BULLETS FOR BEANS: HUMANITARIAN INTERVENTION AND THE RESPONSIBILITY TO PROTECT IN NATURAL DISASTERS

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Cyclone Nargis struck the southern rice-growing region of Myanmar, formerly known as Burma, with devastating force on May 2 and 3, 2008. Early estimates of 50,000 to 77,000 dead were overly optimistic. Nearly 140,000 people were killed or categorized as missing as a result of the cyclone. The international community mobilized itself quickly and efficiently, with millions of dollars worth of aid arriving within days. Despite these efforts, death tolls mounted as relief workers waited and aid resources remained unused because the ruling military junta regime refused to let outside aid into the country. Aid that was delivered did not make it to the starving, sick and wounded in the streets but was impounded by the military regime. U.S. Navy ships languished

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off the coast with fresh water, supplies, and expertise as their offers to help were rebuffed.\footnote{Associated Press, \textit{U.S. Admiral: Myanmar Junta Unconcerned By Cyclone}, CNN.COM, May 15, 2008, http://www.cnn.com/2008/WORLD/asiapcf/05/13/myanmar.aid/index.html.} By May 9, the failed response of the Burmese \textit{junta} regime was so extreme and the resultant avoidable death toll so high, French Foreign Minister Bernard Kouchner\footnote{World Federalist Movement Institute for Global Policy, \textit{The Responsibility to Protect and Its Application to the Situation in Burma}, May 9, 2008, http://www.globalpolicy.org/component/content/article/154/26069.html.} and forty-three U.S. lawmakers\footnote{AUSTRALIA NETWORK NEWS, \textit{US Congressmen Call for Humanitarian Intervention in Burma}, May 17, 2008, http://australianetwork.com/news/stories/asiapacific_stories_2247869.htm.} appealed to their governments for forced intervention to deliver humanitarian aid to the survivors. Until aid was eventually accepted days later, the choices had seemed bleak as the disaster unfolded: should countries morally appalled by the mounting death tolls continue to let aid rot off the coast, or should they deliver that aid at the point of a gun to affected Myanmar civilians in opposition to the ruling government? That dilemma is humanitarian intervention (what is done) and the theory of responsibility to protect (why it is done) in a nutshell.\footnote{Humanitarian intervention is a wide-ranging doctrine that includes all diplomatic means from negotiations through sanctions, embargoes and, as a last resort, military intervention. Even military intervention has several levels from refusal of training, port blockades and, on the extreme end, aggression. This article deals primarily with this extreme end of humanitarian intervention, which is considered only when all other lesser forms of reasoning and coercion have failed.}

I. \textbf{INTRODUCTION}

The concept of humanitarian intervention may be gaining some international recognition despite its opposition to the widely-accepted status quo of nonintervention into matters of State sovereignty.\footnote{U.N. GAOR, 25\textsuperscript{th} Sess., Supp. No. 18, at 338, U.N. Doc. A/8082 (Oct. 24, 1970) (General Assembly Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, proclaiming the “duty not to intervene in matters within the domestic jurisdiction of any state”).} U.N. Charter Article 2(4)\footnote{“All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” U.N. Charter art. 2, para. 4.} directs all States to refrain from the use or threat of force against one another for any reason other than self-defense\footnote{U.N. Charter art. 51.} or actions in accordance with express U.N. authority.\footnote{U.N. Charter arts. 39 and 41 (stating self-defense and U.N. Security Council direction are the only bases for use of force against other nations).} What, then, could make some Western politicians advocate force against another country in the wake of a natural disaster?
Theorizing that all states have a responsibility to protect people suffering massive human rights abuses is controversial. Even more controversial would be using this theory as a justification to use aggression against a state unwilling to accept humanitarian assistance in the event of a natural disaster. Controversial does not mean impossible. Part II of this article explains the general concept of humanitarian intervention and its possible emergence as an international legal norm. Part III discusses the new “kinder, gentler” theory of humanitarian intervention emerging as the responsibility to protect and its application as a basis for intervention. As the concepts are far from established customary international law, Part IV discusses controversies and attractions of the doctrines. Part V addresses how the “responsibility to protect” theory could shape future natural disaster response efforts if States were so inclined to apply its tenets.

II. BACKGROUND

The impact of Cyclone Nargis prompted a request to use the responsibility to protect doctrine as a justification to force a nation to receive humanitarian aid. Although the request was not acted upon, it illustrates the willingness of some people to consider individual human rights as superior to a State’s right to sovereignty in the event of a devastating natural disaster. This illustration provides insight for potential application of the principles concerning current pending natural disasters.

