Humanitarian Action – A Scope for the Responsibility to Protect: Part II: Responsibility to Protect – A Legal Device Ready for Use?

Marie-José Domestici-Meṭ[*]

Table of Contents

*   Professor of Law at Université Paul Cézanne, Aix-Marseille III, France.

Abstract

Throughout three issues of the Goettingen Journal of International Law we are trying and answering the same question: with the recognition of responsibility to protect, is humanitarian action at last guaranteed? Will this concept avoid some avoidable deaths and lack of rescue? Our first issue was devoted to the long quest for a legal regime in favor of humanitarian action effective delivery. After a step by step review of the many solutions which have been tried, the paper ended with the "discovery" of physical protection. After mentioning the Kosovo (and Serbia) air strikes and the 3rd millennium UN field missions, the paper ended with a worrying assessment: no device over the past 150 years has succeeded in guarantying neither assistance' provision nor protection. And we raised the issue of responsibility to protect (R to P) as a possible help to solution. Our today's paper goes down this way.

A.   Introduction

> "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. […] We accept that responsibility and will act in accordance with it. […] The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means. […]. In this context, we are prepared to take collective action, in a timely and decisive manner […]."[1]

This excerpt from the summit outcome of the UN's 60th anniversary is strong and generally speaking, the wording "Responsibility to protect" still sounds, if no longer quite brand new, at least, a recent conquest of humanitarianism.

This is the starting point of our present issue, but we have to discuss it more in-depth. Indeed, the very concept was already underlying many aspects of contemporary international law; and, in the aftermath of the formalization of the concept in a UNGA Resolution, the situation is not that clear cut. Many authors envisage R to P as a legal way for armed operations,

---

[1]   GA Res. 60/1, 24 October 2005, para. 138.

with some of them also suspicious as to the very possibility of such interventions being carried out with a protective goal. And the literature practically ignores the other ways of protection that are yet to be found in the famous summit outcome.

Speaking of armed protective intervention, a long way was necessary for a narrow opening (B). Yet, broadly speaking, the responsibility to protect should open onto a wide area with far-reaching consequences (C).

B.   The Responsibility to Protect Through an Armed Operation: A Long Way for a Narrow Opening

It will thus be necessary to focus upon each of these two elements: the way and the achievement. International humanitarian law and international human rights law do protect the human being. However, international law still encompasses sovereignty. In some cases, between human protective norms and the possibility to have them implemented, there is a gap. It took years to find a solution to overcome it. We will trace back this way, including the tentative solutions put forward (I) before describing the solution found (II).

I.   Assessing the Gap and Some Non-Solutions

Some glimpses at some steps of this long way appeared in our previous issue, as side effects of humanitarian action history review. However, we are now tackling with quite a different investigation, which concerns the legal set of rules.

In humanitarian affairs, action is often emotion-driven. Sometimes, a sense of moral duty brings actors (organizations or States) to disregard certain legal constraints and to intervene in spite of them; whereas in other times and places, legalism inspires abstention for the worse. The last thirty years have shown tremendous efforts made by humanitarian workers in order to put concepts forward (1) which have to be read in light of a customary rule of the ancient times, the so-called *intervention d'humanité* (2).

1.   Humanitarian Sensitivity, Between too Much and too Little

Each decade has brought its legal contribution to answering distress in difficult conditions.

a)   In the Late 1980s: Choosing *ingérence* (or the "Right to Intervene") in Order "not to let them die"

The concept was proudly and provocatively put forward by the then "French doctor" Bernard Kouchner and his friend the law professor Mario Bettati. Beyond the provocative wording, the idea was not meant to subvert the principle of sovereignty. Mario Bettati knew all too well how fundamental it is, and in Bernard Kouchner's approach to the question, there was more indifference towards sovereignty than hostility. The name "Medecins sans Frontières" – the organization he created – signifies a dedication to rescue efforts throughout the world, but nothing of the kind of imperialism some "southern" countries have denounced.

The French diplomats took up the motto "don't let them die". Moreover, they attempted to get it accepted by the United Nations as the basis for a new norm. France put forward a draft UNGA resolution, aimed at the adoption of a strong position that could help if a local government showed a lack of cooperation regarding assistance. It was about a legal device aimed at bypassing this kind of bad will.[2]

But the topic was handled conservatively by the UNGA. The rationale behind the proposition was that respecting such sovereign refusal of help would amount to letting people die without rescue. Every precaution was used to have this declared on a large basis; therefore France sought as many co-sponsors as possible for the text. Negotiations ensued, the result of which was that only a few States – most of West – accepted to co-sponsor a text with a reference to "right to life" in its preamble. The final output was resolution 43/131, which left the "right to life" unmentioned, passed on December 8 1988. It was however construed in a misleading atmosphere. For France and most European States – as well as for the so-called *"Sans frontierist"* movement – it was taken as a victory due to the importance granted to humanitarian assistance (even without the wording "right to life") and the fact that NGOs were placed on the same footing as IGOs when it comes to the responsibilities for rescuing. But, on the latter chapter, the text gives the local State priority[3], reaffirming "the sovereignty of the affected States and their primary role in the initiation, organization, co-ordination

---

[2]   Cf. M.-J. Domestici-Met, 'Aspects juridiques récents de l'assistance humanitaire', 35 *Annuaire français de droit international* (1989), 117.

[3]   GA Res. 43/131, 8 December 1988, para. 2.

and implementation of humanitarian assistance within their respective territories"[4]. The same occurred once again in resolution 45/100 (1990).

b)   In the 1990s: Peacekeeping Preferred to *ingérence…* and Some Shortcomings

The UNSC raised great hopes when it identified a "threat to peace" in some activities aimed at hindering the delivery of humanitarian assistance of utmost and vital importance.[5] The same was stated for activities directly targeting civilian populations. Thus, according to UN Charter Chapter VII, namely Art. 39, problems which sought a legal solution eventually came under UNSC jurisdiction. Hence, the UNSC was, whenever populations where at risk, entitled to make necessary decisions. And the latter resulted in entrusting peacekeeping forces with a protective mandate, first in favor of humanitarian assistance and then in favor of civilian populations.[6]

But hope turned into disappointment with difficult crises to which the UNSC jurisdiction was inherently unable to bring remedy. The decision to rely upon peacekeeping forces, even if entrusting them with the mandate to defend besieged cities qualified "security zones", proved a lack of security.[7] Therefore, after the Rwandese genocide and the Srebrenica slaughter, in 1999, most States embraced a type of operation by-passing both sovereignty and the UNSC jurisdiction, insofar as it was conducted under the aegis of protection of populations.

In the Kosovo area, there were two opposing approaches to legitimacy. Serbia invoked its multi-secular presence in the region it considers as its birthplace while Albanian Kosovars could invoke their right to self-determination on a territory in which they constitute 90% of the population. But legally, Serbia was sovereign and in a position to rely upon the *uti possidetis* principle.[8] UNSC, in resolution 1199 (1998) ignored any contestation of Serbian sovereignty and established a commission – the Kosovo Verification Mission to be set up by the OSCE – in order to monitor

---

[4]   *Id.*

[5]   SC Res. 767, 24 July 1992, SC Res. 770, 13 August 1992.

