The Responsibility to Protect:
Issues of Legal Formulation and Practical Application

I. Introduction

The codification of the doctrine of the "responsibility to protect" at the World Summit meeting in 2005 is emblematic of the increasing importance attributed to human security in world affairs today. An indication of the growing recognition that state sovereignty "finds limits in the protection of human security," the responsibility to protect, also known as R2P, posits an alternative interpretation of sovereignty—one that is no longer just a right in Westphalian terms, but one that also creates obligations for States with respect to the security of their subjects. As a doctrine, R2P encompasses a number of normative tenets with varying degrees of legal acceptance, the most controversial of which seeks to permit coercive intervention, under certain conditions. Given the wide and long-standing acceptance for the preventive and peace-building aspects of the doctrine, the real debate surrounding R2P is a rehash of the long-standing discussion on "just war" and humanitarian intervention. While far from crystallizing into anything resembling binding law, R2P can arguably impact the justificatory discourse[1] in international law and raise the political costs of action or inaction in the face of gross human rights violations.[2] By creating a sense of moral obligation among States, through a repeated process of interaction, interpretation and internalization,[3] R2P has the potential to spur a "coincidence of interest." With this paper, I will examine whether it is justified to speak of an emerging norm in the case of R2P; whether state practice in the area demonstrates any conformity to this principle; and whether there is any evidence in international discourse of a broad consensus (*opinio juris*) with respect to its legality.

In order to judge the potential for such an outcome to develop, a useful starting point would be to track the frequency and nature of recourse to this concept in international discourse, and more specifically, within the General Assembly and the United Nations Security Council, which, insofar as coercive action is concerned, has been officially charged with the responsibility to protect. Five years into its official "endorsement," the responsibility to protect has been barely made operational and has done very little by way of affecting discourse among Member States. The Security Council is yet to translate R2P in a meaningful way even though it has had ample opportunities to invoke R2P, in the cases of Sri Lanka, Zimbabwe, Somalia or Myanmar. It certainly failed to operationalize it in the cases of Darfur and the DRC. What is more, there seems to be little agreement among the membership as to the scope and operational parameters of R2P, as becomes obvious from recent debates in the General Assembly. The conduct and statements of States do not give weight to the idea that humanitarian

[1] Ian Johnstone, "Security Council deliberations: the power of the better argument", *European Journal of International Law,* Vol. 14(3).
[2] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1996).
[3] Oona Hathaway and Harold Koh eds, Foundations of International Law and Politics (2005).

intervention, albeit under a different nomenclature, is now legal or justified by this nascent doctrine.

This paper is organized in four parts: Section I will explore the historical development surrounding the emergence of R2P; Section II will explore the legal standing of R2P and the preconditions necessary for its evolution into binding law; Section III will trace the practice and references made to R2P in official diplomatic discourse and debate within the Security Council and public space; Section IV will make an appraisal of the value added by R2P in its present form.

I.I. The Taboo of Humanitarian Intervention

The notion of a "responsibility to protect" is anything but novel—it can be traced to the writings of John Locke who, aiming to clarify the relationship between a State and its subjects, underscored the responsibility of governments to protect citizens' natural rights. Similarly, Grotius, while acknowledging that "every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere,"[4] argued that an oppressive state that violates basic human rights forfeits its moral claim to full sovereignty.[5] In his major work, *De Jure Belli ac Pacis*, Grotius asserts:

> The fact must also be recognized that kings, and those who possess rights equal to kings, have the right of demanding punishments not only on account of injuries committed, against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever.[6]

The cogency of such ideas notwithstanding, it was the concept of Westphalian sovereignty that shaped the international system for the next three and a half centuries. Sovereignty in the Westphalian sense is first and foremost state security—the notion that borders are sacrosanct, that a state has exclusive control over its population and that there should be no interference in the internal affairs of states. Deeply embedded in the international legal order, state sovereignty has been a long-standing obstacle to efforts by the international community to stop or alleviate humanitarian crises in intra-state conflicts, the frequency and severity of which had soared dramatically in the aftermath of the Cold War. Nevertheless, the twentieth century also witnessed an opposing trend with the emergence of human rights and other legal protections, marking a tangible shift in the debate as the latter gained traction in contemporary discourse. Some norms—i.e. unlawfulness of genocide—have assumed *jus cogens* status, whereas the case for others—the legality of humanitarian intervention—still remain disputed.

Humanitarian intervention is a hotly-contested idea, which posits that cases of extreme humanitarian need can pose a threat to international peace and security and thus

[4] Grotius, *De Jure Belli ac Pads,* 2.25.8.
[5] W.J. Korab—Kaprowicz, "In Defense of International Order: Grotius's Critique of Machiavelism." The Review of Metaphysics, Vol. 60, No. 1 (Sep., 2006).
[6] De Jure., 2.20.40.

warrant Chapter VII action. More controversially, some scholars and States have considered that the magnitude of such crises renders non-consensual intervention legal, even in the absence of a Security Council approval.[7] Because of its implications for state sovereignty and the integrity of the international legal system, humanitarian intervention is neither sanctioned by custom nor uniformly embraced by States. In fact, the international community, torn between the choice to remain passive in the face of gruesome crimes or to violate the dictates of international law, displays something of a split personality which has led to outcomes that for the most part have been poor, uneven and unsustainable. Even in cases of genocide, sovereignty, indifference and political interests have stalled action by having States engage in long debates on the actual presence of genocide. In fact, R2P emerged as a response to sovereignty-intervention impasse.[8] After the debacles of Rwanda and Srebrenica, the United Nations embarked on a course of intensive soul-searching, Kofi Annan urging the General Assembly membership to find better ways to enforce international and human rights laws, while stressing that national sovereignty must not be used as a shield for violations of people's rights. Annan reiterated his position by stating that "States are now widely understood to be instruments at the service of their peoples, and not vice versa."[9] Having introduced the concept of individual sovereignty to mean "the fundamental freedom, enshrined in the Charter of the UN and subsequent international treaties," he explained that reading the Charter today, "we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them."[10] Given the vague articulation of much of the UN Charter and the frequent reliance on interpreting its "principles and purposes," Annan's emphasis on human security, and shift away from state sovereignty, caused alarm among many governments. The African Union itself had embraced that alternative notion of sovereignty in Article 4 of its Constitutive Act of July 2000, long before R2P had seen the light of the day.

The disastrous failures of the 90's were not lost on the Security Council, itself the target of strident criticism. It subsequently requested a study by the Secretariat to address the dysfunctions of the United Nations and to make recommendations for change. Even though these efforts were directed at improving the operational efficiency of the UN, rather than tackling head-on any deep-rooted doctrinal issues, they did provide useful pointers and pushed the debate in the right direction. In what later became known as the Brahimi Report, the Panel on United Nations Peace Operations re-evaluated the features of traditional peacekeeping (consent, impartiality, non-use of force) and advocated relaxing some of the classical assumptions of peacekeeping to fit better the nature of the contemporary challenges facing the UN. Other initiatives such as the High-level Panel on Threats, Challenges and Change were quick to follow. It was in this climate of soul-searching that the idea of R2P was born. The doctrine was developed conceptually in four foundational documents: 1) the report of the International Commission on Intervention

[7] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects," *The European Journal of International Law* 10, pp. 2-3; Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, University of Pennsylvania Press, Philadelphia. 1996, pp. 71-75; Jonathan Charney, "Anticipatory Humanitarian Intervention in Kosovo," *Vanderbilt Journal of Transnational Law* 32, 1999, pp. 1234-1235.
[8] Gareth Evans. *The Responsibility to Protect,* The Brookings Institution, 2007, p. 37.
[9] Kofi Annan, "Two Concepts of Sovereignty". *The Economist.* 18 September 1999.
[10] Ibid.

and State Sovereignty, appointed in September 2000; 2) the Report of the High-level Panel on Threats, Challenges and Change, entitled "A more secure world: our shared responsibility"; 3) The Report of the Secretary-General "In Larger Freedom"; 4) The World Summit Outcome Document. While the foundational documents demonstrate a degree of conceptual variation, the following section will provide a summary on the consequential aspects.