State sovereignty implies responsibility, and primary responsibility for the protection of its people lies with the state itself. States have a responsibility to protect their own citizens from avoidable catastrophic human rights violations such as starvation, mass murder, and systematic rape specifically and from genocide, war crimes, ethnic cleansing, and crimes

16 Report of the International Commission on Intervention and State Sovereignty [ICISS], The Responsibility to Protect Report, at. XI, Dec. 2001 [hereinafter ICISS Report]. (The ICISS Report attempts to lay out the complete theory of responsibility to protect and rules for its implementation as an international legal norm. The ICISS Report was largely adopted whole cloth by the U.N. at the 2005 World Summit; as such it is the basis for the U.N.’s most current policy stance, which accepts the theory in large measure.) See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § SCOPE (1987). Increasingly, international human rights agreements have created obligations and responsibilities for States to respect individuals subject to their jurisdiction, including their own nationals, and customary international law of human rights has developed and has continued to grow. See also id. at § 701.
against humanity more generally. 18 “Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”19 As the international community looks beyond state sovereignty-centered legalism toward a more heavily individual rights influenced paradigm, this concept may take on greater significance.

Typically, states do not interfere with the internal workings of other sovereign states. 20 A sovereign state is empowered in international law to exercise exclusive and total jurisdiction over matters within its territorial borders. 21 Other states have the corresponding duty not to intervene in the internal affairs of sovereign states. 22 If states do intervene, the offended state has the right to defend itself from outside aggressors. 23 Humanitarian intervention and the responsibility to protect theory both seek to elevate the protection of individual human rights above the sanctity of sovereignty where there are gross violations of human rights. 24

Although the legality of humanitarian intervention is not well-supported in current international law, 25 intervention to protect people from their sovereign in serious situations is an old concept. 26

Though it is a rule established by the laws of nature and of social order, and a rule confirmed by all the records of history, that every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris, a Phalaris or a Thracian Diomede provoke their people to despair and resistance by

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19 ICISS Report, supra note 16, at XI. See also U.N. Secretary-General Kofi Annan, Truman Library speech, 45 I.L.M. 1411 (2006) (urging states to protect human rights at home and abroad, even at the expense of state sovereignty if required).
21 Id. at § SCOPE.
22 ICISS Report, supra note 16, at 12. See United Nations Charter, art. 2. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § SCOPE.
24 Id. at 6.
26 See Malvina Halberstam, The Legality of Humanitarian Intervention, 3 Cardozo J. Int’l & Comp. L. 1, 2 (1995) (asserting that references to principles of humanitarian intervention originated as early as 1579).
unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.  

“It is increasingly accepted that a state may take steps to rescue victims . . . in an action strictly limited to that purpose and not likely to involve disproportionate destruction of life or property.”28 While not currently customary law,29 there may be an emerging norm of humanitarian intervention for the narrow purpose of suppression of human rights violations.

The protection of human rights is well-established customary international law. One of the core precepts of the United Nations is, in part, to “. . . achieve international cooperation in solving international problems of . . . humanitarian character and in promoting and encouraging respect for human rights . . .”30 Recent statements by two Secretaries General of the U.N.31 and the adoption of the theory of responsibility to protect at the 2005 U.N. World Summit show that respect for human life is critical to the role U.N. Member States play in world affairs. At the 2005 U.N. World Summit, States affirmed the obligation to “protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”32 While focusing primarily on peaceful means, the Summit also supported timely, decisive, collective action should

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27 Valek, supra note 25, at n.1. (citing Hugo Grotius, THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS 288 (A.C. Campbell trans. 1901)).
30 U.N. Charter art. 1, para. 3.
    I believe it marks an important step in the difficult process of building a new global consensus on intervention for human protection. . . . What is clear is that when the sovereignty of States and the sovereignty of individuals come into conflict, we as an international community need to think hard about how far we will go to defend the former over the latter. Human rights and the evolving nature of humanitarian law will mean little if a principle guarded by States is always allowed to trump the protections of the citizens within them.
    (Secretary General Kofi Anan commenting on the launch of the ICISS Report). See also Press Release, United Nations Secretary General, Secretary-General Defends, Clarifies ‘Responsibility to Protect’ at Berlin Event on ‘Responsible Sovereignty: International Cooperation for a Changed World,’ U.N. Doc SG/SM/11701 (Jul. 15, 2008), available at http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm (Secretary General Ban Ki-moon, stating “[Responsibility to Protect] is not a new code for humanitarian intervention. Rather, it is built on a more positive and affirmative concept of sovereignty as responsibility.”) See also 2005 World Summit Outcome, GA Res. 60/1, para. 138 (Oct. 24, 2005).
32 2005 World Summit Outcome, GA Res. 60/1, para. 138 (Oct. 24, 2005).
peaceful means prove inadequate to redress human rights violations. The responsibility to react to sudden crises is one of the three key components of the responsibility to protect theory. “In extreme and exceptional cases, the responsibility to react may involve the need to resort to military action.”

