prospective international agents would lack sufficient reason to be motivated by them. The application of R2P principles to situations of natural disaster would satisfy this concern by providing a framework of previously agreed-upon reasons for foreign actors – whether they be states or coalitions of states, UN coalition forces, regional actors, or even neutral international non-governmental organizations – to incur the costs associated with taking action where a state is manifestly failing to protect the subsistence interests of populations within its borders following a natural disaster. Therefore, says Beitz, “since it has not been established that no reasonable assignment of obligations is possible, we are not forced to conclude that there is any conceptual error in thinking that subsistence interests are an appropriate subject of human rights.”

Identifying Motivations – International Human Rights as Reason-Giving for Various Forms of Action

Eligible actors with regional interests affected by the aftermath of a catastrophic natural disaster will have particularly acute motivations to act in defence of the right of humanitarian assistance in a given case. But particular motivations aside, regardless of whether state, regional, or non-governmental actors are determined to be the eligible actors best placed to act and to accept the

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36 For more on the benefits of selecting the General Assembly as the proper forum for promoting application of R2P to natural disasters, see Part II, Section II.

37 Beitz, supra note 26, at 164.

38 Beitz, supra note 26, 165.
costs of acting to provide humanitarian relief, it is critically important to note the role that beneficence may also play in motivating a broader cross-section of foreign actors. As Beitz explains, “it is controversial whether reasons of beneficence are strong enough, in themselves, to require anyone to undertake substantial sacrifices for the benefit of persons unknown to them, particularly when the sacrifices take the form of continuing commitments rather than one-off transfers.”

Nevertheless, Beitz puts forth a strong argument that beneficence may justify attribution of a responsibility to act in special cases, which he calls cases of “strong beneficence”. Cases of “strong beneficence” are those that satisfy three conditions, which are clearly contemplated in a scenario of a state denying its citizens lifesaving humanitarian relief following the occurrence of a natural disaster. The first condition is that the threatened interest is “maximally urgent, in the sense that the realization of the threat would be devastating to the life of anyone exposed to it.” Second, there must be a set of “eligible agents” with the resources, position, and capacity to act so as to alleviate the threat or mitigate its consequences. Third, “the costs of action, if shared among these agents and regarded from their perspectives, would be only slight or moderate, and when added to the costs previously borne by these agents for similar purposes would not be unreasonably great.” In cases which satisfy these three conditions, Beitz says that “the eligible agents have a reason of beneficence normally strong enough to require them to act.”

It should be noted that in any given case, eligible agents could have a stronger reason to act on some other front, so the argument for the motivational effect of strong beneficence is not necessarily conclusory. Beitz recognizes this, but maintains that if these three circumstances are met, the agents’ reasons to act under typical circumstances are “sufficiently weighty to overcome the conflicting reasons they are apt to face in the normal course.” Indeed, Beitz acknowledges that “there is no single reason for action that applies in all cases to all eligible agents” but this should not cause one to believe there can be no such human right unless the reasons for action to

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39 Beitz, supra note 26, at 167.

40 Beitz, supra note 26, at 167-168.

41 Beitz, supra note 26, at 168-169.
all potential agents are the same: “This is simply how principles operate in practical reasoning.”

For those who object to a right to humanitarian assistance on the basis that any prospective agreement at the international level regarding the distribution of second-level responsibilities would be too abstract to be helpful in practice, Beitz suggests that this does not mean it is impossible to assign second-level obligations, merely that the principles surrounding the right would have to differentiate among different types of cases. That is, principles about when and how to act would have to be articulated with enough specificity to be practically useful in guiding action by various eligible actors. “It is likely that in many typical cases, some eligible agents will have reasons, although not always the same reasons, to act.” Therefore, we can expect there will always be available reasons to motivate some eligible actors to address a government’s failure to protect its citizens’ subsistence interests, but these reasons will vary in strength, and in the forms of action for which they are reasons.

It is an argument in favour of the application of R2P to the right to post-disaster humanitarian assistance that the concept includes a range of actions on a continuum available for eligible actors depending on the reasons or motivations for action and the strength of the motivations. Indeed, as will be seen below, R2P in its current, traditional, conception provides considerations flexible enough to be applied to a range of situations where one of the four enumerated triggering crimes may be invoked, but specific enough to guide international consensus on which responses are available to eligible actors in a given situation. Provision of a R2P-based framework to guide the international community’s response to grave rights-protection failures following a natural disaster would have the advantage of being able to strike a similar balance between circumstantial flexibility and practical utility.

42 Beitz, supra note 26, at 170.

43 Beitz, supra note 26, at 171-172.

44 See United Nations Secretary-General Ban Ki-Moon, Implementing the Responsibility to Protect: The Report of the Secretary-General, 63rd Sess., UN Doc. A/63.677 (January 12, 2009), at 1-2 and 7 [hereafter, the Secretary-General’s 2009 Report].
Beitz also notes that “[a]gents may often have to decide how and when to act without knowledge or assurance about the plans of others. This means that judgments about responsibilities to act will have to be pragmatic. But this fact does nothing to reduce or cancel the force of the reasons to act.” However, if R2P principles were accepted with enough specificity to define the eligible actors and parameters of action, it would generate a scheme that encourages eligible agents to act by reducing this uncertainty. That is to say that employing R2P provides eligible actors with increased certainty as to when action will be justified and by whom, but inherently provides flexibility by condoning a possible range of actions that allows the response to be proportional to the strength of the reasons to act. It is therefore logical to assert that in a typical case, there will be reasons for action available of a significant weight, even if the content of these reasons and the nature and extent of required action depend on features of the individual case.45

Identifying a Pool of Eligible & Motivated International Actors: R2P and A Role for Regional Organizations

It should be pointed out that consideration of possible eligible actors need not necessarily be strictly state-centric.46 The International Court of Justice (I.C.J.) has affirmed the obligation to deliver and accept humanitarian aid in accordance with the principles of the Red Cross – a neutral humanitarian NGO. If the I.C.J. is willing to recognize the value of neutral humanitarian aid and to endorse its delivery specifically as set out by a leading non-governmental organization, there is no reason to believe that similarly qualified and reputable non-governmental organizations would be unjustifiable or illegitimate holders of an obligation to deliver aid.47 Similarly, regional coalitions could be obliged to take specified actions at the request of the Security Council under the R2P natural disaster framework in circumstances where disaster puts subsistence interests in jeopardy.48 Indeed, the UN Security Council has, in

45 Beitz, supra note 26, at 173.
46 Beitz, supra note 26, at 2, address this: “It is not clear why a practice that claims aims to protect individual persons against various threats should assign responsibilities primarily to states rather than to other kinds of agents.”
the past, authorized regional actors to intervene and take action to protect civilians in their regional spheres of influence, albeit generally in situations of armed conflict as opposed to natural disasters. However, as was seen in the weeks following Cyclone Nargis in Myanmar, the military junta’s initial resistance to accepting foreign offers of humanitarian aid was overcome when offers of aid from fellow ASEAN states were accepted, thus exemplifying the unique role that regional organizations have to play in protection of civilians across national borders. States in the region of the disaster-affected state are often well-placed to act in defence of human rights on account of their geographical proximity and particularly relevant motivations to pursue involvement, such as shared cultural and historical roots and desire to avoid regional inability that could strengthen popular support for action. Furthermore, regional organizations provide unique opportunities for burden-sharing among states, the structure and dynamics of which predate the crisis in question, all of which operate to provide regional coalition actors with increased incentives for involvement. Indeed, Beitz notes that regional regimes are becoming increasingly significant, and “it would not be surprising if the legal and institutional capacity to place where jurying can occur: despite the prohibition in Art. 53 of the UN Charter (which specifically prohibits regional organizations from resorting to force without the prior approval of the SC), regional organizations in practice “have acquired considerable credibility as ‘juries’ when it comes to determining whether a situation of bona fide extreme necessity has arisen within their vicinity that requires extraordinary recourse to force.”

