Is There a Responsibility to Protect in Disaster Relief, And Is It Needed?

by

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Abstract

This thesis examines whether the doctrine of Responsibility to Protect (R2P) can be invoked, at international law, to compel a state to accept foreign humanitarian relief or aid in cases of humanitarian emergencies arising from natural disasters. Focusing on the 2008 Myanmar Cyclone, the thesis will do three things. First, it evaluates the normative development of R2P and its practice. Second, it addresses the core weakness of R2P arguments in favor of intervention in natural disasters in the light of skepticism from states and the problem of indeterminacy in R2P and how it could trigger criminal sanctions. Third, this thesis frames the argument that R2P is not applicable to natural disaster situations. It further argues that the most feasible approach to dealing with the needs of victims of natural disasters is through the diplomatic mechanism of international cooperation, which is premised on the well-developed, accepted principles of sovereignty and non-intervention.
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Introduction

After Cyclone Nargis struck Myanmar in 2008, the government restricted external aid by strictly controlling whose aid was admitted, how much aid was allowed, and where aid was distributed, which exacerbated human suffering on a wide scale. This crisis highlighted the question of whether international law can require the affected state to consent to the entry of personnel and to the provision of goods and services by international actors in its territory. France’s Foreign minister at the time, Bernard Kouchner, proposed that the UNSC invoke R2P to authorize the delivery of aid without the consent of Myanmar, arguing that the denial of humanitarian assistance constituted a crime against humanity. China and the Association of Southeast Asian Nations (ASEAN) rejected this proposal and contended that R2P did not apply to natural disasters and that Myanmar could not be coerced on this basis into accepting humanitarian assistance. Kouchner’s proposal then led to a debate in the academic literature on whether R2P could extend to a state’s failure to provide and/or allow the provision of necessary aid in the aftermath of natural disasters, such as Myanmar’s restrictions on external aid after Cyclone Nargis, as a justification for intervention. Topics at issue in that debate included the status of R2P in international law, the threshold for the use of force, the applicability and necessity of extending the scope of R2P to a state’s conduct in natural disasters, and the challenges R2P posed to the principles of non-intervention and prohibition on the threat or use of force.

In discussing the application of R2P to humanitarian crises involving natural disasters, advocates argue that R2P would improve the imperfect system of international relief, thus increase the

chances of saving lives and minimizing post-disaster suffering.\textsuperscript{5} Rebecca Barber contends that while the invocation of R2P for military intervention in Myanmar was premature, the doctrine as such does have potential.\textsuperscript{6} Tahmika Ruth Jackson is more optimistic about humanitarian intervention based on R2P and believes that R2P could give reasoned, dispassionate guidelines to concerned states.\textsuperscript{7}

In contrast, there are those who contend that R2P poses serious challenges to the principles of sovereignty and non-intervention.\textsuperscript{8} R2P would be a flawed basis for the obligation to accept disaster assistance, mainly because of strong resistance from states to applying the doctrine to state conduct in natural disasters along with strong humanitarian and theoretical arguments against it.\textsuperscript{9} R2P’s orientation toward the use of force has attracted humanitarian concerns that it could politicize relief activity and destabilize the affected areas.\textsuperscript{10} Some argue that the cost to state sovereignty may not be an acceptable price to pay for the protection of victims in natural disasters.\textsuperscript{11} In their view, R2P cannot be construed as a right to enter foreign territory without the consent of the territorial state or without UNSC authorization.\textsuperscript{12}

In order to decide whether R2P could be applied to state conduct in the face of natural disasters, I first evaluate the normative development of R2P and its practice. Although the concept of R2P was delineated in the 2005 World Summit Outcome Document (Summit Outcome) and elaborated in the UN Secretary-General’s Report on Implementing the Responsibility to Protect (Report on Implementing R2P), it remains uncertain how best to implement the doctrine, especially for the use of force. The uncertainty of what positive obligations R2P would entail


\textsuperscript{6} Rebecca Barber, “The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study” (2009) 14:1 J Confl & Sec L 3 at 33 [Barber].


\textsuperscript{9} Ibid at 432.

\textsuperscript{10} Ibid at 434.

\textsuperscript{11} Ibid at 436.

creates a problem of indeterminacy. I locate the indeterminacy by evaluating state practice and the UNSC’s reflections on R2P. As R2P is unable to convey clear expectations for states about what they should do with this doctrine, they could choose to trigger or ignore R2P in humanitarian crisis response. For example, Russia invoked R2P to deal with the Georgia crisis (2008), despite no evidence that genocide or other mass atrocities existed in Georgia. In contrast, ethnic cleansing, war crimes, and crimes against humanity were committed in Somalia between 2006 and 2008, but governments or diplomats did not propose to use R2P in diplomatic discourse. R2P has not produced an adequate compliance pull amongst states. They may circumvent R2P if they want without being-condemned for violating this doctrine.

Meanwhile, I question the role played by R2P in the UNSC’s decision on the use of force. Although the UNSC adopted Resolution 1973 permitting intervention in Libya, R2P did not play a determining role in facilitating the authorization. The majority of the UNSC members did not employ R2P to justify their position. The Libyan intervention did not proceed as the UNSC expected to save civilians but instead the military intervention aggravated the situation. Libya is now a failed state, with no effect central government and several militia groups fighting each other for control of Libya. The Libyan intervention and its consequences discouraged certain members of the UNSC to support the authorization of coercive measures in resolving the Syrian crisis. Their attitude towards armed intervention had shifted back to its earlier reluctance. As a result, R2P may encounter more uphill battles for its acceptance and application due to the indeterminacy of the outcomes of the use of force in any given state.

In what follows, I explore the relationship between R2P and state conduct in response to natural disasters by using the Myanmar example among others. It is my contention that R2P is not well equipped to deal with humanitarian crises as its problem of indeterminacy produces lack of compliance amongst states and inhibits itself from having evident influence on the UNSC’s authorization of intervention. The weakness of the R2P arguments in the natural disaster context becomes glaringly obvious when a wider skepticism was voiced and stronger resistance came from states. The proposal of France to trigger R2P in Myanmar’s refusal to accept wholesale humanitarian aid, especially from western countries, received little support. As well, in the debate surrounding the International Law Commission (ILC)’s work on the Protection of Persons in the Event of Disasters (PPED), most members, “representing various regions, economic interests, and political dispositions,” have denied the relevance between R2P and natural disaster
response. This position was shared by the UN Secretary-General in the Report on Implementing R2P and the ILC’s Special Rapporteur on the PPED.

Expanding the R2P scope to include natural disaster response may undermine the consensus reached at the World Summit, which had restricted R2P to the four enumerated crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. These crimes are the deliberate and premeditated acts and omissions of individuals and groups and therefore engage the responsibility of states in which they occur to stop them and punish perpetrators, failure of which may trigger the responsibility of the international community to intervene. However, natural disasters are acts of God or force majeure; a state in whose territory they strike cannot be held accountable for what it had not control over. R2P’s close connection with the use of force makes it a particularly problematic mechanism for disaster response. In addition, even if one were to assume that R2P is legally tenable, the natural disaster situation does not involve the sorts of events/actions that would trigger R2P. By analyzing the crisis in Myanmar, I argue that the local government’s restrictions on external assistance cannot be regarded as a crime against humanity.

I also doubt the need to relate state conduct in natural disasters with R2P crimes as a means to coerce a state to accept assistance. In any case, it is unnecessary to resort to an emerging, fragile and controversial concept like R2P because much more foundational concepts, such as state sovereignty and international cooperation, are available. In contrast to R2P’s shaky foundations, the principles of sovereignty and non-intervention are more theoretically and politically tenable. They can better direct state conduct in natural disasters. The principles of sovereignty and non-intervention entail that the affected state should play a primary role in the direction, control, coordination, and supervision of relief activities. International actors must make a request to the affected state if they want to provide assistance. When met with multiple assistance requests, the affected state can independently decide to accept or reject these requests (the consent rule).

Even in circumstances where restrictions are intense and humanitarian needs are urgent, there is no need to turn to the concept of R2P. A more promising legal avenue to pursue may be to explore the relatively well established notion that sovereignty is not absolute. In fact, the ILC has

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13 Heath, supra note 8 at 432, n 46.
14 Ibid, n 47.
pursued this approach by elaborating the relevant developments in international cooperation to balance the principle of sovereignty. When a state is unwilling to accept international aid, the principle of international cooperation enshrined in the UN Charter and other international instruments may create a possibility that the state were persuaded to consent to external aid by its commitment to international cooperation. The Myanmar crisis was finally resolved through international cooperation rather than a more radical means of invoking R2P. A “Tripartite Core Group” was established after representatives from Myanmar, ASEAN, and the UN consulted with each other, which proved to be an effective platform to establish mutual trust. Through the efforts of this group, international actors were allowed to enter Myanmar.15

15 Trascasas, supra note 3 at 238.
Chapter 1
The Conceptual Evolution of R2P and Its Practice

1 The Major Normative Development

Discussing the normative evolution and practice of the doctrine of R2P serves as a prerequisite and also provides a background for the discussion of whether R2P can be extended to state conduct in natural disasters. The doctrine emerged as an attempt to provide guidance for responses to mass atrocities and bridge the divide between intervention and state sovereignty when the international community did not recognize that “humanitarian intervention” could justify the military intervention in Kosovo in 1999.\textsuperscript{16} Compared to humanitarian intervention, R2P emphasizes that the primary responsibility of a state is to protect its population, and also suggests that the international community should assist the state. This doctrine has achieved worldwide attention due to its moral purpose of protecting civilians and preventing humanitarian disasters. The application of this doctrine, however, has caused an intense debate as divergence of opinion exists over the extent to which the international community can interfere with internal affairs of a state when it is unable or unwilling to protect its population and “the potential for [R2P] to legitimize coercive interference.”\textsuperscript{17} These issues touch on the fundamental principles of international law, such as the principles of non-intervention and prohibition on the threat or use of force.

The R2P concept was initiated in 2001 by the International Commission on Intervention and State Sovereignty (ICISS), determined to, “ensure the avoidance of future Rwandas and Kosovos.”\textsuperscript{18} The ICISS, in its report entitled The Responsibility to Protect,\textsuperscript{19} shifted its focus

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\textsuperscript{16} Barber, \textit{supra} note 6 at 13; Max W Matthews, “Tracking the Emergence of a New International Norm: the Responsibility to Protect and the Crisis in Darfur” (2008) 31:1 Boston College Intl & Comp L Rev 137 at 139 [Matthews]. There is another opinion that R2P was devised to “lay the foundation for an international consensus on the legality of humanitarian interventions.” See Ford, \textit{supra} note 1 at 261-262. More analyses regarding the question of whether international law should allow humanitarian intervention can be seen in Dapo Akande, “The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect” (28 August 2013), \textit{The European Journal of International Law} (blog), online: <http://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/>.

\textsuperscript{17} Bellamy, “Five Years”, \textit{supra} note 2 at 148.

\textsuperscript{18} Justin Morris, “Libya and Syria: R2P and the Spectre of the Swinging Pendulum” (2013) 89:5 Intl Affairs 1265 at 1269 [Morris].
from the “right to intervene” to the discussion of the primary responsibility of a sovereign state to protect its populations from “serious and irreparable” harm or threats as well as the subsidiary role the international community plays in case that the state is unable or unwilling to rescue its populations. After the ICISS report was released, states often referred to the notion of R2P in international debates or diplomatic agenda regarding the prevention of genocide and mass atrocities as well as the protection of victims. International organizations, non-governmental organizations and independent institutions were also trying to use this notion to “justify behavior, cajole compliance, and demand international action.”

