Mississippi College Law Review

Volume 32
Issue 3 *Vol. 32 Iss. 3*

Article 5

2014

Responsibility to Protect: An Anti-Fragile Perspective

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Custom Citation
32 Miss. C. L. Rev. 467 (2013-2014)

Responsibility to Protect: An Anti-Fragile Perspective

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I. Introduction

This paper explores the concepts of fragility, robustness, anti-fragility,[1] reification, world risk society, modernity, informal international lawmaking, and their relationship to international law in the field of the *Responsibility to Protect* (R2P). We shall begin with articulations and definitions of the terms involved.

Fragile systems break down in the event of a crisis.[2] They do not survive. They are vulnerable to large-scale, unpredictable events. Fragility is the accelerating sensitivity to a "harmful stressor." Robust systems have the power to resist hazards, but they too are breakable at a certain point and do not guarantee complete security against risks.[3] They are merely less fragile. Robust systems are densely regulated systems and reflect the modernist view that top-down regulation can avert harmful stressors. Further, robust systems cannot take advantage of volatility. Randomness is not an opportunity but a danger to be absolutely avoided. Robust systems use "probability models" and "insurance mechanisms" to avoid randomness. However, these models and mechanisms themselves create other uncertainties. By contrast, an anti-fragile system does not break down. It may suffer damage, but in the end it takes advantage of crises and difficulties. Anti-fragility thus gains from disorder.[4] Risks, volatility, randomness, and uncertainty are therefore advantages for the anti-fragile system, whereby it renovates itself through the information to which it is exposed. An anti-fragile system absorbs harmful stressors and utilizes them as opportunities

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1. Nassim Nicholas Taleb, Antifragile 11–12, 17 (Random House 2012).
2. *Id.* at 23–27.
3. *Id.*
4. *Id.* at 20.

for self-improvement. Anti-fragility is the non-linear response to harmful stressors and leads to more benefit than harm, thus allowing and ensuring survival.[5] All surviving complex systems are anti-fragile.

Reification means the freezing of parameters of an ideology, whereby a certain reality is established as immutable. The world order reifies in a linguistic worldview and cannot be seen as an interpretive system open to criticism.[6] Reification is the corollary of modernity. By contrast, a *world risk society* predicates uncertainty, unawareness, and a lack of knowledge.[7] It requires modesty on the part of policy makers—risks cannot be eliminated. Whereas the modernist legalist approach believes in the power of central organization and positive law for eliminating risk, the world risk society approach does not favor top-down and formalist legal regulations of international relations. It argues that the success of modernity is now producing consequences for which we do not have any answers. Hence, the notion of the world risk society understanding is compatible with anti-fragile thinking. Modernity, in terms of international law, denotes a reliance on the nation-state, respect for sovereignty, a favoring of centralization, and the belief in the normative value of written rules. These characteristics of modernity pose a conundrum for the supporters of humanitarian intervention—and for the R2P.

Informal international lawmaking denotes law outside the formalist strictures of traditional international lawmaking. That is to say, there is neither an international treaty, nor are there binding legal obligations or mechanisms for delegating authority to other bodies for the purpose of legal interpretation. Mere guidelines, concepts, standards, and benchmarks are posited, with the latter accepted as international law if actually implemented and complied with by participants.[8] In other words, informal international lawmaking favors effects over the form. It rejects classical sources of international law—as indicated in Article 38 of the Statute of the International Court of Justice (ICJ)[9]—and instead favors a new method of lawmaking.[10] It is a challenge to the modern understanding of international

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5. *Id.* at 7.

6. JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOLUME 1: REASON AND THE RATIONALIZATION OF SOCIETY 69 (Thomas McCarthy trans., Beacon Press 1984).

7. ULRICH BECK, WORLD RISK SOCIETY 72–75 (Polity Press 1999).

8. INFORMAL INTERNATIONAL LAWMAKING (Ayelet Berman et al. eds., Torkel Opsahl Academic EPublisher 2012). .

9. Article 38 provides in pertinent part:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>   b. international custom, as evidence of a general practice accepted as law;
>   c. the general principles of law recognized by civilized nations;
>   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38, ¶ 1.

10. JÖRG KAMMERHOFER, UNCERTAINTY IN INTERNATIONAL LAW 199 (Routledge 2011) (defining sources of law as methods of law creation).

law and, due to its acknowledgement of uncertainty, is compatible with the concept of the world risk society.

The *Responsibility to Protect* (R2P) is the term proposed by a Commission convened by Canada in 2001. It received approval to counter humanitarian crises the world over in the United Nation's (UN) 2005 World Summit Outcome[11] and the Security Council (SC)[12] and General Assembly (GA) resolutions.[13] In the event of neglect or failure of the nation-state in preventing genocide, crimes against humanity, war crimes, or ethnic cleansing within its own borders, the international community is given the responsibility by the R2P to warn the state and, if deemed necessary, militarily intervene. The R2P represents the third type of intervention in the domestic affairs of weak states—"failed states" in contemporary parlance—after World War II. The first two were developmentalism and neoliberalism. The R2P is not, however, ratified by an international treaty and whether it has become a customary rule of international law or a general principle of law remains open to debate.

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11. The Resolution outlines the R2P:

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Sept. 16, 2005). The Resolution also outlines the methods of accomplishing the R2P:

> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

Id. at ¶ 139.

12. The R2P principle has been referred to by the SC for the protection of civilians in intra-state armed conflicts. *See* S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006); S.C. Res. 1814, U.N. Doc. S/RES/1814 (May 15, 2008); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). On top of that, the SC has implicitly or explicitly approved some unilateral humanitarian interventions after they took place. *See* S.C. Res. 788, U.N. Doc. S/RES/788 (Nov. 19, 1992); S.C. Res. 1132, U.N. Doc. S/RES/1132 (Oct. 8, 1997).

13. On September 14, 2009, the General Assembly passed its first resolution on the R2P and a General Assembly debate in July 2011 reasserted its support for the R2P concept. The Responsibility to Protect, G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7 2009); Press Release, General Assembly, 'For Those Facing Mass Rape and Violence, the Slow Pace of Global Deliberations Offers No Relief,' Secretary-General Cautions in General Assembly Debate, GA/11112 (July 12, 2011).

