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RESPONSIBILITY TO PROTECT IN ENVIRONMENTAL EMERGENCIES

This panel was convened at 9:00 a.m., Thursday, March 26, by its moderator, Gwen Young of the Bill & Melinda Gates Foundation, who introduced the panelists: Linda Malone of the College of William & Mary; Gareth Evans, President of the International Crisis Group; and Edward C. Luck, Senior Vice President of the International Peace Institute.

GREEN HELMETS: ECO-INTERVENTION IN THE TWENTY-FIRST CENTURY

UNILATERAL AND MULTILATERAL INTERVENTION

*By Linda A. Malone**

In terms of unilateral or multilateral use of force without United Nations authorization, the twentieth century law of ecological response is primarily law of ecological intervention, not ecological defense or disaster prevention. In Robyn Eckersley's 2008 article, "Ecological Intervention: Prospects and Limits," in *Ethics and International Affairs*, she posits three different categories of environmental harm: (1) major environmental emergencies with transboundary spillover effects that threaten public safety in the wider region; (2) ecocide or crimes against nature that also involve genocide or serious human rights violations (irrespective of spillover effects); and (3) ecocide or crimes against nature that are confined within the territory of the offending state and that involve no serious human rights violations. The core provision of the United Nations Charter with respect to the unilateral use of force outside the United Nations machinery is Article 51. The Charter's preservation of the right of self defense when there is an "armed attack against a state" is ill-suited to evaluation of forceful response to avert an environmental disaster. The legality of a forceful state response to environmental harm is more easily justified when the environmental harm is deliberately inflicted by a state against another state, or even by a group of nonstate actors, than when it is the result of dereliction of duty on the part of a state. Deliberate damage inflicted by one state or a group of nonstate actors on another state through pollution, hazardous substances, disease agents, or unleashing of natural resources (for example, destroying a dam) may be deemed an armed attack against the territorial integrity and political independence of a state, and such actions by state agents or nonstate actors may constitute genocide, war crimes, crimes against humanity, or ethnic cleansing, as discussed more fully below. If the transboundary environmental emergency is attributable to a state's failure to govern or regulate adequately its industry or resources, however, is there the necessary state responsibility to characterize the transboundary harm as an "armed attack" triggering a right of forceful self-defense? In an unusual twist, it may be easier to hold the nonstate actor "terrorists" liable for an armed attack for the unintended consequences of their criminal acts in such circumstances, under basic principles of accountability for the unintended but foreseeable consequences of intentional criminal behavior.

If the environmental damage inflicted is genocidal in design and intent, or can be characterized as any other serious human rights violation, the law of humanitarian intervention may be utilized to justify force regardless of any transboundary effects. Indeed, if the ecocide qualifies as genocide or a grave breach of the laws of war, other states would have an

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affirmative obligation to intervene to curtail the human rights violation. Of course, the ambiguity in the legal norm as to what extent or type of other human rights violations would trigger a right of humanitarian intervention is intensified when the state or nonstate actor perpetrator effectuates a human rights violation by inflicting damage on the environment rather than directly on the human population. As the natural disaster in Myanmar illustrates, even if late twentieth-century law had begun to recognize an obligation of assistance to states dealing with natural or, presumably, instigated natural disasters, a concomitant legal obligation to *accept* assistance had remained mired in traditional notions of state sovereignty. Even more problematic, but not relevant to the analysis at this point on when environmental damage qualifies as an “armed attack” or a human rights violation triggering “humanitarian” intervention, is that the twentieth century law of intervention fails entirely to address Eckerlesley’s third scenario—when massive, severe destruction of an environment or a species, without clear and immediate harm to a human population, might trigger a right of forceful, ecological intervention.

All of the above three scenarios assume actual, immediate environmental harm. If the harm is potential harm, however likely or extensive, legality is dependent upon the highly suspect, and equally ill defined, norms of anticipatory self-defense, necessity, or self-help. At this juncture, the political realities of forceful intervention must also be acknowledged. On a descending scale of likelihood, anticipatory forceful intervention to prevent environmental damage which may result in transboundary harm is most likely against nonstate actors with a state’s consent; against nonstate actors without a state’s consent; against a deliberate state perpetrator; and extremely unlikely against a merely neglectful or incapable state regulator. The legal parameters of humanitarian intervention are not limited to actual harm and therefore can be inherently anticipatory, although the nonoccurrence of the human rights violations, however likely or serious, certainly militates against forceful intervention as a political matter. Once again, grave breaches and genocide carry their own relatively unique, affirmative responsibility of prevention as well as curtailment. Finally, forceful intervention to prevent potential massive environmental damage or destruction of a species, with no transboundary harm or serious human rights violations, however morally justifiable, has little or no legal predicate even under the most attenuated interpretations of self-help or necessity. The international law of force in the twentieth century is at its most dated state-centric, at its most progressive human-centric, and in no way eco-centric.

THE RESPONSIBILITY TO PROTECT

On September 16, 2005, the United Nations General Assembly adopted by consensus a resolution recognizing the responsibility to protect.¹ The core of the responsibility to protect (hereinafter “R2P”) as adopted by both the United Nations General Assembly and Security Council was first embodied in Paragraph 138 of the 2005 World Summit Outcome Declaration:

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.²

¹ G.A. Res. A/RES/60/1, ¶ 138 (Oct. 24, 2005); S.C. Res. 1674, ¶ 4, (Apr. 28, 2006) (in which the Security Council reaffirmed provisions of paragraphs 138 and 139 of 2005 World Summit Outcome Document regarding the responsibility to protect).

² See G.A. Res. A/RES/60/1, ¶ 138 (Oct. 24, 2005).

Paragraph 139 continues:

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.²

As an emerging cornerstone of international law for the twenty-first century, each and every term of these critical paragraphs merits careful scrutiny. As one of two fundamental formulations of the responsibility to protect, comparative evaluation of the contending formulations on a legal, political, and ethical level not only yields a better understanding of the ramifications of each formulation, but also a better sense of how the responsibility to protect may and should evolve. This comparison is only the first step in the inevitable determination of when the responsibility to protect triggers the use of military force, and it is the intermediate step in determining the central quest of formulating the parameters of eco-intervention for the twenty-first century.

The original, and broader, formulation of the responsibility to protect was included in the December 2001 report, "The Responsibility to Protect," from the International Commission on Intervention and State Sovereignty (ICISS). In response to the controversial basis for NATO's 1999 intervention in Kosovo, the government of Canada, with a group of major foundations, announced to the General Assembly in September 2000 the establishment of the ICISS to evaluate the legal, moral, operational, and political questions surrounding humanitarian intervention, to culminate in a report back to the Secretary-General with its conclusions. As discussed below, the genesis of the responsibility to protect in the context of *humanitarian* intervention is essential and cautionary to critiquing its incorporation into a norm for eco-intervention. It is also worth noting that the report was completed just weeks before the attacks of September 11, 2001.³

The report of the ICISS is nothing short of extraordinary. It goes far beyond the rubric of what international law permits, to project where international law and the political realities of the global community are headed, formulating what should be the emerging overriding legal norm for the future in terms of resort to peaceful means of resolution, precautionary principles, national (preferably human) security, and the ultimate question of permissible use of force through the United Nations, collectively, and unilaterally. Its foresight is limited by two factors: one which might have been anticipated, and another less so. The analysis of the report is human-centric. Indeed, it is even more narrowly confined as an analysis of how humanitarian intervention in terms of prevention of human loss of life should be formulated.