The 2005 Summit Outcome is regarded as the most influential document on R2P. This document was unanimously adopted by all UN member states at the 2005 UN World Summit in the form of the UN General Assembly (UNGA) Resolution 60/1. The document narrowed the scope of R2P by restricting its application to four specified crimes. Specifically, Heads of State and Government agreed to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The Summit Outcome Paragraphs 138 and 139 contain a detailed explanation on R2P, which can be summarized as:

The primary responsibility to protect populations from the four [enumerated] crimes lies with each individual state, but that the international community also has a responsibility to assist states in reaching their capacity to do so. Should a state ‘manifestly fail’ to uphold this commitment, the international community has a responsibility to protect those affected by the consequences of this failure.
As well, this document requires that R2P be undertaken collectively and through the UNSC in a “timely and decisive manner” under the UN Charter (Chapter VII), “on a case-by-case basis” and only if, “peaceful means be inadequate.” These requirements have been reiterated by the UNSC through Resolution 1674 of 2006 and Resolution 1894 of 2009.

The progress in implementing the Summit Outcome Paragraphs 138 and 139 was addressed by UN Secretary-General Ban Ki-Moon in the Report on Implementing R2P on 12 January 2009. He indicated that R2P consisted of three pillars allocated with similar importance: (1) an individual state bears the primary responsibility to protect its populations from the four mass atrocity crimes of genocide, ethnic cleansing, war crimes and crimes against humanity, as well as protect them from being incited (Pillar One); (2) the international community commits to assist the state to fulfill its responsibility (Pillar Two); (3) the international community should fulfill its responsibility in a “timely and decisive manner” in accordance with the UN Charter and under the circumstance where a state is manifestly unable to protect its populations from the four crimes (Pillar Three).

The first informal debate on R2P was conducted in July 2009 within the UNGA. Ninety-two member states and two observers participated in this debate. Resolution 63/308 entitled The Responsibility to Protect was the first resolution adopted by the UNGA specifically devoted to R2P. While this resolution simply “[recalled] the 2005 World Summit Outcome, especially paragraphs 138 and 139 thereof” without confirming whether to accept the R2P concept defined in these paragraphs, its decision to “continue its consideration of [R2P]” reflected that R2P had been included on the agenda of the UN agencies. Thus far, the UN Secretary-General has released six annual reports to reflect upon different themes on the operationalization of R2P.

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25 Trascasas, supra note 3 at 234; Summit Outcome, supra note 23 at para 139.
26 UNSC, Resolution 1674, 5430th Mtg, UN Doc S/RES/1674, April 2006.
28 UNGA, Secretary-General, Implementing the Responsibility to Protect, 63rd Sess, UN Doc A/63/677, January 2009 [Secretary-General Report].
29 Ibid at para 11.
annual Informal Interactive Dialogue was held concurrently to provide new findings and recommendations to these reports.31

2 Military Intervention within the R2P Concept

In line with the purpose of the UN Charter to protect “fundamental human rights and dignity and worth of the human person,”32 the R2P concept outlined in the texts above attempts to prevent and suppress the occurrence of large scale loss of life within the international law framework. R2P appears to obtain more support from states than the doctrine of humanitarian intervention does. For example, the African Union has shown a strong interest in R2P by endorsing it at a regional level.33 Also, the Non-Aligned Movement of states used to remain vigilant to R2P’s connection with humanitarian intervention and the effects R2P may have on sovereign states. But later many of its member states abandoned their skepticism on R2P.34 However, while opposition to the R2P concept itself seems to be shrinking, the elaboration and implementation of this concept is still controversial, especially for the use of force.35

Under the R2P framework, military intervention is placed on a broader continuum of measures that the international community may draw upon in order to cope with genocide and mass atrocities.36 Chapter Four of the ICISS report outlined the threshold and precautionary criteria for the use of force: “just cause, right intention, last resort, proportional means and reasonable

31 The UN Secretary-General’s Reports included: UNGA, Secretary-General, Implementing the Responsibility to Protect, 63rd Sess, UN Doc A/63/677, January 2009; UNGA, Secretary-General, Early Warning, Assessment and the Responsibility to Protect, 64th Sess, UN Doc A/RES/64/864, July 2010; UNGA, Secretary-General, The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect, 65th Sess, UN Doc A/RES/65/877, June 2011 [UNGA 2011]; UNGA, Secretary-General, Responsibility to Protect: Timely and Decisive Response, 66th Sess, UN Doc A/RES/66/874, July 2012; UNGA, Secretary-General, Responsibility to Protect: State Responsibility and Prevention, 67th Sess, UN Doc A/RES/67/929, July 2013; UNGA, Secretary-General, Fulfilling Our Collective Responsibility: International Assistance and the Responsibility to Protect, 68th Sess, UN Doc A/RES/68/947, July 2014. The corresponding UNGA dialogues can be seen at Global Centre for the Responsibility to Protect, Summaries of UN General Assembly Dialogues on the Responsibility to Protect, online: Global Centre for the Responsibility to Protect <http://www.globalr2p.org/about_r2p>.

32 See Charter of the United Nations, 26 June 1945, Can TS 1945 No 7 at Preamble [Charter].


34 Ibid at 200, 205.

35 Ibid at 204-205.

36 Bellamy, “Five Years”, supra note 2 at 143.
prospects.”37 The Secretary-General’s Report on Implementing R2P explicitly referred to the possibility that the UNSC and the UNGA will use military intervention. Paragraph 56 of this report concerned the procedures for the UN to authorize the use of force. It mainly referred to three methods of authorization: first, the use of force is authorized by the UNSC in accordance with the UN Charter Article 41 or 42; second, it is authorized by the UNGA according to the procedure of “Uniting for Peace”; third, it is authorized by regional or sub-regional organizations on the basis of UN Charter Article 53 with the UNSC’s prior authorization.38

In contrast to the ICISS’s opinion that unilateral action may be allowed in times of the UNSC failing to react to humanitarian crises,39 the Summit Outcome and the Secretary-General’s Report on Implementing R2P appear to restrict military intervention within the UN framework. The three-pillar approach was adopted to fashion R2P into a less confrontational doctrine, which is different from the meaning of R2P as envisaged in the ICISS report. This approach tried to attach less importance to military intervention and rejected the possibility of intervention without the UNSC’s authorization.40 Meanwhile, it introduced the concepts of “prior preventive” and “subsequent building efforts” for the protection of people.41 Nevertheless, uncertainties and disagreements were still evident on the parameters of collective action such as who could decide whether a situation fell within the four crimes and under what circumstances the UNSC could trigger the measures under Chapter VII of the UN Charter.42 But neither the Summit Outcome nor the Report on Implementing R2P had reflected on the ICISS’s recommendation for a more specific, “criteria to guide decision-making on the use of force.”43

37 ICISS, supra note 19 at para 6.1.
38 Secretary-General Report, supra note 24 at para 56.
39 ICISS, supra note 19 at XII, 47-55, XIII, cited in Brunnée & Toope, supra note 33 at 195.
40 Bellamy, “Five Years”, supra note 2 at 143.
41 Trascasas, supra note 3 at 234.
42 Brunnée & Toope, supra note 33 at 202, nn 59-60.
43 Ibid at 197; Bellamy, “Five Years”, supra note 2 at 143.
3 Evaluating R2P in Practice

Despite a large amount of norm-development efforts in R2P, the doctrine has not become a binding norm of international law. R2P has not been enshrined in any treaty or evolved as an international custom and thus it does not form part of a state’s obligations under current international law. The failure of a state to fulfill R2P will not lead to any international legal repercussions under treaty or customary law. A review of why R2P has not become a binding norm is beyond the scope of my research. But I locate the problem of indeterminacy in R2P by evaluating state practice and the UNSC’s reflections on R2P and question the additional value R2P may contribute to the existing regime with regard to humanitarian crisis response.

A closer look at the three-pillar approach reveals that while R2P’s Pillar One restates the existing international law that “states are legally and morally required not to intentionally kill civilians,” it remains uncertain how Pillars Two (the international community’s commitment) and Three (timely and decisive response) can be best implemented. These two pillars could not suffice to convey a clear expectation for states, which Alex Bellamy called as the problem of indeterminacy. In contrast to Pillar One’s certain expectation for states to protect people from genocide, ethnic cleansing, war crimes, and crimes against humanity, the other two pillars exert uncertain demands for international compliance. The indeterminate expectation may give states a lot of discretion on how they could deal with R2P, which in turn undermines the doctrine’s capacity to generate “compliance pull” among states. Also, the inadequate compliance pull lowers R2P’s influence on the UNSC’s decision to resolve humanitarian crises.

3.1 Practice by States

R2P’s indeterminacy produces an insufficient compliance pull in states. They could choose to trigger or ignore this doctrine when dealing with humanitarian crises. This doctrine was triggered

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44 See Matthews, supra note 16; Carsten Stahn, “Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?” (2007) 101:1 AJIL 99 [Stahn], as cited in Brunnée & Toope, supra note 29 at 192. Brunnée & Toope also shared this assessment, see Brunnée & Toope, supra note 33 at 193.

45 Bellamy, “Five Years”, supra note 2 at 160.

46 Ibid at 161-162.

47 Ibid at 162.
in some crises that did not fall within the four enumerated crimes, whereas it was not fully implemented or even circumvented by states in some crises where the need for triggering R2P seemed so urgent. The inconsistent state practice in R2P further obscures the expectations of the doctrine and worsens the problem of indeterminacy.