The turn of the millennium was indeed a time of intense inward reflection at the UN. Alongside the Brahimi Report, the Canadian government appointed an international commission and tasked it to report on the "so-called 'right of humanitarian intervention' and the question of when, if ever, it is appropriate for states to take coercive—and, in particular, military—action," how and when it should be exercised, and under whose authority. The commission highlighted the critical gap between the magnitudes and scale of human suffering and the rules and mechanisms available to the international community for their prevention. It argued that the principles enshrined in the UN Charter, especially the provisions on state sovereignty, had lost their applicability, given the new realities facing humanity and the international world order. The report described R2P as an "emerging principle" of customary international law, which, while not yet having reached the status of an existing norm, had already found support in State practice and in a variety of legal sources.[11] Whether humanitarian intervention is what is had in mind by the authors or not, such an assertion is – at best – of questionable validity.

I.II. Humanitarian Intervention

In fact, the question of humanitarian intervention has been the subject of much debate among the interpretive and academic communities, which have struggled to define its parameters and legal status. The controversy surrounding humanitarian intervention largely stems from the fact that it violates state sovereignty, above and beyond the legally recognized grounds for such violations—self-defense and traditional Chapter VII enforcement, triggered by threats to the peace. Thus, the very definition of humanitarian intervention is subject to wide interpretation. J.L. Holzgrefe, for example, has defined it as "the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied."[12] Proponents consider such characterizations good in that it does not pre-judge the issue of authorization by the United Nations. Sean Murphy is also in favour of using a broad definition of humanitarian intervention, as such formulations "capture the myriad of conditions that might arise where human rights on a large scale are in jeopardy" and includes acts committed by both state and non-state actors. However, others claim that "the consensus of opinion among governments and jurists

[11] Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001, paras. 2-24, 2-27.
[12] Humanitarian Intervention: Ethical, Legal, and Political Dilemmas, edited by J.L. Holzgrefe and Robert O. Keohane. Cambridge: Cambridge University Press, 2003. p. 18.

favors requiring Security Council approval for humanitarian intervention."[13] Murphy points out that the Security Council has a legal right to intervene, or authorize others to do so. While he stresses that such a right is generally recognized in international law, Murphy clarifies that it should not be mistaken for a duty, adding that "[t]o date … the notion of a 'duty to intervene' by the United Nations, regional organizations, or states does not appear present in international law."[14]

An additional level of controversy is added by the question of whether humanitarian intervention can be legal in absence of a Council sanction and opinions vary widely on this issue. In that context, one of the most vocal supporters of the right to unilateral humanitarian interventions is Fernando Tesón, a leading proponent of the legal right to unilateral humanitarian intervention:

> The human rights imperative underlies the concepts of state and government and the precepts that are designed to protect them, most prominently article 2(4). The rights of states recognized by international law are meaningful only on the assumption that those states minimally observe individual rights. The United Nations purpose of promoting and protecting human rights found in article 1(3), and by reference in article 2(4) as a qualifying clause to the prohibition of war, has a necessary primacy over the respect for state sovereignty. Force used in defense of fundamental human rights is therefore not a use of force inconsistent with the purposes of the United Nations.[15]

In contrast, positivist scholars have ardently refuted the legality of unilateral interventions, holding that Article 2(4) was meant to be an unassailable prohibition against the use of force.[16] Yet others have discerned a noticeable change after the end of the Cold War in how far states have recognized humanitarian intervention as a legitimate exception to the rules of sovereignty, non-intervention, and non-use of force. In a comprehensive comparative analysis of Cold War and post-Cold War cases, Nicholas Wheeler argues that while claims for humanitarian intervention were not accepted in the 1970s, a new norm of UN-authorized humanitarian intervention developed in the 1990s.

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[13] Ryan Goodman. "Humanitarian Intervention and Pretexts for War." The American Journal of International Law. Vol. 100:107, p. 108. Goodman argues that more than 133 states have issued individual or joint statements rejecting the legalization of unilateral humanitarian interventions and that the weight of the weight of academic opinion is also against it. See also Richard B. Bilder "Kosovo and the 'New Interventionism': Promise or Peril?" *Journal of Transnational Law and Policy* Vol. 9 No. 1 (1999): 153—182. Anthony C. Arend, and Robert J. Beck. International law and the use of force: beyond the UN Charter paradigm. London; New York: Routledge; 1993. London; New York: Routledge; 1993. Oscar Schachter, The Right of States to Use Armed Force, 82 Michigan Law Review. 1984, p. 1620, 1629.

[14] Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, University of Pennsylvania Press, Philadelphia. 1996. p. 295.

[15] Fernando Tesón., *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., Transnational Publishers Inc., Irvington-on-Hudson, NY, 1997, pp. 173-174.

[16] Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects," *The European Journal of International Law* 10, pp. 2-3; Sean Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, University of Pennsylvania Press, Philadelphia. 1996, pp. 71-75; Jonathan Charney, "Anticipatory Humanitarian Intervention in Kosovo," *Vanderbilt Journal of Transnational Law* 32, 1999, pp. 1234-1235.

Wheeler advocates for a "solidarist" approach that makes humanitarian intervention not only permissible but morally necessary. Wheeler argues for the creation of agreed criteria on humanitarian intervention but rightfully adds that such criteria cannot guarantee consensus in particular cases.[17] In contrast, Alex Bellamy argues that only with respect to particular cases, on an *ad hoc* basis, that moral consensus can be built. Bellamy identifies an important problem raised by the pragmatic search for legitimating criteria in that "procedural formality is a liability because rules cannot ensure either approximations of authentic critique or convergence around ethical criteria."[18] He questions the possibility to build a consensus on such criteria, given the absence of "firm foundations on which to ground such claims" or an overarching perspective against which to evaluate knowledge claims. Thus, in his view, given there is "no guarantee that common institutions create such knowledge, potential interveners need to construct moral communities based on shared understandings in particular cases."[19]

I. III. Conceptual Evolution of R2P

The above complexities were not lost on the International Commission on Intervention and State Sovereignty. The report stressed that the international community often faces an intractable dilemma—whether to remain a bystander to genocide on the one hand or whether to launch an intervention that could bring more harm than good and lead to a "further fragmentation of the state system."[20] The undesirability of either choice notwithstanding, the commission took a firm stance against inaction. It underscored that UN peacekeeping strategies, might no longer be appropriate to protect civilians who are caught in the vortex of bloody struggles between states and insurgents and elaborated that military action could be a legitimate "anticipatory measure" in the presence of clear evidence of looming large-scale international crimes. The alternative, it held, would place the international community "in the morally untenable position of being required to wait until genocide begins, before being able to take action to stop it." Thus, one of the main recommendations of the report is that action should not be delayed until the minute genocide unravels. While non-intervention and prevention through "encouraging States to meet their core protection responsibilities" should be the standard under the R2P framework, it emphasized that, when the conditions demand it, intervention could be initiated with or without the consent of the parties.[21] In other words, coercive military action under the rubric of R2P was intended as a legal measure of last resort, aiming at the protection of civilians when all other provisions had failed. The commission conceded that military intervention, taken "against a state or its leaders, without its or their consent, for purposes which are claimed to be humanitarian or protective [was] by

[17] Nicholas Wheeler, "Legitimating Humanitarian Intervention: Principles and Procedures." Melbourne Journal of International Law. 2001. 2(2).
[18] Alex J. Bellamy, Pragmatic Solidarism and the Dilemmas of Humanitarian Intervention, Millennium - Journal of International Studies, Jul 2002; vol. 31: p. 496.
[19] Ibid.
[20] Report of the International Commission on Intervention and State Sovereignty. "The Responsibility to Protect" (International Development and Research Center, 2001), para. 1.22.
[21] Ibid., para. 1.38.

far the most controversial form of such intervention" and it treated in detail how R2P could be used as a preventive measure, in order to avoid the need for military intervention. In order to alleviate fears with respect to the erosion of sovereignty, the report stated that non-intervention should be the default condition. Nevertheless, the larger point raised by report is "that the Charter's strong bias against military intervention is not to be regarded as absolute when decisive action is required on humanitarian grounds."[22]

As regards the conditions to trigger coercive intervention, the report outlined five broad, and rather vague, categories—right authority, just cause, right intention, last resort, proportional means and reasonable prospects. Turning to the critical question of the right agency to execute coercive action, the commission stated that "the Security Council should be the first port of call on any matter relating to military intervention for human protection purposes." However, it did not reject the possibility, if the Council failed to respond, of that role being assumed by other organs and entities—the General Assembly, regional organizations, or coalitions.[23] It further stressed that the Security Council had the 'primary' but not the sole or exclusive responsibility under the Charter for peace and security matters.[24] Thus, in cases where "the Security Council rejects a proposal or fails to deal with it in a reasonable time," an alternative option would be "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." The report remained vague with reference to the circumstances that would grant legal validity to intervention not authorized by the Security Council or the General Assembly.[25] Nevertheless, an implicit answer could be found in the rhetorical question posed as to whether "greater harm lies in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered."[26] The Commission authors rightfully anticipated that political interests were likely to obstruct the uniform application of R2P, but asserted that its uneven application would not invalidate it and "the fact that effective international action is not always possible in every instance of major humanitarian catastrophe ever be an excuse for inaction where effective responses are possible?"