At present, the R2P seems to be a concept rather than a legal rule. The R2P is a new initiative aiming to resolve the dilemma between intervention in state activities—which is currently forbidden in international law under Articles 2(3) and 2(4) of the UN Charter—and the protection of human rights. The R2P favors the "responsibility" of the international community over the "right" to humanitarian intervention and it stresses a more comprehensive approach, in comparison to humanitarian intervention. It includes three stages—prevention, intervention, and rebuilding.

This article does not explain the history of the R2P, nor does it attempt to formulate a comprehensive policy analysis through an examination of the attitudes of the international community with regard to past humanitarian crises. The R2P raises a whole series of highly complex international legal issues, many of which remain outside the scope of this paper. Instead of tackling each of these issues, this paper instead focuses on a rather limited question—that is, the conceptualization of the R2P, and discusses the difficulties encountered in understanding and regulating the R2P. Actually, with the recent humanitarian crisis in Libya and the ongoing turmoil in Syria, these difficulties have become all the more acute. The questions with regard to the R2P raised by these crises have, it can be said, baffled the international community.

This paper presents a normative argument: the international community should endorse an anti-fragile understanding of the R2P—a system that copes with the volatility inherent in the R2P. Humanitarian crises and interventions in sovereign states for the sake of the protection of persecuted populations are large-scale and unpredictable events—"harmful stressors" challenging UN law. The R2P should be envisaged in an anti-fragile way, so that international law does not break down as a consequence of such events. In effect, qualifying the use of force under international law is no easy task. It is better to speak of possibilities of legitimization, mitigating circumstances, tendencies, and more or less justifiable practices, instead of employing black and white terms such as lawful or unlawful[14]—and this is also a way to better interpret and understand the R2P.

In this context, it cannot be denied that the R2P does not belong in the realm of positive international law. This is possible by perceiving the efforts for the establishment of the R2P as an example of informal international lawmaking. Instead of a pseudo-stability created on paper through "positivization"—which ignores the harmful stressors of international politics—the inefficiencies in the functioning of the R2P should be acknowledged. That is to say, an approach based on a world risk society—which doubts the ability of legal regulation of the R2P to remedy global humanitarian crises—should prevail. Moreover, inefficiencies in the operation of the R2P should be seen as an integral part of the R2P, not as obstacles.

14. Rein Müllerson, *The Law of Use of Force at the Turn of the Millennia*, 3 BALTIC Y.B. INT'L L. 191, 199 (2003).

Rather than accumulating tensions under the polish of positive international law—which did not avert grave crises like the First and Second World Wars or the current crop of humanitarian crises ongoing in places such as Syria and Burma—the international system should be flexible enough to let the practicalities lead the path ahead of legalese. In launching the concept of the R2P, the international community made a commendable effort. In this regard, the international community should not be demoralized by the fact that the R2P has not entered into the realm of positive international law. In fact, this can be seen as an advantage. The affirmation of the R2P by the UN's World Summit Outcome in 2005 is the acknowledgement by the international community that there is no sharp distinction between politics, ethics, and international law. Although the Summit Outcome is not binding, it does represent the power of ethics. It may not legalize war on a new autonomous legal basis, but it still legitimizes it. The GA and SC resolutions mentioning the R2P did not legalize the R2P either, but again they did legitimize it. Hence the R2P constitutes a challenge to a positive international law supposedly constituted merely by rules.[15] The R2P is a play on the modernity of the post-1945 era.

This paper does not argue for dissolution of international law within the framework of international politics. International law may continue to pursue its normative ambitions with regard to the R2P. This is all very well. However, modesty and a caveat are in order. The gap between the sovereignty paradigm in the UN Charter and its practical challenges is considerable. The reconciliation of international law, embodied by the UN Charter, with the politics of international intervention is not easy. Being useful as a concept, the R2P may not be practical if further legalization is pursued. International law should therefore continue to observe developments with regard to the R2P. The R2P may, in the future, be favorable to positivization. However, for now, this requires an honest acknowledgement by the international legal scholarship that the path towards further legalization of the R2P would lead to international law becoming more fragile and would lead to greater harm than benefit.

This paper first discusses UN law in the field of intervention, after which, the approach to the R2P is delineated, followed by an examination of the relationship between sovereignty and human rights. The concepts of violence and ideology are then considered under different sections. The paper concludes by highlighting the need for the anti-fragility of the R2P.

II. UNITED NATIONS LAW

Standing up to the randomness and uncertainty of international politics is a challenge for the UN. This challenge becomes all the more visible

15. DAVID KENNEDY, OF WAR AND LAW 83–98 (Princeton Univ. Press 2006) (arguing that international law is more than mere rules).

when it comes to the issue of intervention. The International Court of Justice (ICJ), in the *Corfu Channel* ruling, openly admitted this when it determined that it could "only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, *whatever the present defects in international organization*, find a place in international law."[16]

The Court admits to the defects of the post-1945 international system. Still, it does not endorse any exception whatsoever to the prohibition of the use of force apart from two explicitly endorsed exceptions in the UN Charter—Security Council enforcement under Article 42 and self-defense under Article 51. Thus, the UK's argument in the *Corfu Channel* case[17] that the British use of force in the Corfu Channel did not involve any threat to the territorial integrity or political independence of Albania—and thus did not literally violate Article 2(4) of the UN Charter—did not affect the Court. The Court did not endorse such a circumvention of Article 2(4) by the UK. The UK's objective, so the UK argued, was the securing of free navigation of international straits and waters. Nevertheless, the Court did not attempt to counter the free navigation of international waters with the prohibition of use of force.

Likewise, in the 1986 *Nicaragua v. United States* ruling, the ICJ, in clear terms, favored the principle of non-intervention, whatever the political regime of the intervened upon country. The Court made it clear that it viewed intervention in another state with a view to changing its ideology or political system as illegitimate.[18] The USA thus could not rely on the argument of "bringing democracy and human rights" to justify intervention in Nicaragua. The ICJ stated that: "[w]hile the US might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect."[19]

The same is true of humanitarian intervention as well. The intervention in Kosovo in 1999 and its aftermath is a case in point. The United States,[20] the UK,[21] and Belgium[22] were clear as to the humanitarian dimension of the intervention in Kosovo. But, Belgium was the only NATO

16. Corfu Channel (U.K. v. Alb.), Decision, 1949 I.C.J. 4, 35 (Apr. 9) (emphasis added).

17. *Id.*

18. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 263 (June 27).