A study conducted by Bellamy assessed the efforts made to implement R2P in humanitarian crises between 2005 and 2010. He indicated that R2P had been applied by states inconsistently.\textsuperscript{48} For example, the application of R2P in the post-election ethnic violence in Kenya (2007-2008) may be the sole example of R2P use that was relatively uncontroversial.\textsuperscript{49} But in 2008, Russia’s justification of its unilateral armed intervention in Georgia on the basis of R2P was widely rejected as no evidence showed genocide or other mass atrocities were committed in Georgia. Neither did Georgia fully lose ability to protect its people.\textsuperscript{50} In the same year, France tried to trigger R2P in the aftermath of natural disasters in Myanmar where the local government had failed to provide or permit sufficient humanitarian assistance to victims. But connecting R2P with disaster relief, which was beyond the four enumerated crimes, sparked an intense debate on the relationship between R2P and state inaction in natural disasters.\textsuperscript{51} By contrast, ethnic cleansing, war crimes, and crimes against humanity were committed in Somalia between 2006 and 2008, causing 16500 civilians to be killed and 1.9 million displaced. The international community seemed hesitant to mention R2P in diplomatic discourse.\textsuperscript{52} The same circumventions also occurred in the crises of Afghanistan (2001) and Iraq (2003).\textsuperscript{53}

### 3.2 The UNSC’s Reflections on R2P

The role R2P plays in the UNSC’s decision is not evident. The UNSC adopted Resolution 1973 permitting intervention in response to the Libyan crisis and the North Atlantic Treaty Organization (NATO) led the military intervention in Libya. Although the UNSC for the first

\begin{flushright}
\textsuperscript{48} Ibid at 148.
\textsuperscript{49} Ibid at 154.
\textsuperscript{50} Ibid at 148-151.
\textsuperscript{51} Ibid at 149-152.
\textsuperscript{52} Ibid at 156.
\textsuperscript{53} Ibid at 148-150.
\end{flushright}
time mandated “military intervention in a sovereign state against the express will of that state’s government,” 54 R2P’s influence on facilitating the intervention was exaggerated. 55 An examination conducted by Justin Morris, based on the official record of the UNSC’s deliberations on Resolution 1973, revealed that most of the UNSC member states had not cited R2P to justify their position over the Libyan crisis. 56 Only France and Colombia referred to R2P’s Pillar One that Libya had the responsibility to protect its populations but without mentioning the international community’s responsibility when Libya failed to undertake its responsibility (Pillars Two and Three). 57 The lack of reference to R2P or even the avoidance of its Pillars Two and Three was also reflected in Resolutions 1970, 2016 and 2040, and other ten UNSC meetings’ records. 58

Similarly, in the debates over the Syrian crisis, R2P was not regularly cited as the normative basis for international action, 59 which may suggest that “the R2P effect was far smaller than is often claimed.” 60 Compared to their passionate discussion on the doctrine’s merits in theory, states were less motivated and more cautious to trigger the doctrine in the face of real crises. Such inadequate reference revealed the marginal role of R2P in influencing states’ decisions on the intervention. Without positive obligations defined under R2P, the UNSC members could be selective in citing R2P as a justification for their position.

The coercive measures under R2P do not add anything new to the UNSC’s authorization on the use of force. The Summit Outcome had limited the right to exercise R2P and authorize intervention within the UNSC. Even if the Secretary-General’s Report on Implementing R2P suggested that the UNGA, under the “Uniting for Peace” procedure, can reflect upon the intervention for international peace and security when the UNSC fails to do so, 61 the UN

54 Morris, supra note 18 at 1271.
55 Ibid at 1265.
56 Ibid at 1272-1273.
57 Ibid at 1272.
58 Ibid at 1272-1273.
59 Ibid at 1276.
60 Ibid at 1277.
61 Secretary-General Report, supra note 28 at para 63.
members have not agreed on the suggestion. Because only when the UNSC authorizes the use of force can a military intervention be justified, R2P does not automatically provide a legal basis for intervention in humanitarian crises. At this point, R2P does not seem to contribute additional value to the UN Charter, but only to provide a softer explanation\(^{62}\) of when the UNSC should regard a humanitarian crisis as, “threats to the peace, breaches of the peace, and acts of aggression”.\(^{63}\) What is worse, the crises in Libya and Syria denote that the attitude of some UNSC members towards military intervention has shifted back to its earlier reluctance. As a result, R2P may encounter more uphill battles for its application due to its orientation toward the use of force.

When voting Resolution 1973, the UNSC member states had divergence of opinion over the means to mandate the intervention and the need to use force. Germany, Brazil, India, China and Russia abstained from the voting.\(^{64}\) These five states, at varying degrees, expressed their concerns and even anxiety over the efficacy of the armed intervention as well as the “ambiguities of the authorization.”\(^{65}\) With the military operation proceeding in Libya, the concern with Resolution 1973 and the use of armed force became more evident.\(^{66}\) The Secretary-General, in the report on the Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect, readdressed the role of non-coercive measures as timely and decisive response to crisis.\(^{67}\) He became less confident about the coercive measures, “[t]hough [the Chapter VII methods] might be the most visible and dramatic instruments in the [R2P] repertoire, they are just the tip of the proverbial iceberg.”\(^{68}\) Many states echoed this statement,

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\(^{62}\) Ford, supra note 1 at 246.

\(^{63}\) See Charter, supra note 32 at Chapter VII.


\(^{65}\) Morris, supra note 18 at 1272; Bellamy, “Libya and R2P”, supra note 20 at 267.

\(^{66}\) See e.g. South Africa “remains concerned about the implementation of…resolutions 1973” and doubted the NATO’s method of “[u]nfreezing assets to support one side of the conflict would…[violate] the sanctions regime and further complicate the situation.” It even considered the practice in Libya may set “a dangerous precedent that will surely damage the credibility of the Council and its resolutions.” in UNSC, The Situation in Libya, 6595th Mtg, UN Doc S/PV.6595, July 2011 at 5.

\(^{67}\) UNGA 2011, supra note 31 at para 30.

\(^{68}\) Ibid.
recalling that “under [R2P], the use of force related only to exceptional circumstances as a tool of last resort.”

The international community’s skepticism towards the military authorization was aggravated by the NATO action. The UNSC voted to terminate all military action in Libya on 27 October 2011 after the last remnants of the Qaddafi regime were defeated. There were assessment concluding that the military intervention “significantly exacerbated humanitarian suffering in Libya…as well as security threats throughout the region,” even if it had been justified on the humanitarian grounds of the protection of civilians. Rather than resolving the crisis quickly, the intervention prolonged the Libyan civil war and multiplied the total number of military and civilian casualties. In fact, NATO could have ended the military action early when the African Union proposed a cease-fire plan for a compromise between Gaddafi and the Libyan rebels. However, NATO chose to favor the rebels’ insistence that Gaddafi had to surrender his political power rather than consider, “a negotiated settlement that could have saved thousands of lives.” Even Bellamy, a keen R2P advocate, criticized the effect of this intervention as “highly imperfect.” NATO seemed to provide “indirect and patchy protection” to civilians but at the sacrifice of “long-term stability” in their homeland.

It became more difficult to fulfill R2P by means of military action in the aftermath of the Libyan intervention in other crises. The negative impact of the military intervention in Libya resulted in a different UNSC decision on the crisis in Syria. China and Russia’s vetoes led to the failure of

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69 International Coalition for the Responsibility to Protect, Interactive Dialogue of the UN General Assembly on the Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect, online: International Coalition for the Responsibility to Protect <http://www.responsibilitytoprotect.org/ICRtoP%20Report%20on%20RIGO%20GA%20dialogue%20on%20RtoP%20FINAL%281%29.pdf> at 7 [ICRtoP].


71 Kuperman, ibid at 132.

72 Ibid at 132-133.

73 Ibid at 135.

74 Bellamy, “Libya and R2P”, supra note 20 at 269.
adoption of a UNSC resolution on intervention in Syria. The Russian delegation, in a UNSC meeting regarding the situation in the Middle East, did not consider the current Syrian situation as “a threat to international peace and security” despite “increasing tension and confrontations.” The delegate from China called on the crises to be resolved “through political dialogue” and in “an appropriate manner.”

So far, the UNSC has not authorized an intervention in Syria as it did in the Libyan crisis. The different approaches reflect the fact that attitudes of some UNSC members towards military intervention in humanitarian crises of a sovereign state have shifted back to their earlier reluctance. In an open debate over the Syrian crisis on 31 January 2012, the US, the UK and France, the three permanent members, with some other member states, demanded a “Draft Resolution Backing Arab League Proposal” to resolve the deteriorating situation. The other two permanent members, China and Russia, however, insisted that the crisis could only be resolved through negotiation and dialogue. China firmly opposed the use of force and deliberate attempts to force regime change,” and stressed these acts violated the UN Charter principles. Russia affirmed that it would not support any resolution containing sanctions against Syria and the terms regarding the use of force, nor would it agree to any resolution that may facilitate potential intervention in Syria. Opposition from China and Russia may be rooted in their concern that the Libyan tragedy may recur in Syria and/or in their caution against widening the scope for intervention.

### 3.3 The Concern for Selective Practice


76 **Ibid.**

77 **Ibid.**


79 **Ibid.**

80 **Ibid.**

81 Morris, *supra* note 18 at 1276.
Concerns over selective implementation of R2P have arisen from both states and the UN. In 2009, the UNGA debate over R2P reflected on the issue of “selectivity and double standards”. Some countries questioned the western countries’ double standards on military intervention and requested that R2P be implemented consistently.82 This concern increased after NATO intervened in Libya. Some considered the NATO intervention as one example of the UNSC’s selective nature, causing new doubts about the application of R2P.83 Ireland even contended that the authority and reputation of the UN and its member states were affected by the questions of “when and how we apply the doctrine, whether we are faithful to the three-pillar approach, whether we hold ourselves to the principle of non-selectivity.”84

In response, the former UNSC’s Special Advisor on R2P, Edward C. Luck, argued that, “[N]o two situations are identical so a single response mechanism cannot and should not be applied.”85 The Secretary-General also shared this point of view, “As the principle moves from words to deeds on both the global and regional levels, what is needed is an early and flexible response tailored to the circumstances of each case rather than any generalized or prescriptive set of policy options.”86 However, it is noteworthy that the Secretary-General had previously stated, in the Report on Implementing R2P, that “the credibility, authority and hence effectiveness of the [UN] in advancing…[R2P] depend, in large part, on the consistency with which they are applied. This is particularly true when military force is used to enforce them.”87 Both Luck and the Secretary-General tried to attribute the inconsistent implementation of R2P to the complexity of different humanitarian crises. But their suggestions of a flexible mechanism in response to crises further increased the uncertainty on how R2P could be exercised.

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82 “Algeria, Democratic People’s Republic of Korea (DPRK), and Qatar-drew particular attention to what they saw as an inconsistent response to the bombardment of Gaza in January 2009, or Israel’s occupation of Palestine-a point made also by the Palestine observer mission.” In Global Centre for the Responsibility to Protect, Implementing the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment, online: Global Centre for the Responsibility to Protect <http://www.globalr2p.org/media/files/gcr2p_-general-assembly-debate-assessment.pdf> at 6.

83 ICRtoP, supra note 69 at 7.

84 Ibid.

85 Ibid.


87 Secretary-General Report, supra note 28 at para 62.
Chapter 2
Is R2P Applicable in Disaster Relief?

1 The Myanmar Crisis and the ILC’s Debate

In response to Myanmar’s restrictions on external aid, the international community had two opposite approaches. One was to adopt peaceful means. Samak Sundaravej, the then Prime Minister of Thailand, visited Myanmar to persuade the military junta to accept international aid. Ban Ki-Moon, in several statements, called upon Myanmar immediately to consider accepting external assistance. China also repeatedly called on Myanmar to cooperate with the international community.88

The second approach by those dissatisfied with Myanmar’s inaction favored intervention under the aegis of R2P. Kouchner proposed that the UNSC apply R2P and authorize international relief operations without Myanmar’s consent, on the grounds that refusal to humanitarian assistance constituted a crime against humanity.89 Lloyd Axworthy, a former Foreign Minister of Canada, argued from a moral perspective that innocent persons killed by “machete or AK-47” didn’t differ from those “starving to death or dying in a cholera epidemic that could have been avoided by proper international response.”90 Some UK and US officials also regarded Myanmar’s inaction as a “man-made catastrophe” or a “criminal neglect”.91 Forty-three legislators from the US even advocated their government to conduct “humanitarian intervention” into Myanmar to rescue victims.92

89 Bellamy, “Five Years”, supra note 2 at 152.
91 See Ford, supra note 1 at 232, n 29.
These proposals aroused the concern that using R2P to authorize the delivery of disaster relief in a non-consenting state would equate the doctrine with forced military intervention.\(^93\) China and ASEAN strongly opposed the application of R2P in disaster relief and insisted that Myanmar cannot be compelled to allow assistance.\(^94\) The UNSC ultimately did not invoke R2P to resolve the Myanmar crisis. Liu Zhenmin, the Deputy Permanent Representative of China to the UN, stated that, “The current issue of Myanmar is a natural disaster. It is not an issue for the [UNSC]. It might be a good issue for other forums of the UN.”\(^95\) He noted that the humanitarian assistance to Myanmar should not be politicized and encouraged the international community to create favorable conditions for humanitarian relief in Myanmar.\(^96\) In the end, international actors were allowed to enter Myanmar by diplomatic efforts between the Secretary-General, ASEAN and the local government rather than coercive measures based on the R2P grounds.