Determining whether a situation warrants protection by military intervention is complicated. The doctrine of humanitarian intervention was arguably used to justify military intervention in Kosovo, Somalia and Bosnia even without clearly established parameters of use. It would not be a far stretch to apply the doctrine to the current situation in the Darfur region of Sudan. Severe human rights violations were committed either at the direction of their governments, in complicity with their governments or in the absence of effective governance. When force is used to perpetrate these types of violent actions against the populace, using greater force to stop it may be reasonable and necessary if other lesser means of resolution have failed.

III. HUMANITARIAN INTERVENTION: AN EMERGING LEGAL NORM

Interventions undertaken without the approval of the U.N. Security council are still considered by most international legal scholars to be illegal, even if morally justified. One definition of anticipatory humanitarian intervention is “the coercive interference by one state or group of states into the affairs of another state for the express purpose of preempting or mitigating human rights atrocities that are about to be committed in the latter state.”

33 Id. at 139.  
34 ICISS Report, supra note 16, at XI. The other two key elements are the responsibility to prevent and the responsibility to rebuild. This article will not focus on these two elements.  
35 Id. at 31.  
37 See U.N. Charter art. 27, ch. VII-VIII. See Joyner & Arend, supra note 36, at 33. See DeNicola, supra note 29, at 653 n.58. See also Valek, supra note 25, at 1236 (“[n]onetheless, unilateral humanitarian intervention is in conflict with the international customary law principle of non-intervention, the General Assembly’s 1970 Declaration on Friendly Relations, and the 1981 Declaration on the Inadmissibility of Intervention”). See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 703.  
38 Joyner & Arend, supra note 36, at 34. For a definition of humanitarian intervention see Lee F. Berger, State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone, 11 IND. INT’L & COMP. L. REV. 605 n.5 (“[h]umanitarian intervention may be defined as: [T]he justifiable use of force for the purpose of protecting the inhabitants of another State from treatment so arbitrary and persistently abusive as to exceed the limits within
Individual rights, even human rights, are still primarily viewed as subservient to sovereign rights. 39 "Whether a state may intervene with military force in the territory of another state without its consent, not to rescue the victims but to prevent or terminate human rights violations, is not agreed or authoritatively determined."40 Even so, an initiative undertaken by a regional body might be legitimate even without U.N. Security Council authority.41

Since the end of the Cold War, humanitarian intervention has become more common, subordinating national sovereignty claims in favor of basic human rights protections. 42 Two such examples are the North Atlantic Treaty Organization (NATO) intervention into Kosovo in 1999 43 and the Economic Community of West African States (ECOWAS) regional use of force against Sierra Leone in 1997. 44 In both cases justification hinged at least in part on using multi-lateral regional force to stop massive killings of civilians when the State refused to act or was the violent aggressor. Both proceeded without U.N. Security Council authorization and both were sanctioned post-intervention. 45


39 DeNicola, supra note 29, at 655 (citing Independent Int’l Comm’n on Kosovo, The Kosovo Report 167-68 (2000) and arguing Article 1(3) of the Charter merely states that the United Nations seeks to "promote and encourage respect for human rights" and does not state that the organization’s mission is to enforce human rights. U.N. Charter, art. 1, para. 3.).

40 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 703.

41 Id. at § 905. See also ICISS Report, supra note 16, at XII.


43 Id. at 405–406. Between February 1998 and March 1999, ethnic tension and violence in the Kosovo province of Yugoslavia surged dramatically between the majority ethnic Albanian population and the majority Serbian government. Thousands of Albanian civilians were killed or forcibly removed, resulting in the death or forced expulsion of thousands of ethnic Albanian civilians. President Bill Clinton and NATO Secretary General Javier Solana ordered 79 days of NATO airstrikes against Serbian military targets to restore order and prevent Serb forces from inflicting further harm on the Kosovar population.