19. *Id.* at ¶ 268.

20. Jim Garamone, *Clinton Makes Case for Kosovo Intervention*, ARMED FORCES PRESS SERVICE, Mar. 24, 1999, http://www.defense.gov/news/newsarticle.aspx?id=42001.

21. The United Kingdom argued in the SC that "in the current circumstances military intervention was justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe." Natalino Ronzitti, *Lessons of International Law from NATO's Armed Intervention Against the Federal Republic of Yugoslavia*, XXXIV(3) THE INT'L SPECTATOR 45, 47 (1999).

22. Belgium argued that both the cumulative effect of the SC resolutions pointing to the situation in Kosovo and the armed humanitarian intervention were two legitimate grounds on which to argue for the legal right of NATO to intervene. Legality of Use of Force (Yugo. v. Belg.), Verbatim Record, CR 99/15, 3–4, 11–12 (May 10, 1999 3 p.m.), www.icj-cij.org/docket/files/105/4513.pdf.

country that dared argue before the ICJ that alleged humanitarian intervention—Operation Allied Force in Yugoslavia—was compatible with Article 2(4), for it did not violate the territorial integrity or the political independence of Yugoslavia.[23] Although this case was not decided on procedural grounds, Belgium's isolated position demonstrated the difficulty of making a legal case for humanitarian intervention. Indeed, most NATO members presented the intervention in Kosovo as an "exceptional intervention" under "exceptional circumstances."

A broad consensus seems to exist that accepts that intervention is restrained on the level of positive international law, whatever the political and humanitarian motivations. The reasons advanced by interveners—freedom of the seas, the establishment of human rights and democracy, and humanitarian concerns—are significant values. Nevertheless, those values must unquestionably yield to the principle that prohibits the use of force. In the realm of positive international law, there is no mechanism to balance those values with the prohibition of intervention. The understanding of UN law is that state sovereignty and internationalism complement each other and no pretext shall breach this complementarity apart from the two explicit exceptions indicated in the Charter.

The lack of protection of aforementioned values is a result of the post-1945 modernity. Modernity is the "stifling of volatility and stressors" and "corresponds to the systematic extraction of humans from their arbitrary physical, social and epistemological ecologies."[24] Hence the UN Charter embodies the epistemological modernization of the use of force. It comprises a legalese attempt at the overstabilization of the use of force with the acknowledgement of only two exceptions.

In this, UN law creates the impression that it is a matter of fact but not of choice. It assumes the entirety of responsibility for violence on the international stage. This is the modern understanding of international law, which asserts that all the relevant considerations are held into account by "comprehensive" UN law.[25] But, the "modern" UN Charter as an "insurance mechanism"—a "probability model"—itself created the problem of the non-protection of aforementioned values.

It is interesting to note that during the twentieth century, 35 million people died in all international wars, while 150 million people were killed by their own governments.[26] There is no indication yet in the twenty-first century that civil wars around the world will end in the foreseeable future, yet, civil war is not mentioned in the UN Charter. The Charter avoids any reference to domestic crises within States, focusing solely, instead on international war, using the language of a definite remedy to the scourge of war. The UN represents a modernist initiative on the part of the international

23. *Id.* at 12.

24. TALEB, *supra* note 1, at 108.

25. KENNEDY, *supra* note 15, at 77–83.

26. CATHERINE LU, JUST AND UNJUST INTERVENTIONS IN WORLD POLITICS 53–54 (Palgrave Macmillan 2006).

community of sovereign States to restrict the reality of war to its international dimensions whilst neglecting civil wars and intra-state conflict. If modernity is to be envisaged as the reduction of reality to clear and definitive black-and-white dichotomies, the UN Charter, with its ostensibly definitive dichotomy between the internal and external affairs of nation-states, is the epitome of this reductionism.

The counter is that civil laws are not completely excluded from international law—the Charter cannot be the sole criterion. General international law shows a concern for intra-state conflicts and likens it to inter-state conflicts. The prime example is the Geneva Conventions—Common Article 3 and Additional Protocol II thereto—that regulate conduct during civil law. International humanitarian law regulates both international and domestic conflicts. The *Nicaragua* ruling of the International Court of Justice endorses the applicability of the Geneva Convention's provisions to both international and internal armed conflicts and further bolsters the view that the line between internal and international affairs is a fine one.[27] Indeed, the *Tadic* ruling of the International Criminal Tribunal for the former Yugoslavia stated that the definition of "armed conflict" encapsulates both inter-state and intra-state conflicts: "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[28]

Likewise, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, in 1995, stated that "the settled practice of the Security Council and the common understanding of the United Nations membership in general" is that even a *purely internal* armed conflict may constitute a "threat to the peace."[29]

Thus, it is not surprising that UN peacekeeping forces are dispatched not only in the event of wars between countries, but also to civil war zones within state borders as well. Most importantly, in UN practice, civil wars may also be interpreted as a danger to international peace and security. This was the case with, for example, civil wars in Somalia[30], Iraq,[31] the Sudan,[32] Libya, and Southern Rhodesia,[33] all of which were internationalized by the Security Council (SC). Likewise, the protection of civilians and the objective of halting violations of civil liberties and human rights, and the

27. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. at ¶¶ 218–19. Rules in common Article 3 reflected "elementary considerations of humanity," and the Rules "applicable in international and internal armed conflicts are identical." *Id.*

28. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

29. *Id.* at ¶ 30.

30. S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

31. S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991).

32. S.C. Res. 1706, *supra* note 12, at 3 ("*Determining* that the situation in the Sudan continues to constitute a threat to international peace and security.").