³ THE RESPONSIBILITY TO PROTECT, REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY VII (2001), available at <<http://www.iciss.ca/pdf/Commission-Report.pdf>>.

It also suffers from having been completed before the events of 9/11. On the other hand, however horrendous and despicable the events of 9/11, the massacre of innocent civilians by nonstate actors was not a novel international crime, regardless of the means of perpetration. The sensitivity of the co-chairs, Gareth Evans and Mohamed Sahnoun, to the events of 9/11 is more a reflection of their humanitarian concern than a limitation on their legal conclusions. The core principles of the report are quite simply a courageous effort to explain where international law should and must go, limited only by its defined focus on so-called “humanitarian intervention.”

What then, does the ICISS report propose? As a basic principle, it concludes that “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 nonintervention yields to the international responsibility to protect.”⁴ The elements of the responsibility include the responsibility to prevent, to react, and to rebuild, with the single most important priority being the responsibility to prevent.⁵ For military intervention to be justified for *human protection purposes*, there must be:

serious and irreparable harm occurring to human beings, or imminently likely to occur, of the following kind:

- 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; or
- B. Large scale ‘ethnic cleansing,’ actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.⁶

In keeping with precautionary principles, the right intention for intervention is better assured with multilateral operations, as a last resort, with proportional means, and with reasonable prospects for success.⁷ The ICISS takes the necessary step the United Nations formulation simply fails to address, much less take. The ICISS formulation deals with what should occur if the Security Council fails to fulfill its responsibility or to do so “in a reasonable time.” In that case, “alternative options” are consideration of the matter by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure; and “action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.” Both alternatives are intellectually intriguing and legally challenging. It is an open question whether or not the Uniting for Peace Resolution, which authorizes the use of force under the auspices of the General Assembly, can lawfully under the Charter do so with any legal force beyond that of a nonbinding recommendation. The second alternative poses the only somewhat less murky circumstances in which a regional organization may utilize force with Security Council authorization (the same Security Council unable to act for the option to come into play), especially with respect to force against a non-member. The most innovative and controversial alternative follows. In what is a clear warning to the Security Council, the ICISS report cautions:

The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for

⁴ *Id.* at XI.

⁵ *Id.*

⁶ *Id.* at XII.

⁷ *Id.*

action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.⁸

Speaking from the perspective of September 2001, the Commission concludes that it is impossible to find a legal consensus regarding humanitarian intervention without United Nations authorization but does not rule out the possibility of such intervention. Ironically, the commission remarks that when a state or states intervene *successfully*, there may be “enduringly serious consequences for the stature and credibility of the United Nations itself.”⁹

The responsibility to protect shifts the paradigm, but in its accepted United Nations formulation less so where it might matter in the environmental context. Paragraphs 138 and 139 of the Outcome Document (the United Nations formulation) imposes the responsibility to protect from (and concomitant obligation to prevent) genocide, war crimes, ethnic cleansing, and crimes against humanity by a state *within its own territory*. As noted above, the affirmative responsibility to protect, including *prevention* of genocide and grave breaches, was already recognized in international law. The R2P, in terms of state action within its own territory, adds to the state’s responsibility not to engage in these crimes, a responsibility to prevent the offenses of war crimes that are not grave breaches, ethnic cleansing, and crimes against humanity within its territory, presumably by whatever means necessary which do not in and of themselves violate human rights. In some emergency circumstances which preclude trial, the necessary measures could include the use of deadly force against nonstate actors within its territory and jurisdiction. Paragraph 139 takes on quite a different focus when speaking to the use of force. First, the paragraph speaks of the “international community,” not “individual” states. The possibility of the use of force arises only in the context of

collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as are appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁰

When force across state boundaries appears to be the only way to protect and prevent, legality is left on the overworked, inadequately defined shoulders of humanitarian intervention. The justifications for preferring the United Nations’ collective machinery are numerous and well known, but consideration should always be given to the legal alternatives if the collective machinery of the United Nations should fail in its responsibilities. In this framework, where only force provides any protection or prevention, the United Nations formulation of the responsibility to protect does little more than confirm the established power of the Security Council to engage in humanitarian intervention under Chapter VII, and for the four designated categories of crimes for which there is perhaps the strongest established basis for Chapter VII authority in the first place.

THE LIMITS OF R2P IN ECO-INTERVENTION

The United Nations formulation of R2P offers little additional legal support for eco-intervention, with its limitation to four categories of crimes and refusal to grapple with the

⁸ *Id.* at XIII.

⁹ *Id.* at 54-55.

¹⁰ G.A. Res. A/RES/60/1, ¶ 139 (Oct. 24, 2005).

consequences of inaction in the Security Council. There are any number of questions which may be raised as to why these crimes are included and why not others. For example, why is there the general reference to war crimes (which may involve relatively minor offenses in terms of human life) rather than grave breaches or more specific war crimes, as in the Rome Statute? Why not a separate recognition of torture, at least if undertaken on a widespread or systematic level? More provocatively (and timely), why not include piracy, the longest established crime against all mankind? With ethnic cleansing still characterized as an emerging norm by many experts, why is it included?

A possible answer to the last question also suggests an overall difficulty with the limitation of the R2P to a short list of specific crimes. It would have been impossible and unjustifiable not to include the conscience-shocking offense of genocide in a list of specific crimes. As Darfur illustrates, the intent element of genocide as well as the omission of gender or political groups from the categories of protected victims has limited the real-world efficacy of the criminal sanction. To an extent, ethnic cleansing is emerging to provide a more easily demonstrated (and, unfortunately, less demanding remedially) criminal offense as an alternative to genocide. Ethnic cleansing is a crime of effect, while genocide is a crime of intent. To allege ethnic cleansing, it is not necessary to demonstrate that the intent is to destroy the protected group per se. Cynically, it is also not necessary for states to take affirmative steps as articulated in the Genocide Convention to prevent or halt genocide.

United Nations officials, including the Secretary-General, have been quick to deny that the responsibility to protect applies to environmental crises, including specifically climate change and its consequences. Nevertheless, the four specified crimes can encompass situations of abusive governments or nonstate actors inflicting environmental damage. For example, Saddam Hussein's destruction of the natural resources essential to living conditions of the Marsh Arabs may be considered "deliberately inflicting conditions of life calculated" to bring about the physical destruction of the group in whole or in part. If it is too difficult to demonstrate the necessary intent for genocide (as a government may always insist it is simply determining the best management of its natural resources), the fallback argument of ethnic cleansing can be posited. In that case, however, showing the necessary "force or intimidation" by virtue of environmental devastation becomes equally subjective and problematic. For a crime against humanity, the environmental destruction must be sufficiently widespread or systematic to be considered "inhumane acts of a similar character" to the specified atrocities "intentionally causing great suffering, or serious injury to body or to mental or physical health." Somewhat ironically, a body of legal norms to address environmental destruction may be most fully defined in the laws of war rather than in peace. The Rome Statute specifically incorporates and addresses the norms of the Protocols to the Geneva Convention and the Environmental Modification Convention, and the more general balancing test of proportionality and military necessity, coupled with protection of civilian populations, at least raises the possibility that war crimes necessarily entail consideration of environmental destruction by incumbent governments or their challengers.