It is also noted that states displayed little willingness to initiate unilateral intervention to conduct relief activities.\(^97\) Several states had navy warships, vessels and aircrafts docked nearby Myanmar, but they did not take further action.\(^98\) The unwillingness could be attributed to many sources. For example, it remains unclear whether an international assistance without the affected state’s consent could effectively rescue victims. It is possible that “aerial aid drops or foreign troops” may bring more harm than good.\(^99\) A unilateral intervention may hinder aid operations because such intervention would politicize the humanitarian assistance. The local government may become more resistant to external aid or even fully terminate the acceptance of aid.\(^100\) Some humanitarian organizations, such as the International Committee of the Red Cross and Doctors

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\(^94\) Bellamy, “Five Years”, *supra* note 2 at 152; Trascasas, *supra* note 3 at 237.


\(^97\) Ford, *supra* note 1 at 266.

\(^98\) *Ibid* at 230, n 16, 266.

\(^99\) Barber, *supra* note 6 at 32-33.

\(^100\) Trascasas, *supra* note 3 at 238, n 62.
without Borders, indicated the risks of applying R2P inappropriately. They believed that the use of force in disaster relief may be counterproductive, further hampering relief to victims. Once military measures are adopted, there is no guarantee that victims could obtain protection quickly. With an additional military attack, victims may need more time to recover from the disaster.\textsuperscript{101}

Despite the failure to extend the application of R2P to the Myanmar case, the relationship between R2P and natural disasters is still being discussed. Indeed, even the ILC, the UN body charged with codifying and progressively developing international law, has reflected upon R2P since 2008, in the project of PPED.\textsuperscript{102} The ILC debate on R2P provided a window on states’ opinions. Several states welcomed/supported the ILC’s engagement with R2P. Finland and other Nordic countries contended that the ILC should focus on R2P because this doctrine was key to protecting persons in disasters. According to these countries, although the ILC’s purpose was to codify the existing obligations undertaken by states and their rights to obtain protection, the ILC was also allowed to “consider any aspect of protection and explore the connections between various areas of international law.”\textsuperscript{103} In Poland’s view, the R2P concept was closely related to the changing understanding towards the principle of sovereignty because sovereignty included not only the right of a state but also its responsibility towards individuals within its jurisdictions, namely the responsibility to protect its people from other states’ invasion and ensure their freedom from fear and deficiency. There was no compelling reason to exclude R2P from extending to natural disasters.\textsuperscript{104} Also, when unable to rescue its own people, a state cannot interpret the principles of sovereignty and non-intervention as a reason to deny external assistance.\textsuperscript{105}

However, the majority of states held that R2P was irrelevant in the context of natural disasters. Russia believed that R2P was only relevant to grave crimes and could not find its place in the

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\textsuperscript{101} \textit{Ibid}, nn 62, 64.
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India’s argument was that the affected state played a primary role in protecting people in its territory. The state’s sovereignty and primary role had been confirmed by several UNGA resolutions. Japan shared this opinion and noted that a state’s consent was critical to the provision of humanitarian assistance. R2P could only be limited to extreme cases, such as the occurrence of persistent and massive violations of human rights. Iran believed that state consent to international cooperation was in accordance with the principles of sovereignty and non-intervention. Iran, China and Sri Lanka were concerned with R2P’s political nature and its status in international law. Other opponents included the US, the UK, Venezuela, Czech, Spain, Ghana and Ireland. The arguments these states made on whether R2P could apply to state inaction in the face of natural disasters were mainly surrounding the scope and legal status of R2P and the challenges this doctrine may pose to the principles of sovereignty and non-intervention.

2 The Scope of R2P and Natural Disasters

Aside from the difficulties encountered in implementing R2P, opponents of so extending R2P to state conduct in disaster response believe too broad application of R2P may further undermine the consensus reached at the World Summit, which has become fragile after states conducted...
inconsistent and selective practice in R2P and the UNSC members were reluctant to reflect upon this doctrine in real crises. Granted, one might say R2P’s Pillars One and Two may be the most relevant in strengthening the home state’s duty to ensure/allow relief; and the international community’s responsibility to press/work towards admission of relief, short of force. That would all hinge on whether the triggering events are present. In this section, I discuss the scope of R2P as defined above and then, in the next section, I consider the triggering crime issue more closely.

International documents regarding R2P have restricted this doctrine’s implementation. The ICISS report only indicated the application of R2P to “extreme and exceptional cases”. The Summit Outcome further narrowed its scope to the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. Only when one or more of the four crimes are committed by a state could the UNSC or relevant regional organization have the right to take action. In 2009, UN Secretary-General restated this restrictive scope in which R2P only applies to four specific crimes before other decision has been made. If this norm extends to the field of natural disasters, then the consensus reached at the World Summit will be undermined. The over-expansion of R2P will deviate this norm from its original purpose, or lose its “operational utility”.120 The position that R2P did not apply to disaster response was also endorsed by Eduardo Valencia-Ospina, the ILC’s Special Rapporteur on the PPED, after a wide consultation with ILC members.121

The exclusion of the response to natural disasters from the Summit Outcome as a cause to justify military intervention was a notable evidence to show states’ caution against a broad scope of R2P. The ICISS report had envisioned natural disasters as one of the “just cause” to invoke “military intervention for human protection purposes.”122 Specifically, a military intervention on the R2P basis may be justified when there are “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.”123 However, such a proposal was not supported by the UN High-level Panel on Threats, Challenges and Change. The Panel, in

120 Secretary-General Report, supra note 28 at para 10 (b).
122 ICISS, supra note 19 at paras 4.19-4.20.
123 Ibid at para 4.20.
its report entitled A More Secure World: Our Shared Responsibility,124 concentrated on the issue of “intervention in man-made catastrophes” rather than “the connection between intervention and natural disasters.”125 Similarly, the Summit Outcome drew a distinction between R2P and natural disasters. The document did not mention natural disasters in its paragraphs 138 and 139 that were devoted to R2P. Instead, natural disasters were addressed in the parts concerning the specific disaster response frameworks, such as the Hyogo Framework for Action 2005-2015: Building the Resilience of Nations and Communities to Disasters.126

Excluding disaster response may be explained as a compromise to seek worldwide consensus on R2P and reduce its contentious nature. Advocates of R2P attempted to develop R2P as “one of the most important normative advances in global governance since the Second World War.”127 So they worded this norm in a less confrontational language and also set a fairly high threshold to trigger R2P. Military intervention could only be justified to prevent genocide, war crimes, ethnic cleansing and crimes against humanity. Stretching R2P beyond its recognized scope (e.g. apply this doctrine to prevent death caused by natural disasters) may diminish its intended function to provide “legal and normative foundation for a military intervention to stop killings.”128 The lowered threshold of R2P not only undermines the consensus reached by numerous efforts but may also produce the risk of abuse and misuse of this concept, weakening potential support for combating atrocities.129

After all, natural disaster relief is unlike the humanitarian assistance justified by R2P. These two concepts differ in who will implement these arrangements. Relief assistance could be carried out by states, international organizations, multinational corporations, or even individuals. However, 

126 Summit Outcome, supra note 23 at para 56 (g); Harrington, ibid at 144.
127 Barber, supra note 6 at 34.
128 Ibid.
R2P is generally regarded as a collective measure that has to be undertaken by the UNSC or by regional or sub-regional organizations with the UNSC’s prior authorization. While relief assistance and R2P both stress that the international community may take action to assist a state when the state is unable or unwilling to protect its people, they also differ in the way they are executed. In disaster response, the international community conducts humanitarian relief by providing subsistence supplies and organizing search and rescue teams to undertake medical protection and epidemic prevention. In regards to R2P, the international community should first take diplomatic, humanitarian and other peaceful measures. Military intervention under the UNSC’s authorization can only be conducted when the crisis cannot be solved in peaceful manners. Thus, the fulfillment of R2P touches upon the sensitive issue of military intervention.

In order to operationalize R2P, UN Secretary-General emphasized the value of prevention and early response in the three-pillar strategy. Pillars One and Two embraced both the home state and the international community’s responsibility to provide a sound protection for people from genocide, ethnic cleansing, war crimes and crimes against humanity. In Pillar Three, measures were further suggested to realize timely and decisive response, including “peaceful measures under Chapter VI of the Charter, coercive ones under Chapter VII and/or collaboration with regional and sub-regional arrangements under Chapter VIII.” Nonetheless, as I point out earlier, Pillars Two and Three do not suffice to exert determinate expectation for the international community. It remains unclear “what it means to invoke [R2P]...to justify something other than forced intervention.” Military intervention is regarded as the most visible and dramatic options triggered by R2P. In natural disasters, relief without consent will almost by definition require some measures of “force”.

The association with the use of force renders R2P “particularly problematic for disaster response operations.” If a relief assistance is conducted in a coercive way justified by R2P, then foreign military forces may enter the affected state to deliver assistance. Serious doubts arose that

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130 Secretary-General Report, supra note 28 at 2.
131 Ibid at para 11 (c).
132 Heath, supra note 8 at 433.
133 UNGA 2011, supra note 31 at para 30; Heath, ibid at 433-434.
134 Heath, ibid at 434.
disaster relief may be politicized and the Red Cross or other humanitarian organizations’ efforts in delivering aid may also be reversely affected. I agree with Heath’s opinion that, “In the context of genocide, crimes against humanity, ethnic cleansing, or war crimes, there is a clear need for military force to separate warring parties, defend victims against use of force by the state, and apprehend international criminals.”136 But conducting military intervention in natural disasters simply to provide humanitarian aid is likely to misinterpret the security function of the use of force.137 The differences between humanitarian assistance in natural disasters and in other humanitarian crises (e.g. genocide) have also been noted by states. At an UNGA plenary session regarding R2P, China indicated that international assistance to victims in natural disasters should be separated from humanitarian aid in fulfilling R2P, so that disaster relief could be provided neutrally and impartially and the abuse of R2P could be avoided.138

3 Does Inaction to Relief Assistance Constitute the R2P Crimes?

Even if one were to assume that R2P has legal force, I argue that the natural disaster situation does not involve the sorts of events/actions to which R2P is meant to apply. In the Myanmar case, there were attempts to treat Myanmar’s inaction as one of the enumerated four crimes. Stuart Ford, after comparing the categories of genocide, war crimes, ethnic cleansing and crimes against humanity, chose to classify Myanmar’s refusals of aid from the US, the UK and France as crimes against humanity because he considered such crimes as more suitable for natural disasters than the other three crimes.139 Barber indicated the possibility of triggering such crimes

135 Ibid, n 53.
136 Ibid at 434.
137 Ibid.
139 Ford’s analysis logic is “[w]hile the situation in Myanmar did not fit easily into the confines of a traditional crime against humanity, it more closely resembles that than a war crime, genocide, or ethnic cleansing.” See Ford, supra note 1 at 234-235. See also Harrington, supra note 125 at 145; Jarrod Wong, “Reconstructing the Responsibility to Protect in the Wake of Cyclones and Separatism” (2009) 84 Denv J Intl L & Pol’y 219 at 248.
in response to immense and urgent needs of victims and “[threats] of large-scale loss of life,” and supposed that “other inhumane acts” provided in Article 7.1 (k) of the Rome Statute of the International Criminal Court (the Rome Statute) may extend to cover conducts that have restricted or refused external assistance so that the possibility of life-saving was reduced and the circumstances of the affected areas became worse.

