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R.I.P. R2P

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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 atrocity 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). Action 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 on.

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 being considered more generally in relation to further disasters. Despite the popular notion that a cyclone or series of events resulting in widespread loss of life, great human suffering and distress, mass displacement, or large-scale material or environmental damage, seriously disrupting the functioning of society, 2 the focus of this chapter is no disaster linked to natural hazards, but rather to human-made or natural events, despite the fact that no disaster is fully natural, and even those relating to natural hazards combine human action or inaction (e.g. lack of action to adopt and implement building codes that should improve the earthquake resistance of buildings). Being or sound like the international
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.

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 their addressed conflict in Africa in the mid-1990s. This 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 often-cited ‘genocide’. These ideas suggested 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 beyond the need for global respect for human rights. Cooperation to halt terrorism and the non-proliferation of weapons of mass destruction was another of these for them. 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 may be qualified for practical reasons, for example, and could not be ignored as a purely internal matter.

Especially after the 2003 US-UK-led Iraq invasion, developing countries became very anxious about R2P and its possible misuse in military interventions. This comes as no real surprise, for Global South countries are traditionally quite anxious about the prospect of being at the receiving end of such sanctifying ‘humanitarian interventions’. However, some authors, such as Luck, argue that it makes little sense to perceive R2P as a North-South debate and thus try to domesticate the issue and how it affects the R2P idea. He rather encourages Southern countries to participate in the conceptualisation and, notably, in the identification of the limits of the notion so as to make sure the doctrine will not be abused later on. This might be a model (though somewhat unfortunate) that challenges the development of the concept, which does not question the limited possibilities of different States. Another aspect to bear in mind, however, is that R2P is not limited to coercive military action but also includes other measures.

In any event, being R2P grounded in the North or in the South, its developing states are commonly linked to the further development of the concept, one that took place in the South (Darfur) and one in the North (the Balkans).
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 casualties among American troops and with local militias 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 Milosević 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 NSA's interventions in Kosovo was considered to be based on solid moral grounds, as it was meant to stop the bloodshed of the civilian population. Action here is the 'extraordinary' action could be exceptionally justified under very particular circumstances. However, the bypassing of authorisation to use force according to the UN Charter should never become the rule, for it would risk the collapse of the collective security system."

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 measures' 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 (requiring 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 go that far, they would have to make sure 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 mechanisms of collective security, which, if working properly, should be able to prevent mass atrocities. One new twist of the idea that R2P is a superfluous concept, if the UN Charter already carefully assigns powers and competencies to the main UN bodies, which, if they were acting accordingly, should be able to tackle mass atrocities in a timely manner. 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 there.

The UNSG'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. 18
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 summit lent great legitimacy to the doctrine.

This document fundamentally set out the key features of the R2P doctrine, namely its components 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 refers 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 community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

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 stop if the affected State be unwilling or unable to protect its own population 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 prevent or protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, as a last resort, to protect populations the Affected States, in accordance with Chapter VII of the Charter, 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 general, mass, war crimes, ethnic cleansing and crimes against humanity.

A later report by the UNSG, assisted by Edward Luck, then Special Adviser on the Responsibility to Protect, proposed here the "pillars of the R2P concept," indicating that 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.

The Report suggested three pillars for the R2P concept, which can without difficulty be linked to the World Summit Outcome document paragraphs just quoted: (1) "protection responsibilities of the state," meaning that the primary protection responsibility lies with the affected States; (2) "international assistance and capacity building," meaning that collective action may be taken by other States to support the affected States; and (3) "timely and decisive response," meaning that when the affected State is failing its population the international community may act.

Finally, the Report makes it clear that R2P implies a "continuum of response," military action being only one shade in the spectrum, R2P is therefore not to be understood as boiling down to "sending the Marines." It rather encompasses a larger vision that includes prevention, reaction, and post-crisis rebuilding.
In 2006, the UNSC (per Resolution 1674, which enshrined R2P exactly as adopted by the UNGA) 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 enshrined 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 means the question of the added value of such a doctrine, which was originally meant to provide additional moral constraints 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 legally accountable when taking such action.

The most serious (though pre-R2P) example of State action 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, or to act in such a changed threat. Humanitarian justifications were included among various justifications given by the coalition to self-legitimise their action. 27 Nonetheless, the Iraq invasion was one leading example where States’ actions hint not towards a responsibility to protect populations facing serious threats but, rather, toward 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, but none related to R2P. 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 used its veto in a UN resolution allowing States to take such action. Without entering into the merits of the discussion, the question is how to accommodate individual military State action without eroding 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, many political statements suggesting that military action could be carried out despite the lack of authorisation by the UNSC (as none related to R2P). 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 used its veto in a UN resolution allowing States to take such action. Without entering into the merits of the discussion, the question is how to accommodate individual military State action without eroding 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, many political statements suggesting that military action could be undertaken without the need for such a doctrine. Cooperation required under R2P will continue regardless of the fate of the doctrine. Cooperation required under R2P and will continue regardless of the fate of the doctrine. It is true that States have taken R2P in its wider role as a “prevention” or “prevention in action” (as we shall see later).