David Scheffer has contended that the crimes selected derive their legitimacy from the jurisprudence of the international and hybrid criminal tribunals of the 1990's.¹¹ He proposes that the characteristics of what he terms "atrocity crimes" shed light on when these crimes

¹¹ D. Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, 40 CASE W. RES. J. INT'L L. 111, 115 (2007-08).

merit implementation of the R2P of “more robust” and, if necessary, military measures.¹² What he offers is not so much an alternative formulation of the crimes for the R2P (with two possible exceptions discussed below) as a gloss or background frame of reference for the circumstances in which the R2P is either most likely to occur or when the most robust remedies available under the R2P may be utilized. The criteria he offers are insightful, knowledgeable, helpful, and also highly subjective, particularly with respect to the first criteria, which is essentially whether the crime is “significant,” “widespread,” “systematic” or “substantial” enough, with a “relatively large” number of victims, imposing “other very severe injury” upon noncombatants, or subjecting a “large number” of combatants or prisoners of war to war crimes. The two additional crimes that he suggests may be included in the future are the crime of aggression and the crime of international terrorism, should either crystallize into a definition adequate to impose individual criminal liability.

The ICISS formulation strikes a balance between subjectivity and the restrictiveness of a specific listing of crimes. As a matter of political and diplomatic compromise, it is not surprising the drafters of the World Summit Outcome Document in 2005 were compelled to limit the paradigm-shifting, somewhat revolutionary R2P to a short, specific list of crimes. If the mission of diplomats and politicians is to find an acceptable solution to a problem, the mission of academics and experts is to find the best solution, for which political acceptability may or may not be taken into consideration. The ICISS eschewed a list of specific offenses, opting instead for (1) affirming that sovereignty yields generally when a population is suffering “serious harm” that the state is unwilling or unable to halt or avert; (2) specifying that military intervention happens only when there is “serious and irreparable harm occurring to human beings, or likely to occur,” involving large scale loss of life (whether from deliberate, neglectful, or failed state action or inaction) or large scale ethnic cleansing “carried out by killing, forced expulsion, acts of terror or rape.” The broader parameters of when the R2P may be triggered, therefore, is limited by a qualification on the use of military intervention, and more delineation of the use of the United Nations collective machinery and operational principles than in the UN formulation. In sum, the ICISS (1) proposes a

¹² *Id.* at 118-19; see also D. Scheffer, *Atrocity Crimes Framing the Responsibility to Protect*, in R. COOPER & J. KOHLER, *RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY* 77 (2009), which states that:

1. The crime must be of significant magnitude, meaning that its commission is widespread or systematic or occurs as part of a large-scale commission of such crimes. The crime must involve a relatively large number of victims (e.g., a fairly significant number of deaths or wounded casualties), or impose other very severe injury upon noncombatant populations (e.g., massive destruction of private or cultural property), or subject a large number of combatants or prisoners of war to violations of the laws and customs of war. In short, the crime must meet the substantiality test developed by the international and hybrid criminal tribunals.
2. The crime may occur in time of war, or in time of peace, or in time of violent societal upheaval of some organized character, and may be either international or non-international in character.
3. The crime must be identifiable in conventional international criminal law as the crime of genocide, a violation of the laws and customs of war (war crimes), a crime against humanity (the precise definition of which has evolved in the development of the international and hybrid criminal tribunals), or the emerging crime of ethnic cleansing. For purposes of R2P, additional crimes that may become identified in the future as atrocity crimes would be the crime of aggression (if and when it is defined so as to give rise to international individual criminal culpability and is an assault on a civilian population, particularly as an operational crime before the International Criminal Court) and the crime of international terrorism (when it reaches a magnitude comparable to a crime against humanity).
4. The crime must have been led, in its execution, by a ruling or otherwise powerful elite in society (including rebel, insurgent, or terrorist leaders) who planned the commission of the crime or were the leading perpetrators of the crime.
5. The law applicable to such crime, while it may impose state responsibility and even remedies against states, is also regarded under customary international law as holding individuals criminally liable for the commission of such crime, thus enabling the prosecution of such individuals before a court duly constituted for such purpose.

broader R2P based on a default of state sovereignty whenever a population is suffering “serious harm;” (2) limits the use of force to halt or prevent “large scale loss of life” or large scale “ethnic cleansing;” and (3) seeks to prevent abuse of the right by giving priority to the United Nations Security Council and General Assembly, but acknowledging the possibility of state intervention in a “conscience-shocking” situation if the United Nations fails to address the situation in a timely manner.

Both the United Nations formulation and the ICISS formulation are forthrightly human-centric. It is not unusual for an increasingly urgent problem of the international community to be inadequately addressed by existing norms of international law; there is often the need for it to be addressed by piggy-backing, as it were, on the most closely analogous legal norms. Environmental crises—whether climate change, natural disasters, loss of biodiversity, extinction of a species, or deliberate targeting of populations with environmental disasters or hazardous substances—have not been the focal point for definitions of the lawful use of force.

FROM STATE SECURITY TO HUMAN SECURITY

In the twenty-first century, the transformation of international law from national security to human security will inevitably (or, more precisely, necessarily) proceed. Examples of the illegitimacy of premising international legal norms on the Westphalian primacy of the sovereign state have reached a point at which the question is not whether the focus should shift from national sovereignty to human security, but rather how this normative shift should be formulated. Recognition of the responsibility to protect as a legal norm is a necessary, inevitable step in this progression. That this minimally progressive legal norm sometimes seems recognized more in its breach than its acknowledgment is a political reality that should be familiar and answerable to every international lawyer who has ever had to address the question, “But is international law really *law*?” Civil and political human rights were more easily acknowledged and solidified as law precisely because they required that governments refrain from engaging in unacceptable behavior. Economic, social, and cultural rights lagged behind in recognition and enforcement precisely because they required affirmative (and not incidentally costly in the short term) governmental action rather than mere restraint. The responsibility to protect is at its very essence an affirmative state obligation, not mere restraint. As such, it will be more difficult to achieve widespread recognition, acceptance, and implementation. That difficulty does not, however, negate its importance or necessity. Returning again to the familiar paradigm of civil and political rights versus economic, social, and cultural rights, the most laudatory implementation of the former set of rights does not guarantee stability or peace when implementation of the latter set of rights is lacking. The converse, of course, is true: earnest efforts by a state to afford the so-called “second generation” of rights does not assure personal security or national stability if implementation of civil and political rights is deficient. Acknowledging the political reality of today’s global community, however, demonstrates that far more progress has been made with the first generation of rights than the second, and the community has reached a point where lack of progress in ensuring economic, social, and cultural rights threatens the advances made in civil and political rights. Such is the nature of “terrorism,” which is to date a phrase without generally acknowledged legal definition, but which on a different level is clearly traceable to an ability of dissidents to exploit frustration of disenfranchised individuals who may or may not feel that they have their civil and political rights, but are absolutely convinced they lack their economic, social, and cultural rights.