44 Peter A. Jenkins, The Economic Community of West African States and The Regional Use of Force, 35 DENV. J. INT’L L. & POL’Y 333, 346–347 (2007). Sierra Leone struggled with a history of authoritative regimes and civil disputes between the Revolutionary United Front (RUF) and the Sierra Leone People’s Party (SLPP) prior to and throughout the 1990’s. The temporary peace of the Abidjan Accord fell apart. In the late 1990’s the Kamajors, a rural militia fighting against the RUF, initiated several attacks which caused a vicious response by the RUF including some of the worst state-sponsored atrocities ever in Sierra Leone. ECOWAS and the Nigerian government’s justifications for the use of force were: the right to self-defense, the appeal by President Kabbah seeking ECOWAS assistance, the atrocities committed by junta troops against Sierra Leonean citizens, the threat to international peace and security in the region caused by the flow of Sierra Leonean refugees to neighboring countries, and the prevention of the execution of "atrocities" by the junta. The humanitarian intervention was based in part on a belief they had a responsibility to protect the civilians in peril from the government and rebel forces.

45 Alexander, supra note 42, at 403, 404; and Jenkins, supra note 44, at 346.
The U.N. Security Council itself has helped to legitimize humanitarian intervention. It has shown a “willingness to recognize that humanitarian crises may in and of themselves be threats to international peace and security.”46 When the U.N. Security Council voted resoundingly against condemning NATO’s Kosovo action, they made what was previously illegal legal.47 As there was not a strong international outcry against either NATO’s actions nor the Security Council’s response, States, by their silence after the Kosovo Commission findings were published, may also legitimize humanitarian intervention at least in certain circumstances.48

It cannot be said that humanitarian intervention has the immutable strength of customary international law. Still, the concept cannot be dismissed as irrelevant when there are many indicators of its growing acceptance.

IV. CRITICISM OF THE RESPONSIBILITY TO PROTECT THEORY

There are longstanding and pervasive criticisms of the responsibility to protect theory. The use of force to maintain or establish peace appears a contradiction on its face in both end state and nature of action.49 Because of the cost in resources, finances, and logistics, it can be argued that the entire concept is a ruse to allow powerful countries to control and subjugate weaker countries during a time of increased vulnerability and reliance. If the responsibility to protect actually implies an obligation to act or a right to be protected, there is also a withering lack of law governing the concept generally or natural disaster response requirements specifically. If the responsibility to protect is actually an obligation or a right, all countries must be treated equally, which introduces issues of equity and resources. Several criticisms are summarized by Louise Arbour, the U.N. High Commissioner for Human Rights.

46 Joyner & Arend, supra note 36, at 43 (citing U.N. actions in Northern Iraq, Bosnia, Somalia, and Rwanda as direct support to that conclusion).
48 One of the very last lines of the Independent International Commission on Kosovo: The Kosovo Report (Oct., 2000), available at http://www.reliefweb.int/library/documents/thekosovoreport.htm [hereinafter The Kosovo Report] makes this clear: “If, therefore, we stand back from the Kosovo intervention, it becomes clear that it did not so much create a precedent for intervention elsewhere as raise vital questions about the legitimacy and practicability of the use of military force to defend human rights and humanitarian values in the 21st century.” Id.
49 See generally Young Sok Kim, Responsibility to Protect, Humanitarian Intervention and North Korea, 5 J. INT’L BUS & L. 74 (2006).
To begin with, the ‘right’ to intervene is by definition discretionary. It is the prerogative of the intervener and has always been exercised as such, thereby creating a hierarchy among those who received protection and those whom the potential intervener could afford to ignore. The invocation of such right has also, not surprisingly, unleashed criticism form the many who question the interveners’ purity of intent and who denounced, plausibly or not, the self-serving agendas that they believed were hidden behind the pretence of humanitarianism.  

While these concerns may be valid, they are not insurmountable.

A. Humanitarian Military Intervention as Sophistry

Detractors of humanitarian intervention vilify its use as a smokescreen to justify wars of aggression. Detractors of humanitarian intervention vilify its use as a smokescreen to justify wars of aggression.  

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Shifting focus in international treaties from State-centered orientation to the well-being of individuals might lead to an increased temptation to invade more readily in contradiction to the rule supporting nonintervention set out by the United Nations Charter. Some argue there is not justification for humanitarian intervention, which is basically another name for invasion.

Wars waged by powerful countries are generally expensive, complex and disruptive. While it is true that the history of the world has seen pretextual wars of aggression, this paper is concerned with intervention in response to disastrous fallouts from natural disasters. To make a war strategy that depends first on a random act of nature is unlikely in the extreme.


51 Kim, supra note 49, at 74 (citing FRANCIS A. BOYLE, DESTROYING WORLD ORDER: U.S. IMPERIALISM IN THE MIDDLE EAST BEFORE AND AFTER SEPTEMBER 11TH 106 (Clarity Press, 2004) (discussing the U.S. retroactive application of humanitarian intervention to justify its invasion in Iraq after no weapons of mass destruction were discovered)).