On the whole, the report did not directly challenge the authority of the Security Council but was bold in seeking to erode its *de jure* monopoly with respect to authorizing coercive enforcement action. However, that momentum was not taken up by the remaining documents, largely due to the political sensitiveness involved.

The High-Level Panel on Threats, Challenges and Change endorsed and reiterated most of the ideas and recommendations of the ICISS. It stressed the "growing acceptance" that while governments were primarily responsible to protect their citizens, this responsibility fell to the wider international community, if States were unable or

[22] Ibid.,p. 16.
[23] Ibid., para. 6.28.
[24] Ibid, para. 6.7. This is an extreme interpretation of the Charter – as though the Council usually but not necessarily governs international peace and security decisions. Surely this reading was influenced by the stagnation of the Council throughout humanitarian disasters, principally Rwanda and former Yugoslavia, in order to identify other avenues of humanitarian protection in the face of Council impotence.
[25] Ibid., ((3) E, II).
[26] Ibid., para. 6.37.

unwilling to do so.[27] More crucially, however, the report endorsed "the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort," in the instance of any of the four crimes. However, the report of the panel was marked with a certain ambiguity in that it stressed the "responsibility to protect of every State when it comes to people suffering from avoidable catastrophe, mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease."[28] The phrase "every State," which can be construed to mean that R2P is subject to implementation by any state on an individual basis, raised serious concern among many capitals around the world. Critics have suggested that such "reading would significantly extend the existing parameters of the law of state responsibility… and [would] establish a multilayered system of responsibility, in which the primary responsibility of the state vis-à-vis its citizens is complemented by a residual responsibility of all sovereign governments vis-à-vis human catastrophes."[29] In its entirety, the report presented a firm endorsement of the doctrine of R2P. However, in addition to the above-mentioned ambiguities, it failed to shed light on questions of critical significance for the conceptual evolution of the doctrine, such as efforts of unauthorized collective intervention.

While "aware of the sensitivities involved in this issue," the Secretary-General in his report entitled *In Larger Freedom* endorsed what the Commission and the High-Level Panel had described as an "emerging norm" for a collective responsibility to protect and strongly "agree[d] with [that] approach." The SG report placed strong emphasis on the need to "embrace the responsibility to protect, and, when necessary…act on it." However, as rightfully pointed out, there were sensitivities involved in the issue. In fact, the sensitivities were so acute that the passages on R2P were excluded from the section on the use of force and reintegrated under the "rule of law" section, thus sending an unambiguous message with respect to the normative and substantive dilution of the concept. As a resort of first instance, the report mentioned diplomatic, humanitarian and other methods to help protect the human rights and well-being of civilian populations. "When such methods appear insufficient, the Security Council may out of necessity decide to take action under the Charter of the United Nations, including enforcement action, if so required."[30] Not surprisingly, the report remained silent on the question of action in the case of Security Council deadlock, illustrating how the responsibility to protect was slowly but surely deprived from its original scope and force.

Five years after ICISS report, the afore-mentioned studies and prescriptive analyses culminated in two short and highly open-ended paragraphs of the World Summit Outcome Document, adopted on 16 September 2005. The provisions of paragraphs 138-139 defined the authoritative framework through which Member States, regional arrangements, the United Nations system and its partners can give a doctrinal, policy and institutional life to the responsibility to protect. But they fell tragically short of the commitment ascribed or expected of it. They offered nothing by way of revising the

[27] "A More Secure World: Our Shared Responsibility", United Nations High-Level Panel on Threats, Challenges and Change, 2004. para. 201.
[28] Ibid., para. 201.
[29] Carsten Stahn. "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" The American Journal of International Law, Vol. 101, No. 1 (Jan., 2007), p. 8.
[30] Ibid., para. 135.

current decision-making mechanism for authorizing the use of force or eliminating the *de jure* monopoly of the Security Council as the sole authority on matters of intervention. While stressing the "need for the General Assembly to continue consideration of the responsibility to protect," the World Summit document cemented the central role of the Security Council in carrying out the responsibility to protect. Critics rightfully argued that the document's "greatest drawback is also one of its touted merits: that it is so carefully crafted to conform with the current UN charter, which makes the Security Council the most important arbiter of war and peace."[31] Others argued that, if anything, the language "sharpens the wording of Article 42 on authorization for the Security Council to resort to force."[32] While it expressed the preparedness of the international community of Member States to act in a "timely and decisive manner," the document was little more than a reaffirmation that collective coercive action would be taken on "a case by case" basis, thus failing to provide R2P with the necessary precision or delegation. Most critically, the World Summit Outcome Document did not address the pressing question of action in the instances of Council paralysis. It did not outlaw interventions carried by other actors, nor did it confront the question of unauthorized interventions. By not explicitly ruling out unauthorized interventions—it left the door open for future freelance intervention in sync with the practice heretofore. In sum, the vague language and unclear tenor of the document were symptomatic of the little agreement there existed on the subject. Commenting on the text, the Special Representative on the Responsibility to Protect Edward Luck characterized it as a "guarantee for action as much as it is for inaction."[33]

Comparing the four texts in substantive terms, one can legitimately conclude that R2P has been textually diluted. What is more, there has been a consistent effort to de-emphasize the politically inconvenient aspects of R2P such as coercive intervention and instead to stress prevention as the main thrust of the doctrine. While such a race to the bottom can push back disagreements for the time being, it ensures that R2P will remain little more than a framework for using tools that are largely endorsed, like mediation, early warning mechanisms, and capacity-building. As demonstrated above, the World Summit Document, which comes closest to a legal basis for the doctrine, differs substantially from the remaining foundational documents. Given these variations, the norm of R2P is arguably amenable to creative interpretations by various actors, who could cherry-pick aspects of the foundational documents that most suit their agenda.

II. The Emergence of Norms and General Practice of R2P

A survey of the legal landscape today would prompt the observation that most of international law is not enforced but rather complied with.[34] There are many reasons why

[31] R2P: An Idea Whose Time Has Come—and Gone? *Anonymous*. The Economist. London: Jul 25, 2009. Vol. 392, Iss. 8641; p. 58.
[32] Noam Chomsky: UN Address: Dialogue on the Responsibility to Protect. 2009. available at http://www.zcommunications.org/un-address-dialogue-on-the-responsibility-to-protect-by-noam-chomsky
[33] Edward Luck. "The United Nations and the Responsibility to Protect." The Stanley Foundation. August 2008.
[34] Beth Simmons. *Mobilizing for Human Rights: International Law in Domestic Politics.* Cambridge: Cambridge University Press, 2009.

States comply with the law, in the absence of higher enforcement, a question that can be approached from numerous perspectives, from the point of view of either international relations or law. A realist would explain compliance as a non-uniform and selective phenomenon that serves to utilize norms and rules as a convenient front for satisfying national interests. For example, Hans Morgenthau acknowledged that "during the four hundred years of its existence international law ha[d] in most instances been scrupulously observed," but largely explained such compliance with convergent interests or prevailing power relations.[35] Similarly, Aron claims that "[i]nternational law can merely ratify the fate of arms and the arbitration of force."[36] According to this view, international law is merely epiphenomenal and only made effective through the balance of power. Moreover, institutions and norms persist so long as they further hegemonic interests. While such an idea has a simplistic appeal, it fails to explain the continuing existence of institutions, when they perpetuate rules and norms that inconvenience the powerful. Thus, the persistence and expansion of institutions and norms and the emergence of systems of independent internal legal order such as the European Union have given rise to functional institutionalism, which explains their emergence as a result of a functional "demand" for such.[37] The rationalist institutionalist critique of functionalism adds to the picture the importance of internal institutions and political concerns.[38] International treaties usually become an integral part of internal law and—when domestic legal systems are reliable and well developed (particularly, independent from the executive)—that may provide an internal incentive for compliance. Noncompliance with an international treaty can also irk internal stakeholders that benefit from it or can be affected by retaliatory action as a result of the breach. But none of these theoretical mechanisms seems convincingly applicable to human rights issues.