33. S.C. Res. 232, U.N. Doc. S/RES/232 (Dec. 16, 1966) (declaring that the continued existence of Southern Rhodesia's racist minority Smith regime—a wholly domestic issue—constituted a threat to international peace and security).

need to resort to force under Chapter VII of the Charter, have been affirmed by Security Council resolutions on Rwanda,[34] Burundi,[35] and Haiti.[36]

In particular, though SC Resolution 940 (1994) on Haiti referred to the flow of refugees across the boundaries between Haiti and its neighbors as an argument to internationalize the issue, it found in the systematic violations of human rights committed and the overthrow of the democratically elected government an element of international concern. It is all the more interesting that SC Resolution 933 did not even mention the trans-border effects of the Haiti crisis; the restoration of the democratic government was seen by the SC as sufficient cause for action.[37] Such a flexible interpretation of the powers of Chapter VII points to a hopefully more permissive attitude to the R2P. However, the UN cannot be accused of dereliction of duty when the humanitarian crisis remains wholly within the borders of a State. Indeed, the SC may refrain from internationalizing an intra-State conflict, as was seen in the 2011 Shia-Sunni conflict in Bahrain,[38] and cannot be held accountable for that.

Furthermore, even in those cases where the SC internationalizes civil wars, the *unique* and *exceptional* circumstances of the interventions in the seemingly internal affairs have been underlined by SC resolutions. Extraordinary circumstances are implied for the legitimization of these interventions;[39] SC Resolution 794 underscored the *unique character* of the Somalia situation and the need for *exceptional* response. Although a good

34. S.C. Res. 925, U.N. Doc. S/RES/925 (June 8, 1994); S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994).

35. S.C. Res. 1545, U.N. Doc. S/RES/1545 (May 21, 2004).

36. S.C. Res. 933, U.N. Doc. S/RES/933 (June 30, 1994); S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

37. *See* Erik Voeten, *The Political Origins of the UN Security Council's Ability to Legitimize the Use of Force*, 59 INT'L ORG 527, 531 (2005); Christopher J. Le Mon & Rachel S. Taylor, *Security Council Action in the Name of Human Rights*, 11 AFR. Y.B. INT'L L. 263, 292 (2003).

38. The repression of the Shia population by the Sunnite government in Bahrain passed unnoticed even though these two intra-State conflicts took place at the same time in the same geography. Jayshree Bajoria, *Libya and the Responsibility to Protect*, COUNCIL ON FOREIGN REL, March 24, 2011, *available at* http://www.cfr.org/libya/libya-responsibility-protect/p24480. Moreover:

> Marjorie Cohn, a law professor at the Thomas Jefferson School of Law, argues the Obama administration is silent on Yemen and Bahrain (Huffington Post) because they are close U.S. allies. The White House has condemned the violence in those two countries too, urging their governments to show restraint, but any stronger action has yet to be taken. Others note more pressing cases for humanitarian intervention from the Democratic Republic of Congo to the Ivory Coast—to question Libya as the R2P test case.

Id. Similarly, in 1946, the SC did not describe Franco's Spain as a threat under Chapter VII of the Charter notwithstanding the immense atrocities committed at the time. AIDAN HEHIR, HUMANITARIAN INTERVENTION AFTER KOSOVO 19 (Palgrave Macmillan 2008).

39. Apart from the SC, the international community refers to the *sui generis* character of these interventions as well. Simon Chesterman, *'Leading from Behind'. The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*, 15 (N.Y. Univ. School of Law, Working Paper No. 11-35, 2011). For instance, in relation to Kosovo, the German, American, and the British governments underlined the exceptional character of the interventions. Daniel H. Joyner, *The Kosovo Intervention. Legal Analysis and a More Persuasive Paradigm*, 13 EUR. J. INT'L L. 597, 609 (2002).

example of the intervention in the internal affairs of a State,[40] SC Resolution 940 (1994) on Haiti also highlighted the "unique character of the situation." Likewise, SC Resolution 929 on Rwanda (1994) argued that the Council faced a *unique case*.

In fact, the expression "unique and exceptional" is the signal that the modern-reductionist UN Charter is unable to deal with civil wars. The prohibition of the use of force—with only two exceptions—and the use of terms such as "unique and exceptional" in SC resolutions illustrates the dilemma of the modernist framework. This difference between the written rules of the Charter and the practice of the SC to invoke "unique and exceptional circumstances" for intervention in civil wars is a source of ambiguity—an organizational ambiguity.

Organizational ambiguity is neither a defect nor a deviation. It is inherent in most international organizations. The vagaries and randomness of international politics render international organizations ambiguous. In the face of the uncertainty of international politics, organizational goals are often unclear, contradictory, or otherwise poorly specified.[41] This is the case with the UN Charter, which underlines both human rights[42] and sovereignty.[43] In the event of humanitarian crises—the "harmful stressors" challenging the UN law—the two concepts unsurprisingly clash. The issue at hand is the extent of this clash and how it is to be managed and resolved.

There is still no procedure or criterion to deal with the clash between the two. Two conflicting principles exist side by side, and this creates an inherent ambiguity. A case in point is Security Council Resolution 1244 on Kosovo.[44] The resolution created an ambiguity by formally recognizing Yugoslav sovereignty over Kosovo while simultaneously instructing the UN Mission in Kosovo to establish the institutions of substantial autonomy and self-government in the province. Yugoslav sovereignty co-existed as though there were no contradictions alongside the extreme autonomy granted to a province of Yugoslavia, Kosovo, after a military intervention for the sake of the protection of the Kosovar Albanians.

Modernists would be disturbed by this ambiguity. In ideal speech situations inspired by modernity, everything should be on the table, without any contradictory objectives existent. However, in most political conflicts,

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40. *See* Le Mon & Taylor, *supra* note 37, at 263.

41. FRANCIS FUKUYAMA, STATE-BUILDING GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY 51 (Cornell Univ. Press 2004).

42. Article 55 of the UN Charter provides in pertinent part:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. Charter art. 55, para. (c).

43. Article 2 of the UN Charter provides that "[t]he Organization is based on the principle of the sovereign equality of all its Members." *Id.* at art. 2, para. 1.