[6]   Cf. M. Bothe, 'Peace-keeping', in B. Simma (Ed.), *The Charter of the United Nations. A Commentary,* 2nd ed. (2002), paras 13-71.

[7]   SC Res. 819, 16 April 1993, SC Res. 824, 6 May 1993 and SC Res. 836, 4 June 1993.

[8]   Cf., for the latter point, Opinion No. 2 of the (Badinter) Arbitration Commission of the Peace Conference on the Former Yugoslavia, reprinted in 31 *International Legal Materials* (1992), 1497, 1498.

a cease-fire while checking the conditions for the Albanian Kosovar population. Protection was then in the forefront. Protection, precisely, was the ground on which NATO launched its military intervention in March 1999. Neither authorized nor condemned and certainly not prized by UNSC, was the so-called "humanitarian intervention", or "humanitarian intervention" or even "humanitarian war", which ended up with the UN simply taking into account the new situation[9] – the end of Serbian control over the territory – and organizing what was due to be the "substantial autonomy" of Kosovo.[10]

However, the fact that NATO had fostered the release of the Serbian grasp on Kosovo was prized by large parts of public opinion, which showed evidence of an "International moral consensus".[11] The fact that NATO had achieved the result through the use of force without any UN mandate was strongly challenging the UN. Was it the survival of an old customary exception to sovereignty?

Indeed, the pre-UN and pre-League of Nations era offered a device for which the French language has a specific word: *"intervention d'humanité"*, not to be confused with *intervention humanitaire*[12], while in English "humanitarian intervention" covers both. Was something in the old customary rule helpful for finding the requested solution to the gap in protection?

2.   The Legacy of the So-Called *"intervention d'humanité"*

The given concept is a legacy rooted in previous centuries. In the 19th and early 20th centuries, the formula stood for a short military operation aimed at saving lives that were immediately threatened.[13] From the then

---

9   SC Res. 1244, 10 June 1999.

10   *Id.*

11   The Kosovo Report by the Independent International Commission on Kosovo (also known as Goldstone Commission), available at http://www.reliefweb.int/library/documents/thekosovoreport.htm (last visited 28 December 2010).

12   The expression *"intervention humanitaire"* can be used with a very wide scope, as a synonym of "humanitarian operations" encompassing all activities of humanitarian assistance and protection. Some authors however use it instead of *"intervention d'humanité"*.

13   Indeed Lebanon is only a part of the "Syrian province", but it is the part where the intervention took place. *Cf.* with regard to the legal nature A. Pillet, *Revue générale de droit international public* (1894), 1, 13, who pointed at the starting point of this concept the so-called "droit commun de l'humanité".

"Syrian province" – of Ottoman Empire (1860) – today Lebanon[14] to Beijing – (where western diplomats had underwent a 55 days nightmare in 1901) – a kind of legal regime had arisen from practice. That regime encompassed a partial collective approach – the authorization or ratification according to the *Concert des Nations*, together with proportionality, the prohibition of using this intervention with a purpose different from what was alleged. This customary exception to the major rule of sovereignty has been theorized in the last years of this period.[15]

In some later cases the given rule has been invoked in troubled areas such as Congo – in 1960 (Leopoldville), 1964 (Stanleyville-Paulis) and 1978 (Kolwezi) – but also in Cambodia (1978)[16] and Uganda (1979)[17].

Two false interpretations must be refuted with regard to *intervention d'humanité*. Many say that it is a western practice.[18] However, the last two aforementioned cases involved both Vietnam putting an end to the Khmer Rouge regime, and Tanzania putting an end to the Idi Amin Dada regime. Another false statement refers to the so-called rescue operation in favor of nationals. Both of these cases, as well as older ones, demonstrate that the operations do not necessarily benefit to nationals of the intervening State. For instance during the Kolwezi operation, French (and also some Senegalese) soldiers rescued people of 54 diverse nationalities.

---

[14]   Cf. I. Pogany, 'Humanitarian Intervention in International Law: The French Intervention in Syria re-examined', 35 *International and Comparative Law Quarterly* (1986), 182, 186; S. Chesterman, *Just war or Just Peace?: Humanitarian Intervention and International Law* (2001), 32.

[15]   A. Rougier, 'La théorie de l'intervention d'humanité', 17 *Revue Générale de Droit International Public* (1910) 1, 468; Brownlie says that by the end of the nineteenth century the scholars had accepted the existence of a right of humanitarian intervention but notes that the doctrine was 'inherently vague' and 'open to abuse by powerful states. Cf. I. Brownlie, *International Law and the Use of Force by States* (1963), 338.

[16]   Cf. T. M. Franck, 'Interpretation and change in the law of humanitarian intervention' in J. L. Holzgrefe & R. O. Keohane (eds), *Humanitarian Intervention. Ethical, Legal, and Political Dilemmas* (2003), 204.

[17]   F. Tesón, *Humanitarian Intervention. An Inquiry into Law and Morality*, 3rd ed. (2005), 228.

[18]   This impression may derive from the important French – and also British – activity in this regard. Besides, the topic is especially popular among American authors, *cf.* e.g. M. Reisman & M. McDougal, 'Humanitarian Intervention to protect the Ibos', in R. Lillich (ed) *Humanitarian Intervention and the United Nations* (1973), 167, 172; J. Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention : Its Current Validity Under the U.N. Charter', 4 *California Western International Law Journal* (1973), 203; W. M. Reisman, 'Editorial Comments', 94 *American Journal of International Law* (1999), 824.

One last peculiarity makes the so-called *"intervention d'humanité"* distinct from humanitarian action. If the latter helps mitigate a disaster, the former helps prevent or stop it. Humanitarian intervention is active upon the consequences of the slaughter, while the *"intervention d'humanité"* is active upstream, upon the causes of suffering.

From the 1960s to the 1980s, at the onset of the associative humanitarian adventure, this legacy was still vivid for associations which – unlike the ICRC – do not rely upon the local State's cooperation. Proof of this rests with the fact that States or politicians that want to criticize a given *intervention d'humanité*, usually accuse its authors of having forged a "false" or "pseudo" *intervention d'humanité.* A good example is to be found in the USSR's criticism towards the US intervention to Stanleyville-Paulis (Congo, 1964).[19]

Thus, after the UN Charter entered into force, States went on referring to this customary rule,[20] which had become contrary to a general treaty. If an explication is to be found, it can be that the inefficiency of the UN collective security system made it appear as something virtual.

But with the new international paradigms, and namely the end of Security Council paralysis, both sovereignty and the UN security system have to be taken into account even more. The Kosovo case showed an up-to-then hidden reality: behind the aforementioned failed attempts (so-called *"ingérence"*, peacekeeping…), there was a real need for a solution bridging the protection gap. In order to put an end to both deadly abstention and unilateral intervention, an answer had to be found.