Contrary to the popular view that institutions explanations are of limited application in the field of human rights, Antonia and Abram Chayes have demonstrated how institutions and organizations can boost human rights compliance.[39] Breaking from the "enforcement model" of compliance, the Chayeses posit a "management" framework that describes institutions as loci of discourse, reputation-building, and the clarification of norms. Having identified inadequate clarity and capacity as the principal source of non-compliance, the Chayeses argue that international organizations and institutions boost compliance through the clarification of norms and the development of enforcement capacities.

From a positivist perspective, an alternative explanation for compliance is to approach it through the prism of sovereign consent, as the foremost source of the binding

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[35] Hans Morgenthau. *Politics Among Nations: The Struggle for Power and Peace*. New York: Knopf. 6th ed. p. 688.

[36] Aron R. 1981. Peace and War: A Theory of International Relations. Malabar, FL: Robert E Krieger. P. 820.

[37] A functionalist would consider the emergence of the WTO (with its dispute-resolution mechanisms) a natural consequence of the rapid and unprecedented growth in international trade in the 1990s. See Robert Keohane. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton, NJ: Princeton Univ. Press. 1984. Robert Keohane, "Compliance with international commitments: politics within a framework of law." *American Society of International Law. 1992. 8*6:176.

[38] (cf. Simmons 2008).

[39] Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1996), pp. 22-28.

power of the law. However, if sovereign consent, be it in the form of treaties or agreed practice, is the central explanatory variable, then it can be legitimately concluded that international law has little or no independent binding power if all it took for the collapse of the scheme would be the withdrawal of sovereign consent of a handful of powerful states. The truth of the matter is that states rarely withdraw their consent at the first clash with national interests, partly because they tend not to vocalize dissent, but rather choose to ignore a norm or a rule. Thus, a much better explanation is that compliance can be largely attributed to an internalization of the law, driven in part by self-interest and in part by socialization. Thus, through a process of interaction, the law acquires certain "stickiness" and in the long run hardens into custom. Transnational Legal Process offers a useful analytical framework, which posits that the repeated interaction by actors in various fora leads them to interpret and internalize the rules of international law. It is through such a process that "interlinked rules of domestic and international law develop, and that interlinked processes of domestic and international compliance come about."[40] A fundamental assumption on which the TLP framework rests is that there are "instrumental benefits of reciprocal compliance with the law and the stability provided by a law-based international system" just as there is "a sense of obligation that comes with membership in an international organization."[41] Admittedly, even internalized habits may be broken, especially when vital national interests are at stake, but their violation usually comes at a political price whose significance is rarely lost on States. These explanatory frameworks, while by no means exhaustive, provide useful analytical methodologies when analyzing with compliance. It is not the purpose of this paper to rule in favor of one or another. However, they all present useful benchmarks for appraising the standing and potential of R2P and raise valid questions: Is there enough evidence to assume sovereign consent on the issue? Has R2P advanced in the interactive discourse of the international system to an extent that would result in the internalization of the norm? Alternatively, is R2P yet another convenient front for justifying humanitarian intervention when it fits the interests of the powerful?

A general rule is that the more binding the laws and the "stickier" the customs, the higher the price of non-compliance. Some norms and custom emerge as "stickier" than others, forming a wide spectrum at the top of which stand *jus cogens* norms, also known as peremptory/non-derogatory norms. Unlike ordinary customary law, which has traditionally required consent and allows the revision of State obligations, *jus cogens* norms are considered binding to such an extent that even violations of the norm do not undermine its standing or validity. The International Court of Justice has identified Article 2.4 of the UN Charter, as a provision of *jus cogens* stature.[42] However, this assertion has not been widely accepted—a number of scholars have held that the Charter is not immune to being superseded by custom, an argument relying on the assumption that norms and law are largely driven by the will of States, overriding treaties.[43] One

[40] Oona Hathaway and Harold Koh eds., *Foundations of International Law and Politics* (2005).
[41] Ian Johnstone, "The role of the UN Secretary-General: the power of persuasion based on law", *Global Governance,* Vol. 9(3) (2003), p. 6.
[42] Yearbook of International Law Commission, Edition 1966, Volume 2, p. 247. International Court of Justice, Nicaragua vs. United States, I.C.J. Reports 1986, Page 14, at Paragraph 190, Page 871.
[43] Michael Glennon, *Limits of Law Prerogatives of Power: Intervention after Kosovo*. Palgrave, 2001, p. 7. Koremenos, Lipson, and Snidal. 2001. "The rational design of international institutions". International Organization 55 (autumn): 761-799. For a comprehensive overview of the subject, see Finnemore and

immediate conclusion is that, in theoretical terms, evidence of a customary interpretation and acceptance of the responsibility to protect could prove instrumental in superseding the UN Charter and the sovereignty provisions enshrined in Article 2.7. But this raises two vital questions: 1) How does custom emerge and are there grounds to conclude that R2P can reach such threshold? 2) Does the R2P doctrine, as endorsed by the World Outcome Document, present a substantive revision of the current framework of intervention or the UN Charter?

Turning to the first question, for a norm to reach the level of custom, it need not necessarily have universal compliance. However, it needs to satisfy two basic conditions: a) State practice must generally conform with the norm and such practice must be "common, consistent and concordant;"[44] b) State practice need be accompanied by corresponding *opinio juris*, i.e., the belief that this practice is required by law and is not pursued out of mere convenience. Relevant sources in that context include the pronouncements of states, treaties, state laws, as well as the decisions of international courts. Additionally, as demonstrated by the ICJ ruling in the Nicaragua case, another relevant means of contributing to state practice is through meetings of international organizations, particularly the GA, by voting and expressing views and opinions on the issues in question.[45] Thus, in order to make an assessment with respect to R2P, the 2009 debate of the General Assembly on Implementation of R2P presents a good reference point and litmus test to measure R2P's progression to an accepted norm.

III. I. General Assembly Debate on Implementation of the Responsibility to Protect

R2P has acquired certain prominence in political discourse, especially among the media, intellectuals and academics. A cursory look at the general state practice, however, indicates that it has gained little traction by way of legal incorporation. No major treaties have made affirmative references to R2P; the General Assembly debate on the SG Report Implementation of R2P is another attestation to the lack of basic consensus. The Report itself laid out a three-pillar framework for the implementation of R2P: Pillar I concerned the responsibilities of individual States whereas Pillar II described the role of the international community in helping States fulfill their responsibilities through capacity-building. The report pointed out that paragraph 139 of the Summit Outcome was a reflection of the fact that no strategy to fulfill R2P "would be complete without the possibility of collective enforcement measures," including coercive military action in exceptional cases, which fell under Pillar III. The latter would be triggered when other measures of prevention and protection assistance had failed and when a State had failed to fulfill its sovereign responsibilities thus necessitating that the international community fulfill its responsibility under R2P.[46] The report stressed that "[s]uch collective measures could be authorized by the Security Council under Articles 41 or 42 of the Charter, by the

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Sikkink. "International norm dynamics and political change". International Organization 52. 1998. (autumn): 887-917.

[44] *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Merits)* [1974] ICJ Reports 3 at 50.

[45] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Reports 14.

[46] A/63/677, para. 56.

