Introduction

The assumption upon which the doctrine discussed in this chapter builds is that it is not morally acceptable for human beings and the international community to be aware of existing atrocities in the world, but not to take effective action to prevent or halt them, due to political differences blocking existing international mechanisms. The question is how to develop an alternative route to effectively bypass such blockages.

The ‘responsibility to protect’ (R2P) concept was meant to address this difficulty. It should allow the international community to act once confronted with ongoing atrocities despite eventual blockages in the United Nations (UN) system (especially veto by the UN Security Council permanent members against actions aimed at stopping atrocities). 1

R2P links sovereignty to responsibility, making it clear that States have the primary responsibility to protect their own populations. However, when States are either unable or unwilling to protect their populations from mass atrocity (defined as war crimes, crimes against humanity, ethnic cleansing, and genocide), this will give the residual authorisation for the international community to act to protect the lives at risk (secondary responsibility). Actions under this framework is believed to enable the international community to halt widespread violence. Thus, arguably, this concept was meant to address the moral call of the international community. However, things are not as smooth as they may sound, and much debate entangles the R2P concept, as discussed later.

Beyond analysing R2P, this chapter considers whether and how this doctrine may be used in disasters. The cyclone that hit Myanmar in 2008 is the closest example on the use of R2P in disasters, as illustrated later on. The question, however, is also whether or not the considered more generally in relation to further disasters. Due to the nature of the event, it is evident that the natural events causing widespread suffering and death, make displacement, or large-scale material or environmental damage, thereby severely disrupting the functioning of society. 2

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caveat, the chapter will also use the term ‘natural disaster’ as shorthand, and it will not cover purely ‘human-made’ disasters, especially situations of armed conflict. 3

The chapter is organised as follows: the second section outlines the responsibility to protect doctrine; the third section considers the possibility of applying it in disasters; and the fourth section considers alternatives to the application of R2P in disasters.

The rise and fall of a concept

Who came up with the R2P idea and why? The North-South debate and the experiences of Rwanda and the Balkans

R2P is rooted in the idea of ‘sovereignty as responsibility’, a contribution of former Sudanese diplomat (later nominated as the UN Secretary-General’s Special Representative on Internally Displaced Persons) Francis Deng and colleagues, when they addressed conflict in Africa in the mid-1990s. 4 These ideas were later included in regional instruments, such as the African Union (AU) Constitutive Act of 2000, which mentions the AU’s obligation to intervene in ‘grave circumstances’, together with a pledge of ‘non-indifference’ to the internal affairs of States. The same document also referred to three of the four R2P-triggering crimes (discussed later), apart from ethnic cleansing. 5 These ideas suggest that there is an international collective need to care for and assist people in danger, despite national borders.

On the other hand, by effectively discharging their obligations of good governance, including the observance of fundamental rights, national governments would demonstrate they were meeting their sovereignty-related responsibilities. Mass atrocities taking place in a given country would thus suggest a State’s failure towards its population, leading to potential international community action to protect rights of the affected population.

Administrations in the Global North, the United States (US) (Clinton and Bush) and the United Kingdom (UK) (Blair), among others, have supported similar initial considerations but indicated that the concept should go further, also encompassing security concerns beside the need for global respect for human rights. Cooperation to halt terrorism and the non-proliferation of weapons of mass destruction were among concerns for these. The argument continued on the basis of the interdependency of the globalised world, in which egregious human rights violations or security threats in one country may jeopardise the stability and security of other countries. In such scenarios, the principle of non-interference in internal affairs was to be qualiﬁed, for instance, for the use of armed force. Particularly after the 2003 US/UK-led Iraq invasion, developing countries became very anxious with R2P and its possible future abuse in military interventions. 7 This comes as no real surprise, for Global South countries are traditionally quite anxious about the prospects of being at the receiving end of international military interventions. However, some authors, such as Luck, argue that it makes little sense to perceive R2P as a North-South debate and that its role is to deter the mass atrocities and to avert the situation of a threat to civilisations. 8 He rather encourages Southern countries to participate in the conceptualisation and, notably, in the identiﬁcation of the harms of the nation in order to make sure the doctrine will not be abused later on. 9 This might be a model (though somewhat unfortunately) take on the development of the concept, which does not question the limited possibilities of different States. Another aspect to bear in mind (later discussed) is that R2P is not limited to coercive military action but also includes non-military measures. In this vein, being R2P grounded in the North or in the South, non-military elements are commonly linked to the further development of the concept, one that took place in the South (African) and one in the North (the Balkans).
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In both situations the response of the international community was far from ideal. In Rwanda, in 1994, the international community was still healing its wounds from the then recent intervention in Somalia, which ended up with concert among American troops and with local militiamen putting the bodies of US soldiers on display as trophies. The result was a very weak international action in Rwanda, which did not manage to effectively stop the genocide that took place over the course of one hundred days and ended up with the slaughtering of about a million people. 10

In the Balkans, the international community acted after the situation escalated to a breaking point (notably the anti-Albanian discrimination campaign conducted by the Milosavljevic regime), though on dubious legal grounds. Despite not securing a UN Security Council (UNSC) authorisation, mostly because of the threat of veto by both Russia and China (the NATO intervention in Kosovo was considered to be based on solid moral grounds), it was not meant to stop the bloodshed of the civilian population. Action was put, the extraordinary, action could be exceptionally justified under very particular circumstances. However, the bypassing of authorisations to use force according to the UN Charter should never become the rule, for it would risk the collapse of the collective security system. 12

What is R2P and has it ever been used?