After the 1999 operation, Kofi Annan tackled two challenges. One was peacekeeping operations efficiency, which he knew well, as a former head of the Department of Peacekeeping Operations. Ways to better UN peacekeeping missions were sought after in 2000 by the Brahimi report,

---

[19]   More precisely, this criticism was forwarded by *Pravda*, the official newspaper of the Communist Party of the USSR; cf. M.-J. Domestici-Met, 'Aspects juridiques récents de l'assistance humanitaire', *Annuaire Français de Droit International*, 35 (1989), 117.

[20]   There is evidence for a State practice, e.g. Vietnam in Cambodia, (1978), Tanzania in Uganda (1979), NATO in Kosovo; however it is not clear whether this practice was based on an *opinio juris*. In the literature, Bowett and Stone still considered the humanitarian intervention legal under the Charter, since Art. 51 does not exclude the right of self defense which derives from customary law. The case of Humanitarian Intervention as part of customary law should then still be admissible, D. W. Bowett, *Self-Defence in International Law* (1958), 154, 182; J. Stone, *Aggression and World Order. A Critique of United Nations Theories of Aggression* (1958), 95.

which was the first of a series of documents leading to the CAPSTONE doctrine.[21] In a less technical way, there was the problem of a norm allowing emergency protection, often aimed at minority groups' safety.[22] He addressed the issue as follows:

> "(…) if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?"[23]

A new approach developed throughout some group reports, and led to Kofi Annan's own report.[24] The ICISS established by Canada issued its report in December 2001 with the title: "*The Responsibility to Protect*".[25] The timing was not ideal, since after September 11, the common approach to security shifted from mass killing to terrorism. Indeed, it could have been an opportunity to think of human security, since terrorism intrinsically targets civilian population. Even though the September 11th attacks' death toll was "only" around 3000: killing some 3000 people is already mass killing. However, the UNSC focusing its resolutions upon the United States' right to self-defense and the George W. Bush's announcement of the "war on terror",[26] together shifted the focus upon the State's security. And with the 2003 Iraq war, many small States raised concerns about the possible use

---

[21]   *United Nations Peacekeeping Operations. Principles and Guidelines* (2008) available at http://www.peacekeepingbestpractices.unlb.org/PBPS/Pages/Public/Download.aspx?d ocid=895&cat=10&scat=0 (last visited 28 December 2010).

[22]   "On constate l'émergence lente, mais inexorable, je pense, d'une norme internationale contre la répression violente des minorités, qui aura et doit avoir préséance sur les questions de souveraineté", Kofi Annan, cited in 3 *Revue de l'OTAN* (1999) 3, 24-27 available at http://www.nato.int/docu/rev-pdf/fra/9903-fr.pdf (last visited 30 November 2010).

[23]   Report of the Secretary- General, We, the peoples: the role of the United Nations in the twenty-first century, UN Doc A/54/2000, 27 March 2000, para. 217.

[24]   Report of the Secretary General, In larger freedom: towards development, security and human rights for all, UN Doc A/59/2005, 21 March 2005.

[25]   *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty* available at http://www.iciss.ca/pdf/Commission-Report.pdf (last visited 30 November 2010), as to this concept cf. M. Zambelli, 'Putting People at the Centre of the International Agenda': The Human Security Apporach', 77 *Die Friedenswarte* (2002), 17.

[26]   SC Res. 1368, 12 September 2001 and SC Res. 1373, 28 September 2001.

of the "Responsibility to Protect" as a pretext for invasion. Thus, enthusiasm was lowered, and the first conceptions of the ICISS did not immediately result in official inter-states documents. But Kofi Annan entrusted a High Level Panel on Threat, Challenges and Change, with a view to include genocide prevention in the 2005 UN reform. In December 2004, the High Level Panel released a report "*A more secure world. Our shared responsibility*",[27] where the "responsibility to protect" was qualified an "emerging norm"[28]. That same year, the 2005 World Summit Outcome showed the success of the latter norm.

The legacy of *intervention d'humanité* and that of the 1990 Security Council major resolutions merge into a new concept.

> "[…] paragraphs 138 and 139 of the R2P may signify the crystallization of customary international law, as evidenced by state practice and opinio juris in respect of the interpretation of 'threat to peace' in chapter VII of the United Nations Charter. That is, in the wake of 1990s developments such as the Security Council's determination on more than one occasion, that serious or systematic, widespread and flagrant violations of international humanitarian law may contribute to a threat to international peace and security, as well as action taken outside the Security Council in Kosova, the General Assembly has seen fit to acquiesce to such an interpretation."[29]

The following year, the Security Council solemnly recalled paragraphs 138 and 139, in a kind of quasi legislative resolution, adopted on April, 28 2006 under number 1674 and devoted to the protection of civilians in armed conflicts.

However, on this long way towards R to P, the International community has not yet reached the end, as will be shown in Section II and point C. Still, the debate is now well framed in new terms: the hypothesis of an armed intervention has to be linked to the UN, since the present state of the world makes it impossible to rely on the old *intervention d'humanité* without taking into account world institutionalization. And the responsibility

---

[27]   A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, UN Doc A/59/565, 2 December 2004, 8.

[28]   *Id.*, 57, para. 203.

[29]   E. Massingham, 'Military intervention for humanitarian purposes: does the responsibility to protect doctrine advance the legality of the use of force for humanitarian ends?',91 *International Red Cross Review* (2009) 876, 803, 823-824.

to protect regime does take it into account. Filling the gap called for some precise conditions that R to P was due to fulfill.

II.   At Last a State-Friendly and UN-Friendly Solution?

The long expected solution for answering the protection gap was shaped by some collective reflexions aimed at shifting the stress from the intervention and its actors to those in need of rescue; from a right to intervene, to a responsibility to protect. And this was an answer to a call for a re-appraisal of sovereignty. In this regard, former UN SG Boutros Boutros Ghali was a forerunner. In 1992, when reporting upon UN activities in 1991,[30] he warned against any counterproductive dilemma of "sovereignty–protection". And the new approach had been drafted, even before the Kosovo intervention, with the very concept of "sovereignty as a responsibility" by Francis Deng – the present UNSG Special adviser for the Prevention of Genocide – then working within the framework of the Brookings Institution. Here lies the change: as quoted in the introduction, "each individual State"[31] endorses the responsibility to protect its population and UN members are "prepared to take collective action"[32], as a substitute means of protection. It is now up to us to focus upon the possible substitution of a State by the International community. And as for armed intervention, the result is by no means a revolutionary one. On the one hand, there is a strange convergence between the criteria set up for armed intervention in the name of the responsibility to protect and those of the old *intervention d'humanité* (1). On the other hand, a kind of shyness in practice goes against the primary impression that a big step forward has been made (2).

1.   The Substitutive R to P Scheme is That of "*intervention d'humanité*", now put in Line With Modern International Law's Main Features

This convergence is worth highlighting since it concerns rules belonging to two dramatically different ages of international law.