The critical question is whether Myanmar’s restrictions on external assistance constitute crimes against humanity. The Rome Statute Article 7 defines “crimes against humanity” as a range of acts “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” This article further enumerates eleven types of acts with detailed interpretations. From the Rome Statute and relevant cases, at least three constituent elements should be satisfied to convict Myanmar of crimes against humanity in the aftermath of Cyclone Nargis: first, whether Myanmar’s reaction fell within any type of the enumerated acts; second, whether the act could be regarded as a “widespread or systematic attack” that was directed towards innocent people; third, whether the act was conducted with the knowledge of attack.

In the literature, Ford argued that the military junta had committed crimes against humanity due to its persistent refusal to external aid and R2P would then be invoked to override junta’s control. Regarding the first element, Ford believed that the junta’s inaction exacerbated the victims’ suffering and even their risk of death. Victims that had survived in the initial cyclone attack may be affected again because of the junta’s indifferent attitude. He considered such inaction as the strongest argument that the junta’s acts amounted to crimes against humanity and further clarified these acts as “murder” or “other inhumane acts”. Despite full knowledge of disaster severity and risks that more people may die without timely rescue, Myanmar did not take

140 Barber, supra note 6 at 34.
142 Barber, supra note 6 at 19.
143 Ford and Barber both based their arguments on these three elements. See Barber, supra note 6 at 19; Ford, supra note 1 at 235-236.
144 Ford, ibid at 235, 265.
145 Ibid at 244.
appropriate measures to facilitate the entry of humanitarian relief personnel into the affected areas. Instead, the government insisted on its military to transport all aids and firmly controlled the distribution of daily necessities to the affected people.\textsuperscript{146} Ford concluded that the military junta had the intention to cause death since it refused or restricted international aid.\textsuperscript{147}

The facts, however, demonstrated that the restrictions Myanmar exerted on foreign assistance were not as severe as Ford described. Evidence could be found to support the notion that Myanmar had no intention to kill its people. The domestic relief had been conducted immediately after the disaster. Despite the restriction on issuing visas for international relief personnel, Myanmar did not limit local authorities and personnel to conduct search and rescue.\textsuperscript{148} Neither did Myanmar fully refuse external aid. It chose to accept bilateral assistance rather than any form of international rescue arrangements.\textsuperscript{149} It accepted relief consignments from several countries and regions, including China, Thailand, Singapore, Japan, India and Indonesia, as well as the Red Cross Societies in Taiwan and Hong Kong. For example, tents, blankets, biscuits and other supplies from China arrived in Yangon on 7 May 2008. China also provided 30 million Chinese yuan to Myanmar for disaster relief and post-disaster recovery and reconstruction.\textsuperscript{150}

Myanmar rejected the aid from states it viewed as hostile. For example, it prevented rescue workers and supplies from the US, the UK and France entering its territory.\textsuperscript{151} Ford condemned this refusal and magnified its consequence. But his analysis sidestepped the reason why Myanmar chose to accept the aid from several Asian neighbors but refused the requests from the US, the UK and France. The refusal could be accounted for the political and ideological considerations. In 2007, the EU and the US imposed a number of sanctions on the military junta

\textsuperscript{146} Ibid at 230-233.
\textsuperscript{147} Ibid at 246.
\textsuperscript{148} Trascasas, supra note 3 at 237; Tripartite Core Group, “Post-Nargis Joint Assessment” (July 2008), UN Information Centre Yangon, online: <http://yangon/sites.unicnetwork.org/files/2013/05/post-nargis_joint_assessment_all_pages.pdf>.
\textsuperscript{149} Trascasas, supra note 3 at 236.
\textsuperscript{150} Liu, supra note 96.
\textsuperscript{151} Guo, supra note 88; Ford, supra note 1 at 230.
after it arbitrarily removed all fuel subsidies within Myanmar that caused a nationwide protest. The junta’s selective acceptance of external aid in 2008 may have been influenced by those sanctions. It is also noted that a constitutional referendum was held on 10 May 2008. Myanmar might have feared that those “hostile” states could interfere with its referendum. In contrast, Myanmar had more trust in its neighbors who had similar economic, political, and cultural backgrounds. So at this time, the Asians countries played a critical role in the coordination of aid delivery. To discount the involvement of Asian countries in providing relief to Myanmar by scholars such as Ford is to suggest that the international community means the US and Western European States.

In Ford’s analysis, Myanmar’s conduct was also regarded as inhumane acts. The evidence Ford provided was that “a very large number of people suffered a lack of shelter, food, clean water, and medical care.” I contend that such evidence does not suffice to assume that Myanmar committed inhumane acts. The lack of life necessities was a result of the cyclone not of Myanmar’s inaction. The local government had tried to provide assistance to its people but the severity of the disaster far exceeded its capacity to respond. Myanmar did not fully refuse external assistance but allowed several Asian countries to provide necessities to victims. Granted, Myanmar turned down the US and France’s requests to transport food, medical supplies, water purification systems, small boats and helicopters to victims in the remote areas; but Myanmar, just like any other sovereign states, had its own reason to choose assistance from different countries. Such a selective acceptance may inhibit victims from receiving enough assistance but it cannot be mistaken as the cause of the lack of necessities.

In addition, the judgments of the International Criminal Tribunal for the former Yugoslavia (ICTY) indicated that “[t]he denial of food, water, housing, and medical care” should be in

153 Guo, supra note 88.
155 Ford, supra note 1 at 247.
156 Ibid at 248.
conjunction with “other acts like unlawful imprisonment, physical and psychological abuse, or beatings” to constitute an inhumane act.\textsuperscript{157} It remains unclear whether the denial of those necessities alone could amount to inhumane acts. Ford claimed that the lack of aid and the devastating situation in the affected areas had afflicted the victims mentally and physically.\textsuperscript{158} However, Myanmar had not conducted unlawful imprisonment or physical and mental abuse towards its people. Myanmar’s refusal did not fall within the inhumane acts required by the ICTY judgments.

Despite the indication of Myanmar’s refusal as inhumane acts, Barber acknowledged that Myanmar did take some actions to accept external aid even though its acceptance did not satisfy the assistance requests from several states. Hence, it was difficult to argue that Myanmar’s act fell within the crimes under the Rome Statute Article 7 as the gravity of Myanmar’s restriction are not wholly comparable to those crimes.\textsuperscript{159} While Myanmar’s restrictions on external aid did not meet the just cause of military intervention, Barber envisaged a situation after the disaster that the local government has wholly refused international aid but the humanitarian needs are so urgent, then there is a need to use force.\textsuperscript{160} In Barber’s requirements, not only should the conduct be comparable in nature and gravity to the crimes in the Rome Statute Article 7, but the conduct should be analyzed on a case-by-case basis. The specific questions include how urgent the humanitarian needs are, what the potential consequences are should humanitarian assistance be denied, whether the affected state fully or partly refuses the aid, and whether the affected state adopts measure to rescue the victims.\textsuperscript{161}

I agree that these requirements are important for deciding whether or not the affected state’s act constitutes an international crime. However, I doubt the need to relate a state’s action in disaster relief with the R2P crimes and then to invoke R2P to justify forced intervention. In any case, it may not be necessary to resort to an emerging, fragile and controversial concept like R2P

\textsuperscript{157} Ibid at 249, n 117.
\textsuperscript{158} Ibid at 249.
\textsuperscript{159} Barber, supra note 6 at 21-22, nn 84-86.
\textsuperscript{160} Ibid at 3.
\textsuperscript{161} Ibid at 21.
because much more foundational concepts, such as state sovereignty and international cooperation, are available.
Chapter 3
Is It Needed to Apply R2P?

R2P is a norm that has gradually developed over the past decade. By contrast, before the rise of R2P, a relatively independent legal system had evolved in the international disaster response. As of 19th century, the Red Cross Movement initiated a worldwide response to natural disasters.\textsuperscript{162} The Principles and Rules for Red Cross and Red Crescent Humanitarian Assistance had detailed rules and guidelines regarding disaster relief.\textsuperscript{163} The Statutes of the International Red Cross and Red Crescent Movement also included a large number of provisions relating to international relief assistance.\textsuperscript{164} These two instruments have a substantial influence on disaster response. They provide a number of practical rules that states can substantially benefit from following the rules. For example, a large number of standards and guidelines released by the International Federation of Red Cross and Red Crescent Societies on medical support, have been widely used by domestic Red Cross societies.

When it comes to more sensitive issues, such as coordinating the relationship between the affected state and international actors, attention could be turned to both the instruments specifically designed for disaster response and the existing multilateral conventions, the UN resolutions and the ongoing ILC work on disaster response. International disaster relief can be fully independent from R2P as some foundational principles of international law, especially state sovereignty, non-intervention and international cooperation, can provide adequate protection for victims in natural disasters.

\textsuperscript{162} David Fisher, Law and Legal Issues in International Disaster Response: A Desk Study (Geneva: International Federation of Red Cross and Red Crescent Societies, 2007) at 29.

\textsuperscript{163} International Federation of Red Cross and Red Crescent Societies, Principles and Rules for Red Cross and Red Crescent Humanitarian Assistance, online: <https://www.ifrc.org/Global/Documents/Secretariat/Accountability/Principles%20Rules%20for%20Red%20Cross%20Red%20Crescent%20Humanitarian%20Assistance.pdf>.

\textsuperscript{164} International Conference of the Red Cross and Red Crescent, Statutes of the International Red Cross and Red Crescent Movement, online: <https://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf>.
1 The Principle of Sovereignty

States’ keen insistence on the foundational principles of sovereignty and non-intervention is one of the reasons that they resist invoking R2P in natural disaster response. Under the ILC’s deliberation on PPED, many members advocated to exclude R2P from the ILC’s work out of their sovereignty concern. According to a consultation of the Red Cross and the Red Crescent Societies with the G20 states, most of them held the opinion that “[the] primary responsibility for addressing needs and leading the response during a natural disaster lies with national authorities.”

Compared to the fragile and controversial foundations of R2P, the principles of sovereignty and non-intervention are more theoretically and politically tenable in international law. These principles entail a robust rule that the affected state plays a primary role in directing disaster relief and coordinating international aid. If state sovereignty yields to R2P when a state is either unable or unwilling to protect its people, then international assistance can enter the state without its consent. The primary role of the affected state in disaster relief would be undermined or even replaced by other international actors. But such an assumption is less likely to happen in the real world as most states may not consent to legal rules that require them to accept foreign assistance. Instead, they still tend to emphasize state sovereignty and non-intervention when met with external aid requests.