For example, recently the UN Security Council responded quickly to empower a regional organization – NATO – to lead a coalition of states in the use force in respect of civil unrest in Libya involving “attacks against civilians, which might constitute ‘crimes against humanity’”: Resolution 1973, UNSC, SC/10200, (17 March 2011), online: <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm> [hereafter, Resolution 1973]. Calls for international assistance through the UN by the African Union and the League of Arab States were critical in securing the passage of Resolution 1973 which approved a “no-fly zone” over Libya and authorized “all necessary measures” to protect civilians. Indeed, this was the first time the Security Council authorized the use of force against a functioning government to protect civilians, and it has been asserted that the Council took this unprecedented step in direct response to calls for intervention by the League of Arab States and the African Union. Thus, the power of regional influence to generate international political will and to push the Security Council to implement measures in relation to humanitarian concerns falling under R2P, as well as the corresponding power to voice disapproval in an instance of unjustifiable interference in sovereign affairs, ought not to be underestimated. [See Bellamy, Alex J. “We Can't Dodge the Hard Part Stabilising Libya”, The Australian (21 March 2011), online:<http://www.theguardian.com/world/2011/mar/21/libya-disasters-implications>.] Bellamy also notes that in Rwanda and Somalia, the Security Council only authorized the use of force to protect civilians when it determined that there was no longer a functioning government to consult.]
protect human rights were to develop more impressively within regions … than at the global level.”

The importance of an international agreement on the role regional organizations ought to play in the enforcement of R2P cannot be underestimated, as examples of UN-initiated humanitarian action and of independent regional humanitarian action persist in tandem. In cases like Somalia and Guinea-Bissau, during which crises the African Union (AU) and Economic Community of West African States (ECOWAS), respectively, addressed a threat to regional peace, the UN Security Council had contemplated or created a role for the regional organization to engage. But, in other cases, including in Burundi, Liberia, and Côte d’Ivoire, regional organizations initiated humanitarian action of their own accord. Development of an international agreement providing for defined legal space in which regional organizations could operate would effectuate R2P in natural disasters by clarifying the duties concomitant with R2P, while lessening the burden falling to individual or hastily-formed coalitions of Member States by sharing it among motivated regional associations. Inclusion of a formalized role for regional organizations to provide advice and opinions on potential R2P situations would help to allay smaller states’ fears of unchecked humanitarian rhetoric as a guise for imperialism, and – due to the inherent interest in stability as neighbouring states – would serve to help limit the exercise of R2P-related measures to only those situations severe enough to motivate regional coalitions to encourage international involvement in their region. By carving out a legal space enabling regional organizations to act quickly at the request of the Security Council to prevent large-scale suffering and loss of life resulting from a natural disaster, states making up the regional organizations would be able to effectuate humanitarian aid assistance with the certainty that their collective actions are sanctioned by the United Nations, and would help to develop the norm of R2P in a legally coherent and consistent manner, enhancing its binding nature over time.

Based on the two-level model of international human rights as posited by Charles Beitz, and particularly in light of the relevance of R2P to effectuate this right, it is possible to definitively

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50 Beitz, supra note 26, at 14.

assert a right to humanitarian assistance for victims of catastrophic natural disaster under circumstentially-flexible parameters for action. Identifiable eligible actors are those entities which would commit to sharing a second-level responsibility to protect populations affected by disaster, knowing there is flexibility in a range of available responses proportional to their motivating reasons in any given case, such as those contemplated under the current conceptualization of R2P. After all, “when one asserts a human right, one is saying that international agents have reasons to act when domestic governments fail.” Thus, says Beitz, “the attribution of second-level responsibilities depend on the details of the case in question. … [For example,] we would fix responsibility differently in cases of natural disaster than in cases of chronic malnutrition or epidemic disease.”

Therefore, although it is suggested here that extension of the principles of R2P to natural disaster events is not precluded by – and in fact appears to be consistent with – Beitz’s theory of the normative structure of international human rights, disagreement is bound to arise in deliberating how to act. However, in accordance with Beitz, even if it is not always immediately clear which identified international actors are most eligible in a given case, and since motivations for action necessarily vary between actors, this does not undermine or cancel the force of the reason to act. The right to humanitarian assistance is therefore properly considered a matter of international human rights doctrine, “violations or threatened violations of [which] might reasonably be taken as a justification for remedial or preventive action by outside agents,” which “remedial or preventive action” is what the application of the Responsibility to Protect doctrine to natural disaster scenarios embraces.

Part II: Operationalizing the Right to Humanitarian Assistance

Using the normativity framework set out by Beitz for identifying human rights, the existence of a right to humanitarian assistance in the event of a natural disaster has been shown to be a proper subject of international human rights. But for this right to be fully operative, clearer parameters need to be developed between states regarding to whom second-level rights-protection responsibilities attach, and what actions are permissible under international law and morally justifiable according to widespread international consensus. Fortunately, there is already an

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52 Beitz, supra note 26, at 174.

53 Beitz, supra note 26, at xi.
emerging norm under which this right may be framed. As noted above, the concept of the Responsibility to Protect has generated significant international consensus at a foundational level regarding how the international community can frame its response to a state that manifestly fails to protect populations within its borders in respect of four international crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity, and their incitement. The development trajectory of R2P and its current parameters will be therefore outlined in greater detail, in order to then demonstrate more clearly how this doctrine can translate into circumstances of natural disaster to operationalize the right to humanitarian assistance.

Section I: Development of the Traditional Conceptualization of R2P and Sovereignty as Responsibility

The Responsibility to Protect doctrine is founded on a human security perspective of international law “grounded in a belief that the rights of people, not states, are the bedrock of a just and secure world.” R2P thus represents a tension between the centuries-old doctrine of the inviolability of state sovereignty requiring non-interference by outsiders in the domestic affairs of sovereign states, and the emerging notion of sovereignty as responsibility and growing emphasis on global recognition of individual human rights.

The international system developed over centuries such that “relations between states became increasingly governed by the view that a sovereign government has the right to rule within its own territory as it sees fit without fear of outside intervention. Thus, state sovereignty came to be treated as nearly absolute and individual rights, while recognized, were at the mercy of the state.” The United Nations Charter similarly reflects its origins in a historical period emphasizing non-interference and state sovereignty, firmly establishing the sovereign equality of


56 Seybolt, supra note 54, at 8.
The Charter further provides at Article 2(4) that all states “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state,”\footnote{Charter of the United Nations, supra note 57, art. 2(4).} except for reasons of self-defence\footnote{Charter of the United Nations, supra note 57, art. 51.} or in accordance with express UN authority.\footnote{Charter of the United Nations, supra note 57, arts. 39 and 41. In addition, the UN has consistently recognized the principle of non-intervention, notably, for example, in General Assembly Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, UN GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8082 (24 October, 1970) at 338 asserting the “duty not to intervene in matters within the domestic jurisdiction of any state.”}

R2P in its current formulation falls into the latter exception as, due to the most recent – and unanimous – agreement between states, the use of force under the doctrine requires Security Council authorization under Chapter VII.\footnote{United Nations General Assembly, 2005 World Summit Outcome, UN Doc. A/RES/60/1 (24 October 2005), online: <www.un.org/summit2005/documents.html>, at ¶ 138-139 [hereafter, World Summit Outcome].} However, proponents of R2P point out the norm’s broader Charter legitimacy, simultaneously obligating Member States to “achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights”\footnote{Charter of the United Nations, supra note 57, art.1(3) [emphasis added].} and to “take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55,” which promotes respect for human rights and fundamental freedoms.\footnote{Charter of the United Nations, supra note 57, arts. 55-56. The broader Charter argument has been suggested by, inter alia, Saechao, supra note 12, at 669 and Benton-Heath, supra note 4, at 440-441.}

“Since the creation of the United Nations, despite the resilience of sovereignty and the principle of non-intervention, slow but continuing efforts have been made to shrink the sovereign domain and to recognize the imperatives of collective action. Examples are numerous, especially in human rights, the environment, and trade.” Special note is also made of the Charter’s provisions
which allow for challenges to sovereignty, evidence that “the ambition of the drafters was to subject sovereignty both to human rights norms and to the constraints of collective security.”