---

[30]   Report of the Secretary-General on the Work of the Organization, UN Doc. A/46/1, 13 September 1991, 5.

[31]   GA Res. 60/1, *supra* note 1, para. 138.

[32]   *Id.*, para. 139.

Not all of the conditions of legality of the old *intervention d'humanité* are stated in the World Summit Outcome. The given only refers to
- on the one hand a "right authority" – through an institutional process – which is in line with ICISS's statement that

"A. […] The task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has. B. Security Council authorization should in all cases be sought prior to any military intervention action being carried out."[33]

- and, on the other hand, a threshold of atrocities, which is to be read in the light of the concept of "just cause".

The present state of international law allows for a better framing of the four "horsemen of the apocalypse" that constitute the scope of substitutive protection (a). And the existing institutional system allows an institutional process (b). However, further conditions were envisaged in the ICISS and High Level Panel reports and by Kofi Annan[34] as a "set of guidelines […] which […] the Security Council […] should always address in considering whether to authorize or apply military force."[35]

a)   Strictly Limited Triggering Events as an Avatar of "Just Cause"

As ICISS states in its report "Military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure".[36] This is in line with both the ban of the unilateral use of force in the UN Charter (Art. 2 para. 4) and the prohibition made to the organization to interfere in domestic affairs (Art. 2 para. 7). And not every attempt against life or physical integrity can be taken as a pretext. This was perhaps possible in the pre-UN era, but it is no longer the case today. Some groups in the international community could have been in favor of a broader

---

[33]   The Responsibility to Protect, *supra* note 25, para. 6.14.
[34]   Report of the Secretary General, In larger freedom: towards development, security and human rights for all, *supra* note 24.
[35]   A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, *supra* note 27, 53.
[36]   The Responsibility to Protect, *supra* note 25, para. 4.18.

approach.[37] But in the aftermath of the Kosovo affair, a resolutely limitative scope has been chosen. However, it is possible to notice an evolution in the wording in terms of time and context.

The 2000 African Union Constitutive Act enshrines in art 4 (h) "the right of the Union to intervene in a member State in respect of graves circumstances".

In the ICISS report (2001), the given events are mainly approached through their result, more or less regardless of the means carried out. It considers a military intervention aimed at averting 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"[38]. The same result-based approach prevails for a "large scale 'ethnic cleansing", actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape"[39].

In the High Level Panel, it is not just the wording that evolves.[40] Moreover, there is a noticeable addition: "serious violations of international humanitarian law"[41.]

In the 2005 World Summit Outcome, the topic was rephrased and the language is now ripe. It is about genocide (already targeted by the convention since 1948), crimes against humanity (condemned since Nuremberg), crimes of war (condemned by a full corpus of law) and ethnic cleansing (condemned since ICC), which we consider as being "the four horsemen of the apocalypse".

---

[37]   According to Massingham "Some African states had favoured the inclusion of the overthrow of democratically elected regimes as part of the doctrine; this was (and still is) also supported by some academics. In 1945 France unsuccessfully proposed that the United Nations Charter be drafted so as to allow intervention in situations where 'the clear violation of essential liberties and of human rights constitutes a threat capable of compromising peace'. Others have more recently suggested that the irradiation of weapons of mass destruction and terrorism should also invoke a responsibility to protect.", Massingham, *supra* note 31, 818.

[38]   The Responsibility to Protect, *supra* note 26, para. 4.19.

[39]   *Id.*

[40]   "in the event of genocide and other large-scale killing, ethnic cleansing or serious violations", A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, *supra* note 27, para 203.

[41]   *Id.*

b)   An Institutional Process as an Avatar of "Just Authority"

This one can be defined by the central role of international organizations. Unlike what would have been authorized with Tony Blair's "doctrine of the international community"[42] and in line with the 1948 Convention for repression and prevention of the crime of genocide, the UN is the one called upon to decide and act whenever the world's fate is at stake.

As already quoted, "[t]he task is not to find alternatives to the Security Council as a source of authority, but to make it work better than it has"[43]. The UN Security Council's jurisdiction in this domain is self evident. Kofi Annan notices: "As to genocide, ethnic cleansing and other such crimes against humanity, are they not also threats to international peace and security, against which humanity should be able to look to the Security Council for protection?"[44] But the SC is not the only one involved.

Apart from the "Uniting for peace", which can involve the General Assembly, what about regional organizations? There was a strong position taken by the African Union in the Ezulwini consensus. "Since the General Assembly and the Security Council are often far from the scenes of conflicts and may not be in a position to undertake effectively a proper appreciation of the nature and development of conflict situations, it is imperative that Regional Organizations, in areas of proximity to conflicts are empowered to take actions in this regard. The African Union agrees with the Panel that the intervention of Regional Organizations should be with the approval of the Security Council; although in certain situations, such approval could be granted "after the fact" in circumstances requiring urgent action. In such cases, the UN should assume responsibility for financing such operations.[45] But the text of paragraph 139 does not ratify this large approach. Chapter VIII of the Charter is referenced with regard to "diplomatic, humanitarian and other peaceful means"; and "should peaceful means be inadequate and

---

[42]   T. Blair, *Doctrine of the International Community*, speech given at the Economic Club of Chicago, 24 April 1999 available at http://www.number-10.gov.uk/output/Page1297.asp (last visited 28 December 2010).

[43]   A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change, *supra* note 27, para. 54.

[44]   Report of the Secretary General, In larger freedom: towards development, security and human rights for all, *supra* note 24, para. 125.

[45]   *The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus"*, 7 March 2005.

national authorities are manifestly failing to protect their populations"[46], the recourse to Chapter VII is foreseen "in cooperation with relevant regional organizations"[47].

Another point in the institutional process should be devoted to decision making. It is well known that the UN Security Council has for decades severely suffered from its decision making process. And if the end of the Cold War gave it some added efficiency, the veto system is not dead; and , precisely, the topic of protection could become one field for veto, due to the high level of the stakes, both protection of the human being and sovereignty. Therefore, the ICISS has tried and drafted in advance a kind of check list or memento for decision stakeholders, which amounts to listing a set of conditions. And these have not been invented in the conceptual framework of the R to P; but they are close to the *intervention d'humanité* legacy, and also paralleled to "just war" conditions. But the Summit outcome seems to stand back on this topic.

c)   A Set of Guidelines and Conditions That Hardly Bind the Decision Makers

Even though the nature of the given guidelines is not clear, and their compulsory character not guaranteed,[48] we cannot avoid quoting the way in which they were envisaged by the preparatory reports of the Summit:

- Right intention: "The primary purpose of the intervention must be to halt or avert human suffering"[49]. The wording is important. It is not about the deep motive but the official intention. And it is about the primary purpose unlike in the early *intervention d'humanité* doctrine, where it was the only one.[50]

---

[46]   GA Res. 60/1, *supra* note 1, para. 139.