52 Kim, supra note 49, at 94 (citing NOAM CHOMSKY, ROGUE STATES: THE RULE OF FORCE IN WORLD AFFAIRS 48 (South End Press, 2000)).

53 Id. (quoting OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 81 (Martinus Nijhoff Publishers, 1991) (“the fact that increasingly treaties in the economic and social fields as well as in the area of the law of war recognized the well-being of individuals as their raison d’etre is further evidence that international law is moving away from its State-centered orientation”).

54 U.N. Charter art. 2, para. 4; art. 2, para. 7.

B. Power Struggles

Some in the international legal field see an ulterior motive of command and control behind the guise of aid promised through humanitarian intervention. “Humanitarian intervention looks like an ingenious juridical technique to encroach little by little upon the independence of a State in order to reduce it progressively to [a] status of semi-sovereignty. . . .[it is] impossible to separate the humanitarian from the political grounds for intervention.” 56 International law professor Francis A. Boyle states the suspicion even more bluntly. “Humanitarian intervention is a joke and a fraud repeatedly manipulated and abused by a small number of very powerful countries in the North in order to justify wanton military aggression against and prolonged military occupation of weak countries of the South.”57

These are not overwhelmingly compelling arguments, especially given the response of Myanmar’s junta regime of in the wake of Cyclone Nargis. However, they may explain the obvious distrust a weaker country might show when aid is offered by more powerful countries. Even as death tolls shot over 100,000, the cost of accepting assistance was deemed too high. Clearly this is not an insignificant concern.

Humanitarian assistance in the wake of a natural disaster is not designed with either occupation or subjugation in mind, although it may be difficult to cull political motivation from altruistic pursuits. “There are no apolitical decisions in the field of humanitarian intervention.”58 Thought must be given to resources, timing, other commitments and capability. Thus a nation may find itself unable to assist even if it felt obligated to do so. As all government decisions of an international nature are political, the real issue is not the political motivation for the intervention but how the intervention is carried out. That is where law helps create norms, boundaries and expectations. Unfortunately, this area of the law is almost wholly without governing law.

C. Lack of Compelling Law

The lack of law concerning humanitarian intervention and the responsibility to protect makes it difficult to predict behavioral norms with

57 Id. at 94 (quoting Francis A. Boyle, DESTROYING WORLD ORDER: U.S. IMPERIALISM IN THE MIDDLE EAST BEFORE AND AFTER SEPTEMBER 11TH 106 (Clarity Press, 2004)).
certainty. While there is a great deal of interest in the concept, “interest may not rise to the level of legal responsibility.”

Humanitarian intervention as a legal duty or responsibility is a new, even arguably made-up concept that defies the longstanding international noninterventionist policy that is currently embodied in the United Nations Charter.

Since there are no international legal instruments that set forth the obligations of states regarding the application of humanitarian intervention to natural disasters, customary international law must provide guidance. Humanitarian intervention, while lacking a strong historical legal basis, has gained in popularity both among states and regional bodies. There are two typical rationales asserted for its use.

Specific violations of human rights are also violations of international treaty agreements which warrant ‘self-help’ by other parties to the agreement, or [alternatively] that circumstances that accompany gross human rights violations, particularly the mass flow of refugees across state borders constitute a threat to the peace which warrants unilateral or collective response in the absence of UN action.

While these rationales are firmly rooted in the U.N. Charter and various international documents, they still do not get to the rather boutique issue of intervention solely for the purpose of responses to natural disasters. It is entirely possible, and quite probable, that refugees displaced by a massive natural disaster will flood the surrounding countries or other areas of safety when they are not taken care of by their own government. This could make any massive refugee displacement threat, regardless of reason, fit into the alternative rationale above. This would not require new laws or theories specific to natural


60 Id. at 698.

61 Olivier Corten, Humanitarian Intervention: A Controversial Right, http://www.unesco.org/courier/1999_08/uk/ethique/tx1.htm (last visited Jan. 26, 2009) (“The term ‘right’ or ‘duty’ of ‘intervention’–to which the word ‘humanitarian’ was soon added–was coined in the late 1980s by Mario Bettati, Professor of International Public Law at the University of Paris II, and by the French politician Bernard Kouchner, one of the founders of the aid organization Médecins sans frontières (Doctors without Borders)).