Beyond the above-mentioned initial thoughts on the idea, the kickstart for the later R2P concept came with the 2001 Report of the International Commission on Intervention and State Sovereignty (ICISS), the result of a Canadian initiative. 13 The general framework for the R2P contained in the Report views States as having the primary responsibility to protect their population from mass atrocities, and the international community as having a secondary responsibility to protect if the States involved are unable or unwilling to do so. According to the Report, sovereignty means responsibility and is not a shield for committing mass atrocities. It advocates for a ‘continuum of responses’ in the R2P framework, comprising the responsibility to prevent, to react, and to rebuild. 14 It further suggests that, although the UNSC continues to play a central role in the collective security system, when it fails to act, the UN General Assembly (UNGA) should then take action, similarly to what it did in the ’Uniting for Peace Resolution of 1950’ formula (securing a two-thirds majority approval of military action in an Emergency Special Session). 15

The possibility of military action to be taken by the General Assembly may nudge the UNSC to think twice about its inaction. In extreme situations in which the UNSC fails to address a crisis, regional organisations may also consider taking action, but if they are to go that far, they would have to make sure that they obtain ex post facto UNSC authorisation for backing up the measures taken. 16

In 2004, the High-level Panel on Threats, Challenges and Change, appointed by the UN Secretary-General (UNSG), issued a further report on the subject. 17 It narrowed down the originally proposed framework, placing greater emphasis on the need to strengthen the existing international mechanism of collective security, which, if working properly, should be able to prevent mass atrocities. More or less, one of the whole R2P is a superfluous concept, for the UN Charter already carefully assigns powers and competencies to the main UN bodies, which, if they were to act according to plan, should be able to tackle mass atrocities in a timely manner. 18 The problem is that the UN Charter system has not quite functioned in such situations, especially due to political differences by the five UNSC permanent members (the P5). The development of the R2P concept, however, did not stop here.

The UNSC’s 2005 report ‘In Larger Freedom’ was the third key document drawing the contours of R2P, and it was published in preparation for the world summit later in the same year. It emphasised the need to prevent mass atrocities, focusing on prevention as a key part of the R2P concept. 19
Later on in 2005, UN members met and by consensus adopted the ‘World Summit Outcome’
document, considered the most authoritative document in terms of legal grounding for R2P. Since the 2005 ‘World Summit Outcome’ document was unanimously adopted by more than 150 States, the corresponding UNGA Resolution, adopted during the renewed first good legitimacy
to the doctrine.19

This document fundamentally set out the key features of the R2P doctrine, namely its compo-
nents and pillars and the continuum of measures to be taken. Accordingly, R2P is understood to
have two components, listed in paragraph 138–139 of the ‘World Summit Outcome’ document. The
first of these relates to obligations of the affected State vis-à-vis its population, together with its
efforts to prevent the selected heinous crimes:

138. Each individual State has the responsibility to protect its populations from genocide, war
 crimes, ethnic cleansing and crimes against humanity. This responsibility entails the
 prevention of such crimes, including their incitement, through appropriate and necessary means.
 We accept that responsibility and will act in accordance with it. The international com-
 munity should, as appropriate, encourage and help States to exercise this responsibility
 and support the United Nations in establishing an early warning capability.
 (emphasis added)

In a second stage, R2P lays greater emphasis on the international community, indicating that it
has the duty to assist States, which may include a duty to step in should the affected State be
incapable or unwilling to protect its own populations against such crimes:

139. The international community, through the United Nations, also has the responsibility to use
 appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI
 and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic
 cleansing and crimes against humanity. In this context, we are prepared to take collective
 action, in a timely and decisive manner, through the Security Council, in accordance with the
 Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional
 organizations as appropriate, should peaceful means be inadequate and national authorities are
 manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes
 against humanity.
 (emphasis added)

A later report by the UNSG, assisted by Edward Luck, then Special Adviser on the Responsibility
to Protect, present here as ‘operationalizing the R2P concept’, indicating both the UN, States, and
the international community should act in the R2P framework in the event of mass atrocities
that are underway or about to take place.20

The Report suggested these pillars for the R2P concept, which can without difficulty be
linked to the ‘World Summit Outcome’ document paragraphs just quoted: (i) protective responsibil-
ities of the state, meaning that the primary protection responsibility lies with the affected
State; (ii) international assistance and capacity building, meaning that collective action need not
be taken by other States to support the affected State; and (iii) timely and decisive response, mean-
ing that when the affected State is failing its population the international community may act.21

Finally, the Report makes it clear that R2P implies a ‘continuum of response’, whereby action
begins one shade in the public, R2P is therefore not to be understood as building down to
‘nothing the Marquis’.22 It rather encompasses a larger vision that includes prevention, reaction,
and post-crisis rebuilding.