[47]   *Id.*

[48]   Barbara Delcourt has listed the diverse qualifications given by different States to R to P: guidelines, principles, joint commitment, concept. The author speaks of "moral obligation", B. Delcourt, 'La communauté international reactions coercitives: la responsabilité de protéger et le principe de l'interdiction du recours à la force. Communication de Barbara Delcourt' in Société Française de Droit, *Colloque de Nanterre. La Responsabilité de Protéger* (2007), 311.

[49]   The Responsibility to Protect, *supra* note 25, para 4.33.

[50]   Bellamy gives as an example a country wanting both to halt injustice and to secure borders. (A. J. Bellamy, 'Motives, outcomes, intent and the legitimacy of humanitarian intervention', 3 *Journal of Military Ethics* (2004) 3, 216) This was the

- Last resort: "Every diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis must have been explored […] with reasonable grounds for believing that, in all the circumstances, if the measure had been attempted it would not have succeeded"[51.] There is some similitude with the relation between Arts 41 and 42 of the UN Charter. Second, if the stage before intervention is a pacific one, it is also a preventive one, compared to a reactive one. With great accuracy of judgment, the ICISS adds: "The responsibility to react… can only be justified when the responsibility to prevent has been fully discharged"[52].

- Proportional means: "The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the humanitarian objective in question"[53]. This was a significant aspect of the *intervention d'humanité*.

- Reasonable prospects: There must be "a reasonable chance of success, that is, halting or averting the atrocities or suffering that triggered the intervention in the first place. Military intervention is not justified if actual protection cannot be achieved, or if the consequences of embarking upon the intervention are likely to be worse than if there is no action at all"[54].

However, the World Summit did not take up the given items, preferring to envisage the decisions for recourse to arms to be taken "on a case-by-case basis". Was this a real choice for a method, or simply the quickest way to reach a consensus?

Anyhow, the precise scheme drawn in the Summit outcome has hardly been implemented. Is it shyness?

---

case of Viet-Nam as to the Khmer Democratic Republic and Tanzania as to Idi Amin's Uganda.
[51]   The Responsibility to Protect, *supra* note 25, para. 4.37.
[52]   *Id.*
[53]   The Responsibility to Protect, *supra* note 25, para. 4.39.
[54]   *Id.*

2.   A shy Implementation?

The situation in Darfur, raised large expectations for international protection, which has not yet been met; and the Nargis Hurricane was followed by a rough refusal of humanitarian workers, which sounded like a set back.

a)   Darfur

The alert was given by UN Deputy Secretary General Egeland regarding Darfur in 2003. Humanitarian assistance hardly arrived several months later, but the killings did not stop. Due to chronology, Darfur could have been a striking case study for protection by the international community. In October 2004 the Secretary General appointed Antonio Cassese as Chairperson for the International Commission of Inquiry on Darfur. And January 2005 offered two important milestones. On the one hand, the Cassese Commission issued its report: while there was evidence of war crimes and crimes against humanity, there was no intent for a genocide. And, on the other hand, almost simultaneously, a peace agreement was finalized in Naivasha (Kenya) about the South Sudan conflict.

Soon after, in a resolution 1590 from March 24, 2005, which was devoted both to south Sudan and Darfur, the UNMIS – UN mission in Sudan – was created and was due to settle first in the South. A week later on March 31, in resolution 1593, the Security Council, "acting under Chapter VII of the Charter, [decided] to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court".

Thus, both substitutive protection and punishment where on the tracks when, in September 2005, the World Summit issued its outcome, with paragraphs 138 and 139 devoted to the responsibility to protect.

On August 31, 2006, the Security Council, in resolution 1706, making reference to R to P, decided that "UNMIS' mandate shall be expanded […], that it shall deploy to Darfur"[55]. It was building upon Darfur peace talks in Abuja[56] and on the desire expressed by the African Union to transmit the peacekeeping mission it had had in Darfur to the UN. In the given resolution, the Council immediately added "*and therefore invites the*

---

[55]   SC Res. 1706, 31 August 2006, para. 1.
[56]   Peace agreement dated 5 May , 2006, after a Humanitarian cease fire dated N'djamena 2 April 2004.

consent of the Government of National Unity for this deployment"[57]. This latter sentence is not commonly used in UNSC resolutions that aim at creating peacekeeping forces even though the consensual nature of peace keeping forces is well known. Was this a forerunning element of a necessary failure?

To Sudan, this UN military presence in Darfur was not easy to admit. While UNMIS was due to begin in October and complete its deployment in December. In November High level consultations were still on the agenda. Held in Addis Ababa, and endorsed by the AU Peace and Security Council[58] they resulted in the creation of a Hybrid AU–UN operation instead of UNMIS deploying directly to Darfur. The latter was created by SC Res. 1769 with the symbolic name of UNAMID, D meaning Darfur even though Darfur is part of Sudan. Dated July 31, 2007, and welcomed as an audacious step forward, it reflects a climate of strong cooperation between organizations[59], but also the reduced presence of extra African forces.[60] The resolution was not implemented until January 2008. And organizing a relatively strong presence of European forces in the area was made possible for the Security Council only when it started addressing the Chad and Central African Republic situation. This resulted in another complex device made of the UN so-called MINURCAT[61], reinforced for some months by the EUFOR[62]. This device itself took a long time to set up. February 2008 was, finally, the moment when a force able to oppose the Janjaweed became settled. Moreover, it only had jurisdiction for their cross border razzes; still it was in a position to defend the Darfuri refugee camps.

Thus, four years were needed and the death toll had risen. Indeed, it was not really expedient. And the legal analysis shows that the UNSC was reluctant to use the coercive device provided by UN Charter Chapter VII. The latter is not quoted at the end of the preamble in 1706 or in 1769, but is only devoted to the "necessary actions" it authorizes the force to take in remote paragraphs.

---

[57]   SC Res. 1706, *supra* note 56, para 1.
[58]   30 November 2006.
[59]   Appointment of the AU-UN Joint Special Representative for Darfur, Rodolphe Adada, and Force Commander Martin Agwai.
[60]   "UNAMID […] shall incorporate AMIS personnel and the UN Heavy and Light Support Packages to AMIS", SC Res 1769, 31 July 2007, para. 2.
[61]   SC Res. 1778, 25 September 2007.
[62]   *Id.*, para. 6.

Even worse, the judiciary reaction has itself proven to be weakened by politics. After the case was referred to the ICC, the ICC Procurer Office requested the pre-trial chamber to issue a warrant of arrest for Ahmad Al Bashir, the President of Sudan. The first warrant was issued in March 2009 against him as an indirect perpetrator, or as an indirect co-perpetrator, under Art. 25 para. 3(a) of the statute regarding war crimes and crimes against humanity.[63]

Bashir not only considered it a political decision inspired by the western and humanitarian world, but also had many of his fellow heads of State join him in this interpretation. As a matter of retaliation, he expelled 13 humanitarian organizations in early 2009. The African Union, although audacious in principle upon these kind of affairs (cf. *supra I,B,1)*, showed solidarity to Bashir, who goes on participating in international meetings. Even more, after his re-election in May 2010, he was sworn in front of a sizable part of the international community.