Development of the international norms which bring the Charter’s terms, spirit and purpose into more harmonious alignment have been pursued by vocal proponents. The late Thomas Franck has asserted that the UN Charter “cannot rationally be applied in strictly literal fashion” because, at the time of its drafting, drafters could not reasonably foresee global development indefinitely; therefore, they could not have contemplated many of the modern challenges international law must grapple with, including the development of new weapons, the end of colonialism and communism, and emergence of terrorism as a weapon of choice for the disempowered. Franck therefore favoured a more holistic interpretation of the Charter, and related efforts to operationalize the goals it embodies: “straining to save law’s determinacy by applying it strictly, even when to do so leads to absurd or horrific consequences, is futile and of no benefit either to the law or morality.”

Similarly, former U.N. Secretary-General Kofi Annan has explained that the UN Charter was pursued since its inception in the name of “the peoples” – not governments – of the United Nations. Its aim, he notes, is to preserve international peace, but also “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person.” To these ends, the Charter clearly assigns responsibility to the Security Council for maintaining international peace, and the Security Council retains sole authority to decide that an internal situation in any Member

65 Franck, supra note 48, at 143.
66 Franck, supra note 48, at 144.
67 Annan, Kofi. “Toward a New Definition of Sovereignty” in Ethics of War: Classic and Contemporary Readings, Reichberg, Syse & Begby, eds., (Blackwell, 2006), at 690. Peter MacAllister-Smith has also asserted that the principle of cooperation holds a central place in the UN Charter, “such that the foundational principles of sovereignty, territorial integrity, and non-intervention should be balanced against the duty to cooperate for the sake of human rights and fundamental freedoms.” Peter MacAllister-Smith, International Humanitarian Assistance Disaster Relief Operations in International Law and Organization (1985), as cited in Benton-Heath, supra note 4, at 439.
State is so grave as to justify forceful intervention by any actor, including regional actors enforcing R2P in the affairs of their member states.

Thus, a middle ground between non-intervention and concern for protection of the right to humanitarian assistance for populations abroad is developing. If a Responsibility to Protect populations affected by natural disaster were to become the subject of broad international consensus by states, action pursuant to a resolution by the Security Council authorizing regional or state actors to protect the right to humanitarian assistance would not be *ultra vires* the intent and purpose of the UN Charter. The intersection of these Charter articles and its overarching principles provide legal support for the proposition that state sovereignty has evolved in recent decades, and now consists of a “more modern view … that acknowledges the sovereign status of states as conditional upon those states recognizing obligations to their people.” The concept of an international Responsibility to Protect reflects this modern view by reconciling state sovereignty with domestic and international responsibilities for ensuring the global respect for certain enumerated universal human rights.

Despite the continued conceptual evolution of sovereignty to encompass rights-based responsibilities, it was only as recently as NATO’s intervention in Kosovo when humanitarian justification for military involvement began to be debated as a legitimate cause for foreign use of force in a sovereign state. In early 1999, NATO intervened in the Serbian province of Kosovo in the face of grave human rights violations, without waiting for UN Security Council authorization. In justifying the intervention, most NATO states refused to advance a general norm of

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68 Annan, *supra* note 67, at 691.


70 Former UN Secretary-General Kofi Annan has voiced his support for the notion of sovereignty as responsibility and framed it so: “State sovereignty, in its most basic sense, is being redefined – not least by the forces of globalization and international cooperation. … At the same time individual sovereignty – by which I mean the fundamental freedom of each individual, enshrined in the Charter of the UN and subsequent international treaties – has been enhanced by a renewed and spreading consciousness.” Kofi Annan, *supra* note 67, at 685.
humanitarian intervention, and instead relied on a “moral duty” or “necessity to act” in the circumstances. Yet the intervention by a regional organization in the internal affairs of a non-member state sparked vehement disagreement over whether human rights and humanitarian concerns can ever be a legitimate cause of war, and has been cited as an early precedent of the now-global effort to elaborate the concept of R2P.

The debate around the legality of humanitarian intervention ignited by the NATO/Kosovo events prompted then-UN Secretary-General Kofi Annan to issue a challenge to the UN membership to “forge unity” around basic principles of intervention in cases of extreme need. In his request, Annan asked:

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? In essence the problem is one of responsibility: in circumstances in which universally accepted human rights are being violated on a massive scale we have a responsibility to act.

The response was the introduction of the Responsibility to Protect at the international level in 2001, in the Report of the International Commission on Intervention and State Sovereignty


72 Seybolt, supra note 54, at 13. It is important to note that although NATO used force in Kosovo without Security Council authorization, it later obtained ex post sanction by the Security Council, retrospectively rendering the use of force legal. However, note that The Independent International Commission on Kosovo concluded that NATO’s action in using force against Yugoslavia, although not strictly legal, was “legitimate” and called for the applicable law to become more congruent with “an international moral consensus”. Independent International Commission on Kosovo (the “Goldstone” Commission), Kosovo Report: Conflict, International Response, Lessons Learned (Oxford: Oxford University Press, 1990), 67-83, as cited in Franck, supra note 48, at 146. Other authors note that Kosovo “at least arguably legitimated” unilateral humanitarian action where the Security Council fails to act. Brunee and Troop, supra note 64, at 135.

(ICISS Report) which had been commissioned by Canada.\textsuperscript{74} The ICISS Report re-characterized the issue of intervention for human protection purposes from a debate about a right to intervene to one about the responsibility to protect innocent civilian lives. The ICISS Report emphasized that a duty inherent in state sovereignty is to safeguard the lives and livelihoods of civilians, and absent that, other governments authorized by the UN have a responsibility to act to protect civilian life – even by way of military force as a last resort.\textsuperscript{75} The ICISS Report set out that:

Residual responsibility lies with the broader community of states… activated when a particular state is either unwilling or unable to fulfill its responsibility to protect or is itself the actual perpetrator… This responsibility also requires that in some circumstances action must be taken by the broader community of states to support populations that are in jeopardy or under serious threat.\textsuperscript{76}

Importantly, the triggering events identified by the ICISS were “large scale loss of life … with genocidal intent or not, which [was] the product either of deliberate state action, or state neglect, or inability to act, or a failed state situation,” and explicitly noted that such conscience shocking conditions would typically include “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.”\textsuperscript{77}

The ICISS Report placed overriding importance on a wide spectrum of proactive measures and the provision of international assistance to local governments in discharging their Responsibility to Protect, as well as the importance of non-military forms of pressure.\textsuperscript{78} Yet, the ICISS Report formulated R2P such that military force was available in exceptional circumstances, in the pursuit of protecting populations from grave human rights abuses. Starting from a presumption


\textsuperscript{75} Seybolt, \textit{supra} note 54, at 2.

\textsuperscript{76} ICISS Report, \textit{supra} note 74, at 2.31.

\textsuperscript{77} ICISS Report, \textit{supra} note 74, at 4.19 and 4.20.

\textsuperscript{78} Brunnee and Toope, \textit{supra} note 71, at 3-4, citing ICISS Report, \textit{supra} note 74 at 3.1-4.9.
of non-intervention, deviation from which must be exceptional and justified, the Report offered guidelines for the “exceptional and extraordinary measure” of military intervention to protect large numbers of people from imminent danger where there was “serious and irreparable harm occurring to human beings, or imminently likely to occur.” 79 The six “precautionary principles” for the use of military force justified under R2P included: just cause, right intention, last resort, proportional means, reasonable prospects of success, and the right authority to act. 80 Sound assessment of the “right authority” has been heralded as an important way to control for illegitimate use of R2P rhetoric to cover an intervention that does not serve humanitarian ends, a fear that has continued to undercut further international commitment to the norm.

The ICISS Report introducing R2P was followed up by the 2004 High-level Panel Report on the future direction of the United Nations, which found among Member States a sustained political will to support the idea that governments have a responsibility to protect individuals. The High-level Panel emphasized that guidelines on the most controversial aspect of R2P – the use of force to address external threats to states’ security or grave humanitarian crises within states – could “maximize the possibility of achieving Security Council consensus,” and “minimize the possibility of individual Member States bypassing the Security Council” in future situations of humanitarian concern. The criteria for these guidelines, the Panel found, should be “embodied in declaratory resolutions of the Security Council and the General Assembly” and criteria suggested by the Panel mirrored the precautionary principles of the ICISS Report: seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences. 81

In response to the High-level Panel, the Secretary-General released a report which endorsed the ICISS and High-level Panel’s criteria for intervention, but notably, “whereas both ICISS and the

79 ICISS Report, supra note 74, at 4.18. “Military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure, and for it to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur.” Seybolt, supra note 54, at 14.