General Assembly under the "Uniting for Peace" procedure…or by regional or subregional arrangements under Article 53, with the prior authorization of the Security Council."[47] While this language solidified the Security Council as the primary entity authorized to discharge the responsibility to protect, the language of the report can be construed to implicitly endorse GA authorization for coercive intervention. Such an assumption of authority by the General Assembly is by no means automatic. Nevertheless, the "Uniting for Peace" resolution of 1950 is a useful precedent in stating that in cases where the Security Council fails to act in the maintenance of peace and security, the matter shall be addressed immediately by the General Assembly. This reference notwithstanding, it is unlikely that leading members of the Council would seek such an alternative route to obtain authorization, in the event of a Council deadlock, and set a precedent on a matter as contentious as R2P, particularly in view of the possibility of such precedent being used to undermine individual sovereignty.[48]

Even though a degree of overall support for the doctrine could be evinced, it is far from an agreed vision as regards scope, parameters or application. In his summary of the first debate, General Assembly President Miguel d'Escotto questioned whether the time for a full-fledged R2P norm had arrived, explaining that many Member States hesitated to embrace the doctrine and its aspirations due to a fear that the current system of collective security had not evolved to the degree that would allow it to operate in the intended manner. Underlining these concerns, the Non-Aligned Movement, represented by Egypt, expressed that there was a persistent concern regarding the implementation of R2P, driven by the possibility of abuse and application beyond situations involving genocide, ethnic cleansing, war crimes and crimes against humanity. Other states were concerned as to which authority would determine that alternate means of intervention had failed and that force was needed, and the criteria according to which such decisions would be made.[49] The issue of R2P's standing as an emerging norm was aptly summarized by Morocco, which questioned how something could be considered an international norm if only a minority of States adhered to it.[50] What the debate demonstrated was that a substantial source of discontent with respect to R2P stemmed from the fact that it perpetuated an "unequal world order," dominated by a subjective Security Council, with a differential system of international law geared towards the strong.[51] Similar hesitation was revealed in the text of the resolution adopted at the end of the debate, which in its penultimate paragraph stated that the matter requires "further consideration."[52]

Despite these reservations, most speakers expressed support for the three-pillared approach to the R2P doctrine, as laid out by the Secretary-General and voiced support for the tenets of the first two pillars. With respect to the third pillar, there is a glaring gap in attitudes that is essential for the establishment of any framework to govern coercive

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[47] A/63/677, para. 56.
[48] This was the motivation behind the decision not to seek GA authorization on the Kosovo campaign prior 1244 (1999).
[49] Morocco.
[50] In addition to that, during the General Assembly's 5th Committee budget debate funding for the new Special Adviser on R2P was denied. Some delegations (Cuba, Venezuela, Pakistan, China, Egypt, Nicaragua, Iran, and India) opposed such funding on grounds that the Responsibility to Protect had actually never been agreed to as a norm during the World Summit. For more info, see Press Release GA/AB/3832.
[51] Saudi Arabia.
[52] A/63/677.

intervention. Thus far, this lack of agreement has not been used as and does not present a legal basis to deter the use of force. Yet, if the thrust of the doctrine is to be equated with prevention and assistance, the question remains as to whether a new doctrine is needed to endorse tools that have been widely used and largely accepted.

III.II. The Responsibility to Protect and Security Council Practice

Turning to the Security Council, which has been charged to apply R2P in the cases of coercive action, reveals a disinclination to invoke R2P, be it in its decisions or deliberations. A certain measure of rhetorical support notwithstanding, there is little or no evidence of R2P in Council practice. The annexed table provides a comprehensive list of all direct references to the concept made in the official meetings of the Security Council. It clearly demonstrates that the bulk of those references are made during thematic debates. To date, there have just three agenda items under which Security Council resolutions, two of which were thematic, have made an explicit reference to R2P.[53] While Security Council resolution 1674 (2006) "reaffirm[ed] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity," it did little by way of providing an outline for the future application of R2P. Admittedly, only those unfamiliar with the endless bickering in the Council over matters as trivial as punctuation, could fail to appreciate the significance of this reference as well as its mention in resolution 1706 (2006) on Sudan. But the question remains whether the invocation of this doctrine has brought about the anticipated benefits. If it were the case that R2P was discussed and accepted in the context of particular disputes being dealt with in the UN, in the manner of evolution of customary law, one could argue that this new interpretation of sovereignty could potentially become entrenched as accepted law or as an innovative interpretation of Article 2.7. Heretofore, there is little to suggest such a trend.

It has to be acknowledged here that five years is not sufficient time for a norm to develop. However, it also has to be pointed out that there have been numerous opportunities for the launch of R2P, in whichever one of its pillars. What has been missing, however, is the political will. There was little or no mention of the responsibility to protect while the Council reviewed the situations in Kenya, Somalia, Zimbabwe, Sri Lanka or Myanmar.[54] Admittedly, the bulk of Council deliberations takes place in informal consultations. However, for R2P to have an impact on the justificatory discourse, it needs to leave the confines of the consultations room. Another hurdle is the fact that the gravest situations fail to gain the required votes in the procedural vote and never make it to the official agenda of the Council. Illustrative examples are the issues of

[53] Resolution 1674 (2006) on protection of civilians in armed conflict was recalled in the preambular part of several resolutions on Sudan: 1755 (2007), 1784 (2007), 1812 (2008), 1828 (2008), 1870 (2009), 1881 (2009). These resolutions do not mention the responsibility to protect explicitly, but rather reaffirm the "relevant provisions of the United Nations World Summit Outcome Document."

[54] For more information, review of the provisional verbatim records of the United Nations. The situations in Kenya, Zimbabwe and Sri Lanka were not debated in public and thus there is no record of R2P made. For discussion of the situation in Myanmar, see next section.

Zimbabwe and Kenya, which were never reviewed as situations, but were considered under the title "Peace and Security in Africa," in a nondescript and laconic fashion that has come to exemplify the working methods of the Council. Such absence is not to be mistaken with a lack of situations eligible for the responsibility to protect. Sri Lanka is one such situation. Even though more than 20,000 perished in the clashes between the Tamil Tigers and the government, Sri Lanka was not only criminally neglectful in addressing the needs of the population trapped in the security zones, but also remained adamant in its refusal to grant access to humanitarian agencies and the UN country team. Given the scale and magnitude of the suffering, Sri Lanka merited review under the R2P rubric but was instead discussed in a highly secretive interactive exchange between the Security Council members and the Sri Lankan government, thus prompting the former UN Head of Humanitarian Affairs Jan Egeland to conclude that R2P had failed in Sri Lanka Member states had "failed in what they solemnly swore to do."[55]

The situation in Myanmar

An equally grave situation emerged over the humanitarian crisis in Myanmar after the anti-government protests led by the Buddhist monks in 2007 and cyclone Nargis in 2008—both issues had prompted heated debate within the international community with respect to the failures of the government to fulfill its sovereign responsibilities. Following Nargis and the resulting humanitarian crisis, prominent figures made an argument that the denial of humanitarian aid to communities facing immediate risk of death constituted crimes against humanity, in the version provided by the Rome Statute, and thus could trigger R2P. For one, Gareth Evans argued for R2P to be invoked, given there was "at least a prima facie case to answer for their [the government of Myanmar/Burma] intransigence being a crime against humanity—of a kind which would attract the responsibility to protect principle."[56] John Virgoe, of the International Crisis Group, also pointed out "it getting close to an R2P situation", presumably because of the potential commission of crimes against humanity.[57] French Foreign Minister Bernard Kouchner, echoed by the French Minister for Human Rights, Rama Yade, urged for the implementation of R2P in the Security Council with the aim of authorizing the delivery of aid without the consent of the government, adding that "[w]e 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."[58]

These calls prompted a strong response in the international community—the Under-Secretary-General for Humanitarian Affairs described Kouchner's stance as unnecessarily confrontational while the British Minister for International Development

[55] For more information, see a record of the Press Conference of Egeland's overview of the global humanitarian situation in 2006, available at http://www.youtube.com/watch?v=zjSD-wnVNmk. Egeland also highlighted Eastern Congo and Gaza as examples of the failure to implement R2P.
[56] Gareth Evans, "Facing up to Our Responsibilities", *The Guardian*, 12 May 2008.
[57] Leigh Phillips, "EU Ready to Support Any Initiative for Burma", *EUobserver*, 13 May 2008.
[58] For more information, see http://www.reuters.com/article/idUSL07810481.