44. *See* S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999).

much goes unsaid. Intervention in a sovereign state is a political argument—and much about intervention goes unsaid. The practice of intervention—the "life-world" or the "essence" of international politics—is different from that of the modern systemic-world of the UN Charter.[45]

The concept of "overcompensation" could throw further light on the "modern" UN Charter and the uncertainties it causes. Overcompensation takes place when an unforeseen challenge emerges and endangers the pre-established parameters.[46] The challenge leads the system to transform more than it would take place under ordinary conditions or in reaction to minor difficulties. If the system is fragile, it breaks down. If it is robust enough, it resists further. Yet, in the event of higher tension, it is ultimately breakable. However, if the system is "anti-fragile," it reacts by reforming and improving itself—the overcompensation mode. The challenge improves the system more than expected.

Before the First and Second World Wars, some serious initiatives against war were taken—the Hague Conventions of 1899[47] and 1907,[48] the 1919 Covenant of the League of Nations, and the 1928 Kellogg-Briand Pact.[49] These measures "modernized" and "robustified" the international system against intervention. However, they were not enough to prevent the two world wars. International politics were twice broken. Lessons were drawn and the post-1945 system—with its "never again" motto—stands as a clear case of overcompensation.

In this regard, the UN did not mature gradually.[50] On the contrary, sponsored by the Great Powers, its birth was abrupt, and its midwife was war.[51] It tried to completely and universally eliminate the use of force providing only two exceptions to this blanket provision. The risk of total nuclear war is also worth taking into account as a significant factor in this absolute aversion to armed conflict. The system became more robust by being universally and formally endorsed by all States[52] and by establishing an ostensible consensus.[53] This is the epitome of building extra capacity and strength—overcompensation—in anticipation of a global conflict and is the reaction to information about such a grave possibility.[54] International politics proved itself anti-fragile by reconstructing itself on the ashes of World War II. Yet, the reconstruction again acquired a modern shape.

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45. JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION, VOLUME 2: LIFEWORD AND SYSTEM 117 (Beacon Press 1987).

46. Taleb, *supra* note 1, at 41–48.

47. *See* Hague Convention II with Respect to the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 410.

48. *See* Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 22777, 205 Consol T.S. 277.

49. *See* Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

50. MARK MAZOWER, GOVERNING THE WORLD, at XV (Penguin Books 2012).

51. *Id.*

52. The 1928 Kellog-Briand Pact was not universally ratified.

53. The United Nations is more inclusive in comparison with the League of Nations.

54. TALEB, *supra* note 1, at 45.

That is, an international political system of an anti-fragile nature constructed under the banner of the UN Charter, a modern international law regarding the use of force.

By approving only two exceptions to the use of force, the post-1945 international system brought about an ostensible clarity. The system became robust to future shocks that could be of the magnitude of the Second World War. This is the modernist approach: Seemingly clear-cut rules and exceptions, reliance on the power of the written rule addressed to the nation-state, belief in the power of a central and universal organization formed by these nation-states, trust in the power of positive international law to eliminate risks, and the belief in the "robustification" of the system.

The problem inherent to modernity is that, in the long term, tensions accumulate behind the scenes and become costly in terms of lives. Modernity, under the cover of stability, contains the seeds of its own undoing. The great complacency that led to the First World War after almost a century of relative peace in Europe in the nineteenth century is a case in point, alongside the rise of the heavily armed nation-state.[55] The 1815 Vienna Congress System was thought to have established peace in Europe. However, the robustness constructed by the 1815 system was inadequate in the volatile and random arena of European politics. Although it prevented a number of wars until the First World War, the latter was the unexpected result of accumulated tensions.

Likewise, in the post-1945 period, the phenomenon of war continued the world over. Just mentioning several of the conflicts with accompanying and grave humanitarian crises is enough to make the point: Kosovo, Rwanda, Syria, Somali, Sudan, Congo, Colombia, Iraq, Sierra Leone, East Timor, Afghanistan, and Burma. The humanitarian crises are evidence that the UN's modernist—robust—approach cannot cope with the realities on the ground. The two exceptions to the prohibition of the use of force provided in the UN Charter have not helped prevent these endemic human tragedies. Beneath the veneer of the UN Charter, violence in a multitude of states has emerged incessantly and without remedy, although thankfully a Third World War has so far been averted.

The size of international politics is a factor, too. The "modern" fragility of the post-Second World War system arises from the size of the challenge. The 1815 Vienna Congress System regulated only European politics, but the UN system's scope is the whole world. The international system is complex and vulnerable to acute errors. Causality is not easy to come by. There are a lot of interactions. Non-linearity is the order of the day. This is the world-risk society.

Modern international law, as represented by the UN Charter, purports to bring an order to international politics. Yet, the danger is that where one seeks order, a pseudo-order is created.[56] That is the case especially

55. *Id.* at 105.
56. *Id.* at 6–7.

with regard to use of force and intervention, where uncertainty is notoriously multi-phenomenal and multi-causal. The R2P should be approached and developed by taking into account all these factors. The value protected by the R2P—the protection of civilian populations in humanitarian crises—is a challenge to this modernity. The R2P "communicates" that the "modern" UN Charter is in fact a matter of choice and that the international community cannot leave all responsibility for humanitarian crises to the UN Charter.

III. RESPONSIBILITY TO PROTECT

Increasing justification of the use of force does not mean that it will be more effective. Modern regulation of the R2P may give us a merely formal and ostensible security. However, this would not do away with the risks and randomness inherent in the politics of humanitarian crises. Instead, it would expose and make more fragile international law. Indeed, it is debatable as to whether international law has ever been responsible for inaction. More commonly, inaction has been a function of the triumph of the lack of will.[57]

Regarding the anti-fragile approach, civil wars and interventions function as information.[58] Volatility could be a component of the overall stability of the international system. In other words, rather than seeing the R2P as a modernization project building upon the modern UN Charter and trying to establish it as a rule of positive international law, the R2P should be a function of anti-fragile lawmaking. Rather than a codification attempt, the R2P is to be regarded as a discourse attempt. Rather than formal law, it should be framed by the precepts of informal international lawmaking.