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In 2006, the UNSC passed Resolution 1674, which endorsed R2P exactly as adopted by the UNGA. An important question to ask in this context is: what is the practical use of the doctrine to date? R2P has already been used in practical situations, including in instances not involving coercive military action. One such example was the diplomatic mediation that diffused the post-election violence that erupted in Kenya between 2007 and 2008. 24 An example of R2P in coercive military action was the reference made to the doctrine by the UNSC when it addressed the situation in Libya after the repression of opposition members by the Gaddafi government. 25 R2P success story, the chaos that descended upon the country following the toppling of Gaddafi has raised serious doubts about the practical use of the doctrine. 26

Why is R2P flawed?

The basic flaw in the R2P doctrine as it stands currently, as endorsed by the UNGA and later by the UNSC, is that military action under R2P can only be undertaken in accordance with the UN Charter. Therefore, beyond the possibility of acting in self-defence (grounded in Article 51 UN Charter), States do have to secure authorisation by the UNSC before taking coercive military action (even under the R2P doctrine). This issue questions the added value of such a doctrine, which was originally meant to provide additional sanction in situations in which the international community fails to take action due to splits in the UNSC. Beyond this technical and somewhat legalistic answer, a more worrying trend is that, in recent years, States seem to be very reluctant to assume responsibility for taking external military action but, more than that, for possibly being held liable when taking such action. The most recent (though pre-R2P) example of States acting despite the lack of UNSC authorisation was the 2003 Iraq invasion led by the US and the UK. Together with references to previous UNSC resolutions authorising the use of force against Iraq, another debatable justification used was to oppose the threat posed by weapons of mass destruction held by the Iraqi regime, which later on proved not to exist, nor to pose such a clear threat. Humanitarian motives were also included among various justifications given by the coalition to legitimise their action. 27 Nonetheless, the Iraq invasion became one leading example where States’ actions hint not towards a responsibility to protect populations facing serious threats but, rather, towards their willingness to pursue nebulous interests, while avoiding legal accountability.

Even after the R2P doctrine came into being, there have been political statements suggesting that military action could be carried out despite the lack of authorisation by the UNSC (as more broadly foreseen in the World Summit Outcome). For example, in the ongoing Syria crisis, the former UK prime minister David Cameron suggested that the UK would be prepared to take military action in Syria even if Russia should veto a UNSC resolution authorising States to take such action. Without entering into the merits of the discussion, the question is how to accommodate individual military State action without undermining the collective security system of the UN Charter. 28 At the same time, the question regarding the selectivity of international actions is a recurrent one to bear in mind in this context.

It is true that one can make the fair point that R2P is actually more than coercive military action. Be that as it may, less than coercive military action can be undertaken without the need for such a doctrine. Cooperation stated before R2P and will continue regardless of the fate of this doctrine. Cooperation stated before R2P and will continue regardless of the fate of this doctrine. It is true that R2P lacks a true frame of reference to frame and execute a collective security response. 29 On the other hand, it can also be argued that the main advantage of the R2P doctrine, as accepted in the World Summit Outcome, is to institutionalise the response to the gravest crimes through the UN and in particular the UNSC. Consequently, R2P cannot be used to justify unilateral military action claiming to be taken in pursuit of collective interests.
Considering R2P in disasters

Why and how to apply R2P in disasters?

One may ask why consider the application of R2P to disasters, for as illustrated in the previous section, R2P is a human-centric concept, aiming to protect populations from atrocities committed by other human beings. It is true that (unlike hazards) disasters are themselves also human-made (at least in part). But, beyond this point, the possible application of R2P to disasters had been discussed in early conceptual documents on the doctrine. This aspect of the debate is grounded in its first days, namely, in a reference to the subject made in the 2001 Report published by the Canadian-led initiative on R2P to that document, among the “consequence-shocking situations” that could trigger military action under the R2P doctrine figured “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.”

However, later on, when the R2P concept was adopted in the UNGA, the reference to disasters was completely left out. The General Assembly was adamant to limit the use of R2P to the four serious international crimes, and the language adopted in the 2005 World Summit Outcome document refers only to these four crimes. The phrasing adopted leaves little room for doubt, for the General Assembly repeats five times the exclusive reference to these four crimes as triggers for applying R2P.

Therefore, for the UNGA (and later on, for the UNSC, which endorsed R2P exactly as adopted by the UNGA), these are the only situations in which the doctrine could be used.

What would trigger R2P in disasters?

In an effort to evoke R2P in disasters, some authors have tried to identify whether the commission of one of the four R2P-triggering crimes can be linked to disasters. The idea here would be to test whether actions or inaction by a disaster-affected government may amount to the commission, in particular, of crimes against humanity (the other crimes are less likely to be linked to natural disasters). This would arguably then justify the triggering of R2P, including any military action to be taken for the delivery of humanitarian aid.