Douglas Alexander rejected it as "incendiary."[59] The Ambassador of the United Kingdom to the United Nations echoed the Chinese delegation[60] in arguing that R2P did not apply to natural disasters but nevertheless said London looked to the Yangon regime "to take the necessary measures to allow humanitarian relief in."[61] Nevertheless, the British subsequently indicated that they would be willing to partake in a discussion of R2P in that context. [62] The Special Advisor on R2P, Ed Luck himself stated that "it would be a misapplication of responsibility to protect principles to apply them at this point to the unfolding tragedy in Myanmar", recalling that the Outcome Document had limited its application to four crimes and violations: genocide, crimes against humanity, war crimes and ethnic cleansing. Luck stressed that efforts had to focus on implementing those principles in these four cases, since there was no agreement among the Member States on applying them to other situations, no matter how disturbing and regrettable the circumstances.[63] Similarly, Rameesh Thakur, one of the leading participants in ICISS, emphasized that humanitarian aid did not justify going to war, as allegedly called for by Kouchner in urging a resolution to force the delivery of aid.[64]

All this goes to show that there was little agreement on the application of R2P in Myanmar. However, while the discussion was conducted within the framework of R2P, no such mention was made in the Security Council chamber. In fact, the Council was so divided that it held no meetings on the issue except for a secretive briefing by John Holmes in closed consultations. It is therefore not surprising that in July 2009, the International Law Commission determined that applying R2P to natural disasters 'would stretch the concept beyond recognition or operational utility'.[65]

What this demonstrates is that there is ambiguity and discord with respect to the scope of the doctrine. But if Nargis was a vague case for the invocation of R2P, Myanmar's murky record with respect to human rights and its repeated crackdowns against civilians and ethnic groups, including the violence against the demonstrating monks, were seen as a stronger case. Nevertheless, neither in the short exchanges between China and the United States prior the procedural vote on Myanmar [66] nor in the subsequent Council deliberations on the subject was there any mention of R2P. During

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[59] Julian Borger and Ian MacKinnon, Bypass Junta.s Permission for Aid, US and France Urge, *The Guardian*, 9 May 2008.

[60] Chinese deputy ambassador Liu Zhenmin stressed that the issue involved a natural disaster that was within the purview of the competent UN agencies and not the Security Council, which is tasked with handling threats to international peace and security. US Ambassador Khalilzad expressed shock by the behavior of the government but made no mention of R2P.

[61] Security Council Divided on Response to Myanmar Cyclone." Available at http://www.terradaily.com/reports/Security_Council_divided_on_response_to_Myanmar_cyclone_999.html

[62] World Fears for Plight of Myanmar Cyclone Victims., *New York Times*, 13 May 2008.

[63] Edward Luck, Statement to the US Senate Foreign Relations Committee, 17 June 2008 and Asia-Pacific Centre for the Responsibility to Protect, 'Cyclone Nargis and the Responsibility to Protect', report, 16 May 2008.

[64] Ramesh Thakur, "Should the UN Invoke the 'Responsibility to Protect?" The Globe and Mail, 8 May 2008.

[65] See A/CN.4/SR.3019.

[66] S/PV.5526, 10 in favor, 4 against (China, Congo, Qatar, Russian Federation), and 1 abstention (United Republic of Tanzania).

the preliminary deliberations of the Council, the United States argued that the "grave human rights and humanitarian conditions" in Myanmar threatened to have a destabilizing impact on the region, and thus requested that "the situation in Myanmar" be placed on the agenda of the Council. Instead of citing R2P as a legal peg, the United States instead asserted that after the passage of resolution 688 (1991), which dealt with refugee flows from Iraq after the first Persian Gulf war, matters of that kind were considered to be threats to international peace and security, and that it was similarly so in the case of "Burma."[67] The opposing view was expressed by China, which, echoed by Qatar, recalled that only questions that constituted threats to international peace and security warranted discussion by the Security Council and stressed that neither the direct neighbors of Myanmar nor the overwhelming majority of Asian countries recognized the situation in Myanmar as such. China argued that requesting the Council to discuss an issue that by nature pertained to the internal affairs of a country not only exceeded the Council's mandate, but would risk undermining its authority and legality.[68] This discussion repeated itself in subsequent meetings on Myanmar in 2007, when the Council voted on a draft resolution tabled by the United Kingdom urging Myanmar to enable the good offices mission of the SG, to cease military attacks against civilians in ethnic minority regions and to allow international humanitarian organizations to operate without restrictions in Myanmar.[69] China and the Russian Federation argued that the issue need be taken up by the Human Rights Council. Interestingly, the R2P argument was not raised even by the vocal proponents of the doctrine who had also tabled the resolution, largely because making a case for Myanmar through the lens of R2P would have killed the chances for passing a resolution, given the violent opposition that would have been mounted at the prospect of an R2P precedent being set.[70] The United Kingdom argued that Myanmar represented a threat to regional peace and security and whereas the issue was within the responsibilities of the Council, it was not an exclusive Security Council interest.[71]

In sum, while in popular discourse the issue of Myanmar was discussed under the tutelage of R2P, no such mention took place in the Security Council. Instead, the issues were discussed within the framework of the traditional notions of the Council mandate, in accordance with Article 24 and Article 2.7.

Darfur and Kenya

The only instances whereby the principle of R2P has been "applied" have been in reference to the situations in Darfur and Kenya. Even though resolution 1706 (2006) did uphold the principles enshrined in paragraphs 138 and 139 of the World Summit

[67] S/PV.5526, pp. 3-4.
[68] Ibid., pp. 2-3.
[69] Ibid. p. 6. At the same meeting, the draft resolution was put to the vote. It received 9 votes in favor, 4 votes against (China, Russian Federation and South Africa) and 3 abstentions (Congo, Indonesia, Qatar), and was not adopted, owing to the negative votes of permanent members of the Council.
[70] After the draft resolution was put to the vote, some states expressed support for the role of the Council as legitimately seized of the question of Myanmar. Ibid., p. 6 (United States); p. 7 (United Kingdom); p. 8 (Belgium); and p. 9 (France).
[71] Ibid., p. 7.

Document, "the debates on R2P in connection to Darfur translated into little more substantive action than the pragmatic decision to deploy peace operations with mandates that included civilian protection."[72] Furthermore, critics assert that the R2P advocacy has shifted the discourse on protection "into a question of intervention rather than support for the political process". According to Alex de Waal, in the absence of a workable political process, designing R2P in the guise of a large UN force under Chapter VII was an unfeasible plan. [73] He elaborated that the pursuit of the responsibility to protect in Darfur was unsuccessful, due to the "inadequate conceptualization of the R2P, the inflated expectation that physical protection by international troops is indeed possible within the limits of the military strength envisaged, and the confused advocacy around the issue." This view is supported by Alex Bellamy, who notes that in the case of Darfur, the R2P *acquis* replaced the "'sovereignty-as-absolute'-type arguments against intervention in supreme humanitarian emergencies with arguments about who had the primary responsibility to protect Darfur's civilians."[74] Thus, having transcended one stumbling block, the lack of conceptually clarity in R2P presented another difficulty. Even more telling, however, was the resistance of the Security Council to invoke R2P in the adoption of resolution 1769 (2007), which authorized the deployment a UN-AU force. The resolution provided much needed protection to civilians, but it was largely seen a setback from earlier R2P advances on that situation.[75]

Kenya is perhaps the only case where the application of R2P has been recognized as a success. Following the disputed elections in Kenya in early 2008, the international community broke out of the habit of passive observation and costly reaction. Instead, it chose to prevent a crisis through of a number of bilateral and regional mediation efforts, which were timely and calibrated in a way that matched the sensitivity of the situation. The mediation effort was led by former Secretary-General Kofi Annan who analyzed the crises through the framework of the responsibility to protect, stressing the inability of the Kenyan government to contain the situation or protect its people. Annan asserted that "if the international community did not intervene, things would go hopelessly wrong," adding that intervention was a measure of last resort, contrary to popular opinion which all too quickly equated it with military action.[76] However, it needs to be pointed out that the engagement in Kenya, successful as it was, did not need the endorsement of a summit resolution. Furthermore, it raises a pressing question: if R2P is stripped down to mediation and the pacific settlement of disputes, how does it differ, if at all, to Chapter VI, previous practice in prevention as well as mediation under the good offices of the Secretary-General.

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[72] Christina Badescu and Linnea Bergholm, "The responsibility to protect and the conflict in Darfur: the big let down." Security Dialogue 2009, 40, 287.

[73] Alex De Waal, "Darfur and the Failure of the Responsibility to Protect." International Affairs. 2007. Vol. 63.

[74] Alex J Bellamy. "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq". Ethics and International Affairs. Volume 19 Issue 2.

[75] International Commission on the Responsibility to Protect. Crisis in Darfur. Available at http://www.responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop.

[76] Roger Cohen, "How Kofi Annan Rescued Kenya," The New York Review of Books, vol. 55, no. 13, August 14, 2008.