The R2P should not be seen as a modern and new legal construct, completely different from humanitarian intervention, but as a return to past humanitarian interventions, and with a flexible outlook. It may well be argued that it is thus merely a reiteration of "humanitarian intervention" with a new label. Still, it may be countered that an attempted return to the past will produce something new.[59] Any iteration necessarily brings a novelty. No return to the past repeats the past absolutely. This return to the past merely indicates that the past "culture" of humanitarian intervention is linked with the "new" concept of the R2P, but with a change from a modern to an anti-fragile mode.

In this respect, the 2005 World Summit—high plenary meeting of the General Assembly, which solemnly declared the R2P—should be seen as the incarnation of anti-fragile and informal international lawmaking. The World Summit Outcome's conclusions on the R2P—paragraphs 138 and 139—did not create binding obligations nor did it delegate authority to other bodies for the purpose of legal interpretation. It merely proposed

57. AIDAN HEHIR, HUMANITARIAN INTERVENTION 103 (Palgrave Macmillan 2010).
58. TALEB, *supra* note 1, at 106.
59. PETER BURKE, WHAT IS CULTURAL HISTORY? 104 (Polity 2d ed. 2008).

guidelines for future SC action. True, the World Summit is more than an ordinary General Assembly meeting and is representative of world opinion on a global scale. It represents the attitude of the international community to specific questions and can give impetus to developments in international law. It can even be considered proof of the *opinio juris* of the international community as regards the R2P. Still, it is difficult to argue for the customary rule status of the R2P because of the irregular practice of intervention. Hence, the World Summit did not establish a new norm of R2P; it merely made the SC more anti-fragile to future humanitarian crises. From the World Summit onwards, the SC does not have to invoke the "unique and exceptional" nature of interventions to prevent humanitarian crises. A new argument, the R2P, could replace "unique and exceptional" terminology—the "modern" terminology.

The question is, ultimately do we have to situate the R2P within the current framework of positive international law? That is to say, should the international community be looking, ultimately, for an international treaty, a customary rule, a general principle of law—those indicated in Article 38 of the Statute of the International Court of Justice? Should informal law making strategies—the absence of an international treaty, the favoring of effects over form, attributing the decisive role to implementation, a lack of binding rules, and importance given to concepts—be just a temporary tactic? Or should our view of international law in the face of current crises, with regard to humanitarian issues, be revised altogether?

The R2P does not ultimately have to be anchored in either an international treaty or customary international law. Indeed, in a legal order such as the international order of today, one that is in many ways still in an infancy of sorts and which attributes so much importance to names, terms and labels; concepts surely also matter.[60] That is because of the confusion of languages, cultures, legal structures, and the extreme volatility of the politics of humanitarian crises. One might argue that the international community, with regard to the R2P, does not need a formal hierarchy of norms or a common rule of recognition in the Kelsenian and Hartian sense.[61] In this approach, international law consists of a set of rules and concepts without the existence of a basic rule or rules of recognition providing unity to rules and making it a system.[62] And the R2P should be seen as one of those concepts—its effects being dependent on the political context and the actors involved.

However, there may be two objections. First, in the long term, substance has to develop alongside the nominal claim; otherwise the acceptance of the term itself is eroded.[63] And the development of substance may

60. Peter Hilpold, *From Humanitarian Intervention to Respoinsbility to Protect. Making Utopia True?*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 462, 470 (Oxford Univ. Press 2011).

61. Dirk Pulkowski, *Universal International Law's Grammar*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA 138, 139 (Oxford Univ. Press, 2011).

62. KAMMERHOFER, *supra* note 10, at 227.

63. Hilpold, *supra* note 60, at 470.

take place primarily through examples. The ambiguity inherent in the implementation of the R2P can be dealt with through consistent practice. Whatever our view of the nature of international law, the R2P is to be progressively delineated in its test cases and concretized. Effects of the R2P and compliance with it are to be evaluated and theorized. For instance, will the SC employ the term "R2P" in other humanitarian crises in the future—like in SC Resolution 1973 on Libya—and thus strengthen the R2P? Will regional actors have more say in implementing the R2P? Will a certain pattern of R2P interventions establish itself?

Second, a formal legal benchmark could be chosen to give a direction to the development of the R2P. A formal source of international law—one of those indicated in Article 38 of the Statute of the International Court of Justice—could be targeted for streamlining the efforts towards delineating the contours and determining the influence of the R2P. Mere practice of the R2P and policy might not sufficiently develop its substance. The outright insistence on a modernist-positivist approach to the R2P would impair or perhaps nullify the concept, but this does not mean that the R2P won't have any perspective on positive international law. In this connection, the R2P can be conceptualized as a future general principle of law. In fact, in comparison with treaty and custom, general principles of law are the most flexible source of international law. The R2P, while remaining informal and not creating any binding obligations, could be envisaged as a future principle filling in the gaps of treaty law and customary law. This would respond to the delicate balance that needs to be struck between sovereignty and human rights.

IV. SOVEREIGNTY AND HUMAN RIGHTS

There are many international human rights treaties[64] through which a certain "international discourse" of human rights has established itself after World War II. The "international discourse" of human rights violations has become legitimate,[65] with no country exempt. Yet, with the modernist approach, human rights are finally a private matter between the sovereign state and its citizens. The international community must not forcefully intervene in the nation-state for the sake of human rights. No international human rights treaty can stipulate use of force for the application of human rights norms. Human rights provisions apply only to the extent to which the sovereign State permits them—the discretion of the state has the upper hand. The sovereign state is the sole authority over its territory; it is juridically equal to other states; and the state is not subject to any law to which it did not or does not consent.

64. *See* Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95–19, 993 U.N.T.S. 3; Int'l Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95–20, 999 U.N.T.S. 171.

65. "The spread of popular novels—and the 18th century was effectively the birthplace of the novel in the Western world—gave readers new opportunities to think about other people's pain and suffering (whether physical and emotional), which could lead to new interests at the human rights level." PETER N. STEARNS, HUMAN RIGHTS IN WORLD HISTORY 67 (Routledge 2012).

International human rights law leaves a considerable margin of appreciation to states. In other words, compliance with human rights norms is still seen as a component of domestic political regimes. Human rights talk cannot go so far as to impose a holistic view on states—that is, no liberal political regime could be imposed on violator countries. There is neither an international treaty nor a customary norm for a national political regime. There is no democratic standard of sovereignty—no democratic norm thesis—in international law.[66] National sovereignty is a question of fact, not democracy. There is no "universal" human rights treaty requiring the existence of liberal democratic regimes to secure human rights.