The emblematic example referred to in this discussion is Myanmar after the Nargis cyclone, which hit the country in May 2008, devastating the Ayeyarwady Delta region and affecting about 2.4 million people. About 85,000 people were killed, and over 50,000 went missing. Shortly after the cyclone hit the country, humanitarian aid was initially halted by the national government, despite the fact that the government in power was known to be unable to fully meet the needs of its population.

This led to criticisms against the government for failing to protect its own population, a criticism that was voiced particularly strongly by France’s minister of foreign affairs at the time, Bernard Kouchner.

What is more, in the Nargis situation, peaceful means were tried and at first did not succeed. Coercive military action was then considered, but it would have to pass through the UNSC, and China threatened a veto. Such developments left the international community in a situation similar to the one it tried to avoid when it conceived the R2P doctrine, meaning not being able to prevent massive human tragedy from taking place due to the lack of agreement in the UNSC.

In this particular example, the situation improved within a month from the Nargis cyclone having hit Myanmar. Greatly due to diplomatic efforts at the international and regional levels
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In any event, the episode in Myanmar triggered a discussion on whether the military junta’s obstruction of international aid could potentially amount to crimes against humanity (especially murder, extermination, forcible transfer, persecution, and other inhumane acts). The appraisal of such allegation is not straightforward, however. This is so especially taking into account that humanitarian aid is mostly to be delivered shortly after a natural disaster hits a country, and so the gathering and checking of information on governmental policies during the humanitarian response might prove a difficult exercise to be undertaken under these circumstances. But even if one accepts a less stringent threshold for verifying the likelihood of the commission of crimes against humanity or other R2P-triggering crimes in a country hit by a natural disaster, the advantages of adopting such a strategy do not seem real, as discussed later on.

This is not to say that admitting that a crime against humanity (in particular as a result of a refusal to consent to humanitarian access) can also take place during a humanitarian emergency following a natural disaster would mean expanding the use of R2P in practice, however; it seems that it is better still to resort to military force in such situations, especially due to reasons of political expediency. To refer to Myanmar, the conventional wisdom is that to force humanitarian aid through coercive military action would have made matters worse. Besides, there was a lack of political will by Western States, especially the US and the UK, to take coercive military action. On a more general note, some argue that strategically it may be a wrong move to try to apply R2P in situations less obviously connected with the four international crimes triggering the application of this doctrine, with the risk of putting too much pressure on the concept and blunting it altogether. Since the R2P doctrine, as described in the World Summit Outcome, has not yet clearly crystallised as a norm of international law (it is based on a UNGA resolution which was later endorsed by the UNSC), it might be better not to try to stretch the concept too much, or everything can be lost. It seems that, unless it can be clearly linked to the four R2P-triggering serious crimes, it is better to avoid attempting to apply R2P in disaster situations. Embracing this position are high UN officials, including the UNSG, who opposed the idea of extending the application of R2P to situations beyond the four international crimes which the concept was originally linked to. For them, R2P should not be used to justify the response to natural disasters and environmental crises, including those linked to climate change, for this would arguably undermine the 2005 consensus.

Moreover, and most relevant, is that the use of R2P in disasters has not attracted support from States or from the International Law Commission (ILC) when it addressed the protection of rights in disasters.

Does R2P add value in disasters?

Despite the great opposition to the application of R2P in natural disasters, not everything is lost. Cooperation, which is also an important aspect of R2P, is very important in disasters as a way of enhancing relief action. This regularly takes place outside the development of the R2P concept, and remains vital standalone even if disasters do not undermine the importance of it.

As covered in the following section, the duty to cooperate is also an important feature in the ILC Draft Articles on the Protection of Persons in the Event of Disasters (IC Draft Articles). On the other hand, coercive military action seems to be a very bad idea to be used in disasters. First of all, it is important to have access to places where disasters take place and governmental institutions will normally have vital details about the geography, routes, and population of the affected area, as well as knowledge about the community and its institutional apparatus.
Finally, coercively acting through military means may escalate an already difficult situation in a particular country, thus making it even more difficult for disaster victims to have access to humanitarian aid. If governmental institutions are busy upholding their sovereignty, it is very likely that human and material resources will be split to deal with the two crises. Therefore, cooperation seems a much better approach than coercive military action in disasters.

Alternatives for the use of R2P in disasters

Having argued that R2P is of little value in disasters, particularly in natural disasters, this section identifies the key developments and standards relevant to disasters. It is divided in two parts. The first part covers the work of the ILC in developing articles for the protection of persons in the event of disasters. 46 The focus here is not here is not here is not here is not here the ILC avoided R2P to permeate the Draft Articles and what phrasing it adopted instead. The second part covers regional treaties on disasters, particularly clauses relating to inter-State cooperation in disasters, and how they relate to R2P. It is argued that there is a growing body of legal standards and practices on disasters that can provide useful guidance for States and further actors.