The situation in Georgia

As critics oftentimes point out, some of the most blatant instances of illegitimate use of force in international affairs have been justified in terms of R2P. One need not recall Hitler's rationale for occupying Czechoslovakia to see a recurring pattern in history whereby lofty rhetoric has been abused for inhumane ends. Humanitarian intervention is a favorite excuse for imperialist adventures and Tony Blair's attempt to explain the invasion and occupation of Iraq under this pretext is yet another example. Unfortunately, R2P in its current vague articulation can give currency to attempts to manipulate the doctrine. One such attempt was made by the Russian Federation, in what many consider was a retaliation for Kosovo. At the height of the Georgian crisis in August 2008, Russian Foreign Minister Sergey Lavrov argued that the use of force by the Russian Federation was an exercise of its responsibility to protect, as enshrined in the constitution of the country. Trying to connect the conflict to R2P was a blatant distortion of the basic tenets of the doctrine as Lavrov conflated the responsibilities of a State to protect citizens inside its borders with the responsibilities that a State maintains for populations outside its borders. Moreover, he seemed to have assumed that the World Summit Document sanctioned a freelance responsibility to protect, exercisable by individual States. Nevertheless, the incident was illustrative of how the doctrine can be abused in the hands of a Great Power and underscored the need for more conceptual clarity.

IV. Old Wine in New Bottles?

What this latter case serves to illustrate is that "humanitarian interventions" more often than not occur at the whim of the powerful. Indeed, scholars have busied themselves extensively with trying to separate humanitarian interventions from the pursuit of political interests and the so-called "codification" problem has not been easy to crack.[77] And even tough proponents are eager to separate R2P from humanitarian intervention, R2P's added value comes from the provisions for intrusive military action, irrespective of efforts to downplay it. During the informational exchange prior the GA debate in 2009, Gareth Evans, one of doctrine's founding fathers, went at great lengths to establish a conceptual distinction between R2P and humanitarian intervention. The latter, he claimed, referred solely to coercive military action, allowed for no other policy options and was not sensitive to the demands of the Charter.[78] In contrast, he argued, military intervention under the tutelage of R2P was a nuanced and multidimensional tool, referring to Pillars I and II of the doctrine, but largely missing the point, later underscored

[77] Ryan Goodman. "Humanitarian Intervention and Pretexts for War." The American Journal of International Law. Vol. 100:107, p. 108. Luke Glanville, "Norms, Interests and Humanitarian Intervention". Global Change, Peace & Security, Volume 18, Issue 3 October 2006 , pages 153 – 171. See also "The Debate on Humanitarian Intervention," Humanitarian Intervention: The Evolving Asian Debate; (ed. Watanabe Koji), Tokyo:
Japan Center for International Exchange, 2003, pp. 11-18.

[78] Press conference on General Assembly dialogue on R2P. Full record is available at http://www.youtube.com/watch?v=RS9bSUdW6b4&feature=PlayList&p=FF755F2208DE4CD6&playnext=1&playnext_from=PL&index=14

by France, that the real meaning of R2P comes from Pillar III.[79] In effect, the "novelty" in R2P lies in reframing the discourse from the controversial "right" for intervention to a "responsibility." While humanitarian intervention wreaks controversy by effectively constraining national sovereignty, R2P is arguably different by creating a joint responsibility shared by States and the international community, thus alleviating the perception that it entails a strict erosion of sovereignty. But this rhetorical shift can be evaluated by its implementation. And the prospects on that count are hardly optimistic.
Even if R2P and humanitarian intervention were substantively different doctrines, it remains unclear how the application of R2P would avoid the pitfalls of Council action. An examination of the Security Council practice in humanitarian interventions has shown that it is hard to reconcile it with any principled interpretation of the Council's mandate.[80] The arbitrary and disingenuous nature of the Council's designation of select situations as "unique and exceptional," has effectively subjected "such an ostensibly legal process to the fickle winds of the political climate [and has] diminishe[d] the normative power of international law."[81] Thus, it is no surprise that a number of states remain wary of the possibility that R2P can be used as a pretext for interference by the Global North in the sovereignty of the Global South, as demonstrated by the latest debate in the General Assembly.[82]

One has to acknowledge that appraising R2P should not be reduced to how effective it can render peacekeeping or any other intrusive response conducted under its rubric. R2P cannot and will not miraculously remove the issues plaguing peacekeeping or do away with the democratic deficit of the Security Council. It will not make it easier to remove political difference or to summon political will. It might increase the political costs associated with certain state behavior. Yet, the hopes that R2P could allow for the consideration and correction of situations that otherwise would have remained outside the reach of the SC agenda by virtue of their internal nature have not materialized. The responsibility to protect is indicative of an evolution from a traditional notion of security to a broader definition of individual human security, but beyond that, at this point of time,

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[79] See UN Press Release, GA/10848 of 23 July, available at http://www.un.org/News/Press/docs/2009/ga10848.doc.htm.
[80] Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law, p. 160.
[81] Ibid., p. 160.
[82] Cuba, Zimbabwe, North Korea, Venezuela, Nicaragua, Iran, Sudan, Pakistan, Algeria, Morocco, China, Belarus, Egypt, Syria, Brazil, Bolivia, El Salvador, India, the Philippines, among others, are prominent skeptics with respect to R2P. GA president d'Escotto himself argued that "the legacy of colonialism gave developing countries strong reasons to fear that laudable motives can end up being misused […] to justify arbitrary and selective intervention against the weakest states." Miguel D'Escoto. Statement at the 97th Meeting of the Sixty-Third General Assembly, New York (July 23, 2009). Similarly, at the informal discussion prior to the 2005 High-Plenary meeting at the GA, Cuba's delegate had warned that "R2P will only facilitate interference, pressure, and intervention in the domestic affairs of our states." World Federalist Movement. "State-by-State Positions on the Responsibility to Protect," Report (undated). In similar vein, India's Ambassador to the UN, warned against R2P being used "as a cover for conferring any legitimacy on the so-called right of intervention." Nirupam Sen, Permanent Representative of India to the UN. "In Larger Freedom," Statement at the informal thematic consultations of the General Assembly on the Report of the Secretary-General, New York (April 20, 2005). For more information on attitudes in the global south, read Jonas Claes, "The Drivers of R2P Rejectionism.", available at http://www.mantlethought.com/content/r2p-essay-3. See also Paul D. Williams "The 'Responsibility to Protect:' Norm Localization, and African International Society," *Global Responsibility to Protect* 1 No. 3 (June 2009): 414.

there is little to be gleaned by way of State practice or custom. Given the absence of State practice which invalidates arguments that R2P has become an accepted norm, it is worth asking what legal standing R2P currently holds. The foundational documents fail to meet the criteria for sources of law listed under Article 38 of the ICJ Statute, which cites "international custom, as evidence of a general practice accepted as law," and "general principles of law". In this context, might be worth exploring the wide spectrum of legalization, the process of which has received profuse attention by both political scientists and scholars of international law alike. Both groups commonly identify three distinct categories that encompass the legalization process—obligation, precision and delegation. While each of these categories "is a matter of degree and gradation,"[83] they provide a useful framework for the appraisal of the variability of legalization. The responsibility to protect, as demonstrated in Part I, cannot pride itself of a high degree of precision. It does not entail strict obligation, as the responsibility to protect is to be discharged on a "case by case" basis. Nor is it crystal clear with respect to the authority delegated to carry it out—the case by case approach is a further "acknowledgement that no reasonable rule can be fashioned to govern all circumstances that can foreseeably arise."[84]

Without trivializing the significance of the World Summit Outcome Document in challenging the absolutist view of sovereignty, it is worth pointing out its greatest flaw: its inability to challenge the monopoly of the Security Council. Even though it seems that the Rwanda and Srebrenica have impressed upon Member States that inaction from the international community in the face of humanitarian crises is unacceptable, changing the nomenclature alone will not suffice nor would it assuage the problem of political divisions among permanent Council members, which will always be a potential cause for the Council locking up on key issues. Gareth Evans himself acknowledged that the objective was never to find an alternative to the Security Council but to make it work better by devising a "self-denying ordinance," whereby the Security Council members would be bound by a "gentlemen's agreement" not to cast a veto in the presence of gross human rights violations. However, it belies the political realities and equally stretches the imagination to see how such approach could have worked in the cases of Kosovo, for example. Evans stressed that the Security Council had to be the gatekeeper with respect to R2P in the cases of sanctions or coercive response, adding that, with all of its imperfections, the Council was a better alternative than "freelance intervention."[85] Nevertheless, conditioning R2P on reforming the Security Council, or on the prospects for a self-restraining ordinance, is "tantamount to making it contingent on pigs flying in formation past UN headquarters."[86]

But all this begs the question of whether humanitarian responses are not going to be more difficult to mount. Even more problematically, this could prompt even more

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[83] Kenneth Abott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, "The Concept of Legalization" in *Legalization and World Politics*. Edited by Goldstein, Robert Keohane, Anne-Marie Slaughter, MIT Press. 2001. p. 20.