Regime inviolability is strongly anchored in international law. The UN Charter's focus is international peace and security, not domestic regimes. The Charter does not make an explicit link between international peace and security and domestic regimes of countries. There is no requirement for States to be liberal democracies in order to be members of the UN. Those undemocratic national regimes that do not respect the human rights of their citizens maintain their seats at the UN. Representatives of non-liberal regimes possess diplomatic status. The legal authority of non-liberal countries is not questioned in the international arena; thus, the acts of those countries do not lack validity. For instance, the law of treaties—i.e., the Vienna Convention on the Law of Treaties—does not state that undemocratic or illiberal countries cannot assume binding obligations.

Nevertheless, as mentioned early on, "exceptional" UN interventions in the domestic affairs of countries in the name of human rights have occurred; the assertive attitude of the SC towards South Africa until the end of apartheid, the racist white minority regime of Southern Rhodesia and Haiti after the overthrow of its democratically elected government being prominent examples in this respect. Furthermore, there are examples of interference in domestic political regimes through regional human rights arrangements: the European and American human rights convention systems.[67] The Inter-American Court is not seen merely as an instance for human rights adjudication, but also as a political regime setter.[68] It has an intruding agenda due to the past of the Latin and Central American countries.[69] It aims at the prevention of return to dictatorial regimes and takes into account the political context of the region.[70] On the other hand, the European Convention on Human Rights explicitly makes references to the link between democracy and human rights.[71] The European Court of

66. SUSAN MARKS, THE RIDDLE OF ALL CONSTITUTIONS 48–49 (Oxford Univ. Press 2003).

67. IMMANUEL WALLERSTEIN, WORLD-SYSTEMS ANALYSIS ? (Duke Univ. Press 2004).

68. Ludovic Hennebel, *The Inter-American Court of Human Rights. The Ambassador of Universalism*, 2011 QUEBEC J.INT'L L.57, 97, *available at* http://ssrn.com/abstract=1962558.

69. *Id.*

70. *Id.*

71. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8(2), 9(2), & 10(2), Sept. 3, 1953, 213 U.N.T.S. 222, E.T.S. No. 5.

Human Rights strengthened the link between the two.[72] Democracy has become an identity element of the "European Public Order."

Thus, international protection of human rights can, in exceptional and regional circumstances, impinge upon national political regimes. In fact, as has been indicated by the ICJ, what is national and international in international affairs depends on the state of international relations.[73] The ICJ has concluded that terms like "domestic jurisdiction" were not intended to have a fixed content regardless of the subsequent evolution of international law.[74] In other words, internal and international regimes are intertwined. A matter, which is seen as a matter of "domestic concern" belonging to a national regime, might eventually be conceived as a matter of international concern. Insisting on a rigid dichotomy between the two domains would be too modern an approach, which "fragilizes" international law.

Indeed, the international system requires a well-functioning state that can assume and fulfill the obligations of the UN Charter. Indeed, Article 4(1) of the UN Charter states the very same, requiring States "are able to carry out" their Charter obligations. A State which rests on a solid regime is seen as the ultimate guarantee for a solid international system. Consequently, international peace and security cannot be abstracted from national stability, democracy, peace, security, and human rights. Therefore, the modern case for absolute differentiation between external and internal affairs is problematic.

"States have never been 'sovereign' in the sense of having the capacity to be stand-alone governors of every aspect of their societies."[75] Sovereignty was never really intended to mean total autonomy vis-à-vis the international community. It "was rather meant to indicate that limits on the legitimacy of interference by one-state machinery in the operations of another" did exist.[76] Sovereignty is a barrier between equals, not a defense against the international community. In this regard, the R2P does not formally and visibly increase the power of some States vis-à-vis others. The R2P promotes the "responsibility" of the international community "as a whole" under the leadership of the SC, not specific individual states as such; the R2P does not envisage the primacy of some states over others. The R2P does not, in essence, violate state sovereignty.

The counterargument is that Article 2(7) is clearly worded against UN intervention in domestic affairs. That is to say, sovereignty is not protected solely against other states; it is also protected against the international community as a whole, as represented by the UN. Moreover, "exceptional" interventions by the UN in domestic human rights violations can occur only

72. "Democracy is without doubt a fundamental feature of the European public order . . . the Convention was designed to maintain and promote the ideals and values of a democratic society." United Communist Party of Turkey v. Turkey, App. No. 19392/92, 26 Eur. H.R. Rep. 121, 148 (1998).

73. Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 9 (Feb. 7).

74. Aegean Sea Continental Shelf, (Greece v. Turk.), Judgment, 1978 I.C.J. 3, ¶ 77 (Dec. 19).

75. PAUL HIRST, WAR AND POWER IN THE 21ST CENTURY 147 (Polity Press 2002).

76. IMMANUEL WALLERSTEIN, HISTORICAL CAPITALISM 57 (Verso 7th ed. 1995).

when these violations intensify and pose a significant challenge to international peace and security. The SC might exceptionally internationalize domestic issues, as were the cases in South Africa,[77] Southern Rhodesia,[78] Haiti,[79] Somalia,[80] and Libya.[81] But, these are selective and sporadic instances and are not the foundation of a norm of international law. For instance, the 1998–99 crisis in Sierra Leone presented similar problems to the one in Haiti in 1994. Both crises involved democratic elections and cases of violence erupting in the wake of the rejection and non-acknowledgement of democratically elected governments. However, in contrast to Haiti, no SC resolution was adopted calling for the reinstatement of the democratically elected government in Sierra Leone. Only after Nigerian-led ECOMOG (Economic Community of West African States Monitoring Group) intervention in 1998, did the SC awaken from its passivity, adopting a resolution and sending peacekeepers to Sierra Leone in 1999.