The diplomatic reticence of the UN Secretary General and others to speak officially on behalf of the UN to acknowledge any applicability of the responsibility to protect beyond the most traditional parameters of the four atrocity offenses delineated is understandable. In the January 2009 report of the Secretary General on implementation of the responsibility to protect, the Secretary General stated:

The responsibility to protect applies, until Member States decide otherwise, only to the four specified crimes and violations: genocide, war crimes, ethnic cleansing and crimes against humanity. To try to extend it to cover other calamities, such as HIV/AIDS, climate change or the response to natural disasters, would undermine the 2005 consensus and stretch the concept beyond recognition or operational utility.¹³

The responsibility to protect is a courageous, albeit necessary, paradigm-shifting norm or “quasi-norm” of international law. As demonstrated above, existing international law can be easily interpreted to encompass natural disasters, environmental destruction, and imminent environmental crises within the four atrocity crimes. If, however, in order to preserve this advancement in international law it is necessary, on a practical and diplomatic level, to pretend that its applicability to environmental disasters does not exist, then that approach is preferable to dissent and the abandonment of a norm whose time has inevitably come.

THE RESPONSIBILITY TO PROTECT IN ENVIRONMENTAL EMERGENCIES

*By Gareth Evans**

WHY AND HOW THE “RESPONSIBILITY TO PROTECT” NORM EVOLVED¹

The “responsibility to protect” norm evolved in a very specific context and to meet a very specific need: the absence of any international consensus as to how to respond to mass atrocity crimes occurring within the boundaries of a single state. The imperative driving its initiators and advocates was to ensure that whatever other problems the international community failed to resolve, we would never again have to look back—after a Cambodia, a Rwanda, or a Srebrenica—and ask ourselves with a mix of anger, incomprehension, and shame, how we could possibly have let such catastrophes happen again. The hope was that a way could be found to ensure that whenever one of these kinds of situations again erupted, or looked like it might be erupting, there would be a reflex international reaction: not that this was nobody’s business, but that it was everybody’s, with the only issue being not whether, but how, to respond.

Such a hope was pushing hard against history. For centuries, what we would now call genocide, crimes against humanity, or war crimes committed in a civil war context were, with only a handful of exceptions, greeted with profound indifference by all but their victims. Even after the Holocaust, the Universal Declaration, the Nuremberg Charter, and the Genocide Convention, the norm resonating the most in the Cold War years was that embodied in Article 2(7) of the UN Charter, requiring “non-interference” in “matters essentially within the domestic jurisdiction of any state.” And even with the sequence of catastrophes that

¹³ The Secretary-General, *Report of the Secretary-General on Implementing the Responsibility to Protect*, ¶ 10(b), delivered to the General Assembly, U.N. Doc. A/63/677 (Jan. 12, 2009).

* President Emeritus, International Crisis Group; Chancellor, Australian National University.

¹ For a full account of the evolution and application of the R2P norm, including its application to environmental crises, see GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* (2008).

unfolded in Somalia, Rwanda, and the Balkans throughout the 1990s, there was a huge continuing rhetorical and policy divide between advocates, mostly in the global North of Bernard Kouchner's *droit d'ingérence* or "right of humanitarian intervention" and those, mostly in the global South, who regarded the acceptance of any such general principle as a wholly unacceptable assault on state sovereignty.

The move to bridge that divide, to create a consensus where none previously existed, came with the 2001 Canadian Government sponsored report of the International Commission on Intervention and State Sovereignty. We proposed that "right to intervene" language be reconceptualized as the "responsibility to protect"—that this responsibility be exercised in the first instance by individual sovereign states in relation to their own peoples, with the wider international community's responsibility only arising if they were unable or unwilling to do so; that the responsibility should involve a whole continuum of responses, from prevention through reaction to post-crisis rebuilding; and that coercive military intervention be de-emphasized as just one among many possible reactive responses, only to be used in extreme situations after multiple prudential criteria had been satisfied.

Within just four years, an extraordinarily short time frame given how long it usually takes new norms of international behavior to move from initial articulation to formal institutional embrace, the "responsibility to protect" principle was embraced unanimously by more than 150 heads of state and government attending the 2005 World Summit and sitting as the UN General Assembly. The language of paragraphs 138 and 139 is clear and compelling and, although in some respects a little different from the original Commission, embraces all its key elements. The focus is on four specific categories of atrocity crime—genocide, war crimes, ethnic cleansing, and crimes against humanity—and what have since been described as three "pillars" of action. The first pillar is the responsibility of individual sovereign states to protect their people from such crimes, the second is that of other states to assist them to do so, and the third is the responsibility of states to take appropriate collective action—including, as necessary, forcible action under Chapter VII of the Charter when a state is "manifestly failing" to fulfill its own responsibility.

Since 2005, the new norm has been gradually gaining traction, most obviously and effectively in strong and united international reaction. This norm is in marked contrast to the reaction to Rwanda in 1994 as well as the response to the explosion of ethnic violence in Kenya in the last days of 2007 and first days of 2008, which was very widely described as a responsibility to protect case, and which was diffused by diplomatic mediation rather than coercive force. The latter situation demonstrated that the norm was not just about "sending in the Marines." But in Darfur and other cases, the international response has been manifestly inadequate, and much work obviously remains to be done to meet the institutional and political challenges of ensuring that there is both capacity and will to respond appropriately at all stages to emerging situations of "responsibility to protect."

A good deal also remains to be done, not least in the corridors and chambers of the United Nations itself, to ensure that the norm continues to enjoy the kind of unanimous support its articulation received in 2005. A number of states have subsequently expressed what has been described as "buyers' remorse" for their earlier vote, and there has been some anxiety that, in the context of a forthcoming debate in the General Assembly on the subject—around the Secretary General's report drafted by his Special Adviser, Edward Luck²—there would be

² The Secretary-General, *Report on Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009).

a move to reopen and dilute the language of 2005, rather than focusing on practical measures to ensure the more effective implementation of the principle in the future.

I believe these concerns are somewhat overstated, but they nonetheless point to the very real necessity for advocates and supporters of the “responsibility to protect” to be very clear about the scope and limits of the norm, and not to take positions that would have the effect of significantly reducing either its attractiveness in principle or its capacity to be operationalized.

THE RESPONSIBILITY TO PROTECT AND ENVIRONMENTAL EMERGENCIES

It is from this perspective that I would strongly argue that we need to be very careful, indeed, about even floating the idea of extending the reach of the “responsibility to protect” norm to environmental emergencies. Of course, one can argue, as both a matter of ordinary English language usage and as a matter of good public policy, that the international community has a responsibility to protect people from natural disasters and environmental catastrophes as much as any other kind of actual or potential catastrophe. And one might mention as well, in this context, protection from the ravages of HIV/AIDS worldwide; the proliferation of nuclear weapons and other weapons of mass destruction; the ready availability of small arms; and the use of land mines and cluster bombs. But if one is looking for umbrella language to bring these issues and themes together, it is much more appropriate to use a concept like “human security” than to say these are proper applications of the new international norm of “the responsibility to protect.”