The ILC Draft Articles on the protection of persons in the event of disasters and R2P

An important development in the work by the ILC on the subject, which started in 2006 and culminated in 2016 with the adoption of the eighteen the ILC Draft Articles, together with their Commentaries. This process led to fruitful reflections on the topic by many actors over the years, notably, documented in eight reports by Mr. Eduardo Valencia-Ospina, the ILC Special Rapporteur appointed for the subject, together with several inputs from governments, international organizations, and other entities. By the end of this process, the ILC recommended to the UNGA that a convention be drafted on the basis of the Draft Articles. 47

The UNGA took note of the ILC Draft Articles and invited governments to submit comments on the recommendation by the ILC to draft a convention on the basis of the Draft Articles. 48 The UNGA also decided to include in the provisional agenda of its 71st session, in 2016, an item entitled “Protection of persons in the event of disasters.” It is interesting to note that, from the very beginning of its work on disasters, the ILC indicated that it would rather close the door to R2P, especially in terms of coercive military action. 49 Although we cannot look at the entire project in detail here, the focus will be on ILC Draft Articles 10–14, which, read together, suggest that they were phrased in such a way as to protect the ILC project from R2P intrusion.

Draft Article 10 (Role of the affected State) emphasises that the affected State has the duty to ensure the protection of persons and the provision of disaster relief assistance, but that it also has the primary role in relief efforts. It reads:

1. The affected State has the duty to ensure the protection of persons and provision of disaster relief assistance in its territory, or in territory under its jurisdiction or control.
2. The affected State has the primary role in the direction, control, coordination and supervision of such relief assistance.

This Draft Article seems broadly compatible with R2P if it accommodates a rationale analogous to pillar 1 of that doctrine, namely, the principle that the affected State is the primary and main actor in achieving disaster relief efforts.
Furthermore, paragraph 2 of the same Draft Article 10 suggests that it is incumbent on the affected State to play the primary role in disaster relief operations, thus making it clear that the affected State shall take the lead. Whether this is good or bad is not possible to say in abstract, but the assumption seems to be that the affected State is in the best position to know its country and population and arguably is the best actor to lead relief efforts in the affected country. 50

The following Draft Article already departs from R2P. It reads:

**Article 11. Duty of the affected State to seek external assistance**

To the extent that a disaster manifestly exceeds its national response capacity, the affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors.

This provision places upon the affected State the duty to seek external support should the needs of its population manifestly exceed its national capacity to handle the disaster in question. The ILC commentary on the Draft Article explains that the affected State shall act in good faith in deciding whether a disaster manifestly exceeded its capacity to handle the situation. 51 The Commentary also recalls different human rights obligations of States in the context of disasters, suggesting that the affected State’s duty to seek assistance also derives from them. 52

As the matter is to be decided solely by the affected State, this may pose problems especially if affected States are unwilling to admit they have reached the limits of their operations but do not want external assistance to enter the country, as was the case with Myanmar in the first weeks after the Nargis cyclone. The ILC Draft Articles leave the matter open. Sivakumaran suggests that the compromise formula aimed at solving this dilemma (allowing the needs of the affected population while preserving the sovereignty of the affected State) is that, once consent to external assistance is given, it cannot be arbitrarily withheld, as discussed below. 53

Here one can already see, perhaps unsurprisingly, how the text is a legal drafting exercise discussed chiefly among States, that throughout the entire text of the ILC Draft Articles on disasters a compromise has been struck between the interests of States and those of disaster victims. The very title of the project namely, the "Protection of persons in the event of disasters", suggests this is the main rationale of this initiative. As stated in Draft Article 2, the purpose of the Articles is "to facilitate the adequate and effective response to disaster and reduction of the risk of disaster, so as to meet the essential needs of the persons concerned, with full respect for their rights". However, reading the entire eighteen Draft Articles, one can sense a less openly stated intention to make sure that the sovereignty of the affected State is protected. 54

Draft Article 13 deals with the affected State’s consent to external assistance, basically indicating that the provision of external assistance requires the consent of the affected State but that such consent "shall not be withheld arbitrarily". The formula adopted here suggests a compromise between potential external aid providers and the affected State.

This formula excludes the more controversial use of R2P, namely its use enabling the international community to intervene by coercive military force should the affected State refrain from discharging its obligations towards its population. Instead, the affected State preserves its sovereignty; in other words, no third State can come in and forcefully deliver aid (the discussion that followed Nargis in Myanmar). Issues pertaining to the "arbitrary withdrawal of consent" to external assistance have given rise to much debate, including, among others, the debate held back in 2003 during the Bruges session of the Institut de Droit International. On that occasion, several possible justifications for a non-arbitrary refusal were proposed. One possible example in this regard is where a State is able and willing to use its own resources to adequately make a grim situation better. 55
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Further provisions in the ILC Draft Articles suggest some tension between the interests of the affected States and those of other States, international organisations, and humanitarian NGOs. Draft Article 14 covers ‘Conditions on the provision of external assistance’, stating that the affected State can set the conditions subject to which it will accept humanitarian assistance. This should take into account the needs of the affected population, and also the quality of assistance. This is an important and necessary provision, for disaster relief practice suggests anecdotal evidence of relief items that had to be discarded by the receiving States, such as expired food and medicine or clothing and food that was culturally inappropriate for the affected communities. Draft Article 14 further provides that the conditions placed on external assistance have to be compliant with applicable law, meaning both international law (including the ILC Draft Articles) and national law. This can prove challenging especially in terms of national law provisions. It is important to read the Draft Articles in good faith, and to consider the rationale behind them, including the duty of the affected State to facilitate external assistance, as pointed out in due course.