62 Saechao, supra note 59, at 698.


64 Id. at 339-340.
disasters. Even though threat to the peace might be the basis for intervention, it
would be better to have a narrowly defined method of handling the unique issues
associated with the responsibility to protect theory and humanitarian
intervention. 65 This is particularly important when the U.N. has either refused to
act or its actions have been insufficient to stop large-scale human rights abuses
in the wake of a fast-moving natural disaster.
D. Responsibility, Right or Duty

Responsibility to protect might be used to justify humanitarian
intervention for disaster relief when treatment of nationals “shocks the
conscience of mankind.” 66 One writer proposes that all states have a
responsibility to give and receive aid when natural disaster strikes, including a
duty to warn, provide aid and ensure sustainable reconstruction and
rehabilitation of the disaster-affected area. 67 This proposal does not have
widespread support in the international legal community. Especially progressive
proponents believe the responsibility to protect has “... evolved from a right to
a duty, which is morally required even in the absence of Security Council
approval.” 68 The implications of a transition from a right to a duty “are far-
reaching, and key questions, such as to whom the duty would attach, remain
unresolved.” 69

There is little written law concerning humanitarian intervention and
none whatsoever requiring intervention in the face of a natural disaster. 70 Nor is
there much depth of customary international law on point. As such, until
customary law changes through state practice or specific treaties are widely
ratified, it is difficult to argue the mere term “responsibility” is synonymous
with duty or obligation.

65 Indeed the Commission on Kosovo stressed the need for a body of rules to cover humanitarian
intervention specifically. “The Commission believes that the time is now ripe for the presentation of
a principled framework for humanitarian intervention which could be used to guide future responses
to imminent humanitarian catastrophes and which could be used to assess claims for humanitarian
intervention.” The Kosovo Report, supra note 48.
66 Saechao, supra note 59, at 672. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 702 (“a
violation is gross if it is particularly shocking because of the importance of the right or the gravity of
the violation”).
67 Saechao, supra note 59, at 678.
68 Michael J. Kelly, Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver”?
Revolutionary International Legal Theory or Return to Rule by the Great Powers?, 10 UCLA J.
69 Id.
70 See infra Section IV.C.
Despite the problems with implementing humanitarian intervention and the theory of responsibility to protect, it can still be a viable option if properly managed.\textsuperscript{71}

V. CRAFTING NATURAL DISASTER HUMANITARIAN INTERVENTION DOCTRINE

A. A Call for Responsibility to Protect Theory as Grounds for Humanitarian Intervention

“Proponents of the right to intervene have also claimed that states have a broad ‘responsibility to protect’ citizens of other states from mass murder, rape, and starvation when their own states refuse to do so.”\textsuperscript{72} States also must protect citizens from crimes against humanity, which includes “the intentional denial of humanitarian assistance” during armed conflict.\textsuperscript{73} In the absence of state action, either through disinclination or capability, it becomes the duty of other states to extend that protection and no longer hide behind draconian notions of state sovereignty in these areas of protection.\textsuperscript{74}

Just as the unsanctioned intervention in Kosovo was not considered strictly “legal” prior to the deployment of forces, military intervention in response to natural disasters has weak legal grounds as well. The U.N. eventually sanctioned NATO’s intervention, at least in part, because most believed that, given the circumstances, it was the right thing to do.\textsuperscript{75} This intervention could be described as illegal but legitimate.\textsuperscript{76} The same post-action

\textsuperscript{71} The Kosovo Report, supra note 48 (detailing the need for clarity and guidance in implementing humanitarian intervention policies while supporting its existence).


\textsuperscript{74} Kofi Annan, United Nations Secretary-General, Truman Library speech, 45 I.L.M. 1411 (Dec. 11, 2006).

\textsuperscript{75} The Kosovo Report, supra note 48, at Conflict, International Response, Lessons Learned 4.

sanction could apply in the wake of intervention after a natural disaster where the actions of the responsible government are heinous enough to exacerbate the death toll to a level that shocks the conscience. In order to have the best chance of at least retroactive sanctions, any action must be carefully crafted around accepted principles of the responsibility to protect doctrine.

B. Natural Disasters Current State of Affairs

It is unlikely that Cyclone Nargis will be the last natural disaster of such disastrous magnitude in the world. A natural disaster may be defined as "the consequences of events triggered by natural hazards that overwhelm local response capacity and seriously affect the social and economic development of a region."77 In 2008, 235,816 people were killed or missing as a result of natural disasters and nearly 212 million more were otherwise affected by them.78 The rate of dead or missing people is nearly four times that of the average death toll due to natural disasters between 2000 and 2007.79 In Tajikistan and Djibouti, 41,543 and 40,817 people per 100,000 inhabitants respectively were impacted by natural disasters in 2008.80 There has been a staggering increase in reported occurrences of country-level natural disasters since 1975, from a low of just over 50 in 1975 to a high of nearly 450 in 2005.81 The actual number of natural disasters in 2008 is slightly below the average since the turn of the century,82 but the cost in lives is substantially greater.