That being the case, I attempt to use the principles of sovereignty and non-intervention, which are widely elaborated in the UN documents (e.g. UN Charter and the UNGA resolutions), the ICJ decisions, and other multilateral conventions, to clarify how they could better direct state conduct in natural disasters. I first argue that the principles of sovereignty and non-intervention entail a strong rule that the affected state should play a primary role in disaster relief. I adopt Heath’s approach that disaggregates sovereignty into internal and external dimensions, though they are also intertwined, for the purpose of analysis. State sovereignty has both the internal

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165 Heath, supra note 8 at 422.
166 Trascasas, supra note 3 at 235-236, n 53.
168 Heath, supra note 8 at 428-429.
and external aspects. Within its territory, a state has the right to direct, control, coordinate and supervise relief and assistance. In the international community, a state enjoys an independent and equal relationship with other international actors. The consent of the affected state is a prerequisite to initiating external assistance. I then turn to existing international law, including multilateral conventions, the UNGA resolutions and the ILC’s work on disaster response, to seek material evidence for the primary role played by the affected state in disaster relief.

1.1 State Sovereignty and Non-Intervention

The concept of sovereignty has abundant elaboration in the literature. It originated from Jean Bodin’s doctrine of sovereignty. Hugo Grotius accepted this concept in his book On the Laws of War and Peace. Emerich de Vattel was the first person who gave the exact definition to state sovereignty in international law. In his view, when a state is independent from other states, governs its own internal affairs, and is a formal member of the international community, then it has sovereignty. He also pointed out that each state is “free, independent, and equal,” and that “a small republic is no less a sovereign State than the most powerful kingdom.”

State sovereignty has its internal and external dimensions. A state is an independent entity that can exercise highest political authority within its territory to formulate and develop policies to govern its citizens and handle domestic affairs, which Zhou Gengsheng and Wang Tieya called as the internal supremacy of state sovereignty. They described the external dimension of sovereignty as sovereign equality. A state can make independent decisions on foreign policies, control border activities, and resist interference and invasion from other states.


171 Heath, *supra* note 8 at 428.


173 Ibid.
The widespread support for the principle of sovereignty is reflected in the UN documents, multilateral conventions and the ICJ decisions. Article 2 of the UN Charter requires member states to comply with the principle of sovereign equality. The Declaration on Principles of International Law reaffirmed the role of sovereign equality and called upon states to comply with this principle.\textsuperscript{174} The Annex to the UNGA Resolution 46/182 stipulates that sovereignty, territorial integrity and national unity should be fully respected on the basis of the UN Charter.\textsuperscript{175} Meanwhile, the Corfu Channel Case established that the principle of sovereignty is the fundamental principle of the international order.\textsuperscript{176} In Island of Palmas Case, Judge Max Huber interpreted sovereign relations between states as “independent”. A state has the right to exclude other states from exercising functions and powers of the state within its territory. Confirming such an exclusive jurisdiction is the starting point to resolve most issues in international relations.\textsuperscript{177} The ICJ, in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. The US), clearly stated that the principle of sovereignty is part of customary international law.\textsuperscript{178}

Non-intervention is a conceptual extension of state sovereignty. This principle aims at maintaining equal sovereignty among states. Non-intervention means that a state can act based on its sovereignty without subordinating to any other authority or allowing outside interference.\textsuperscript{179} The UN Charter Article 2.7 has confirmed the status of non-intervention as one of the fundamental principles in international law. The UNGA, in the 1965 Resolution 2131 (XX),\textsuperscript{180} claimed that non-intervention means a state has no right to interfere with other states’

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\textsuperscript{176} Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania), [1949] ICJ Rep 4, Individual Opinion by Judge Alvarez at 4 [Corfu Channel].

\textsuperscript{177} Island of Palmas Case (United States of America v The Netherlands) (1928), II RIAA 829 at 838 [Island of Palmas].

\textsuperscript{178} Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), [1986] ICJ Rep 14 at 111, para 212 [1986 Military and Paramilitary Activities].

\textsuperscript{179} Zhou, supra note 172 at 175.

\textsuperscript{180} UNGA, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 20th Sess, UN Doc A/RES/20/2131, December 1965.
\end{footnotesize}
affairs, including their internal or foreign policy. This claim was also stressed by the Declaration on Principles of International Law where states should comply with the obligations of non-interference in the affairs of other states. Any form of interference not only violates the spirit of the UN Charter but also threatens the peace and security of the international community.¹⁸¹ In the judgment of *Military and Paramilitary Activities in and against Nicaragua*, the ICJ also recognized the principle of non-intervention as a rule of customary international law.¹⁸²

**1.2 A Rule for International Assistance**

The principles of sovereignty and non-intervention had their expression in the recognition of the affected state’s primary role in any stage of humanitarian relief.¹⁸³ I analyze this primary role by separating state sovereignty into two dimensions: first, the affected state has a highest authority within its domestic jurisdiction entitled with the right to direct, control, coordinate and supervise relief activities (the internal dimension); second, the affected state enjoys sovereign equality against foreign intervention and its consent is the prerequisite to initiating an international rescue operation (the external dimension).¹⁸⁴ These two dimensions constitute together as a general rule that governs international assistance.¹⁸⁵

The internal dimension of state sovereignty requires international law to leave the decision whether to accept or reject international aid to the affected state. Disaster relief is firstly regarded as a state’s internal affairs, so the state has complete control and jurisdiction over relief activities. It has the right to determine what is best for its people, including whether to accept international aid, which states or organizations they want to accept, and how much aid they need.¹⁸⁶

The affected state’s rights are reflected in all phases of disaster relief. To start the relief, the state can set requirements for access, which means the legal capacity of a state or organization to enter

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¹⁸² Report 3, *supra* note 170 at para 73, n 152.
¹⁸³ *Ibid* at para 76.
¹⁸⁵ *Trascasas*, supra note 3 at 222, n 1.
¹⁸⁶ *Heath*, supra note 8 at 429.
the affected state to conduct relief activities. For example, the affected state can decide the issuance of visa and work permit, review the qualification of foreign medical and other professional personnel, and process any imported goods. In the process of disaster relief, the way in which the rescue is operated depends on the direction of the affected state. The assisting actors must comply with the affected state’s domestic laws and cannot unduly interfere with its internal affairs. The affected state has the right to regulate the distribution and use of food, drugs, money, vehicles, and communications equipment. In addition, the affected state can decide when to terminate the external aid. In order to ensure a smooth transition and reduce any negative impact on the affected people, the affected state should consult with other assisting actors before terminating the aid. Once rescue activities are completed but the assisting actors refuse to leave the affected areas, such refusal may amount to a violation of the affected state’s sovereignty.

The affected state also enjoys sovereign equality that should be fully respected and maintained by other states. Any state or organization should not unilaterally use armed intervention or other means to force the affected state to accept assistance. The affected state, in dealing with assisting actors, can specify rescue procedures, cost sharing, and the mechanism of liability and compensation. If necessary, it can also adopt measures to facilitate the drafting of contracts and the opening of bank accounts and providing tax benefits to reduce barriers to disaster relief and recovery operations.

The external dimension of state sovereignty is also reflected in the consent rule, which governs both the affected state and assisting actors. As the affected state has exclusive jurisdiction over relief activities within its territory, internationally wrongful acts may arise should assisting actors conduct the activities that fall within the affected state’s internal affairs. Only valid consent can exempt such wrongfulness. In accordance with this rule, the affected state can decide to accept or reject assistance requests from other international actors. In face of requests from different international actors, the affected state can freely choose whose aid they want to accept. Also, international actors must make requests to the affected state before providing assistance. In any case, assistance should be provided within the scope of the consent. For example, mechanisms
such as “the concept of humanitarian space and the establishment of relief corridors” render the affected state to provide “a limited geographical consent to humanitarian assistance.”  

At present, neither treaty nor customary law stipulates the obligation of a state to accept international assistance. The affected state’s refusal of external assistance is not in violation of international law. Some advocates of R2P may say that R2P is needed precisely because the principles of sovereignty and non-intervention otherwise shield the affected state. It may be tempting to see R2P as the “fix”; however, my contention is that invoking R2P is neither promising/productive, nor perhaps even necessary, which I will elaborate in the section of “The Principle of International Cooperation”.

1.3 Material Evidence

The concept that each state’s sovereignty, territorial integrity and national unity should be respected has been widely cited in the instruments specifically adopted for disaster response. Article 3 of the 1984 Proposed Draft Convention on Expediting the Delivery of Emergency Relief provides for the “respect for the sovereignty of the [affected] State and non-interference in its internal affairs.”  

The 2000 Framework Convention on Civil Defence Assistance further requires the respect for local customs. The Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations (the Tampere Convention) requires that personnel or organizations that provide telecommunication assistance shall not interfere in the internal affairs of the receiving states.

The UN has often referred to the principle of non-intervention when discussing the resolutions regarding humanitarian assistance to victims of natural disasters. During the UNGA’s 43rd


189 Framework Convention on Civil Defence Assistance, 22 May 2000, 2172 UNTS 213 (entered into force 23 September 2001), art 3 (b) [Civil Defence].

Session, a number of states stated their position on the principle of non-intervention in Resolution 43/131. Their position mainly included: First, international actors, in carrying out relief activities, should respect the affected state’s sovereignty and territorial integrity and also abide by laws and decisions of local governments. They should obtain the consent from the affected state; otherwise their assistance could amount to interference in the internal affairs of other states. Second, relief assistance cannot be taken as an excuse to interfere with the internal affairs of other states. Assistance based on humanitarian grounds but conducted to support armed groups has occurred in the past. However this form of assistance undermines state security and stability and should be avoided. Third, the UNGA resolutions concerning humanitarian assistance should not be interpreted as allowing interference in other states, but in the spirit of the principles and rules of international law, as well as the states’ domestic laws.

International instruments also show substantial support for the primary role a state plays in disaster relief. In the UNGA’s resolutions, the 1983 Resolution 38/202 restates member states’ sovereignty. This resolution recognizes the primary role of each state to take care of the affected people and also stresses that all relief operations should be implemented and coordinated according to the priorities and needs of the states concerned. The 1988 Resolution 43/131 further illustrates that the primary role of the affected state is reflected in the initiation, organization, coordination and implementation of humanitarian assistance. The 1991 Resolution 46/182 even regards such a role as a responsibility that states bear first and foremost to protect and take care of the affected people within their territories. This spirit was also restated by the 2009 Resolution 63/141 and the 2010 Resolution 64/251.