It is not just a matter here of making the formal point that these cases are clearly not intended to be subsumed under the various descriptions of mass atrocity crimes that appear in the World Summit outcome document and the relevant lead-up reports. The argument is a more practical one: if the “responsibility to protect” is to be about protecting, as the former Canadian Foreign Minister not so long ago suggested in regard to the Inuit people of the Arctic Circle and the ravages of climate change—if it is to be about protecting everybody from everything—it will end up protecting nobody from anything. The whole point of embracing the new language of “the responsibility to protect” is that it is capable of generating an effective, consensual response to extreme, conscience-shocking cases in a way that “right to intervene” language simply could not. We need to preserve the focus of the “responsibility to protect” as a rallying cry in the face of mass atrocities.

A further problem with stretching the “responsibility to protect” concept to embrace what might be described as the whole human security agenda is that this immediately raises the hackles of those who see it as the thin end of a totally interventionist wedge, giving an open invitation to the countries of the North to engage to their hearts’ content in the *missions civilisatrices* that so understandably anger those in the global South, who have experienced it all before. That trouble is compounded when it is remembered that coercive military intervention, while absolutely not at the heart of the “responsibility to protect” concept, is nonetheless a reactive response that cannot be excluded in really extreme cases. So, any understanding of “responsibility to protect” as a very broad-based doctrine, which would open up at least the possibility of military action in a whole variety of policy contexts, is bound to give the concept a bad name.

This issue was thrown into stark relief by the dilemma facing the international community when, in May 2008, the ruling military regime of Burma/Myanmar dragged its feet badly in responding to offers of international aid following the catastrophic Cyclone Nargis. The cyclone brought a tidal surge that devastated the Irrawaddy delta, directly killing over 130,000

people and putting scores of thousands more at risk from disease, starvation, and exposure. Was this, or was this not, a “responsibility to protect” case that would conceivably justify coercive military intervention for the explicit purpose of delivering the necessary aid? The short answer is that natural disasters, as such, are not *per se* “responsibility to protect” situations, but they can be if mass atrocity crimes are also involved. While the Burma/Myanmar reaction could have been the case here—and the issue certainly deserved close scrutiny—in the event itself it was not.

The Myanmar case is worth teasing out in a little more detail. When French Foreign Minister Bernard Kouchner made an initial statement arguing that the generals’ dilatory response justified coercive intervention under the “responsibility to protect” principle and proposed that the Security Council pass a resolution that “authorises the delivery and imposes this on the Burmese government,” he generated a storm of controversy.³ This controversy erupted partly because of a fear that this threat would be counterproductive in winning any still-possible cooperation from the generals, but more because it was seen as realizing the worst anxieties of “responsibility to protect” opponents, opening up the specter of military intervention on a human security issue—here, natural disaster relief—not related to mass atrocity crimes.

But what if man-made mass atrocity crimes were also involved and Kouchner had put the argument expressly in these terms (as he and others later did)? What if the Burmese military regime’s inaction and resistance to any external help, notwithstanding its immediate availability in large quantities, had, instead of giving way to eventual significant cooperation, continued to the point that large numbers of people were actually suffering and beginning to die in significant numbers? Would it not be possible to argue in these circumstances that, by omission if not by act, the regime was, in fact, committing crimes against humanity?

The definition of crimes against humanity (in the Rome Statute establishing the International Criminal Court, as well as in customary international law) embraces, along with widespread or systematic murder, torture, persecution and the like, “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁴ Also potentially applicable in the Myanmar case was the international crime of “extermination,” defined in the Rome Statute as including “intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”⁵

The most problematic aspect of applying all this language to the Myanmar case might appear to be the “intentionality” requirement, given that what would most likely have been in issue here was not so much direct intention to cause suffering and death, but reckless indifference as to whether such harm occurred. But, in fact, the Rome Statute defines a person as having intent where, “in relation to a consequence, the person means to cause that consequence, or is aware that it will occur in the ordinary course of events.”⁶ This formulation

³ For Kouchner’s widely reported statement see, for example, Darren Schuettler, *Myanmar Must Act Now to Clear Aid Red Tape*, REUTERS, May 7, 2008, available at www.reuters.com/article/featuredCrisis/idUSBKK328448. For some of the reaction it engendered, see Seth Mydans, *Myanmar Faces Pressure to Allow Major Aid Effort*, N.Y. TIMES, May 8, 2008; Louis Charbonneau, *China, Indonesia Reject France’s Myanmar Push*, REUTERS, May 8, 2008; James Blitz, *Western Diplomats Assess Risks of Unilateral Intervention*, FINANCIAL TIMES, May 10, 2008; and Maggie Farley, *U.N. Struggles over how to Help Nations that Reject Aid*, L.A. TIMES, May 14, 2008.

⁴ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), entered into force July 1, 2002, art. 7(1)(k), available at www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

⁵ *Id.* art. 7(2)(b).

⁶ *Id.* art. 30(2)(b).

is apparently broad enough to encompass common law notions of recklessness, as written by Glanville Williams ("the state of mind of one who knows that a consequence is likely to follow from his conduct but follows his course notwithstanding"⁷), or to similar effect in the U.S. Model Penal Code.⁸

Of course, even if a *prima facie* case could have been made for the commission by the regime of one or other mass atrocity crime, that would not have been, in itself, enough to justify a coercive military intervention under "responsibility to protect" principles. The UN language contemplates the use of coercive military force only with Security Council endorsement, and all the "responsibility to protect" *travaux préparatoires*, from the ICISS report to the High Level Panel and Secretary-General's Reports,⁹ insist that such force should only be applied as a last resort, after prevention has failed, when it is clear that no less extreme form of reaction could possibly halt or avert the harm in question, that the response is proportional to that harm, and that on balance more good than damage will be done by the intervention. Even if the military intervention here had taken the form only of helicopter air drops and boat landings of supplies, it may have been practically ineffective in the absence of a supporting relief operation on the ground. In addition, by generating a response from the Burmese military, it may have ignited a full-blown conflict that, quite apart from its other impacts, could only have added further to the misery of the cyclone victims.¹⁰

Ultimately, the feared post-cyclone disaster was avoided, enough assistance being delivered by local nongovernmental organizations, foreign relief organizations with personnel already in-country, the military itself, and external relief organizations that were finally allowed (mainly through Asian intermediaries). While the affair overall was not very helpful in the short term in consolidating support for the "responsibility to protect norm," at least it generated a serious international debate about the norm that appears to have advanced, if only a little, international understanding of its scope and limits along the lines here suggested.¹¹ And it is fair to say that if an environmental emergency in the future raised the same sorts of concerns about the inadequacy of a government response being on such a scale that it could be characterized as involving the reckless infliction of great suffering, the "responsibility to protect" argument would be very relevant indeed.

Of course, it remains always very tempting to broaden the application of "responsibility to protect" beyond the actual or feared commission of mass atrocity crimes: it is the case that issues of civilian protection (from loss of life, injury, economic loss, and assaults on human dignity) are always involved in any deadly conflict, whatever its cause and whatever

⁷ GLANVILLE WILLIAMS, *THE MENTAL ELEMENT IN CRIME* 55 (1965).

⁸ "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of a high degree." MODEL PENAL CODE § 2.02(2)(c) (1985).