80 ICISS Report, supra note 74, at 4.16.

High-level Panel had left open the possibility of unilateral action where the Security Council could not act in the face of crisis, the Secretary-General’s response stressed that the task was ‘not to find alternatives to the Security Council as a source of authority but to make it work better.” So it was that the subsequent development of R2P excluded any further assertions that actors other than the Security Council could authorize humanitarian intervention under the doctrine, and further attempts to develop criteria for the use of force have stagnated.

Formal consensus on R2P at the international level was achieved when the concept was unanimously adopted by governments and heads of state at the UN World Summit in 2005, albeit in a more limited way than originally contemplated by the ICISS. As adopted at the World Summit, only the Security Council can authorize R2P intervention, and foundational principles of the doctrine now rest on three pillars on equal weight: (1) the primary responsibility of states to protect their own populations from the four enumerated crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity, and their incitement; (2) the responsibility of the international community to assist a state to fulfill its responsibility to protect; and (3) the international community’s responsibility to take timely and decisive action in accordance with the UN Charter where a state manifestly fails to protect its population from the four enumerated crimes.

In light of the Summit Outcome, collective action can be taken under Chapter VII of the UN Charter through the Security Council on a “case-by-case basis” and military force can be authorized “should peaceful means be inadequate and national authorities manifestly fail to protect their populations” from the listed international crimes. Therefore, in its current formulation, R2P is strictly limited to situations involving genocide, war crimes, ethnic cleansing, and crimes against

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83 World Summit Outcome, supra note 61, at ¶138-140.

84 Benton-Heath, supra note 4, at 429; Bellamy, supra note 13, at 143 and 146.

85 Secretary-General’s 2009 Report, supra note 44, at 1-2.

86 World Summit Outcome, supra note 61, at ¶ 139, as cited in Brunnee and Toope, supra note 71, at 5-6.
This has led some authors seeking protection for populations affected by state neglect following a natural disaster to attempt to fit the state’s conduct into one of the four crimes, generally focusing on the category with the most circumstantial flexibility: crimes against humanity. However, the crimes against humanity category was not designed to contemplate a state’s abuse of the right to humanitarian assistance following a natural disaster; and as such, it is a poor fit. Better protection for disaster-affected populations (and a theory more promising from the viewpoint of achieving early lifesaving rights-protection) could be achieved by developing consensus around R2P as a framework for international response in the unique context of catastrophic natural disasters.

Section II: Conceptual Extension of R2P to Natural Disasters

According to Charles Beitz, and as outlined in Part I of this Note, “[t]he central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventive action by the world community or those acting as its agents.”

Yet history has demonstrated that in the event of a natural disaster, nature’s devastating effects can quickly be compounded by a state’s unwillingness or inability to alleviate the suffering of affected populations within its borders. Furthermore, when a state fails to live up to its responsibilities, international law provides remedies to protect those affected.

87 The doctrine of R2P in its current form and the obligations it imposes upon the international community as outlined in the Summit Outcome document have been reaffirmed twice since the World Summit: Resolution 1674 Protection of civilians in armed conflict, UNSC, S/RES/1674 (2006), ¶ 4 (reaffirming ¶ 138 and 139 of the World Summit Outcome), online: <www.un.org/Docs/sc/unsc_resolutions06.htm>; Resolution 1894 on Protection of civilians in armed conflict, UNSC, S/RES/1894 (November 11, 2009), online: <http://unispal.un.org/UNISPAL.NSF/0/A4E2352BFDF75FF08525766C00588264>. It has also been discussed by the Security Council in reference to the situation in Darfur: Resolution 1706 Reports of the Secretary-General on the Sudan, UNSC, S/RES/1706 (31 August 2006), online: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/484/64/PDF/N0648464.pdf?OpenElement>, at preamble (recalling Resolution 1674, as well as ¶138 and 139 of the World Summit Outcome).

88 Both Stuart Ford, supra note 3, and Rebecca Barber, supra note 6, have attempted to apply traditional R2P to the facts in Cyclone Nargis. Ford’s focus is on the ex post application of the doctrine in support of international criminal prosecution against the military junta for crimes against humanity as a result of their action (and inaction) following the cyclone. Barber looks more broadly at the application of traditional R2P to state conduct following natural disasters, but ultimately concludes that the restrictions imposed by the government of Myanmar following the cyclone fell short of what would have been required to justify forcible humanitarian aid delivery under the doctrine.

89 Charles Beitz, supra note 26, at 12.
responsibility towards its citizens after a natural disaster, this failure has not been met with consistent or clear action by the world community.

The duty on a state to accept humanitarian aid during wartime has been well established: the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, for example, holds that an “Occupying Power shall agree to relief schemes” on behalf of the civilian population in the occupied territory. However, a legal rule regarding an obligation to accept humanitarian assistance under certain circumstances applicable in the event of peacetime natural disasters remains elusive. The United Nations has affirmed that in the typical case, humanitarian assistance “should be provided with the consent of the affected country”, but in extreme cases such as Myanmar’s initial refusal to provide or accept aid assistance, it has been asserted that “it is neither necessary nor obvious that the affected state retains the unchecked right to withhold its consent in all circumstances.” Importing the framework developed around R2P would provide clarity as to what steps can and ought to be taken by the international community under Security Council auspices when state consent to critical humanitarian assistance is unreasonably withheld.

The international community has shown a growing recognition that international disaster response needs to be better coordinated in advance of a crisis, and that some second-level responsibility falls to the international community of states when a state fails to protect its

90 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950), art. 59, which reads in relevant part: “If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.” [emphasis added].


92 Benton-Heath, supra note 4, at 422 [emphasis added].

93 Indeed, it has been noted that any efforts to establish clear rules in this area will require a drafter to engage in progressive development of the law, rather than an attempt at strict codification of custom, due to the fact that many aspects of disaster response are subject to disparate practice by states: Benton-Heath, supra note 4, at 423.
people. Indeed, individual states’ responsibilities to protect their own populations from the listed crimes as well as the international responsibilities to assist and, if necessary, to take collective action through the Security Council, are grounded inter alia in the law of state responsibility.

Broadly speaking, the UN recognized the importance of state responsibility in the 2002 International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which provides “[e]very internationally wrongful act [or omission] of a State entails the international responsibility of that State.” Since respect for human rights is part of customary international law, states already have an underlying responsibility not to allow violations of human rights to occur in their territories. This notion of second-level responsibility was reflected in the ICISS Report which introduced R2P, and states:

The idea [is] that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe … but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. … State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a

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94 Early attempts at coordinating international disaster response date back to 1922 when the League of Nations first established the International Relief Union; however, like the League itself, the IRU became the victim of changing global priorities and increasing isolationism in the Great Depression period. Mac-Allister-Smith, supra note 21, at 20-21.

95 Brunei and Toope, supra note 71, at 13.


97 See infra notes 16 and 17.

98 Saechao, supra note 12 at 674. Thus it has been asserted that the responsibility to protect concept merely makes explicit what international law already requires: “General international law underscores that third states’ concerns over extreme human rights abuses within an individual state are not unwarranted interventions in internal affairs, but the legitimate pursuit of collective legal interests. But what of the greatest innovation of the responsibility to protect, the idea that third states not only have legal interests but also legal responsibilities? A closer look reveals that here too the responsibility to protect against ‘genocide, war crimes, ethnic cleansing and crimes against humanity’ rests on the foundations of the law of state responsibility. In the case of jus cogens violations, the law of state responsibility instructs that states are not merely entitled to demand that they stop but are under an obligation to cooperate to bring them to an end.” Brunei and Toope, supra note 71, at 14. Also see generally Georg Nolte, Comment, “Sovereignty as Responsibility?” (2005) 99 Am. Soc. Int’l L. Proceedings 389 and Louis Henkin, Comment, “Human Rights and State ‘Sovereignty’”, (1995/96) 25 Ga. J. Int’l & Comp. L. 31, cited in Benton Heath, supra note 4 at 9.
result of … state failure … and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.  