Is there a possible comparison with Myanmar/Burma?

b)   Nargis Hurricane in Burma

The situation seems quite different. However, the Myanmar regime, by refusing any entry to rescuers, helped to increase the number of casualties. Furthermore, part of the affected populations belonged to ethnic minorities, which could entail the suspicion of hostile intent, beyond the "pure" refusal of foreign humanitarian workers.

But, when the situation had been evoked in the Security Council in January 2007 upon human rights purposes, Russia and China vetoed a resolution, which led the international community to proceed with great caution in 2008. Therefore, when relief supplies and workers were shipped

---

[63]   The Court found "reasonable grounds to believe that Omar Al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator, under Art. 25 para. 3(a) of the Statute, for: i. intentionally directing attacks against a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime, within the meaning of Art. 8 para. 2(e)(i) of the Statute; ii. pillage as a war crime, within the meaning of Art. 8 para. 2(e)(v) of the Statute; iii. murder as a crime against humanity, within the meaning of Art. 7 para. l(a) of the Statute; iv. extermination as a crime against humanity, within the meaning of Art. 7 para. l(b) of the Statute; v. forcible transfer as a crime against humanity, within the meaning of Art. 7 para. 1(d) of the Statute", *.Situation in Dafur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")*, ICC-02/05-01/09 (Pre-Trial Chamber I), 4 March 2009, 7.

on some western navy vessels to Burma, and when the Myanmar Junta pretended to fear an invasion, little was made to make it change its mind.

Thus, up to now, the 2005 Summit outcome has not dramatically changed the face of protection when the local State is unwilling to hear the international community's plea for its population's protection from of an imminent danger. However, when it comes to less tense situations, where the danger is not as imminent as in the aforementioned cases, things can be different.

c)   The Responsibility to Protect in a General Sense – A Wide Domain With Possible Far-Reaching Consequences

Up to now in the part B of this paper we have concentrated upon protection through an armed operation. As we have just seen, certain conditions are exacting and difficult to meet. At the same time, guidelines for making decisions on intervention have not been adopted. Thus, the probability of a licit intervention carried out in the name of the international community, and according to a mandate conferred by the Security Council, seems very low. The Darfur case, in spite of the above mentioned resolution 1706, has proven not to be the expected case for a first successful application of the responsibility to protect.

Yet, responsibility to protect is not necessarily linked to armed intervention, since other ways are possible even if they are not as popular as military operations (I). And there is room for raising the question of potential responsibility to protect from more than the mere four events listed in the Summit outcome (II).

III.   The Responsibility to Protect Upstream and Downstream of the Peak of Crisis

Though it constitutes the major concern of authors,[64] military intervention is not systematically necessary to protect. It can be so only at

---

[64]   Some of whom show scepticism like Massingham: "As such, genocide, war crimes, ethnic cleansing and crimes against humanity, can now surely be said to constitute 'threats to peace' pursuant to the United Nations Charter. This is the most significant legal advance provided by the R to P, and in effect its crowning glory. […]However, […] it seems little will change in respect of humanitarian intervention. [Whilst] the crux of the doctrine remains devoted to the question of military intervention", Massingham, *supra* note 31, 815.

the peak of crisis – and even then, it is not always efficient. Military intervention is a response to the extreme consequence of the lack of protection. Actions can be taken upstream and downstream by the relevant State or by the international community in its substitutive protection. And the latter substitution has proven to be sensitive and to encounter reluctance from some States.

However, the responsibility lies with the international community over a wide scope, from reacting to early warnings with soft measures, upon re-building the potentially war-torn society. It is what Ban Ki-moon names his "deep" approach in the Berlin Speech: "Our conception of Responsibility to Protect, then, is narrow but deep. Its scope is narrow […] At the same time, our response should be deep, utilizing the whole prevention and protection tool kit available"[65.]

1.   Protecting Upstream Through Prevention

Here, protection is granted at an early stage. Ban Ki-moon asserts: "Our goal is to help States succeed, not just to react once they have failed to meet their prevention and protection obligations"[66], commenting in bold terms that "[i]t would be neither sound morality, nor wise policy, to limit the world's options to watching the slaughter of innocents or to send in the marines. The magnitude of these four crimes and violations demands early, preventive steps – and these steps should require neither unanimity in the Security Council nor pictures of unfolding atrocities that shock the conscience of the world".[67]

The Concept is that of "Sovereignty as a Responsibility", according to the expression put forward by Francis Deng the change is of importance, even if one may quarrel Weiss' interpretation. According to him, the responsibility to protect adds a fourth characteristic, "respect for human rights", to the other three characteristics dating back to the Westphalian treaties.

According to the vision adopted by the Summit outcome, each State has to enhance protection of its population through all possible means. Its

---

[65]   Ban Ki-moon, speech given at Berlin event on 'Responsible sovereignty: International cooperation for a changed world', 15 July 2008 available at http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm (last visited 28 December 2010).

[66]   *Id.*

[67]   *Id.*

judiciary system must be independent and efficient, allowing due recourses by people whose rights seem to have been encroached upon. Safety must be guaranteed to everyone through effective governance, a wise policy *vis a vis* the clans when they do exist, and a strong struggle against gangs in order to effectively control its territory. Civil society must find the necessary freedom to be able to organize the defense of rights. The police must be carefully overlooked and monitored by the government, as well as all forces using arms. This is the picture of the society in a State duly protecting its population.

However, the relevant State may show bad will or be unable to give its population due protection.

Hence, the international community may be entitled to help a State in order to prevent it from failing.

According to Ban Ki-moon, its implementation can be eased by the innovative recognition of a third "pillar" apart from the State's responsibility to protect and the subsidiary responsibility of the international community. This third pillar was put forward in 2008, when he, first, highlighted the strength with which in the 2005 Summit outcome

> "Governments unanimously affirmed the primary and continuing legal obligations of States to protect their populations -- whether citizens or not -- from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement. They declared -- and this, is the bedrock of RtoP -- that 'we accept that responsibility and will act in accordance with it'"[68.]

Building upon this assessment in his 2008 Berlin speech, Ban Ki-moon underlined that:

> "In this context, capacity-building could cover a range of areas -- from development, good governance and human rights to gender equality, the rule of law and security sector reform. Our goal is not to add a new layer of bureaucracy, or to re-label existing United Nations programmes; it is to incorporate the responsibility to protect as a perspective into ongoing efforts"[69].

---

[68]   *Id.*
[69]   *Id.*

No genocide will occur in a State with good governance or in a State that respects human rights. Moreover, helping a State "succeed" means capacity building, i.e. developing what is needed for protective governance. Hence, capacity building may entail institutional building… As a consequence, almost the entire scope of UN activities according to Art. 1 para. 3[70] of the Charter comes under this heading… To incorporate the responsibility to protect "as a perspective into ongoing efforts", is to create "mainstreaming", which finally gives more coherence to UN policies.