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 crises 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 aimed to protect populations from atrocities committed by others. 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 this 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 in that document, among the “conscience-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), there 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 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 criticism against the government for failing to protect its own population, a criticism that was traced 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 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 likely 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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(namely, concerted action by the then UNSG Ban Ki-Moon and the ASEAN delegation, the national government allowed foreign humanitarian assistance to reach the country. 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, and other inhumane acts). 37 The appraisal of such allegations 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 as obvious as discussed here 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 not to resort to military force in such situations, especially due to reasons of political expediency. In relation to Myanmar, the conventional wisdom is that to force humanitarian aid through coercive military action would have made matters worse. 38 Besides, there was a lack of political will by Western States, especially the US and the UK, to take coercive military action. 39 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 flattening it altogether. Since the R2P doctrine, as described in the World Summit Outcome, has not yet clearly crystallized as a norm of international law (as is based on a UNGA resolution which was later endorsed by the UN), it might be better not to try to stretch the concept too much, or everything can be lost. 40 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. 41 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. 42

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. 43

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 restrains legal standards covering disasters already emphasize the importance of it. As covered in the following sections, the duty to cooperate is also an important feature in the ILC Draft Articles on the Protection of Persons in the Event of Disasters (IIC Draft Articles). 44 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 in institutional opposite).
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 disaster assistance. 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. This was how 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 action.

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

An important development is the work by the ILC on the subject, which started in 2006 and culminated in 2016 with the adoption of the eighteen 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 intrusions.

Draft Article 10 (Role of the affected State) emphasizes that the affected State has the duty to ensure the protection of persons and 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 extenuating analogies to pillar 1 of that doctrine, namely, the principle that the affected State is the primary and main actor in addressing disaster relief efforts.

34
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 capacity to handle the disaster in question. The ILC commentary on the Draft Articles explains that the affected State shall act in good faith in deciding whether a disaster manifestly exceeds 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 limit 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 (admitting the need 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 sense, perhaps unsurprisingly, bearing in mind that this is a legal drafting exercise discussed, chiefly among States, 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 disasters and reduction of the risk of disasters, 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 in cases where the international community to intervene by non-peaceful means should the affected State refuse to allow external assistance to enter the country. 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. The possible example in this regard is where a State is able and willing to use its own resources to adequately tackle a given disaster situation. 55
Further provisions in the ILC Draft Articles suggest some tension between the interests of the affected States and those of other States, international organizations, 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. Assistance to the affected State may be offered by a range of external factors, such as States, the UN, NGOs, the International Federation of the Red Cross and Red Crescent Societies (IFRC), the UN Children’s Fund, and others to name 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, according to which the affected State has to decide on offers of assistance made. These provisions benefit the affected population, for they can speed up the process so that aid can move quickly to 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. This has a major contribution in the area, for anecdotal accounts suggest this is a very serious time-consuming a speedy and effective provision of aid is a question.

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 acknowledgment 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 as 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 have 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 to make sense, for example, so that the relief workers are in accordance with the needs of the affected States are properly trained.

From the brief overview of the ILC Draft Articles there is a clear recognition 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...
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as it stands, makes no reference to natural disasters. It therefore seems understandable that the ILC 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 IRC, 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 neutralise. Be that as it may, it seems to 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 or contain provisions on cooperation and/or 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 situations, strengthen co-operation and collaboration to achieve the objectives of this Agreement'. Finally, inter-State cooperation is also emphasised in efforts to reduce disaster losses, to provide information to neighbouring 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. 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 situations, strengthen co-operation and collaboration to achieve the objectives of this Agreement'. Finally, inter-State cooperation is also emphasised in efforts to reduce disaster losses, to provide information to neighbouring States that might be affected by a disaster, and to promptly respond to disasters through concerted national efforts and intensified regional and international cooperation.

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

In the Caribbean, the Agreement establishing the Caribbean Disaster Emergency Management Agency (CDEMA) similarly alludes to the cooperation of States parties towards a timely and structured mobilisation of disaster relief resources and to their obligations to participate in joint technical cooperation programmes on disaster management. The same treaty contains a further provision relevant to R2P, which prohibits external concrete military interventions, making it clear that no member of the ‘disciplined forces’ of another participant State shall be sent to the disaster-affected State without its prior express consent.
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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 must be followed in a future international treaty, such as the treaty that may arise from 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. Be that as it may, the increase in the use of R2P language by the UNSC must be considered a positive development. Especially by linking R2P to international crimes, the Security Council might act in a more systematic and less political fashion. In any event, R2P seems more promising in relation to preventing mass violence from taking place, but one can see prevention outside R2P, and so the added value of this doctrine in such situations is not clearly evident.