The responsibility to provide and accept humanitarian assistance has had its basis established in international case law as well. The history of R2P can be traced as far back as the Corfu Channel case at the International Court of Justice, which established the concept of state responsibility and that international obligations towards humanity exist during peacetime and war. Although the facts of the Corfu Channel case are admittedly distinct from issues of R2P and natural disaster response law, they did cause the Court to examine in detail the tensions between sovereignty and state responsibility. The separate opinion of Alvarez, J. in Corfu Channel established that “we can no longer regard sovereignty as an absolute and individual right of every State… Like sovereignty, the responsibility of States is an ancient conception and holds a very important place in international law.” The Corfu Channel decision is thus supportive of the notion of sovereignty as responsibility, holding that “sovereignty confers rights upon States and imposes obligations upon them.”

Almost 40 years later, the I.C.J. advanced the notion of legally justifiable delivery of international humanitarian aid in the Nicaragua case, stating:

"There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot

99 ICISS Report, supra note 76 at vii and xi [emphasis added].


101 Corfu Channel Case, supra note 100, the separate opinion of Alvarez, J. at 43. Furthermore, Alvarez, J. held at 45 that “every State is bound to preserve in its territory such order as is indispensable for the accomplishment of its international obligations.”

102 The Corfu Channel Case, supra note 100, in the separate opinion of Alvarez, J., as cited in Benton-Heath supra note 4, at 429, which also notes that Max Huber similarly linked sovereignty to responsibility in the Palmas case, stating that territorial sovereignty “has as a corollary a duty: the obligation to protect within the territory the rights of other states.” Palmas, 2 R. Int’l Arb. Award, at 839.
be regarded as unlawful intervention, or as in any other way contrary to international law.\textsuperscript{103}

Elaborating on the meaning of “strictly humanitarian aid” the Court stated:

If the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering’, and ‘to protect life and health and to ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need in Nicaragua.\textsuperscript{104}

This has led scholars to conclude that the I.C.J., while confirming the prohibition against forcible intervention in the affairs of a sovereign state generally\textsuperscript{105}, also retained space for legally justified humanitarian assistance for victims of natural disasters, provided the relief is offered for “humane purposes” such as those set out by the Red Cross.\textsuperscript{106}

More recently, the text of a draft declaration by the UN International Law Commission (ILC), entitled \textit{Protection of Persons in the Event of Disasters}\textsuperscript{107} has been provisionally adopted by the

\textsuperscript{103} The \textit{Nicaragua Case}, supra note 47, at ¶ 242. Recall it was noted above that in \textit{Nicaragua}, the I.C.J. acknowledged the importance of neutral offers of humanitarian aid when offered in accordance with the purposes declared by the Red Cross.

\textsuperscript{104} The \textit{Nicaragua Case}, supra note 47, at ¶ 242-243.

\textsuperscript{105} Lowe, supra note 57 at 10, citing the \textit{Nicaragua Case}, supra note 47, at ¶ 268.

\textsuperscript{106} Saechao, supra note 12, at 686-687. It has also been noted that “in the reasoning of the ICJ, we see a mixture of subjective and objective criteria for humanitarian assistance. On one hand, the relief must be distributed without discrimination in fact. On the other, its purposes must be limited to alleviating suffering and protecting life and health. Only by meeting both of these criteria, in the reasoning of the ICJ, can a unilateral assistance operation avoid implicating the principles of territorial sovereignty and non-intervention. The Court’s reasoning in this case appears to form the basis for the criteria elaborated in later instruments on humanitarian assistance.” Benton Heath, supra note 4, at 466.

drafting committee. But the preliminary report of the UN Secretariat indicates the ILC project is intended to focus on “the practical problems of disaster relief, such as obtaining visas, removing bureaucratic barriers to financial aid, and ensuring that foreign actors comply with local laws”, to the exclusion of larger legal issues such as whether a state has a duty to undertake or accept humanitarian relief following a natural disaster.\(^{108}\) The ILC’s draft document could eventually be the basis for establishing some form of international cooperation in the realm of humanitarian relief and assistance\(^{109}\), although it is unclear as yet what role R2P may play under a broader framework of coordinated international humanitarian efforts, and indeed whether it will engender any broad consensus in that realm.\(^{110}\) Thus while there is not yet any international forum or structure for taking action in the event of a natural disaster where the affected state is unable or unwilling to provide humanitarian assistance to its population, it seems that there is a growing awareness among international actors that some effort at coordinating the international responsibility to take action should be undertaken, but on what basis and how to flesh out this responsibility has yet to be determined.

**Section III: R2P as the Framework to Respond to the Right to Humanitarian Assistance**

This Section examines the claim that the concept of R2P can be employed to operationalize the international human right to humanitarian assistance following a natural disaster, where the


\(^{109}\) The 2009 Draft articles include explicit recognition of the need for greater international cooperation to in the realm of disaster response. U.N. International Law Commission, *Protection of Person in the Event of Disasters: Text of Draft Articles 1, 2, 3, 4, and 5 as Provisionally Adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.758 (24 July 2009), at art. 5 (“States shall, as appropriate cooperate among themselves, and with the United Nations and other competent intergovernmental organization, the international federation of the Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.”)

\(^{110}\) The Special Rapporteur leading the ILC, Eduardo Valencia-Ospina, has stated that the project would not deal with the issue of justification of humanitarian aid by way of force, in effect precluding consideration by the ILC of R2P’s applicability to natural disasters, given that R2P reserves the use of force as an exceptional, last resort, measure along the continuum of permissible actions international actors can consider in defence of enumerated human rights. Eduardo Valencia-Ospina, Special Rapporteur on Protection of Persons in the Event of Natural Disasters, Speech to the International Law Commission (July 10, 2009), cited in Benton-Heath, *supra* note 4 at 422. However, the author also notes that draft article 8 on the primary responsibility of the affected state creates some marginal space for the conception of sovereignty as responsibility: “It notes that the state, ‘by virtue of its sovereignty’, has the primary role in coordinating disaster relief on its territory.” Benton-Heath, *supra* note 4 at 447, citing *Report of the International Law Commission to the General Assembly*, ¶ 178, U.N. Doc. A/64/10 (2009), available at http://untreaty.un.org/ilc/reports/2009/2009report.htm.
affected state is itself unable or unwilling to provide such protection. Under Beitz’s conceptualization of human rights as a normative practice which give reasons for deliberating how and when the international community will act, the framework provided by the traditional conception of R2P is certainly not precluded from applying to the event of a natural disaster where a state cannot protect the subsistence interests of its population, and indeed appears consistent with the goal of international human rights protection. Therefore, it will be shown that the application of R2P provides a viable justification for encouraging preventative and responsive humanitarian assistance to civilians in states affected by natural disaster – a formulation which is supported by Beitz’s interpretation of the normative framework structure of international human rights.

Beitz observes that “international human rights institutions lack capacities for authoritative adjudication of disputes and coercive enforcement of the practice’s norms.” In the context of the right to humanitarian assistance, this pathology could be remedied by commitment at the international level to a cooperative structure mandated to authorize and coordinate disaster relief efforts, a critical aspect of which employs R2P to justify the protection of this right where a state cannot itself provide, and prevents outside actors from providing, humanitarian assistance. As yet “the global political system does not include any authoritative mechanism for implementing and enforcing such a criterion, even if one were present.” Given the existence of a right to humanitarian assistance, as demonstrated above, it has been asserted that “international law should impose on all states certain responsibilities to foster international cooperation during relief operations and to ensure the effective provision of humanitarian assistance to disaster victims,” but what remains to be determined is how these responsibilities should be imposed, and in what forum.