Another role of the international community in prevention is early warning, which makes it possible to take measures aimed at stopping a lethal process. For example, discriminatory laws may prepare persecutions against a group within the population. Furthermore and more upstream, identifying members of the population by their religion or their ethnicity may lead to discriminatory laws. Hence, diplomatic measures can be taken when such a situation is assessed (like the Council of Europe has done with some of its members).

2.   Protecting Downstream Through Reconstruction

After a crisis, stigmas make sufferings last. Reconstruction has to begin and, in the more and more frequent case of a civil conflict, the social fabric has to be repaired through a sense of reconciliation, which often needs emblematic punishment of some criminals.

Indeed, when a civil war ends, the role of the State in control may seem ambiguous, since it does not necessarily reflect the whole population. Often, the people in charge will emanate from the so-called "victims" group, as in the case of Rwanda. In other cases, power will remain with the main group, even though the minorities' position is improved. Such was the situation between North and South Sudan when a peace agreement was brokered in 1972. And the situation may be the same at the end of an inter-States conflict, due to the destabilization which can entail the overthrow of the defeated State's regime.

Whereas the task is difficult for State authorities, it can be easier for the international community.

---

[70]   Which reads as follows "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging universal respect for, and observance of, human rights and for fundamental freedoms for all, without distinction as to race, sex, language, or religion".

It could be easier with stakeholders which are external to past disputes. The international community has developed a range of means to rebuild war-torn societies. It starts with power sharing, a formula which tightly associates former enemies for the exercise of power. And, in addition, it reconstitutes the very power of authorities by restoring the actors of constraint through two major ways: DDR – the result of which is the suppression of irregular troops, and SSR – which amounts to vetting those in the police or other regular armed forces, who are major offenders of the law and/or do not show the necessary loyalty to common interests. The latter, according to the theory is represented and carried out by the State; thus police and military officers have to obey the State first.

The international community is often equally associated with the struggle against impunity, which allows for reconstruction of the social fabric through criminal justice or transitional justice. A striking example of the responsibility to protect – even before the latter was proclaimed — rests with the case of Sierra Leone. The Lomé agreement provided amnesty for RUF warriors in spite of (or – alas – perhaps thanks to) their terrible actions. Kofi Annan, then UN Secretary General, pushed in the opposite direction, so as to have the Special Tribunal created.

Another strong benchmark of the international community acting in the name of R to P is the creation of international authorities in charge, or partially in charge, of a country during a transition period. There, the international community goes beyond influencing the situation. In the sense that it considers being mandated for, possibly up to the exercise of direct control over the territory and the population of the affected State or region. In a softer formula, it may restrict giving assistance to a young power in need of effectiveness: such is the case of UNAMA in Afghanistan, whereas MINUK in Kosovo – at least in the beginning – *had* the power. Moreover, be it local or international, a young power needs a safe environment to impose its rule. Therefore, certain stabilization forces have been created: SFOR[71], ISAF[72], MINUSTAH[73] and MONUSCO[74].

---

[71]   Stabilization force, in Bosnia Herzegovina, the creation of which was authorized by UNSC resolution (after the Implementation force), SC Res. 1088, 12 December 1996, para. 18.

[72]   International Security Assistance Force, SC Res. 1386, 20 December 2001.

[73]   United Nations Stabilisation Mission in Haiti, created by SC Res. 1542, 30 April 2004, para. 1.

[74]   United Nations Stabilization Mission in DRC. The mission was initially created as MONUC and slightly transformed in order to mark of the 50th anniversary of Congo, SC Res. 1925, 28 May 2010, para. 1.

Thus, upstream and downstream the peak of crisis, there is room for national or international actions aimed at protection and – which is more – carried out in the name of the responsibility to do so. However, we believe it is possible to go even beyond this "narrow but deep" approach developed by Ban Ki-moon.

IV. Protecting Against More Than the Four Major Dangers Listed in the Summit Outcome?

The summit outcome expresses a vision of responsibility to protect which is narrower than what was in view in some former documents. Therefore, we can envisage an enlargement in different directions.

Let us quote *pro memoria* some authors who have argued for "a collective 'duty to prevent' nations […] from acquiring or using WMD", namely those "run by rulers without internal checks on their power"[75]. This brings to mind policies run by the UN – sometimes unilaterally – with regard to North Korea, Iran and Iraq. In resolutions, the UN Security Council, acts in the name of his mandate. But, since peace is invoked, it is not directly about protecting the threatened population of one State.

Personally, we shall focus more on natural disasters. Cyclone Nargis, which hit Burma on May 3, 2008, gave a field for arguing in a broader sense about R to P. Whereas 2.4 million people were heavily affected, the Burmese authorities obstructed relief operations in the name of sovereignty. French Foreign Minister Bernard Kouchner – who once put forward the *ingérence* or "right to intervene"- invoked the R to P. Unlike what has been commented[76] by some critics, it was not with the intent of deploying a non-consensual force, but with the intent of getting the Security Council to adopt a resolution in line with the ones previously adopted when humanitarian assistance was endangered in Somalia and in Bosnia-Herzegovina.[77] Kouchner's position read as follows:

---

[75]   L. Feinstein & A.-M. Slaughter, 'A duty to prevent', 83 *Foreign Affairs* (2004) 1, 136, 137.

[76]   "Mr. Kouchner is one of the unrepentant 'humanitarian warriors' who gave 'humanitarian intervention' such a bad name that we had to rescue the deeply divisive idea […]. There would be no better way to damage R2P beyond repair in Asia and the developing world than to have humanitarian assistance delivered into Myanmar [Burma] backed by Western soldiers", R. Thakur, 'Should the UN invoke the 'Responsibility to Protect', *The Globe and Mail,* 8 Mai 2008.

[77]   SC Res. 751, 24 April 1992 (Somalia) and SC Res. 776, 14 September 1992 (Bosnia-Herzegovina).

"We are seeing at the United Nations whether we can implement the Responsibility to Protect, given that food, boats and relief teams are there, and obtain a United Nations' resolution which authorizes the delivery (of aid) and imposes this on the Burmese government".[78]

But the Security Council did not adopt any such resolution. The cause is likely (as already mentioned hereabove) that in January 2007, upon human rights purposes, Russia and China vetoed a resolution which led the International community to great caution in 2008.

Enthusiasm was absent around Kouchner's solution, on the side of institutions as well as on that of R to P proponents. Common sense favored great caution in order to maintain the consensus reached in 2005. Edward Luck, special advisor to the UN Secretary General on the Responsibility to Protect was clear: "We should take care not to undermine the historic but fragile international consensus behind the responsibility to protect by succumbing to the temptation to stretch it beyond what was intended".[79] More theoretically, according to UNSG Ban Ki-moon

"extending the principle (of the responsibility to protect) to cover other calamities, such as HIV/AIDS, climate change or response to natural disasters, would […] stretch the concept beyond […]operational utility."[80]

However, on the opposite side, Lloyd Axorthy, initiator of the ICISS as Canadian Foreign Minister argued that R to P applied to Nargis and could provide "the basis for a resolution to expedite relief efforts".[81]

One cannot but understand the difference between natural disasters and the four criminal activities referred to in the Summit outcome. Distinguishing natural from man-made disasters is, of course, relevant.