⁹ ICISS, *THE RESPONSIBILITY TO PROTECT* XII, 35-37 (2001); UN, *HIGH-LEVEL PANEL ON THREATS, CHALLENGES, AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY* 66-67, 106-07 (2004); KOFI ANNAN, *IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY AND HUMAN RIGHTS FOR ALL* 43, 83, U.N. Doc. A/59/2005 (2005).

¹⁰ See further my response to Bernard Kouchner's initial statement, circulated widely in the UN and subsequently published as Gareth Evans, *Facing Up to Our Responsibilities*, *The Guardian*, May 12, 2008, which appeared to have some influence in steering the R2P debate back along these lines.

¹¹ See, for example, *To Protect Sovereignty, or Protect Lives?*, *THE ECONOMIST*, May 15, 2008; Timothy Garton Ash, *We Have a Responsibility to Protect the People of Burma. But How?*, *THE GUARDIAN* May 22, 2008; Ramesh Thakur, *Getting Real with R2P*, *DAILY TIMES (LAHORE)* May 28, 2008; David Rieff, *Humanitarian Vanities*, N.Y. TIMES MAGAZINE, June 1, 2008, at 13. For some other commentary see the materials collected at the Responsibility to Protect—Engaging Civil Society (R2PCS) website, available at www.responsibilitytoprotect.org/index.php/latest_news/1686.

its scale, and in any significant human rights violation. And, of course, it is true that some full-fledged “responsibility to protect” mass atrocity situations evolve out of less extreme human rights violations, or out of general conflict environments.

At a more general level, it has recently been argued with some persuasiveness by Lloyd Axworthy and Alan Rock¹² that when “responsibility to protect” is “unbundled” into its “foundational principles,” then these “can be applied to other problems that engage humanity as a whole.” The principles in question are “the continued recognition of the primacy of the sovereign state as the “first responder”; the duty of the international community to support the state in meeting that responsibility; and the refusal of the international community in areas of global priority to accept the single state’s failure or refusal to act as the last word.” The authors acknowledge in a footnote that “responsibility to protect” itself is uniquely applicable to mass atrocity crimes, not to a wider array of problems, and that it would in fact be “damaging to “responsibility to protect” itself” to so apply it. However, this message is rather diluted by the overall thrust of their article, reflected in its title: “R2P: A New and Unfinished Agenda,” and by the devotion of several pages of argument to climate change as a key exemplar of that new agenda.

My bottom line, again, is simply that any widening of the application of “responsibility to protect” terminology, expressly or by implication, beyond its core business of addressing mass atrocity crimes is dangerous from the perspective of undermining the utility of “responsibility to protect” as a rallying cry. If anything else is bundled under the “responsibility to protect” banner—be it conflict generally, human rights generally, human security generally, environmental emergencies specifically, or anything else—we run a serious risk of diluting its capacity to mobilize international consensus in the cases where it is really needed. And that would be very bad news.

ENVIRONMENTAL EMERGENCIES AND THE RESPONSIBILITY TO PROTECT: A BRIDGE TOO FAR?

*By Edward C. Luck**

It is a great pleasure to be here and an honor to follow Gareth. I’m not sure it is always a privilege, however, because Gareth always says it better. He was the one who initially coined the phrase “responsibility to protect.” We would not be here without Gareth, and his advocacy has been extremely important in keeping this idea afloat. He said most of what I wanted to, but not everything that I’d like to say, so please consider this a corollary or a supplement to Gareth’s talk.

First, I have one small point of difference. Gareth, like many others, referred to the responsibility to protect (hereinafter “RtoP”) as a norm. At the United Nations, we do not call it a norm because it does not have a binding legal quality to it. A number of member states are distinctly uncomfortable with the notion that RtoP has become a full-fledged norm. In my early work on RtoP at the UN, I called it an emerging norm. But even that terminology proved politically controversial. There is no doubt, however, that the “responsibility to protect” has a normative quality. In any case, our goal at the UN is to achieve a measurable

¹² Lloyd Axworthy and Allan Rock, *R2P: A New and Unfinished Agenda*, in *GLOBAL RESPONSIBILITY TO PROTECT* 1, 64 (2009).

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and sustainable change in behavior—not just in labeling—among states and armed groups alike. Then this principle could be properly considered to be common law, even though the “responsibility to protect” is unlikely to be codified in the form of a binding legal convention—a step that appears to be as unnecessary as it is improbable.

At its core, the “responsibility to protect” is really a political concept, not a legal one. It is based firmly and unambiguously on existing international law in terms of four specified crimes and violations: genocide, war crimes, ethnic cleansing, and crimes against humanity. What RtoP has done is to draw them together into a singular, purposeful package. This has allowed the development of a doctrine, a strategy, and a unified standard for national, regional, and global action, as well as powerful engagement by individuals, civil society, and parliamentarians. In the process, RtoP has moved from the area of law to the area of public policy. Its force derives from its attractiveness as a political concept, one based on fundamental values and widely-held moral precepts. Adding a legal veneer to RtoP would add little to its potency, just as trying to extend the scope of RtoP to cover behaviors or policies beyond the four specified crimes would not provide an additional legal basis for action. Assigning an RtoP label to additional issues may add a little bit of political support in some cases. However, it could also fuel political opposition to such an application. This could well be the case with environmental issues, from those concerned that RtoP could add a sense of obligation to act in a certain way. It is worth recalling, in that regard, that John Bolton, then serving as U.S. Permanent Representative to the United Nations, raised similar concerns about U.S. decision-making sovereignty (or freedom of policy choice) at the time that the 2005 World Summit agreed to the RtoP language in its Outcome Document.¹

In that regard, it is worth noting the differences between the conclusions of the International Commission on Intervention and State Sovereignty (ICISS) report that Gareth so ably co-chaired in 2001 and what the member states accepted in 2005.² There are great similarities between the two documents and we owe an enormous debt to the historic work of Gareth and his fellow ICISS commissioners. Yet the differences are also important, especially in the effort that Secretary-General Ban Ki-moon and I have been pursuing in trying to get the member states back on-board. As Gareth said, there was something of a collective amnesia about all this. In 2006, too many representatives could not seem to remember what they had agreed to in 2005, and by late 2007, when I started this work, it was even worse. To put the pieces of the 2005 consensus back together, it required a keen understanding of why some member states had come to reject certain pieces of the initial agreement. First and foremost, I had to deconstruct the language of paragraphs 138 and 139 in the Outcome Document in order to try to figure out what had actually been agreed to in 2005 and why perceptions of that agreement had shifted since then.

There is an interesting commentary by Jean Ping, who is now the Chairperson of the African Union Commission, but in 2004-2005 was the President of the General Assembly. He was there up to the eve of the September 2005 agreement on the Outcome Document that included RtoP, so he had an unusually close and sustained view of the negotiations. If you actually go back and look at the comments from member states in the spring of 2005 about RtoP, many are decidedly negative. Nevertheless, a few months later they were able to agree on rather detailed consensus language on RtoP. Why? Agreement proved illusive

¹ See Edward C. Luck, *Sovereignty, Choice, and the Responsibility to Protect*, in *GLOBAL RESPONSIBILITY TO PROTECT* 10-21 (2009).