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Regarding multilateral conventions, Article 3 (a) of the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency provides that a state that requests assistance is responsible for the overall direction, control, coordination and supervision of rescue activities within its territory. Similar provisions can be found in Article 4 (a) of the 1991 Inter-American Convention to Facilitate Disaster Assistance and Paragraph 1 of the Annex to the 1992 Convention on the Transboundary Effects of Industrial Accidents. The Tampere Convention requires that any provision of this Convention should not interfere with the right of a state to direct, control, coordinate and supervise telecommunication assistance provided within its territory under the state’s domestic law.\(^\text{198}\) This provision has two innovations: First, it was adopted in the form of “a without-prejudice clause”. This language is important because it considers the affected state’s right to supervise relief activities within its territory as a pre-existing right. It is a right inherent in the general principles of sovereignty and non-intervention. So this Convention does not need to grant this right to a state. Second, this Convention refers to domestic law. The affected state has legitimate control over relief operations in accordance with its domestic law.\(^\text{199}\)

The concept of consent can be found in a number of multilateral instruments. The Tampere Convention provides that telecommunication assistance cannot be provided without the affected state’s consent. The affected state has the right to reject all or part of the telecommunication assistance under its domestic laws and policies.\(^\text{200}\) The Framework Convention on Civil Defence Assistance has made more restrictions in which states can only provide assistance that is requested by the affected state or that the assisting states request but is accepted by the affected state.\(^\text{201}\) In other words, international aid cannot be provided without the consent of the territorial state. The ASEAN Agreement on Disaster Management and Emergency Response has a similar

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\(^{198}\) *The Tampere Convention*, supra note 190, art 4 (8).

\(^{199}\) Report 3, *supra* note 170 at para 82.

\(^{200}\) *The Tampere Convention*, supra note 190, art 4 (5).

\(^{201}\) *Civil Defence*, supra note 189, art 3 (1).
provision that external assistance can only be provided at the request or with the consent of the affected state.202 In addition, the 1986 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency provides that the assisting states need to provide detailed rescue request that could make other states believe their assistance is in good faith.203

The ILC has stipulated the role of the affected state in Article 9 of the Draft Articles on the Protection of Persons in the Event of Disasters (the Draft Articles), which reads, “The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.”204 The Special Rapporteur believed this article was the generally accepted understanding of the sovereign right of a state in disaster relief.205 The affected state can both coordinate and promote cooperation in international assistance and determine the way how disaster relief is conducted.206

The ILC also added the consent rule to Article 11 (1) that, “The provision of external assistance requires the consent of the affected State.”207 This article adopted the basic structure from the relevant UNGA resolutions and conventions, which was agreed by most states.208 For example, Iran believed that humanitarian assistance from other states and international organizations still required the consent of the affected state. Even if the consent was given, the affected state should retain the right to direct, coordinate, control and supervise the assistance provided in its territory.209 Indonesia and Sri Lanka also shared the opinion and added that humanitarian aid should be provided with respect for state sovereignty, territorial integrity, and national unity, as


203 Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency, 26 September 1986, 1457 UNTS 133 (entered into force 26 February 1987), art 2.

204 Ki-Gab Park, The Protection of Individuals in the Event of Catastrophes: 2nd Course Natural Catastrophes, Course PPT (The Hague Academy of International Law, Summer 2013) at 26 [Park].

205 Report 3, supra note 170 at para 98.

206 Ibid at para 80.

207 Park, supra note 204 at 28.

208 Report 3, supra note 170 at para 100.

well as the principle of non-intervention, and the only aim of international aid was to complement domestic initiatives.

2 The Principle of International Cooperation

Even in circumstances where restrictions are intense and humanitarian needs are urgent, I contend that there is no need to activate R2P. A more promising legal avenue to pursue than looking to extend the already shaky R2P concept to natural disaster situations, may be to explore the relatively well established notion that sovereignty is not absolute. The ILC has actually pursued this approach by drawing upon a more traditional understanding that “the principle of international cooperation for the protection of human rights acts as a constraint on the exercise of sovereignty.” A state may be convinced on the grounds of international cooperation to consent to external aid while retaining its primary role in disaster relief. In this part, I analyze the ILC debate surrounding the notion that sovereignty is not absolute, which is particularly reflected in the principle of international cooperation.

2.1 Is Sovereignty Absolute?

The traditional concept of sovereignty was challenged by the view that a state has obligations to local populations. Judge Alejandro Alvarez, in the Corfu Channel Case, explained that, “Sovereignty confers rights upon States and imposed obligations on them.” Since World War II, a series of incidents such as decolonization, the creation of the UN and the introduction of right to self-determination into the UN Charter endowed the traditional sovereignty with a modern perspective, namely, “the people’s sovereignty rather than the sovereign’s sovereignty.” The contemporary prestigious publicists also agreed that sovereignty is not

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210 Ibid at para 68.


212 Heath, supra note 8 at 427.

213 Ibid at 436.

214 See Corfu Channel, supra note 176 at 43, cited in Report 3, supra note 170 at para 75.

215 Saechao, supra note 4 at 669, n 35.
absolute but relative. Absolute sovereignty without any constraint or condition only belongs to a supranational society; however, such a society does not exist.216

In the ILC’s Third Report on the PPED, the Special Rapporteur commented that the principles of sovereignty and non-intervention assume an exclusive domain where a state may exercise exclusive power. Sovereignty is important to a state, but it is not absolute. For example, legal practices in international human rights law and international humanitarian law show that when it comes to the issues of individual life, health and body integrity, concepts such as sovereignty are simply “a starting point for the analysis, not a conclusion.”217

When exercising sovereignty, states are bound by multilateral conventions, regional conventions, bilateral agreements or international custom. A good example is the practice in the protection of human rights. The UN Charter, the Universal Declaration of Human Rights, and relevant human rights treaties provide a relatively comprehensive framework for the standard setting of human rights protection and welfare promotion. Although states recognize and attach importance to human rights in varying degrees, several human rights (e.g. the right to life) have obtained universal respect and have been recognized as norms of international custom. In the natural disaster context, when a state is unwilling to accept international aid, the principle of international cooperation enshrined in the UN Charter and other foundational instruments of international law may persuade a state to consent to external assistance by its commitment to the principle of international cooperation.

2.2 International Cooperation

A large number of international instruments have addressed the importance of international cooperation to international relief. As various actors are involved in the relief process, such as states, international organizations and civil societies, whether relief can operate smoothly largely depends on the effectiveness of cooperation. Likewise, the ILC has affirmed the role of international cooperation by adopting “the duty to cooperate” in the Draft Articles. States welcomed/supported the incorporation of international cooperation into the protection of persons

216 Wang, supra note 169 at 106.
217 Report 3, supra note 170 at para 75.
in disasters. But they held divergent opinions on the relationship between the duty to cooperate and the arrangement of disaster relief.

International cooperation is a universally recognized principle in international law and has been enshrined in many international instruments. The UN Charter defines one of its purposes as “achieving international [cooperation] in solving international problems,”\(^\text{218}\) and repeatedly confirms that cooperation is the premise of the international legal order.\(^\text{219}\) The Declaration on Principles of International Law even emphasizes the duty of states to cooperate with one another in international relations.\(^\text{220}\) In discussing the Declaration, Argentina described the principle of cooperation as “one of the fundamental principles of the [UN]”, Ghana considered it as “the very essence of international law and healthy international relations”, and Poland called it “one of the classic principles of peaceful coexistence”.\(^\text{221}\) The 1966 International Covenant on Economic, Social and Cultural Rights regards international cooperation as a means to achieve the rights enshrined in the Covenant.\(^\text{222}\) The 1974 Declaration on the Establishment of a New International Economic Order reiterates international cooperation as “the shared goal and common duty of all countries.”\(^\text{223}\) The 1985 Vienna Convention for the Protection of the Ozone Layer has specific provisions to implement the obligation to cooperate, including the establishment of mechanisms to transmit information, to conduct research and systematic observations, and to cooperate in the legal, scientific and technical fields.\(^\text{224}\) The 2006 Convention on the Rights of Persons with Disabilities also has an article devoted to international cooperation that states parties take

\(^{218}\) Charter, \textit{supra} note 32, art 1 (3).

\(^{219}\) \textit{Ibid}, arts 11, 13, 55, 56.

\(^{220}\) \textit{Declaration on Principles of International Law, supra} note 174, Annex at para 1.

\(^{221}\) Memorandum by the Secretariat, \textit{supra} note 184 at 17.


appropriate and effective measures within a range of bilateral and multilateral arrangements and also consider cooperating with international organizations and civil societies.225

The principle of international cooperation is also reflected in disaster-related documents. In the Tampere Convention, Paragraph 21 of its Preamble notes that state parties desire to promote international cooperation to reduce the impact of disasters. The ASEAN Declaration for Mutual Assistance on Natural Disasters enumerates the specific areas for cooperation: “a. improvement of communication channels among themselves as regards disaster warning; b. exchange of experts and trainees; c. exchange of information and documents; and d. dissemination of medical supplies, services and relief assistance.”226 Article 4 of the Framework Convention on Civil Defence Assistance provides for several measures to promote cooperation, such as the reduction on customs’ formalities, the grant of the privileges and convenience to rescue personnel, and the protection for rescue personnel and their properties. Resolution 46/182 even suggests that when the severity of the disaster situation exceeds a state’s capacity to respond, international cooperation should be built to cope with the situation and to strengthen the response capacity of the affected state.227

The ILC stipulated the duty to cooperate in Article 5 of the Draft Articles, “States shall, as appropriate, cooperate among themselves, and with the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and with relevant non-governmental organizations.”228 And the specific forms of cooperation include: “humanitarian assistance, coordination of international relief actions and communications, and making available relief personnel, relief equipment and supplies, and scientific, medical and technical resources.”229

226 ASEAN, Declaration for Mutual Assistance on Natural Disasters, online: <https://www.ifrc.org/docs/idrl/N81EN.pdf>, art 1.
228 Park, supra note 204 at 21.
229 Ibid at 22.
This article was supported by Finland and other Nordic countries, Chile, France, Poland and New Zealand.\textsuperscript{230} Finland believed that “if the affected State was unable to provide the goods and services required for the survival of the population, it must cooperate with other States or organizations willing and able to do so.”\textsuperscript{231} Other Nordic countries, Greece and Poland also took this position.\textsuperscript{232} Greece even considered the wording of this draft was not strong enough to reflect the “duty” to cooperate.\textsuperscript{233}

However, more states cautioned against the duty to cooperate. Romania addressed the need to further analyze the relationship between the obligation to cooperate and the role of the affected state.\textsuperscript{234} Czech Republic, France and Iran suggested the ILC distinguish the duty to cooperate with the UN from with other international actors.\textsuperscript{235} France stressed that the purpose of this article was to remind states of their existing obligations to cooperate under international law rather than to create a new obligation for states.\textsuperscript{236} Iran believed it was needed to clarify the scope and limit of the duty to cooperate.\textsuperscript{237} Austria and Russia even recommended reexamining the duty to cooperate after other rules and principles were discussed.\textsuperscript{238}

In addition, there were several states contending that the inclusion of international cooperation into the Draft Articles must not be understood as creating an obligation for the affected state to accept assistance or an obligation for the assisting state to provide assistance.\textsuperscript{239} The UK considered that “a right to humanitarian assistance did not imply a right to impose assistance on a


\textsuperscript{231} UNC6, “A/C.6/63/SR.22”, \textit{supra} note 103 at para 53.


\textsuperscript{233} UNC6, “A/C.6/64/SR.21”, \textit{ibid} at para 47.

\textsuperscript{234} UNC6, “A/C.6/64/SR.22”, \textit{supra} note 109 at para 25.


\textsuperscript{236} UNC6, “A/C.6/64/SR.21”, \textit{supra} note 105 at para 24.

\textsuperscript{237} UNC6, “A/C.6/64/SR.22”, \textit{supra} note 109 at para 82.

\textsuperscript{238} UNC6, “A/C.6/64/SR.20”, \textit{supra} note 106 at paras 17, 47.