The use of force against a sovereign state solely to avert suffering caused by a natural disaster may be argued as justifiable under the responsibility to protect theory. The United Nations has declared that "[t]he sovereignty, territorial integrity and national unity of States must be fully respected . . . [and] . . . humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country."83 As the situation in Myanmar clearly demonstrated, countries do not always want outside aid and, at least once, would rather bury 140,000 people than accept

79 Id.
80 Id.
81 Id.
82 Id.
outside assistance. During the Bosnia and Herzegovina crisis of the early 1990’s, the U.N. Security Council authorized “all measures necessary” to ensure safe delivery of humanitarian assistance and protection of humanitarian aid workers. The U.N. Security Council has already strongly condemned the intentional denial of humanitarian assistance during armed conflict. The Security Council may fail to act in a timely and effective manner in the face of another devastating natural disaster just as it did in the wake of Cyclone Nargis. It is possible another regional body may take it upon itself to intervene the next time the Security Council fails to respond decisively. Force has not yet been used solely to avert the adverse impact on human rights caused by a natural disaster, but it could be possible.

C. Africa Snapshot

From drought and famine to food prices and demagogues, many parts of the African continent are ripe for other natural catastrophes to reach unimaginable and unnecessary devastation. There is a global food crisis that has a disproportionate impact on developing countries, including many African nations. Some estimates place 14 million people at risk in the “hidden famine” in the Horn of Africa. This one natural disaster alone could lead to disastrous regional instability and staggering death tolls that might re-engage the responsibility to protect debate in the international community.

There is little practical difference to citizen observers on the ground between a country actively killing 100,000 of its citizens to remove them from a coveted portion of land and letting 100,000 of its citizens die by refusing readily available food, water, shelter or medical aid to a certain segment of the population impacted by a natural disaster. The resultant death toll is a direct consequence of government-implemented action or inaction aimed at achieving

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89 Such as many argue is happening in Darfur, Sudan.
90 As has been described in Myanmar after Cyclone Nargis.
an otherwise avoidable result. This is a violation of human rights at a most basic level.

D. Pending Disasters in Africa Likely to be Exacerbated by State Policies

The junta regime in Myanmar is unlikely to be the last regime to attempt to impede or hijack humanitarian assistance from disaster-impacted people. In some parts of Africa, the impacts of drought, famine and soaring food prices have been exacerbated by using starvation or access to food as a political tactic. The continued drought and ensuing famine poised to spread throughout Ethiopia are well documented.\(^91\) In the wake of a highly politicized and criticized national election, the President of Zimbabwe, Mr. Robert Mugabe, was accused of impeding aid, aid workers, and food from reaching those civilians who do not support his goal to stay in office.\(^92\) It is claimed that food and aid were refused delivery despite being the only food available for many civilians in a starving community.\(^93\) So far, the U.N. has not acted effectively to halt this situation.\(^94\) In Sudan, there are reports of the country growing food to sell and shipping it outside the country to take advantage of the soaring price of food.\(^95\) Internal conflict or allegations of genocide aside, while the government profits from the world food shortage, ethnic black Africans in the Darfur region of South Sudan are literally left to waste away from lack of sustenance available in other parts of the nation.\(^96\)

Any of these situations, already dangerously unstable, could topple in the face of a natural disaster such as plague or continued drought, earthquake, or other similar, unpredictable force of nature. This could destabilize the entire region surrounding the catastrophe. Should the international community find


\(^{96}\) Id.
itself with a natural disaster and response equivalent to Cyclone Nargis in
Myanmar, it could craft a humanitarian intervention solution utilizing the
principles of responsibility to protect.

VI. NATURAL DISASTER RELIEF UNDER THE
RESPONSIBILITY TO PROTECT THEORY

Criticism of the responsibility to protect doctrine and its vulnerability
to misuse make it essential to weave as many protections into its application as
possible while leaving it viable for impactful implementation. As suggested by
ICISS, six criteria must be met in order to use military force under the
responsibility to protect doctrine: just cause, right intention, last resort,
proportional means, reasonable prospects, and right authority.\textsuperscript{97} Just cause and
right authority act as end caps to best assure the widest acceptance of the
anomaly of intervention. Just cause sufficient to warrant use of force can be
established if there is a “large scale loss of life, actual or apprehended, with
genocidal intent or not, which is the product either of deliberate state action, or
state neglect or inability to act, or a failed state situation.”\textsuperscript{98} The right authority
to authorize military intervention is a sliding scale from the U.N. Security
Council as the primary authority,\textsuperscript{99} two-thirds majority vote of the U.N. General
Assembly as the first alternative,\textsuperscript{100} and localized regional bodies acting in
concert when the U.N. fails to sanction intervention.\textsuperscript{101}