Also, Draft Article 12 covers ‘Offers of external assistance’, stating that external actors have a right to offer their assistance. It does deviate from the coercive rationale of military intervention under R2P, since assistance to the affected State may be offered by a range of external factors, such as States, the UN, NGOs, the International Federation of Red Cross and Red Crescent Societies (IFRC), the United Nations Children’s Fund, Médecins Sans Frontières, and Oxfam, to name but a few. This provision especially benefits the affected population, for it relates to their rights, too. It is also linked to a previous one, Draft Article 13, which states that the affected State has to decide on offers of assistance made. These provisions benefit the affected population, for they must weigh up the process so that aid can more quickly reach those in need.

Finally, Draft Article 15 imposes on the affected State a duty to facilitate external assistance, this by reducing the red tape involved in humanitarian relief items sent to the country, as well as a duty to facilitate the entry of foreign aid workers to work in the country. It has a major contribution to the area, for anecdotal evidence suggests this is a very serious issue jeopardising a speedy and effective provision of aid in situations.

From the above discussion it can be appreciated that the ILC Draft Articles refer to ‘duties’ of international cooperation on the delivery and distribution of humanitarian aid. The disaster-affected State has not only a duty to protect its own population but also the primary role in relief operations. This also suggests acknowledgement of the affected State’s sovereignty, which ought to be respected by other actors cooperating or intending to cooperate with it. It is important to bear in mind the protection of disaster victims as the ultimate goal of the ILC initiative in drafting the Articles, as suggested by the Special Rapporteur back in the early days of the project, referring to the human rights-based approach at the focus of the project. This rationale shall permeate the interpretation of all provisions therein, including the duties of the affected State, among which figure (1) the duty to seek assistance, and this is especially so when the affected State finds itself incapable of addressing the humanitarian needs linked to the disaster, and (2) the duty not to arbitrarily withhold consent to international assistance. On the other hand, the international community would hold the right to offer humanitarian assistance. Under the ILC Draft Articles, the duty to cooperate applies to all actors involved in disaster assistance. As indicated, the affected State shall give consent to foreign assistance, though it can set some criteria, so that truly needed items are to be delivered and that the assistance will be of quality (as is to make sure, for example, that the relief workers sent to the affected State are properly trained).

From this brief overview of the ILC Draft Articles, there is a clear suggestion that the project does not wish to allow R2P to permeate its text. One possible reason for this is that States are generally no longer confident in this doctrine, bearing in mind, among other things, that R2P,
as it stands, makes no reference to natural disasters. It therefore seems understandable that the ILC’s Special Rapporteur refrained from pushing this disputed concept into the ILC Draft Articles. This may be a sensible approach to take, for otherwise the inclusion of R2P in the Draft Articles could sabotage the whole project (including the possible future adoption of the Draft Articles as a treaty).

But one point that R2P also uses and the ILC Draft Articles do not discard is the need for cooperation. In the ILC Draft Articles, the duty of cooperation applies not only to States but also to various other actors, such as international and regional organisations and humanitarian organisations such as the ICRC, the International Committee of the Red Cross, and NGOs. Indeed, cooperation permeates various standard-setting initiatives in disasters, ranging from regional treaties to soft law standards. Cooperation could be perceived as one aspect of the R2P doctrine which the ILC Draft Articles actually do not neutral. It is likely that it may (or may not) reflect an incidental convergence of the two initiatives rather than a declared wish to preserve or accommodate the R2P doctrine in the ILC Draft Articles. The next section will briefly outline some examples of cooperation duties in disasters.

Regional treaties on disasters and R2P

Beyond the ILC Draft Articles, different treaties on disasters also do not address R2P (many predate this doctrine). What is more, many disaster treaties focus on or contain provisions on cooperation and on collaboration among States, a principle that underpins the practice in this area. For example, the 2005 ASEAN Agreement on Disaster and Emergency Management emphasises the need for inter-State cooperation. This is reflected in the very objective of the treaty, which is to provide effective mechanisms to achieve substantial reduction of disaster losses in lives and in the social, economic and environmental assets of the Parties, and to jointly respond to disaster emergencies through concerted national efforts and intensified regional and international co-operation.

Cooperation also figures among the principles of the treaty, according to which States shall, “in the spirit of solidarity and partnership and in accordance with their respective needs, capabilities and situation, strengthen co-operation and coordination to achieve the objectives of this Agreement”.

Finally, inter-State cooperation is also emphasised in efforts to reduce disaster losses, to provide information to neighboring States that might be affected by a disaster, and to promptly respond to disaster emergencies through concerted national efforts and intensified regional and international co-operation.