² See Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Dec. 2001); 2005 World Summit Outcome Document, U.N. Doc. A/60/L.1, ¶¶ 138-40 (Sept. 20, 2005).

on other key issues. For example, the Outcome Document fails to say anything about disarmament or non-proliferation. These issues turned out to have been too polarizing for the member states to agree on, and yet somehow they came together on the responsibility to protect. According to Jean Ping, the critical point in the negotiations came when Munir Akram, then the Pakistani Permanent Representative, not usually described as a great fan of RtoP, insisted that the delegates needed to know exactly which cases and situations they were talking. The ICISS report had really been rather broad on this score, not defining the scope of RtoP crimes in a specific or consistent manner. Member states, on the other hand, wanted to delineate the scope of RtoP's application as precisely as possible. So they were able to negotiate these four crimes.

When we were trying to get the member states back on board in 2008, some of them would come to see me rather frequently to get reassurance that the Secretary-General's report I was drafting would stay within the bounds of the four specified crimes and would not endorse wider application of RtoP. It seems that going even an inch beyond would open up for some of them a Pandora's Box, as well as increasing the opportunities for other states to misapply the principle. Member states become distinctly uncomfortable when confronted by what they perceive to be a boundless concept. Politically, this distinction is very important. If RtoP were to be codified—which I don't recommend at this stage—precise definition would become that much more essential. In many discussions with member states, it became very clear that what they were really talking about in 2005 was the question of mass violence. Broader matters of governmental neglect and malfeasance were well beyond the scope of the 2005 agreement. Even now, there would be little or no chance of getting agreement on anything like that involving intentions and capabilities, especially for those developing countries facing large capacity deficits.

It is worth noting in this regard that there is nothing in the RtoP section of the Outcome Document about the intention of governments, though some of the crimes include intention in their definition. It is a question of the results, not a question of will, according to the summit leaders. The language in no way suggests that there are good states and bad states, or that bad states do certain things and good states don't do them. It is a question of whether, in fact, a state's authorities are manifestly failing—the wording in paragraph 139—to protect their populations from these four crimes and violations. In paragraph 138, the heads of state and government pledged to prevent these four crimes against their populations, as well as their incitement. From a policy perspective, this last point matters, as incitement is something you may see or hear. These kinds of mass crimes do not happen by coincidence: they are planned, and people are mobilized to commit them. So this provision, coupled with the end of impunity, gives the Secretary-General and his envoys a certain amount of leverage. This tool is one of the more prominent when you want to achieve preventive early action, as Gareth pointed out. In Kenya, the first place where the UN tried to apply RtoP, efforts by Secretary-General Ban and his predecessor, Kofi Annan, who mediated an end to the post-election violence, were successful in stopping the incitement.

Trying to determine government will is a timely and uncertain process, one ill-suited as a trigger for rapid response in an unfolding humanitarian emergency, whether caused by political or environmental factors. This has been a perennial problem for efforts at genocide prevention. How do you document intention? For example, despite the massive and well documented violence in Darfur, neither the UN's International Commission of Inquiry nor

the ICC have found that genocide has taken place.³ Such a determination would be at least as problematic in situations of environmental emergencies. For example, would you take the government of Bangladesh to task because it has perpetually been unable to stop recurring mass floods after cyclones and typhoons in its neighborhood? What about desertification? Undoubtedly there has been enormous displacement, suffering, and loss of life in some parts of the world because of desertification. But who is responsible? Surely, not just the governments of the countries where this has occurred. What about governments—and that would include those of most developed and developing countries—that chose short-term gains in economic development over longer-term policies to promote environmentally sustainable development? What about countries that have recurring earthquakes and yet have not adopted or enforced sufficiently high standards for the construction of homes, offices, and public buildings? Should they be held accountable because tens of thousands of people die in earthquakes? If so, should they be accountable to their people or to international institutions and standards, or both? Some would ask about those countries that have lacked financial and fiscal discipline and/or have failed to properly oversee private financial institutions, allowing a worldwide financial meltdown and putting millions of people out of work at home and around the world.

Where do we draw the line if the question is between the government's intention or its competence? One, these things are very hard to prove. Two, there is just no clear dividing line once you start in that direction. At points, the ICISS report spoke about state failure, and at other points about situations of compelling human need. Politically, these are moving statements, but they do not provide sufficient policy guidance about where to draw the line and how to define policy choices. In my view, the world leaders in 2005 were wise to set limits on the scope of RtoP.

In addition to trying to rebuild the political consensus among member states, my assignment from the Secretary-General has included bringing conceptual coherence to RtoP and planning how to give it an institutional capacity. How could the world organization and the many parts of the UN system respond more effectively—along with its regional and sub-regional partners, governments, and civil society—in an RtoP emergency? How could the UN take more timely and effective preventive action? What has and, too often, has not worked in the past? Are there lessons that should be shared from one part of the world to another? So the Secretary-General needed a strategy that would work both politically and practically. The politics and the strategy needed to work in the same direction, as neither would make much difference without the other.

If you spend any time around the UN, you know that one of its hallmarks is taking simple, straightforward ideas and turning them into mush as it seeks to make them become everything to everybody. In the UN's political and bureaucratic culture, this "everything is everything" syndrome—asserting that everything is holistic and everything is inter-related—is pretty hard to resist. I tried, not entirely successfully, to avoid this tendency in drafting the Secretary-General's report, *Implementing the Responsibility to Protect* (A/63/677). Despite a conscious effort not to take a holistic, "everything is everything" approach, at points the report stills sounds, unfortunately, a little bit like that. So, we have resisted, not only for political reasons,

³ See The Secretary-General, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (Jan. 25, 2005), available at <http://www.un.org/news/dh/sudan/com_inq_darfur.pdf>; Warren Hoge, *The UN Finds Crimes, Not Genocide in Darfur*, N.Y. TIMES, Feb. 1, 2005; and the Decision of the Pre-Trial Chamber of the International Criminal Court (Mar. 4, 2009), available at <<http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>>.

but also for coherence reasons, the temptation to broaden RtoP beyond what the heads of state and government agreed to in 2005. How could one begin to operationalize a concept that is so elastic that it begins to apply to more and more different kinds of situations that would require different kinds of mechanisms, different ways of measurement, and different parts of the institution to respond to them? Such an open-ended conception of RtoP would not have, at least for the UN, any real content and power beyond its rhetorical appeal. It would be a bit like human security: an admirable way of thinking about security but one that has little operational content.

Moreover, as the Secretary-General and I have emphasized, his approach would be narrow but deep. It needs to be deep in the sense that there are many different ways of anticipating and responding to these kinds of situations. Under the Charter, there are a wide range of relevant tools for this purpose, various actors who can wield them, and, on the non-coercive side, multiple points of decision-making to invoke them. Because of this variety, there is a need to focus tactically in a targeted way. The UN's strategy needs to be case-specific and flexible. As the Secretary-General puts it, the UN should stress prevention and, when that fails, early and flexible response tailored to the circumstances of each case. To do this, his report presents a strategy based on three pillars: the protection responsibilities of the state; international assistance and capacity-building; and timely and decisive response. As Gareth has already mentioned them, I won't go through them at this point.