111 Beitz, supra note 26, at 8.
112 Beitz, supra note 26, at 10.
113 Beitz, supra note 26, at 163-164.
114 Saechao, supra note 12 at 667.
The application of the framework embodied by R2P is a clear and efficient way to tackle these issues, in order to give effect to the right to post-disaster humanitarian assistance in a way that reconciles the competing doctrines of state sovereignty and international responsibility for the protection of human rights and is both morally legitimate and legally justifiable. While R2P has principally been discussed in its most contentious context of justifying humanitarian *intervention* – that is, military intervention in a foreign state to address gross human rights violations such as genocide – it could equally be used to effectuate the right to humanitarian *assistance* from foreign states in times of natural disaster, to alleviate the suffering of populations whose own state is unable or unwilling to deliver life-saving aid and assistance. This is especially so given the UN Security Council’s demonstrated “willingness to recognize that humanitarian crises may in and of themselves be threats to international peace and security.”\(^{115}\)

The extension of R2P from its application strictly to enumerated war crimes to the natural disaster context as contemplated, is illustrative of more broadly how modern law strives to gain dominion over catastrophe through strategies of anticipation, prevention and amelioration, but this has not always been the case. It used to be that, natural catastrophes were unforeseeable events, considered as “acts of God”, for which there was no liability and no corresponding obligation to act. Under this construction, natural catastrophes were considered “beyond law’s jurisdiction.”\(^{116}\) However, it has more recently been asserted that the distinction between misfortune (natural occurrences) and injustice (man-made events) may no longer be tenable in a liberal legal community: “In our legal universe, the failure to ameliorate the suffering of others may transform what first seemed a ‘misfortune’ into an ‘injustice’.\(^{117}\) Thus what has previously

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\(^{116}\) When considered as ‘acts of God’ catastrophes were viewed as unforeseeable events for which an insurer, for example, would not be held liable. Linda Ross Meyer, “Catastrophe: Plowing Up the Ground of Reason”, in *supra* note 1, 19-33, as cited by Austin Sarat, et al., *supra* note 1 at 4.

\(^{117}\) Austin Sarat, et al., *supra* note 1 at 4-5, where Hurricane Katrina is cited as an example of the fact that it was the United States government’s lack of response the caused outrage, not the storm itself. The chaotic state that ensued was considered a direct result of the government’s inaction and “failure to mobilize a response” whereas it was considered only an indirect consequence of the hurricane. See also generally Linda Ross Meyer, “Catastrophe: Plowing Up the Ground of Reason” in *supra* note 1, 19-33.
been considered misfortune, now requires we turn our minds to new justifications to act in such cases.

Competing scholarship has raised fundamental objections to the application of R2P to the circumstances contemplated. These objections can be roughly grouped into two broad categories: (1) the assertion that the inclusion of the possibility of military action in the doctrine makes it inappropriate for peacetime natural disasters due to the potential for further destabilization and the questionable ability of militaries to prioritize humanitarian over political goals; and (2) an asserted lack of political will on the part of states to enter into such a scheme for obligatory humanitarian assistance, particularly based on states’ fears of endorsing a new humanitarian imperialism that could be used to legitimize the use of force for purposes other than provision of humanitarian aid. Importantly, each of these objections which might be thought to present an obstacle to the application of R2P to elucidate international obligations where a state is unwilling or unable to protect the right to humanitarian assistance following a natural disaster can be mitigated or eliminated by a clearer articulation of the circumstances, duties, and actors engaged under the R2P framework. Each objection will be dealt with in turn, to demonstrate how such objections rest on a misconstrued application of R2P or do not recognize modern developments in the traditional conception of R2P which make it more applicable than ever to natural disaster scenarios.

1) R2P’s Essential Safeguards against Illegitimate Intervention and Eligible Actors Authorized to Deliver Humanitarian Aid Need Not be Militaries, or even States

Some proponents of the application of R2P to the natural disaster context have asserted that even “[t]he use of force against a sovereign state solely to avert suffering caused by a natural disaster may be argued as justifiable under the responsibility to protect theory,” particularly when treatment of nationals “shocks the conscience of mankind.” While the inclusion of available recourse to force is certainly the most controversial aspect of R2P, it is patently obvious that anytime a state is impacted by a disaster, there is a real risk that “military intervention may cause

118 Jackson, supra note 4, at 14.

119 Saechao, supra note 12 at 672, and Jackson, supra note 4, at 12.
further destabilization." Critics, however, use this fact to argue that it is precisely R2P’s close connection with military force raises that “serious humanitarian concerns that make it inappropriate for disaster relief.” Opponents of the extension of R2P to circumstances of catastrophic disaster fear that where R2P is invoked (and in the exceedingly rare case where military intervention for humanitarian purposes is authorized), aid delivery would be primarily undertaken by foreign military forces, rather than impartial NGOs, leading them to express doubt that “militaries can prioritize aid delivery over political goals.”

However, R2P proponents and UN Secretary-General Ban Ki-Moon himself emphasize the safeguards that would prevent authorization for military intervention in all but the most absolutely necessary cases, and instead underscore its protective and capacity-building dimensions that favour peaceful dispute settlement alternatives. The range of actions contemplated by R2P, which the Secretary-General’s Report calls “a continuum of graduated policy instruments”, advocates non-interventionist ways for the international community to assist the state in fulfilling its primary obligations to its people, and includes non-forcible persuasive mechanisms of diplomatic and economic pressure. Unanimous agreement on R2P at the World Summit affirmed that armed intervention be situated at the far end of a broader continuum of potential actions that the international community might take in a case where R2P is invoked, and stressed “the value of prevention and, when [prevention] fails, of early and flexible response tailored to the specific circumstances of each case” to protect populations from grave human rights abuses. Given the multitude of tools available under the concept of R2P, its inherent value is not outweighed by the rare possibility of Security Council-authorized recourse to force.
Beyond ethical reasoning, the pragmatic need for real commitment to R2P in all its protective manifestations is underscored by the recognition, especially in recent times, of the volatility bred when states are allowed to fail in or deny their protective obligations to their own populations. The international community’s failure to enforce protection of the most basic human rights “produces not only moral quagmires, but also allows for some states to become breeding grounds for disaffection, frustration, and, potentially, interstate conflict.”  

R2P furthermore allows for discretion on the part of the Security Council to balance the pros and cons of engaging particular actors, potentially including, as contemplated above, a more active role for regional organizations. The Security Council is enabled, in the current conception of R2P, to take action on a “case-by-case” basis, and can engage with the framework to call on the best-suited of eligible actors to take a given form of action in defence of the right to assistance.  

As applied to natural disasters, R2P parameters can be developed to include capacity for the international community to call upon willing and able intergovernmental and non-governmental organizations specializing in various areas of disaster response, rendering ever more remote the possibility of forcible aid delivery wholly, or even in large part, by foreign militaries. The spectrum of actions encompassed under the R2P framework does not limit the doctrine to application of military force to deliver aid, and in fact de-emphasizes the use of force in favour of a range of other, non-forcible, measures to ensure states respect the right in question. Some of the most vocal proponents of extending R2P to cover natural disasters resulting in abuse of the right to assistance have concluded that the circumstances in Myanmar following Cyclone Nargis, extreme though they were, would not have been sufficient to justify forcible delivery of

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126 Brunnee and Toope, supra note 64, at 133.
127 World Summit Outcome, supra note 61, at ¶ 139.
128 Secretary-General’s 2009 Report, supra note 44, at 7, which notes: “Coining the phrase ‘responsibility to protect’, the Commission identified a responsibility to prevent, a responsibility to react and a responsibility to rebuild, posing a continuum of graduated policy instruments across that spectrum. Although it addressed the proper authority and rules for the use of force, the report of the Commission highlighted the advantages of prevention through encouraging States to meet their core protection responsibilities.”
humanitarian aid.\textsuperscript{129} In light of this, and especially if use of force guidelines were developed along the lines of the ICISS Report and High-level Panel – encompassing sound assessments of just cause, right authority, reasonable prospects of success, principally among them – it is reasonable to imagine that the threat of sanctioned breach of sovereignty to deliver relief would operate principally to strengthen the less extreme forms of encouragement for the affected state to provide or accept aid, as all states would know that under R2P, assistance by force is a possible legal alternative if they continue to refuse humanitarian aid.