This particular treaty clearly diverges from the R2P doctrine, emphasising that State action shall be guided by the respect for State sovereignty, territorial integrity, and national unity, in accordance with the UN Charter. The primary responsibility to respond to disaster lies with the affected State and that “external assistance or offers of assistance shall only be provided upon the request or with the consent of the affected Party”.

In the Caribbean, the Agreement establishing the Caribbean Disaster Emergency Management Agency (CDEMA) similarly alludes to the cooperation of States parties in achieving the objectives of the Agreement. The same treaty also contains a further provision relevant to R2P, which precludes external coercive military intervention, making it clear that no member of the “disciplined force” of another participant State shall be sent to the disaster-affected State without its prior express consent.
Is cooperation only a formal commitment of States, or do they truly follow this rationale? In this brief overview, it was not possible to further investigate the practical reliance on these clauses. Despite this shortcoming, the reference to cooperation in different regional disaster treaties amounts to a positive trend that may be followed in a future international treaty, such as the treaty that was added to the Draft Articles put together by the ILC.

Cooperation and collaboration are important features in disasters. States seem keen on cooperating/collaborating, but they also cherish their sovereignty, lending no support to coercive external intervention in natural disasters. In this sense, it is perhaps unsurprising that the majority of States did support the adoption of the UNGA resolution on R2P, but not the possibility of extending this concept to disasters (especially natural ones).

Conclusion

R2P is dead. R.I.P. R2P. This is what arises from an assessment of the doctrine, especially considering its added value in natural disasters. As Ford puts it, R2P is a failure, for it has not lived up to its expectations. So that it may be significant that the use of R2P language by the UNSC was considered a positive development. Especially by linking R2P to international crimes, the Security Council met its own criteria and shared political objectives. In any event, R2P seems more promising in relation to preventing mass violence from taking place, but one can have reservations outside R2P, and so the added value of this doctrine in such situations is not clearly evident.

One needs to be careful when broadly advocating for the use of R2P in natural disasters. As Evans puts it, if R2P is to protect everybody from everything, it will end up protecting nobody from anything. Thus, loosely applying R2P beyond mass atrocities undermines the very utility of the concept, jeopardising how it can be effectively operationalised. Worse, if we drop the concept and lead States not to act in cases of blatant commission of the original four mass-atrocity crimes.

It is important to also bear in mind that States were already reluctant to embrace the idea of R2P a few years after they adopted the 2005 World Summit Outcome document. That is why the UN is very careful not to expand its usage beyond the phrasing contained in that specific document.

This chapter attempted to provide an account of this ambitious doctrine, which unfortunately boiled down to little once it entered the sphere of international organisations. It seems it is better for States and individuals, especially in the event of natural disasters, to instead rely on further initiatives and instruments, such as those emphasising the need for cooperation in disasters, as suggested by the work of the ILC and of different regional disaster treaties.

Selected bibliography


Notes

1 The author would like to thank various persons that commented on earlier versions of this chapter, namely Professor Maria Lee and the participants of the UCL Staff Seminar held on 16 December 2015 at the Faculty of Laws, the organisers and participants of the International Conference on the Protection of Persons at Times of Disasters International and European Legal Perspectives, held in Rome 3–4 March 2016, and the editors of the current volume. Any errors are the author’s sole responsibility.

2 Definition contained in Draft Article 3(a). See ILC, Protection of Persons in the Event of Disasters: Titles and Texts of the Preamble and Draft Articles 1 to 18 of the Draft Articles on the Protection of Persons in the Event of Disasters Adopted, on Second Reading, by the Drafting Committee, UN Doc. A/CN.4/L.871 (27 May 2016) para 2. For a detailed coverage and discussion of the notion of ‘disaster’ under international law, see Bartolini’s chapter in this volume.

3 Some disaster-related treaties and documents expressly exclude from the disaster definition situations of war. See e.g. the Agreement Establishing the Caribbean Disaster Emergency Management Agency (adopted 1 July 2008, entered into force 4 July 2008) (CDEMA Agreement). Art 1 defines disaster as ‘the exposure or the human habitat to the operation of the forces of nature or to human intervention resulting in widespread destruction of lives or property, but excludes events occasioned by war or military confrontation’. A similar position has been adopted in the IFRC International Disaster Relief Law Guidelines. See IFRC, ‘Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance’ (2011), available at www.ifrc.org/PageFiles/125652/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf, accessed on 6 May 2017 (IDRL Guidelines), Guideline 2.1. Initially, the ILC indicated that the focus of its attention would be ‘natural disasters’, but as its work developed it adopted a more encompassing notion of disasters. ILC, Report of the International Law Commission, Fifty-Eighth Session, UN Doc. A/61/10 (2006) (1 May–9 June and 3 July–11 August 2006) 476.

4 E.C. Luck, ‘Environmental Emergencies and the Responsibility to Protect: A Bridge Too Far?’ 103 Proceedings of the Annual Meeting (American Society of International Law) (2009) 19, 36. Edward Luck was back then the Special Advisor to the UN Secretary-General on R2P. See also Bellamy (n. 1) 21–27.