[84] Michael Glennon, *Limits of Law Prerogatives of Power: Intervention after Kosovo*. Palgrave, 2001, p. 7

[85] Press conference on General Assembly dialogue on R2P. Full record is available at http://www.youtube.com/watch?v=RS9bSUdW6b4&feature=PlayList&p=FF755F2208DE4CD6&playnext=1&playnext_from=PL&index=14

[86] Ian Williams. "Ban Ki Moon and R2P." Foreign Policy in Focus, available at http://www.fpif.org/articles/ban_ki_moon_and_r2p

unilateral interventions and yet, paradoxically, render false legality onto the Kosovo's of the future. As Martti Koskenniemi convincingly argues, "it is never Algeria that will intervene in France, or Finland in Chechnya".[87] The larger point being that humanitarian intervention rarely occurs when a matter does not concern a great power interest. In such cases, the discourse switches to protracted discussions of what constitutes genocide and whether the involvement of the Council is warranted or not.

The ICISS argues that their perspective is not based on power or *Realpolitik* but on morality and stresses that R2P implies a duty on the state to act as a moral agent."[88] The question remains, whether this notion of global/international citizenship is enough if there are no vital interests at stake to prompt intervention. While the possibility of forceful interference could be a source of leverage against rogue States, it is questionable whether such leverage has been amplified through the codification of R2P, given the general arbitrary nature of action taken via the Security Council and the relative ease with which the P5 States in particular, have violated international law, when deemed necessary. After all, the Council had already determined in past resolutions that "serious" and "systematic, widespread and flagrant" breaches of humanitarian law, humanitarian crises, acts of genocide or coup disruptions can constitute a threat to international peace and security.[89] However, that had hardly produced any tangible outcomes. Given the little substantive contribution by the R2P doctrine, in its World Summit Outcome form, and the fact that the main onus for its implementation rests with the Council, the question that inevitably begs is what value is added by this new concept. And while R2P could correct the gap between "formal illegality and moral necessity," as described by Marti Koskenniemi, its repackaging in the present three-pillar form also involves a "shallow and dangerous moralisation which, if generalised, transforms international law into an uncritical instrument for the foreign policy choices of those whom power and privilege has put into decision-making positions."

As a doctrine, R2P was intended to provide an adequate foundation for humanitarian intervention. But the case analysis suggests that its legal formulation has imposed an additional hurdle for such interventions. A critical issue has been the failure to introduce the necessary conceptual and operational benchmarks to make interventions less amenable to political interests and less dangerous in the eyes of sovereignty bulwarks. [90] More importantly, however, the absence of precedent or general consensus and political will for such action is threatening to render the doctrine irrelevant.

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[87] Ibid.

[88] International Commission on Intervention and State Sovereignty, The Responsibility to Protect: Research, Bibliography, Background, Ottawa: International Development Research Centre, 2001, p. 136.

[89] See Resolutions 808 (1993); 827 (1993); 925 (1994); 929 (1994); 940(1994) and 955 (1994).

[90] M. Koskenniemi, 'The Lady Doth Protest Too Much: Kosovo, and the Turn to Ethics in International Law', Modern Law Review, (65), 2002-2, p. 172.

Annex

References to R2P in Decisions and Meetings of the Security Council

Agenda Item	Resolution/Provisional Verbatim Record
The situation in the Great lakes	Resolution 1653
Protection of Civilians in Armed Conflict	Resolutions 1674, 1894
Sudan	
Briefing by the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator	S/PV.5792
Briefing by the United Nations High Commissioner for Refugees	S/PV.5353
Briefings by the Chairman on subsidiary bodies	S/PV.6043
Briefings by the Chairman on subsidiary bodies	S/PV.6043
Briefing by UNHCR	S/PV.6062
Children and armed conflict	S/PV.5494
Children and armed conflict	S/PV.5494 (Resumption)
Children and armed conflict	S/PV.5573
Children in Armed Conflict	S/PV.6114 (Resumption)
Children in Armed Conflict	S/PV.5834
Children in Armed Conflict	S/PV.5834 (Resumption)
Children in Armed Conflict	S/PV.5834
Children in Armed Conflict	S/PV.5834 (Resumption)
Maintenance of International Peace and Security	S/PV.5735 (Resumption)
Maintenance of international peace and security	S/PV.5735
Peace and Security in Africa	S/PV.5868
Post-conflict peacebuilding	S/PV.5761
Protection of civilians in armed conflict	S/PV.6216
Protection of civilians in armed conflict	S/PV.6066 (Resumption)
Protection of civilians in armed conflict	S/PV.6151 (Resumption)
Protection of civilians in armed conflict	S/PV.6151
Protection of civilians in armed conflict	S/PV.6216 (Resumption)
Protection of civilians in armed conflict	S/PV.5781
Protection of civilians in armed conflict	S/PV.5781 (Resumption)
Protection of civilians in armed conflict	S/PV.5703
Protection of civilians in armed conflict	S/PV.5577
Protection of civilians in armed conflict	S/PV.5577 (Resumption)
Protection of civilians in armed conflict	S/PV.5476
Relationship between the United Nations and regional organizations, in particular the African Union, in the maintenance of international peace and security	S/PV.5649
Reports of the Secretary-General on the Sudan	S/PV.6096
Reports of the Secretary-General on the Sudan	S/PV.6170
Reports of the Secretary-General on the Sudan	S/PV.6112
Reports of the Secretary-General on the Sudan	S/PV.5894
Reports of the Secretary-General on the Sudan	S/PV.6028

Reports of the Secretary-General on the Sudan	S/PV.5872
Reports of the Secretary-General on the Sudan	S/PV.5956
Reports of the Secretary-General on the Sudan	S/PV.5849
Reports of the Secretary-General on the Sudan	S/PV.5520
Reports of the Secretary-General on the Sudan	S/PV.5434
Reports of the Secretary-General on the Sudan	S/PV.5519
Reports of the Secretary-General on the Sudan	S/PV.5528
Security Council mission Report of the Security Council mission to the Sudan and Chad (S/2006/433)	S/PV.5478
Strengthening international law: rule of law and maintenance of international peace and security	S/PV.5474
Strengthening international law: rule of law and maintenance of international peace and security.	S/PV.5474 (Resumption)
The maintenace of international peace and security: role of the Security Council in supporting security sector reform	S/PV.5632
The maintenance of international peace and security	S/PV.5979
The maintenance of international peace and security: role of the Security Council in supporting security sector reform	S/PV.5632 (Resumption)
The protection of civilians in armed conflict	S/PV.5319 (Resumption)
The situation in Africa	S/PV.5655
The situation in Africa	S/PV.5571
The situation in Chad and the Sudan	S/PV.6029
The situation in Chad, the Central African Republic and the subregion	S/PV.5980
The situation in Georgia	S/PV.5952
The situation in Somalia	S/PV.6158
The situation in Somalia	S/PV.5858
The situation in Somalia	S/PV.5858
The situation in the DRC	S/PV.6024
The situation in the Great Lakes region	S/PV.5603
The situation in the Great Lakes region	S/PV.5359 (Resumption)
The situation in the Great Lakes region	S/PV.5359
The situation in the Middle East	S/PV.6171 (Resumption)
The situation in the Middle East	S/PV.5508
The situation in the Middle East, including the Palestinian question	S/PV.6201
The situation in the Middle East, including the Palestinian question	S/PV.6061
The situation in the Middle East, including the Palestinian question	S/PV.5493 (Resumption)
The situation in the Middle East, including the Palestinian question	S/PV.5488
The situation in the Middle East, including the Palestinian question	S/PV.5565
The situation in the Middle East, including the Palestinian question	S/PV.5481
The situation in Somalia	S/PV.5805
Threats to international peace and security	S/PV.5615
United Nations peacekeeping operations	S/PV.5376
Women and peace and security	S/PV.5766 (Resumption)
Women and peace and security	S/PV.5766
Women, Peace and Security	S/PV.6196 (Resumption)
Women, Peace and Security	S/PV.6195
Women, Peace and Security	S/PV.6180 (Resumption)

Women, Peace and Security	S/PV.6180
Women, Peace and Security	S/PV.5916
Women, Peace and Security	S/PV/6005
Women, Peace and Security	S/PV.5916