---

[78]   Communiqué issued by the Minister of Foreign and European Affairs, 8 May 2008.

[79]   Statement of Dr. Edward C. Luck, Special Adviser to the Secretary General, United Nations, New York, NY in *International Disaster Assistance: Policy Options. Hearing Before the Subcommittee on International Development and Foreign Assistance, Economic Affairs, and International Environmental Protection of the Committee on Foreign Relations. United States Senate*, 17 June 2008, 29.

[80]   Ban Ki-moon, *supra* note 65.

[81]   L. Axworthy, 'International community has a responsibility to protect Myanmar', *Edmonton Journal,* 13 May 2008.

But we both agree and disagree with Gareth Evans when he writes that in front of a natural disaster, "human security language is sufficient".[82] For sure, a natural disaster triggers human insecurity, both personal, sanitary, economic, as well as food insecurity. And, probably, it will likely be the result of political insecurity leading to environmental insecurity. Moreover, a natural disaster can hit a specific community, displace its members in different directions and affect the community security.

However, this analysis in terms of human security/insecurity is not enough, since it does not tell much about what is to be done. The assessment about human security/insecurity does not provide a solution *per se*, when public authorities neither bring a remedy, nor allow others to do so. And is it not still a crime –at least in the broad sense – to impede rescue attempts? When such an attitude amounts to raising the toll paid by the population is it not somehow a kind of indirect "mass killing"? Would the responsibility to protect not help?

Indeed, R to P in its narrow sense could already be invoked after a natural disaster under specific circumstances. Given the frequent diversity of a State's population, minorities may be at risk. And, sometimes, a natural disaster striking a particular community is followed by the State's refusal of access to it for foreign rescuers nor allow others to. When Armenia was struck in Spitak (1988), the USSR did not immediately open its borders. Such a case might enlighten the Nargis affair, since the cyclone , namely, stroke the Karen community. For this aspect of Nargis, one could perhaps have identified a hostile intent, not to say the very beginning of a genocidal process which could have led to R to P even in the "narrow but deep sense" if there had been enough sensitivity to Karens' fate.

Thus, one perceives a possible difference in status between refusing rescuers' access to a minority and refusing rescuers' access to people belonging to the branch of a population from which the rulers stem. Indeed, in the Nargis case, the question was not put forward in those terms. But another ethnic group, in another case, could catch more attention.

Yet, the treatment of such problems must not rely on the popularity of a given ethnic group. Is it not better to consider that there is a responsibility to protect the whole population in front of a natural disaster? Refusing such an assertion would have the dangerous consequence of denying any State's obligation to prevent and/or prepare for catastrophes.

---

[82]   G. Evans, *The Responsibility to Protect – Ending Mass Atrocity Crimes Once and for All* (2008), 349.

And, still, such an activity is the basis for risk reduction. The same refusal would have the even more dangerous consequence of exempting the State from maintaining a civil protection mechanism and service, whereas the given are mentioned in the Geneva Law[83].   And, in line with what has just been argued, the ICISS report (2001) provided a condemnation of State neglect.

In comparison, the 2005 Summit outcome text looks as an *ad minima* consensus.   And, as we have seen, this consensus could, today, be seen as even more fragile and threatened with promotion as big powers of States which used to traditionally oppose any supposed threat to their sovereignty (e.g. India). This is a sufficient explanation for the Security Council not passing, in the name of the responsibility to protect, a resolution calling upon Burma, to either promptly and efficiently offer rescue, or accept foreign rescue efforts.

And things went on after the Nargis case, namely with the 2009 debate in the UN General Assembly. Indeed, the Summit outcome foresaw a further debate of the UN GA. The latter took place in 2009 after Ban Ki-moon delimited the target by his report *"Implementing the responsibility to protect"*. The debate showed that the concept of responsibility to protect is still subject to reluctance in some segments of the international community. A large group of sponsors[84] and additional sponsors[85] proposed a short but positive text for the resolution due to conclude the debate:

> "1. Takes note with appreciation of the report of the Secretary General and of the timely and productive debate organised.
> 2. Decides to continue its consideration of the responsibility to protect."[86]

---

[83]   In the first 1977 Protocol, civil defence is presented as something the targeting of which would be an offence to civilian population (Arts 63 and 64).

[84]   Argentina, Armenia, Belgium, Benin, Bulgaria, Canada, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Dominican Republic, El Salvador, Estonia, Fiji, Finland, France, Germany, Guatemala, Haiti, Hungary, India, Italy, Luxembourg, Mexico, Monaco, the Netherlands, New Zealand, Panama, Peru, Poland, Republic of Korea, Romania, Rwanda; Senegal, Slovenia, Spain, Swaziland, Sweden, East Timor, Trinidad and Tobago, United Republic of Tanzania, Uruguay.

[85]   Andorra, Australia, Austria, Denmark, Greece, Guinea, Iceland, Ireland, Latvia, Liechtenstein, Lithuania, Madagascar, Malta, Norway, Paraguay, Papua-New Guinea, Slovakia.

[86]   GA Res. 63/308, 7 October 2009.

But Cuba, Venezuela, Nicaragua, Equator, Syria, Sudan and Iran expressed their defiance towards the proposed text for this final resolution. These States spoke of manipulation "by the powerful to justify intervention in the weaker States". A compromise was proposed by Guatemala: it was the suppression of the words "*with appreciation*"[87] in the final text of the resolution.

But, with the development of civil society in the so-called "emerging states", will this kind of "setback"[88] of R to P be sustainable?

We have now to go back to humanitarian action. As exposed in the previous issue, humanitarian action has suffered for decades from what we can call a "protection gap". Therefore humanitarian actors have been constantly looking for concepts that provide for access in view of delivery to persons in need. The famous UNGA resolutions 43/131 (1988) and 45/100 (1990)[89], without using the expression, are written in R to P-friendly terms. Twenty years ago, the picture was already in place for a dual level responsibility: first the State, and an important contribution of the international community. And up to the formulation of the responsibility to protect in 2005, the process was long and winding throughout a rather hectic decade, the 1990s, which have offered great hopes and great failures. Even though the task is not yet completed,[90] perhaps could R to P provide the expected concept?

---

[87] One could find a follow-up of the given resolution in the 6th commission debates upon the protection of persons in front of natural disasters.

[88] S. K. Sharma, 'Towards a Global Responsibility to Protect: Setbacks on the Path to Implementation', 16 *Review Essay Global governance* (2010), 121-138.

[89] GA Res. 43/131, *supra* note 3, GA Res. 45/100, 14 December 1990. Of course the legal basis for humanitarian assistance in war times lies in the Geneva Conventions and Protocols.

[90] "Today, the responsibility to protect is a concept, not yet a policy, an aspiration, not yet a reality. [...] Friends, the task is considerable [...] to turn promise into practice, words into deeds.", Ban Ki-moon, *supra* note 64.