Given that we are meeting in Washington, DC, there is one other point that I should make about the strategy. We need constantly to remind people that this is not humanitarian intervention and that this is not all about the use of force. Force is a piece of the Secretary-General's strategy, but it is a fairly small, if essential, piece of that strategy. The task before us is to look at how these different pieces work together. While the premise of the ICISS exercise, following the polarizing debates about the use of force in Kosovo, was the need to sort out the relationship between armed intervention and state sovereignty, the context has changed in important ways since Kofi Annan's famous speech on humanitarian intervention in 1999. Today, in part because of the mind shift propelled by the ICISS report, the issue is how best to engage with the state and other actors to help ensure the full and proper exercise of sovereignty as responsibility, a concept first raised by Francis Deng and his colleagues addressing conflicts in Africa in the mid-1990s.⁴

Let me just add a word or two on Cyclone Nargis and Myanmar, because that May 2008 situation epitomized the challenges faced in an extreme environmental emergency in which the responsible government is slow to react. Gareth made some very eloquent and very helpful statements at the time. A few prominent voices had labeled it an RtoP situation and broached the possibility of military force to deliver humanitarian aid to the beleaguered population. I argued that the situation did not fit the four crimes, as conceived by the 2005 Summit, and that an effort to deliver assistance by military means would be both impractical and distracting from the humanitarian task at hand. Most member states agreed, of course, and the incident served to underscore the value of sticking to 2005's relatively narrow definition of RtoP crimes. In a briefing to the Senate Foreign Relations Committee that summer, I posed three questions: 1) is RtoP needed?; 2) would RtoP or an RtoP label be helpful?; and 3) is it appropriate?⁵ Starting with the third query, Gareth and I both thought

⁴ See FRANCIS M. DENG, SADIKIEL KIMARO, TERRENCE LYONS, DONALD ROTHSCHILD, AND I. WILLIAM ZARTMAN, *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996).

⁵ See Edward C. Luck, S. COMM. ON FOREIGN RELATIONS, *International Disaster Assistance: Policy Options*, (June 17, 2008).

that in that case, it was not appropriate to apply an RtoP label. I thought that it would be decidedly unhelpful. None of Myanmar's neighbors favored applying that label. Secretary-General Ban himself went to Myanmar and used quiet diplomacy, along with ASEAN and others, to try to push that door open an inch or two. Modest results were achieved. If he had gone there under an RtoP label, in all likelihood he would not have gained admission or access to the leadership.

In terms of the first question—whether it was needed—there were any number of human rights violations occurring at the time that could have served as a justification for greater international engagement. Louise Arbour, then the High Commissioner for Human Rights and soon to be Gareth's successor at the International Crisis Group, was very articulate on that score. As she noted, in situations where there are endemic human rights violations year after year, the international community has relatively little leverage. RtoP does not have too much to offer in chronic situations such as North Korea or Myanmar. It is intended as a way of spurring effective preventive action and timely and decisive response in cases where mass violence is threatened or looming. But there were ample human rights and humanitarian rationales for addressing the post-Nargis damage in Myanmar.

I also suggested that one could look at the 1991 Guiding Principles for Humanitarian Assistance, as captured in General Assembly Resolution 46/182. On the one hand, the resolution predictably bows to sovereignty, territorial integrity, and national unity and suggests that any kind of humanitarian involvement must be by consent. On the other hand, it goes on to say that effective states are “to facilitate the work of these [relief organizations] in implementing humanitarian assistance, in particular, the supply of food, medicine, shelter and health care, for which access to victims is essential.” So that description certainly fit the post-Nargis calamity. That set of principles was reaffirmed at the 2005 Summit itself and in resolutions in the General Assembly in 2006 and 2007. General Assembly resolutions, of course, do not have a binding, legal quality. But the inclusion of these principles in a series of Assembly resolutions does suggest, in a common law way, that these are widely accepted principles.

In addition to these principles on humanitarian assistance, there are also the 1998 Guiding Principles on Internal Displacement. It was estimated that a large number of people—perhaps a million or more—had been displaced in Myanmar. At the end of the day, it turned out that the estimates of the number of casualties were highly exaggerated and that people there coped a lot better than many on the outside expected. Nevertheless, very large numbers were displaced. One of the Guiding Principles of 1998 was that recipient governments should not divert aid. There were a lot of charges about aid being diverted. Second, under the Guiding Principles, the government has to give consent to provide relief, and it should not arbitrarily withhold that consent. In addition, it is supposed to provide free passage and unimpeded access to those who need it. So, it seemed to me, if you added these two sets of guiding principles on humanitarian assistance and international displacement to all of the human rights justifications, you really did not need RtoP. Politically, it would have been an unmitigated disaster in terms of trying to bring member states back on-board. One of the reasons why that effort does seem to be working is that we have been very strict about the 2005 definition of the scope of RtoP.

Later this year, the General Assembly is expected to hold a debate on the Secretary-General's report on implementing RtoP, the Assembly's first on the subject. Undoubtedly it will be a debate, in part, on who owns RtoP and its origin. Some opponents will cast it in North-South terms and suggest that it is part of a plot by militarily powerful countries of

the North to find an attractive rationale for intervening in weaker developing countries. In response, we have cited two principal arguments. One is that RtoP, despite the terrific work done by ICISS, was really a southern concept with strong African roots. Well before the 2001 ICISS report, both the Economic Community of West African States and the African Union (AU) had voiced similar principles. Indeed, Article 4(h) of the AU's Constitutive Act of 2000 spoke of the obligation for the Union to intervene in "grave circumstances," including three of the four RtoP crimes (all except ethnic cleansing). While the earlier Organization of African Unity had stressed non-interference in internal affairs, the AU has emphasized non-indifference instead. The second argument has been that if countries are worried about intervention and worried about these kinds of concepts being abused by big powers, they should assist the efforts of the Secretary-General to define the concept very carefully, to develop a strategy under the UN Charter that works, and to make it more difficult for big states to abuse and misuse the concept.

In closing, I'd like to acknowledge that Linda Malone has raised some important points about RtoP as an ethical framework, as a route for beginning to think about the responsibility for today's and tomorrow's environmental emergencies. As the case of Cyclone Nargis demonstrated, we do not yet have fully appropriate and effective legal, policy, or intellectual tools for addressing such looming threats. At this point, RtoP is not, to me, the answer. It is still in its infancy and must learn to walk before it can run. Normative developments tend to be measured in terms of decades, certainly not in terms of months or years. Think about how long it took—four decades or more—for human rights to take hold in any real policy sense either within states or within international institutions. Humanitarian issues did not take quite as long, but still, it was a question of decades. I think that RtoP actually has moved quite quickly despite some firmly entrenched political opposition. Perhaps, borrowing from Hegel, we are going through some sort of dialectical process and are looking for the synthesis at this point. Given the rapidity of the normative advance, particularly because of the work of Gareth and others, the policy and the politics did not quite keep up. So we are trying to fill in those gaps and consolidate political support for the 2005 version of RtoP. Someday, there will undoubtedly be another generation of ideas that may come closer to satisfying the kinds of needs about which Linda is talking. I just don't think that we are there yet. At this juncture in history, trying to stretch this concept to cover environmental emergencies is just a bridge too far.