5 Luck (n. 4) 38; Bellamy (n. 1) 78.

6 Bellamy (n. 1) 24–26.

7 See Ibid 26–27, for the position of China and Cuba.

8 Luck (n. 4) 37–38.

9 Ibid 38.


11 Bellamy (n. 1) 55.

12 B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ 10(1) European Journal of International Law (1999) 1. See also the same journal article, Cassese’s comments on Simma’s article: A. Cassese, ‘Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ 10(1) European Journal of International Law (1999) 23.


14 Ibid para 2.29.

15 For the ‘Uniting for Peace’ resolution see UNGA, Res 377(V), UN Doc. A/RES/377(V) (3 November 1950).

16 Bellamy (n. 1) 57.


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29 UNGA, Report of the Secretary-General, Implementing the Responsibility to Protect, UN Doc. A/60/217 (13 January 2006).

30 See Evans (n. 28) 331. For the three pillars see the UNGA, Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/60/217 (13 January 2006) para 11, referring to the Korean situation as an example of pillar three of the R2P doctrine. See the UNGA, Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/RES/60/1 (24 October 2005).

31 See Evans (n. 28) 331. For the three pillars see the UNGA, Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/RES/60/1 (24 October 2005) para 11, referring to the Korean situation as an example of pillar three of the R2P doctrine.

32 UNGA, Report of the Secretary-General, Implementing the Responsibility to Protect, UN Doc. A/60/217 (13 January 2006).

33 UNGA, Report of the Secretary-General, Implementing the Responsibility to Protect, UN Doc. A/60/217 (13 January 2006) para 11, referring to the Korean situation as an example of pillar three of the R2P doctrine. See the UNGA, Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/RES/60/1 (24 October 2005).

34 See Evans (n. 28) 331. For the three pillars see the UNGA, Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/60/217 (13 January 2006) para 11, referring to the Korean situation as an example of pillar three of the R2P doctrine.

35 See Evans (n. 28) 331. For the three pillars see the UNGA, Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/RES/60/1 (24 October 2005) para 11, referring to the Korean situation as an example of pillar three of the R2P doctrine.


38 According to media reports, when David Cameron was asked if he would wait for a UN resolution before taking action, he told the UK Parliament that ‘Russia has different aims to us and they have repeatedly threatened to veto any such resolution’. He continued stating that ‘Of course it is always preferable in these circumstances to have the full backing of the United Nations Security Council but I have to say what matters most of all is that any action we would take would both be legal and would help protect our country’.


40 Heath (n. 28) 432–433; Malone (n. 30) 27.

3.5 R2P and disasters


46 In the initial document outlining its future work on the topic the ILC made reference to the R2P, signalling the importance of prevention in the context of disasters. It indicated that it would be focusing on procedural interaction between States, and that it would consider the responsibility to react in response, including through coercive measures, the most extreme of them being military intervention. See ILC, Report of the International Law Commission, Fifty-Eighth Session, UN Doc. A/64/10 (2009) paras 5–10.


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50 This principle is also reaffirmed in many instruments (binding and soft law alike) dealing with the role of the affected State.


52 Ibid paras 43–46.


58 Art 14 covers the conditions on the provision of external assistance, and it reads as follows: “[t]he affected State may place conditions on the provision of external assistance. Such conditions shall be in accordance with the present draft articles, applicable rules of international law, and shall meet the quality and validity requirements of the Parties concerned for consumption and utilisation’.”

59 The actual phrasing is as follows: ‘3. When an offer of external assistance is made in accordance with the present draft articles, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.’
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60  See e.g. IFRC Desk study 98–100, identifying different disaster settings in which relief operations have faced difficulties in the importation of food, medicines, ground vehicles, telecommunications equipment and other relief items. Often as a result of lengthy customs and other clearance procedures, perishable items such as foodstuffs and emergency relief items such as blankets and tents become

61  Allan and O’Donnell (n. 32) 339.

62  See Zorzi Giustiniani (n. 54) 76.

63  On this issue, see McDermott’s chapter in this volume.


65  In the Oxford Dictionaries online thesaurus, the two words are listed as synonyms.

66  One example is the Preamble of the Agreement among the Governments of the Participating States of the Black Sea Economic Cooperation on collaboration in Emergency Assistance and Emergency Response in Natural and Man-Made Disasters (adopted on 15 April 1998), whose opening lines are as follows:

67  ASEAN Agreement on Disaster Management and Emergency Response, art 2.

68  Ibid art 3.

69  Ibid art 4.

70  Ibid art 3.

71  Ibid. See also art 11 (Joint Emergency Response through the Provision of Assistance).

72  See CDEMA Agreement, art XXI(3).

73  Ibid art XIX(r).

74  Ibid art XXI(3).

75  For a discussion on the issue of cooperation in the Draft Articles adopted by the ILC, see McDermott’s chapter in this volume.

76  Ford (n. 1) 268.

77  Ibid.

78  Luck (n. 4) 37.

79  Evans (n. 20) 29.

80  Ibid 32.

81  Luck (n. 4) 38.