One must be careful when broadly advocating for the use of R2P in natural disasters. As Evans puts it, R2P is to protect everybody from everything, it will end up protecting nobody from anything. Thus, broadly applying R2P beyond mass atrocities could undermine the very utility of the concept, jeopardising how it can be effectively operationalised. Worse, if one dilutes the concept and had 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


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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 organizers and participants of the International Conference on the Protection of Persons in Times of Disasters: International and European Legal Perspectives, held in Rome, 3–4 March 2016, and the editors of this current volume, for their comments and suggestions. The author is also grateful to the UN Office for the Coordination of Humanitarian Affairs for publication of a draft article by the author entitled ‘The Protection of Persons in the Event of Disasters: The Experience of the United Nations’ (in discussion), presented at the International Conference on Protection of Persons in Times of Disasters: International and European Legal Perspectives, held in Rome, 3–4 March 2016. The author is grateful for the comments of the participants of that conference and the organizers of the conference, for their comments and suggestions.


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) 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-Eight 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, Cassese’s comments on Simma 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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22  See Evans (n. 20) 26. See also Luck (n. 4) 36. On the three pillars see the UNGA, Implementing the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/63/677 (12 January 2009) (UNSG, Report on R2P).

23  See Evans (n. 20) 28.

24  See UNSG, Report on R2P , paras 11(c) and 51, referring to the Kenyan situation as an example of pillar three of the R2P doctrine. See also Evans (n. 20) 28.


28  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.

29  On this issue, see J.B. Heath, ‘Disasters, Relief, and Neglect: The Duty to Accept Humanitarian Assistance and the Work of the International Law Commission’ 60 J. Int’l Law (2005) 213, 215, arguing that ‘what it means to invoke RtoP remains unclear, especially where the principle is invoked to justify something other than forced intervention’ (footnote omitted).


31  ICISS Report 32.


33  See e.g., Ford (n. 1); Barber (n. 1).


35  Ford (n. 1) 255–256.

36  Luck (n. 4) 36–37.


38  Luck (n. 4) 36–37.

39  Ford (n. 1) 267.

40  Heath (n. 29) 432–433; Malone (n. 30) 27.


42  See the UNSG, Report on R2P para 10(b). Malone (n. 30) 27.
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43 See UNDG, South Commission, Agenda item 75, Report of the International Law Commission on the Work of Its Sixtieth Session, UN Doc. A/61/10 (2006) paras 57 (position of France); para 58 (position of India); para 60 (position of Japan); para 66 (position of China); para 84 (position of Germany); para 86 (position of Malaysia); para 96 (position of Pakistan); para 97 (position of South Africa); para 98 (position of the USA).


49 In the initial document outlining its future work on the topic the ILC made reference to the R2P, signaling the importance of prevention in the context of disasters. It indicated that it would be focusing on procedural interaction between States, and therefore would not consider the responsibility to react in response, including through coercive measures, the most extreme of them being military intervention. ILC, Report of the International Law Commission, Sixtieth Session, UN Doc. A/61/10 (2006) para 257.

50 This principle is also reaffirmed in many instruments (binding and soft law alike) dealing with the role of the military generally has the necessary equipment and experience to speedily reach the affected areas. It is worth bearing in mind, however, that in many cases (uncoerced) foreign military aid is considered very helpful because the military knows what aid items might be inappropriate to the circumstances. It knows the infrastructure, understands the habits and special needs of the population, and is in a position to react in a faster, more effective way when compared to a civilian agency. However, it is recognized that military aid should meet the quality and validity requirements of the Parties concerned for consumption and utilisation.


52 Ibid paras 43–46.

53 See UNGA, Sixth Committee, Agenda item 75: Report of the International Law Commission on the Work of Its Sixtieth Session, UN Doc. A/61/10 (2006) paras 57 (position of France); para 60 (position of Japan); para 66 (position of China); para 84 (position of Germany); para 86 (position of Malaysia); para 96 (position of Pakistan); para 97 (position of South Africa); para 98 (position of the USA).


55 See especially ILC, Draft Art 14.

56 See especially ILC, Draft Art 14.


58 Art 14 covers the conditions on the provision of external assistance, and it reads as follows:

The affected State... Whenever possible, the affected State shall, whenever possible, make known its decision regarding the offer in a timely manner.

59 The actual phrasing is as follows: ‘... Whenever possible, 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, water, shelter, non-food items, telecommunication equipment, and other relief items. Often as a result of lengthy customs and other clearance procedures, perishable items can deteriorate or expire, 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 to 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:

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.

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

68 Ibid art 3.

69 Ibid art 4.

70 Ibid art 1.

71 Ibid art 2 (Joint Emergency Response through the Provision of Assistance).

72 See IHRMS Agreement, art XIX(r).

73 Ibid art XIX(r).

74 Ibid art XIX(r).

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

76 Ibid art 1.30.

77 Ibid art 1.30.

78 Ibid art 3.7.

79 Ibid art 3.29.

80 Ibid art 3.2.

81 Ibid art 3.16.