\textsuperscript{239} \textit{Ibid} at paras 24, 38; UNC6, “A/C.6/64/SR.21”, \textit{supra} note 105 at paras 3, 42.
State that did not want it." In Myanmar’s view, it was important for the affected state to cooperate with other states, and international or regional organizations; however, the state had the right to decide whether to request or accept international assistance. It would be counterproductive to force the affected state to cooperate with any particular state or organization. Venezuela held that although the principles of sovereignty and non-intervention cannot be the reason to refuse “victims’ access to assistance”, relief assistance cannot be provided without the prior consent of the affected state.

In particular, China expressed a strong doubt about the duty to cooperate. It insisted that the affected state should play a primary role in the event of disasters. It had the right to organize and coordinate relief assistance, and consult with other relief providers. The relief operation should be conducted with the consent of the affected state and also limited to humanitarian purposes without any political conditions. The ILC should provide for these contents and consider different states’ varying levels of development and capacities. Thus, China suggested that the Draft Articles should first articulate the fundamental principles, such as state sovereignty and non-intervention, and then include cooperation as a “moral value”.

The Special Rapporteur, in the Second Report on the PPED, also supported the claim that the principle of international cooperation cannot force the affected state to accept assistance. While cooperation was essential to carrying out disaster relief, it cannot be interpreted as “diminishing the prerogatives of a sovereign State within the limits of international law.” Instead, the principle of cooperation had an emphasis on state sovereignty. The affected state played a primary role in initiating, coordinating and implementing relief activities. It may adopt political, regulatory, administrative and judicial measures, or even deploy armed forces in their territories. These measures reflected the decision in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v The US) that every sovereign state is free from outside interference and has the

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242 Ibid at para 42.
244 Ibid.
right to conduct its own affairs.\footnote{1986 \textit{Military and Paramilitary Activities}, \textit{supra} note 178 at para 202.} International cooperation could only supplement the primary role of the affected state.\footnote{Report 2, \textit{supra} note 224 at paras 63-65.}

### 2.3 Myanmar Crisis Resolved by Cooperation

Although the ILC members had an intense debate on the duty to cooperate stipulated in the Draft Articles, they did not deny the relevance between international cooperation and disaster relief. The principle of international cooperation is a more promising way to persuade the affected state to accept foreign aid. For example, the Myanmar crisis was finally resolved by a tripartite cooperation through diplomatic efforts rather than a more radical means of activating R2P. Representatives from Myanmar, ASEAN, and the UN consulted with each other to establish a “Tripartite Core Group” (TCG). This group turned out to be an effective platform to build mutual trust and promote understanding between states for the purpose of creating more efficient humanitarian arrangements.\footnote{Robert Turner et al., “Inter-Agency Real Time Evaluation of the Response to Cyclone Nargis” (17 December 2008) at 6, 12, 26, \textit{UNICEF}, online: <http://www.unicef.org/evaluation/files/Turner_Myanmar_IA_RTE_Nargis_Response_Final_Report_17_Dec_08.pdf>; Trascasas, \textit{supra} note 3 at 238-239, nn 65-66.} By this group’s efforts, international actors were allowed to enter Myanmar.\footnote{Trascasas, \textit{supra} note 3 at 238.}

One speculation is the “threat” of R2P that made the military junta relent. If true, it is more likely that the junta’s fear of the invasion of other states rather than its consideration of a response to R2P that contributed to this change. Although diplomatic efforts were slow, temporary and sometimes asymmetrical, they eventually ensured humanitarian aid to enter Myanmar, which prevented wider suffering that may be caused by disease and malnutrition.\footnote{Bellamy, “Five Years”, \textit{supra} note 2 at 152.} UN Secretary-General, in his 2008 report on the Situation of Human Rights in Myanmar, addressed the role TCG played in facilitating international assistance and also noted the need to separate political considerations from humanitarian action in providing assistance to victims in emergency

situations. The cooperation of Myanmar with the international community was also noted by the 2009 UNGA Resolution on the Situation of Human Rights in Myanmar.251


Conclusion

The emergent R2P concept has evolved over a decade, in which it appeared on states’ diplomatic agenda and became part of diplomatic languages in the debates surrounding humanitarian crises. One the one hand, a shared understanding of the concept of R2P was reflected in documents such as the Summit Outcome and Secretary-General’s Report on Implementing R2P, as well as in the UN interactive dialogues. One of the co-founders of this doctrine even suggested that it was currently a “broadly accepted international norm.” On the other hand, it remains uncertain how R2P could be best implemented. R2P’s Pillars Two and Three do not convey a clear expectation for what the international community should do with the norm. Also, the authorization of coercive measures under the R2P framework is still controversial. A number of states expressed their concern that R2P would become a tool for some states to interfere with other states’ internal affairs, which was contrary to the principles of international law, and they did not consider R2P as mandatory.

The uncertainty of what positive obligations R2P entails gives states much discretion on how they could deal with the norm. States could choose to invoke or circumvent R2P in dealing with humanitarian crises as they don’t need to pay reputation cost for failing to cite this norm. The inconsistent or even selective implementation of R2P does not help to generate compliance pull among states but further obscures the expectation for the norm and worsens the problem of indeterminacy. R2P’s indeterminacy also explains its limited role in the UNSC’s decisions on how to address particular crises. It was not evident that R2P served as a catalyst to facilitate the intervention in Libya. In fact, the majority of the UNSC members did not use R2P to back up their position over Resolution 1973. With the NATO action proceeding in Libya, the concern and anxiety for the military intervention were increasing. The caution of some UNSC members against coercive measures make it more difficult to allow intervention to resolve the Syrian crisis. Thus, R2P may encounter more obstacles for its application because of its close connection with the use of force.

252 Gareth Evans, “From Humanitarian Intervention to the Responsibility to Protect” (2006) 24 Wis Intl LJ 703 at 715. The opposite opinions can be seen in Matthews, supra note 39 at 147-148; Stahn, supra note 39 at 110-116. All as cited in Ford, supra note 1 at 263.

253 Brunnée & Toope, supra note 33 at 202, n 58.
The weaknesses of invoking R2P become more obvious in the natural disaster context. There was lack of support for their relevance: the attempt to activate R2P in the Myanmar case failed; UN Secretary-General, Special Rapporteur on the PPED and the majority of the ILC members also concluded that R2P did not apply to disaster response. An expansive notion of R2P beyond the four enumerated crimes, genocide, war crimes, ethnic cleansing and crimes against humanity, may undermine the already fragile consensus and incur more skepticism towards its future application.

Even if one remains committed to correlating R2P and natural disasters, a closer look reveals that the natural disaster situation does not involve the sorts of events/actions that would trigger R2P. In Myanmar, the facts demonstrated that the military junta had no intention to kill its people. It chose to accept bilateral assistance from several Asian neighbors but reject the requests from the US, the UK and France it viewed as “hostile”. This selective acceptance may be explained by the sanctions the EU and the US imposed on the military junta one year ago. Although Myanmar’s restrictions may inhibit victims from obtaining adequate supplies, it did not necessarily mean that it was Myanmar’s act that caused the lack of necessities and exacerbated people’s suffering. Myanmar’s selective acceptance of external aid did not amount to crimes against humanity.

The particular weakness of efforts to extend R2P to state conduct in disaster situations is that there is no need to resort to the shaky R2P arguments because some of the foundational concepts of international law, such as state sovereignty and international cooperation, help states to adequately navigate the terrain. In accordance with the principles of sovereignty and non-intervention, the affected state should play a primary role in each phase of relief activities. Its consent is critical to the provision of international assistance. International actors have to make a request to provide assistance to the affected state. When met with multiple assistance requests, the affected state can choose to accept or reject these requests. Under the current treaty or customary law, a state’s refusal of international aid does not violate international law. However, using R2P to justify intervention may infringe the state’s right to direct, control, coordinate, and supervise the relief activities, as well as the consent rule.

In circumstances where restrictions are intense and humanitarian needs are urgent, it is also unnecessary to trigger R2P. The use of force justified by R2P cannot guarantee a quick resolution of humanitarian crises. The intervention may cause the affected state to cut off all the
connections with the outside world. The innocent people have to suffer another military attack. The rejection to invoking R2P in Myanmar indicated little interest of states in initiating intervention in natural disasters. In contrast, the notion that sovereignty is not absolute is a more promising approach. The ILC has attempted to reflect upon progressive developments in international cooperation to strike a balance between the protection of human rights and state sovereignty. A state may be persuaded to accept external assistance by its commitment to international cooperation while retaining its primary role in disaster relief.

International cooperation is a generally accepted principle of international law, which has been enshrined in a number of multilateral conventions and disaster-related instruments. Although the ILC’s deliberation on the duty to cooperate led to divergent opinions amongst states, they did not deny the relevance between international cooperation and disaster response. The ILC needs more efforts to word the notion of cooperation in a more acceptable way. I suggest that the principle of cooperation should not be understood as requiring a state to accept international aid. The affected state should retain the primary role in conducting relief activities. The assistance from other international actors should be coordinated with the domestic response in cooperative arrangements that respect international law.

As there is a greater likelihood that states will embrace/accept well-developed principles of sovereignty, non-intervention and international cooperation, more may be gained in disaster response perhaps by seeking to build upon and develop these notions. In contrast, R2P has not only the problem of indeterminacy, but also comes with a lot of baggage that is more likely to produce resistance than success.
Bibliography

Treaties


*Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency*, 26 September 1986, 1457 UNTS 133 (entered into force 26 February 1987).


Cases


*Island of Palmas Case (United States of America v The Netherlands)* (1928), II RIAA 829.

Official Documents


———, Declaration for Mutual Assistance on Natural Disasters, online: <https://www.ifrc.org/docs/idrl/N81EN.pdf>.


International Conference of the Red Cross and Red Crescent, Statutes of the International Red Cross and Red Crescent Movement, online: <https://www.icrc.org/eng/assets/files/other/statutes-en-a5.pdf>.


UNGA, 2005 World Summit Outcome, 60th Sess, UN Doc A/RES/60/1, October 2005.


———, Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations, 45th Sess, UN Doc A/RES/45/100, December 1990.


———, International Cooperation on Humanitarian Assistance in the Field of Natural Disasters, From Relief to Development, 64th Sess, UN Doc A/RES/64/251, April 2010.


———, *Early Warning, Assessment and the Responsibility to Protect*, 64th Sess, UN Doc A/RES/64/864, July 2010.


———, *The Situation in the Middle East*, 6524th Mtg, UN Doc S/PV.6524, April 2011.


**Monographs and Articles**


Barber, Rebecca. “The Responsibility to Protect the Survivors of Natural Disaster: Cyclone Nargis, a Case Study” (2009) 14:1 J Confl & Sec L 3.


Matthews, Max W. “Tracking the Emergence of a New International Norm: the Responsibility to Protect and the Crisis in Darfur” (2008) 31:1 Boston College Intl & Comp L Rev 137.


**Other Materials**


Global Centre for the Responsibility to Protect, *Implementing the Responsibility to Protect: The 2009 General Assembly Debate: An Assessment*, online: Global Centre for the Responsibility to

———, *Summaries of UN General Assembly Dialogues on the Responsibility to Protect*, online: Global Centre for the Responsibility to Protect <http://www.globalr2p.org/about_r2p>.