2) Allaying fears of a new humanitarian imperialism: R2P’s inherent checks and balances regarding the use of force

Critics of R2P have opposed its extension on the basis that it “is little more than rhetorical posturing that promises little protection to vulnerable populations” or that it is a “dangerous imperialist doctrine that threatens to undermine the sovereignty and political autonomy of the weak.”\textsuperscript{130} However, before lines are drawn between stronger “imperialist” states and weaker developing states, recall that the wrath caused along the U.S. coast by Hurricane Katrina in 2004, as well as floods in Australia, the earthquake in Christchurch, New Zealand, and the earthquake, tsunami and nuclear disaster wreaking havoc in north-eastern Japan which all occurred in the first half of 2011 alone, are stark reminders that natural disaster can leave developed states’ populations equally exposed and in need of international assistance. Nonetheless, to counter the argument that R2P risks being a employed as “a ‘Trojan horse’ that legitimizes great power interference in the affairs of the weak”, recall the unsuccessful invocation of R2P to justify armed intervention in Iraq in 2003 by France and Russia as demonstrative that R2P “does not confer automatic legitimacy on coercive interference in the event of a political or humanitarian crisis.”\textsuperscript{131}

Simply because a legal norm is vulnerable to the possibility of misuse doesn’t undermine the value of the norm itself. As former Justice of the I.C.J. and prominent academic scholar on

\textsuperscript{129} See generally Ford, supra note 3 and Barber, supra note 6.

\textsuperscript{130} Bellamy, supra note 13, at 144.

\textsuperscript{131} Bellamy, supra note 13 at 152.
international law, Rosalyn Higgins, has pointed out, in the international legal context, “there have been countless abusive claims of the right of self-defence. That does not lead us to say that there should be no right of self-defence today… We delude ourselves if we think that the role of norms is to remove the possibility of abusive claims ever being made.” After all, “a successful norm building enterprise is one of the prerequisites for effective action in humanitarian crises. But even successful norm building does not guarantee outcomes… Norms also provide a framework for argument, and a hook on which to place demands for accountability.”

Nonetheless, to limit the potential that R2P might be asserted to mask alternate agendas on the part of intervening states, the ICISS Report provided that six criteria would have to be met in order to justifiably call upon the use of force provisions embodied under R2P: just cause, right intention, last resort, proportional means, reasonable prospects of success, and the right authority to act. At least one author has argued that the application of the six precautionary principles set out in the original ICISS Report on R2P would operate to provide discernable and acceptable limits on the use of force in the event of a natural disaster where R2P is invoked. As an

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132 Rosalyn Higgins, supra note 17, as cited in Franck, supra note 48, at 150. Rosalyn Higgins takes the argument of non-compliance with a legal norm one step further, and rightly notes that the prohibition against torture retains its status as customary international law despite widespread non-compliance because the requisite “opinio juris as to its normative status continues to exist.” This has been interpreted as suggesting that the establishment of state practice in demonstrating customary international law may be of diminishing importance where sufficient opinio juris can be shown: Barber, supra note 6, at 9, citing Rosalyn Higgins, Problems and Processes: International Law and How We Use It (Oxford: Clarendon Press, 1994).

133 Brunnee and Toope, supra note 64, at 136.

134 This criticism has been reiterated by states in the General Assembly debates on traditional R2P, and was succinctly set out by then-U.N. High Commissioner for Human Rights, Louise Arbour who stated: “With respect to the latter criticism, see also comments by Louise Arbour in her speech to Trinity College, Dublin: “To begin with, the ‘right’ to intervene is by definition discretionary. It is the prerogative of the intervener, and has always been exercised as such, thereby creating a hierarchy among those who received protection and those whom the potential intervener could afford to ignore. The invocation of such a right has also, not surprisingly, unleashed criticism from the many who question the interveners’ purity of intent and who denounced, plausibly or not, the self-serving agendas that they believed were hidden behind the pretence of humanitarianism.” Louise Arbour, Speech to Trinity College Dublin, The Responsibility to Protect as a Duty of Care in International Law and Practice (Nov.23, 2007), as cited in Jackson, supra note 4, at 9.

135 ICISS Report, supra note 74, at 4.16.

136 See generally Jackson, supra note 4. Note in particular the ICISS Report contemplation of “just cause” leaves room for its employ in circumstances of natural disaster coupled with state neglect, as the Report suggests just cause
additional safeguard against undue interstate interference, recall that the 2005 World Summit Outcome agreement on R2P summarily rejected the original ICISS proposal of “right authority”, objecting to the proposed “sliding scale” from the Security Council as the primary authority, to localized regional bodies acting in concert when the UN fails to sanction intervention. That rejection affirms that the Security Council is the only body the international community of states is willing to entrust with this important authorizing function. The remaining four criteria can then be seen as precautionary principles which act as “additional safeguards to rogue violations of sovereignty.” Notably, the “reasonable prospect of success” criterion takes account of a situation where – as the Beitz theory addressed – the cost of an otherwise legitimate intervention is too high, or where actual protection is not possible.

The development of R2P as traditionally conceived with respect to the four enumerated war crimes has similarly stagnated around the thorny issue of use of force and legitimate humanitarian agendas, yet no one is suggesting that as a result of this difficulty R2P be abandoned in its entirety. Since 2005 the United Nations has moved from the affirmation of R2P in principle to an extensive discussion of its scope and substance, with little success in achieving any further operational consensus on guidelines regarding the use of force aspect. This has prompted scholars to observe that R2P is still in the developing stages of achieving binding international normative significance, and to conclude “that the Summit Outcome has not been treated as the culmination of the norm building process, but rather as a platform for further normative interaction and deliberation.”

The existence of the legitimated possibility for use of force for humanitarian ends in exceptional circumstances remains subject to the authorization of the Security Council, which has repeatedly

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137 World Summit Outcome, supra note 61, at ¶137-139.
138 Jackson, supra note 4, at 17-18.
139 Brunnee and Toope, supra note 71, at 11.
proven its effective “jurying” function in complex matters of international concern. Thomas Franck has noted that in the domestic context, the institution of the jury as a credible mechanism for ensuring black-letter laws are fairly implemented in practice has gained widespread public confidence. He has argued that the willingness of people to be governed by the law depends not only on the content of the law but also on the credibility of the process by which the law is to be applied.\textsuperscript{140} The closest equivalent to a domestic jurying institution in the global context, says Franck, is the Security Council or General Assembly, both of which regularly hear evidence of facts, pleadings about the way the norms should be applied, and vote to convict or acquit a state accused of counter-normative conduct. In the global context, however, the problem of jury selection “is rendered more acute by the highly politicized nature of the subjects to which international law addresses itself.” Thus, he states, the “difficulty lies less in the formulation of applicable norms than in their application to an infinite variety of potential situations where the rule might be invoked.”\textsuperscript{141}

The application of R2P framework to the ambiguous area of available and justified legal actions where a state fails to respect the right to humanitarian assistance of people affected by disaster within its borders, would help to generate international consensus on applicable norms, while also clarifying when and to whom obligations accrue, with the built-in circumstantial flexibility required to allow the Security Council to respond appropriate to a vast array of inherently political assessments. “Laws, of necessity, are usually drawn in bold brush strokes, but they can and should be applied flexibly and in keeping with common sensibility, especially to circumstances of extreme necessity.”\textsuperscript{142} Circumstances of extreme necessity could also be clarified – and the risk of armed intervention being undertaken for reasons other than a humanitarian desire to deliver aid to vulnerable populations following disaster mitigated – by including in the response framework an official role for regional organizations, as suggested

\textsuperscript{140} Franck, \textit{supra} note 48, at 147.
\textsuperscript{141} Franck, \textit{supra} note 48, at 148.
\textsuperscript{142} Franck, \textit{supra} note 48, at 148.
above in Part I, Section II. As Franck rightly observes, “states are unlikely to formally acknowledge, let alone adumbrate, the right to use force for humanitarian intervention unless they can be assured of the legitimacy of the process by which such a right is to be applied.” To be sure, the rudiments of such a process exist, and indeed have been shown to function relatively well, in the form of the Security Council and General Assembly, which “can be perfected only if states agree to use it, and abide by it, even, or especially, when they have the means to do otherwise.”