Given the international norm of nonintervention,\textsuperscript{102} the other four
precautionary principles create additional safeguards to rogue violations of
sovereignty. Military intervention must be for the right intention. “The primary
purpose of the intervention must be to halt or avert human suffering.”\textsuperscript{103} While

(Apr. 28, 2006) (stressing the need to uphold the “humanitarian principles of humanity, neutrality,
impartiality and independence”). \textit{See also} U.N. 2005 World Summit Outcome, G.A. Res. 60/1, para.
138 (Oct. 24, 2005) (stressing the related humanitarian concepts of protection through appropriate
and necessary means); \textit{Restatement (Third) of Foreign Relations} § 905; \textit{The Kosovo Report,\textit{ supra} note 48, 46–47 (2000) (listing five possible criteria for humanitarian intervention as serious
violations of human rights or international humanitarian law, a failure by the UNSC to act,
multilateral bases for the action undertaken, only necessary and proportionate force used, and
“disinterestedness” of the intervening states).}

\textsuperscript{98} ICISS Report, \textit{supra} note 16, at 31. It can also be met if there exists “large scale ‘ethnic
cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or
rape.” \textit{Id.

\textsuperscript{99} Id. at 48.

\textsuperscript{100} Id. at 53.

\textsuperscript{101} Id.

\textsuperscript{102} U.N. Charter art. 2, para 4; art. 2, para 7.

\textsuperscript{103} ICISS Report, \textit{supra} note 16, at 35. Other motives may also have merit but cannot be the basis or
primary goal of military intervention.

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complete altruism or disinterest might be ideal, it is not a political reality. Establishing the “primary purpose” is the best safeguard against subterfuge invasions. Military intervention must be a matter of last resort, justifiable only when “[e]very diplomatic and non-military avenue for the prevention of or peaceful resolution of the humanitarian crisis has been explored” and has either failed or there is no reasonable belief that it would have succeeded. The intervention itself should be strategized as the minimum necessary to secure the human protection objective. Lastly, there must be a reasonable prospect of success to undertake military intervention. Sometimes the cost of an otherwise legitimate intervention may be too high or actual protection is not possible. If any of these safeguards cannot be reasonably insured, military intervention should not be sanctioned.

Application of these six core principles to a natural disaster response must take into account the speed with which natural disaster can take place, the need for a quick and decisive response, and the impact of the affected states’ resistance to receiving humanitarian assistance. Anytime a state is impacted by a disaster, it is reasonable to assume that military intervention may cause further destabilization. If the impacted state is a powerful state, that additional destabilization is almost guaranteed. Since the intervention must cease when the immediate threat has passed, there is a risk of the affected state growing dependent on the aid or interventionists over-stepping their mandated bounds. If a state or regional organization does not commit enough workers and military forces, it may just exacerbate the problem.

Despite its potential limitations, humanitarian intervention based on the corollary responsibility to protect theory could work as a structured response to a massive natural disaster calamity. Applying the six principles can give a reasoned, dispassionate guideline to those states that feel compelled to respond when the U.N. Security Council next fails to provide effective alternatives.

VII. CONCLUSION

The responsibility to protect theory, with its core value of human rights protection, over the sovereign right of noninterference, is an emerging norm in international law discourse. It is not yet law, but, even as a fledgling theory, its framework can be useful in a new frontier—intervention to assist victims of

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104 Id. at 36.
105 Id.
106 Id.
107 Id. at 37.
109 Id.
natural disasters when their own governments fail to act through neglect or design. Certainly it is not without its detractors and difficulties. Because a thing is difficult, however, does not mean it might not be undertaken in extreme or dire circumstances.

It is clear that the international community cannot reconcile itself to watching the dead pile up like so much waste in the wake of a cyclone, tsunami, or earthquake. Normally any country thus affected will reach out for assistance from those organizations with natural disaster response experience. This article focused on the very rare situation when the unavoidable damage is horrendous and the affected government’s response, or failure to respond, is staggeringly devastating. Worse still are regimes that accept limited aid then distribute it in a way calculated to kill off their political opponents, or hijack such relief and sell it to the highest bidder in the international market while its citizens continue to suffer. Cutting off aid through embargoes or other methods helps no one, and continuing to funnel it through a regime that would use it to hurt its citizens perpetuates the catastrophe. The responsibility to protect, particularly under the threat or use of force in response to natural disasters as a last resort, could be a viable option. A time may yet come when it is the best option.