The use of force aspect of R2P has proved to be the most controversial and difficult aspect of the doctrine upon which to generate consensus, recall that the UN-sanctioned use of force is but one of the tools available under the R2P framework, and an exceptional and rare one at that. While wariness of endorsing a new “humanitarian imperialism” may be a valid concern, this ought not to impede what in itself promises to be a useful tool for the international community to protect the lives of vulnerable populations and arguably increase global stability where needed. The range of responses available under R2P provides the flexibility required for eligible actors to respond to a variety of situations. The Secretary-General’s 2009 Report emphasizes that the R2P “strategy stresses the value of prevention and, when [prevention] fails, of early and flexible

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143 Regional advocacy was critical in convincing the Security Council to authorize protective measures in Libya, in light of evidence of gross human rights violations by the state. See *supra* note 49.

144 Franck, *supra* note 48, at 155-156. While Security Council reform has been a topic of much debate as of late, it is beyond the scope of this Note. However, Franck does note that the concern of states over the development of new norms which expand the circumstances in which the use of force would be permissible, “cannot be alleviated solely by refining the normative text to allows some carefully specified interventions, but also, simultaneously, addressing the ‘jurying’ process by which the international system proposes to implement any new rule.” Acknowledging many instances where the Security Council and General Assembly have weighed facts and drawn conclusions, effectively carrying out the “jurying” function at the international level, Franck reasons that it is therefore “impossible” in light of these events, “to conclude that the Security Council is incapable of discharging the ‘jurying’ function in a credible fashion. … It has demonstrated a certain, admittedly fallible, ability and readiness, when faced with states’ unauthorized use of recourse to force, to calibrate the verdict by making quite sophisticated judgments that take into account the full panoply of specific circumstances in each case.” Franck, at 149-152. Importantly, while much has been made of the difficulty of securing Security Council authorization for intervention due to the permanent members’ veto, Franck comments are particularly apt: “To the extent that this sort of flexible response has been opposed by China and Third World states … it is not because they favour rigidity *per se* but because they fear the skewed manner in which flexibility is likely to be implemented in practice.” Franck, at 146.

145 Annan, *supra* note 67, at 684: “Such measures, even when justifiable, must remain occasional and exceptional.”
response tailored to the specific circumstances of each case.”

This seems to be the type of structure Beitz seeks to effectuate an international human right, as he says:

The types of international or transnational action for which a government’s failure supplies reasons depends on the background circumstances of the society under consideration, the reasons for the government’s failure, and the range of policy measures available. … The choice of means [to give effect to this human right] would be a complex judgment of policy, not a direct inference from the assertion of a right.

Beitz himself contemplates this imperialist objection, noting that those who resist international efforts to tangibly enforce human rights would likely assert that “human rights may appear to be a mechanism of domination rather than an instrument of emancipation.” Thus, he says, seeking a deeper explanation of the subject matter, that is, determining the normative structure of international human rights in the way he conceives, “causes the force of [these] skeptical doubts to weaken.”

Thus, the potential of R2P emerging as a principle to ensure the protection of international human rights with respect to natural disasters would put force behind rhetoric, and improve humanitarian assistance and relief efforts. Beitz states that the goal underlying his normative framework for human rights, is to focus on human rights “in its most encompassing manifestation: as a public normative practice of global scope whose central concern is to protect individuals against the consequences of certain actions and omissions of their governments,” which suggests Beitz would favour R2P justifications in natural disaster scenarios to effectuate the right to humanitarian assistance along the lines contemplated herein.

International consensus-building around the issue of how best to operationalize the right to humanitarian assistance is urgently required. If R2P is to be applied as a conceptual framework for doing so, it needs to be developed in such a way as to make clear the position of regional organizations as actors, along with Member States and the UN, which may take action for

146 Secretary-General’s 2009 Report, supra note 44, at 2.
147 Beitz, supra note 26, at 162-163.
148 Beitz, supra note 26, at 6-7.
humanitarian means where the UN Security Council so authorizes. Efforts to generate the requisite initial global consensus indicating support for the concept would be best embodied in a General Assembly resolution, which offers the advantage of universal membership and, as shown above, demonstrated experience in “jurying” complex matters of legal-political concern. Some scholars believe efforts to adopt a General Assembly or Security Council resolution that concretizes the collective Responsibility to Protect through guidelines on the use of force would still be insufficient to progress the concept to the status of a binding legal norm.\(^\text{149}\) However, greater international agreement in the form of a General Assembly resolution would be a distinct first step towards achieving a more consistent practice of R2P, and would begin clarifying the obligations inherent in an international commitment to R2P in respect of natural disasters in a way that allays some of the abstract fears of states currently inhibiting its normative development.

Conclusions

To be sure, disagreement over how to operationalize the right to humanitarian assistance abounds, as the political practice of international human rights is still emergent.\(^\text{150}\) Situating a right to humanitarian assistance in the event of natural disaster within a conception of international human rights such that identifiable actors can be recognized, as well as when, why, and how to act in diverse circumstances, “is unlike any settled and longstanding normative approaches such as might be found, say, in a mature legal system. In mature social practices, there is fairly wide agreement within the community about the actions that are appropriate in response to failures to adhere to the practice’s norms. This agreement is sustained over time by traditions of judgment about the appropriateness of these responses.”\(^\text{151}\) The assertion of a legal right to humanitarian assistance in times of natural disaster, complete with an assertion that corresponding obligations therefore exist, is likewise emergent, and therefore has yet to be fully

\(^{149}\) Even if such a resolution were also to embody an agreement between the permanent members of the Security Council not to exercise the veto on matters involving in R2P. Brunnee and Toope, \textit{supra} note 71, at 17. For more on UN Security Council reform, see generally Brunnee and Toope, \textit{supra} note 64.

\(^{150}\) Beitz, \textit{supra} note 26, at xii.

formed by this “tradition of judgment about the appropriateness” of its response to failure to adhere to its norms. There is equally disagreement about all the main elements of international human rights law: the content of its norms, the means for their application and enforcement, the distribution of responsibilities to support them, and the weight to be accorded to considerations about human rights when they come into conflict with other values.\textsuperscript{152} Notwithstanding its complications, there is no denying the existence or the doctrinal and institutional complexity of the practice of human rights which “organizes much of the normative discourse of contemporary world politics and commands the energy and commitment of large numbers of people and organizations.”\textsuperscript{153}

In the usual course, it would be likely that an affected state would request, or at the very least, consent to international humanitarian assistance in the event of a natural disaster for which the state is not equipped or is unwilling to cope. However, there continue to be a variety of reasons why a state might refuse foreign humanitarian assistance, and history demonstrates that there have been and will be instances where the international community must act in a cooperative manner to give effect to the right of affected populations to receive humanitarian assistance to alleviate suffering and life-threatening conditions imposed by natural disaster. In such a case, the principles embodied by the Responsibility to Protect could be a viable justification for coordinated action, and provide useful tools to be employed in foreign relief operations which appear to conform very well to the normative framework of international human rights articulated by Beitz. Perhaps most significantly, developing R2P along clear, coherent, and legally justifiable lines would help to allay states’ concerns over the outstanding ambiguities of R2P, which are holding back the norm’s development into a set of practical and constructive tools for the protection of vulnerable populations from gross human rights abuses. Given the increased incidence of devastating natural disasters as of late, and especially in light of emerging risks and new vulnerabilities associated with the complexity and interdependency of our modern, globalized world (as the earthquake and tsunami in Japan, and consequent nuclear crisis so ably demonstrated), there is a particular urgency which underlies the need for greater consensus and

\textsuperscript{152} Beitz, \textit{supra} note 26, at 9-10.

\textsuperscript{153} Beitz, \textit{supra} note 26, at 10.
clarity on the parameters of the global Responsibility to Protect which goes beyond advocacy for status of R2P as a binding legal norm, and speaks directly to the protection of human life which might be achieved by increasing the operational capacity of the Responsibility to Protect. Perhaps viewing the right to humanitarian assistance in this light will reinvigorate international efforts to effectuate the right and to provide would-be victims of future natural disasters with the necessary humanitarian aid to make the difference between life and death.
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