Another typical example of selectivity is the special international criminal courts established by or in cooperation with the UN in reaction to civil wars. These courts were established in the aftermath of civil wars in Rwanda, Cambodia, Sierra Leone, Lebanon, and the former Yugoslavia, but not for other civil wars. Moreover, these international criminal courts do not directly intervene in domestic regimes. They demonstrate, at most, an indirect tendency to effect regime change—their influence and point of contact are with State officials, not with regimes as such.[82] Moreover, international criminal liability is not synonymous with the internationalization of otherwise internal conflicts for purposes of the law of *jus ad bellum.*

Similarly, the International Court of Justice's ruling in *Nicaragua v. United States* stressed the inviolability of State sovereignty in the context of the protection of human rights:

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77. S.C. Res. 134 U.N. Doc. S/RES/134 (Apr. 1, 1960).

78. S.C. Res. 217, ¶ 1, U.N. Doc. S/RES/217 (Nov. 20, 1965). The SC called "upon all States not to recognize th[e] illegal racist minority régime in Southern Rhodesia." S.C. Res. 216, ¶ 2, U.N. Doc. S/RES/216 (Nov. 12, 1965).

79. S.C. Res. 940 U.N. Doc. S/RES/940 (July 31, 1994); S.C. Res. 933 U.N. Doc. S/RES/933 (June 30, 1994).

80. S.C. Res. 794 U.N. Doc. S/RES/794 (Dec. 3, 1992).

81. S.C. Res. 1973 U.N. Doc. S/RES/1973 (Mar. 17, 2011).

82. Passing from individual crime to State crime level and linking the two is a challenge. This was most visibly encountered in the draft resolution for State responsibility for international wrongs; the State crime provision was proposed, but later on omitted. The legal personality, and its corollary, the inviolability of regimes, is a sensitive issue. This is similar to the law on spying activities: only the prosecution of spies or traitors—individuals—but not States as such before international or national courts is in question. A national or international court cannot try another State for intelligence activities, but can try spies of that State. Accordingly:

> The State which employs spies or makes use of war treason in its own interest does not violate international law and is not responsible for these acts. The individual, however, who commits these acts, may, according to international law, be punished by the injured State. In these cases, general international law establishes only the individual responsibility of the perpetrators.

HANS KELSEN, PEACE THROUGH LAW 99–100 (The Univ. of N.C. Press 1944).

> [W]here human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring the respect for human rights as are provided for in the conventions themselves.
>
> In any event . . . the use of force could not be the appropriate method to monitor or ensure such respect.[83]

Moreover, the interest of American and European regional human rights systems in democracy should not be exaggerated. Neither the Inter-American Court nor the European Court has the power to bring about structural changes in member States. Member states remain the ultimate authority in implementing and guaranteeing human rights in their territories. The courts merely interpret the link between human rights and democracy and cannot trigger comprehensive changes in states. When widespread human rights violations take place in a member country, these systems of human rights conventions do not have any mechanisms for forceful intervention. The utmost they could require from the violator states is their withdrawal.[84] By contrast, Article 4(h) of the Constitutive Act of the African Union specifically mandates the Union to forcefully intervene in a Member State to prevent or stop genocide, crimes against humanity and war crimes.[85] However, the African Union has failed to implement this provision even in deserving situations, such as Darfur and Libya.[86] There is a gap between this provision and its implementation.

Even the gravest of crimes, genocide, is free of any procedure for forceful intervention. Genocide is the concern of the international community, whether it is of an international or strictly national dimension. However, there is no mechanism for intervening in a State engaged in genocide. The 1948 Genocide Convention[87] provides no method of prevention or halting of genocide. It has not created a third exception to the prohibition of the use of force, nor has it amended the UN Charter. Furthermore, the Convention is merely concerned with individual criminals, regardless of their status, not the regime as such.

This complex relationship between sovereignty and human rights is conditioned to a considerable extent by the post-World War II conceptualization of violence.

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83. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. at ¶¶ 267–68.

84. Tom Kabau, *The Responsibility to Protect and the Role of Regional Organizations. an Appraisal of the African Union's Interventions*, 4 GOETTINGEN J. OF INT'L L. 49, 51 (2012).

85. *Id.*

86. *Id.*

87. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III), U.N. Doc. A/RES/260 (Dec. 9, 1948).

V. VIOLENCE

Post-1945 modernism altered the perception of violence. The "dream of a non-violent modernity"[88] overrode other considerations in the post-war construction of international law. Wars and violence seemed little more than hindrances and disturbances, which were "comprehensively" regulated by the UN Charter. Thus the issue of violence was settled. As such, "there was clearly no need to grant it analytical priority."[89]

However, within the notion of just war, an ambiguity emerged. The discriminatory concept of war has become difficult to delineate.[90] Non-intervention—outside the two exceptions provided in the Charter—has become the preferred path, whatever the justifications for intervention. However, not to act is to act as well. That is to say, "not to intervene to alleviate the sufferings of the world is a form of intervention."[91] The "modern," "reified," "legal," and "robust" restriction of violence does not necessarily signify the restriction of violence on the ground.

International law based itself purportedly on the power of non-violence. In fact, the distinction between violence and power is a modernist approach. It implies a connotation between power and stability whereas violence is perceived as the loss of power. "Power and violence are opposites; where the one rules absolutely, the other is absent."[92] Violence appears where power is in jeopardy, but left to its own devices, it culminates in the disappearance of power.[93] Violence is seen as the antithesis of the power of modern international law as embodied by the UN Charter.

The counterargument is that there is a dialectical relationship between power and violence. Opposites do not destroy but smoothly develop and merge into each other; contradictions promote rather than paralyze development.[94] With this approach, violence for the sake of the R2P could be smoothly integrated into the present international order without any amendment to the UN Charter. The contradiction between the prohibition of the use of force and the R2P could find its own natural harmony. The former is valid on the level of positive international law, the latter in practice. One does not necessarily and completely eliminate the other; rather they check, regulate, and restrain each other. Thus, the international community need not establish an explicit legal procedure for the reconciliation of the R2P and State sovereignty. The UN Charter represents "formal" international law and can interact with the "informal" R2P. Indeed, the 2005 World Summit Outcome signaled the compatibility of the two, the R2P has been linked with the SC. The SC need no more resort to the

88. HANS JOAS & WOLFGANG KNÖBL, WAR IN SOCIAL THOUGHT 184 (Alex Skinner trans., Princeton Univ. Press 2013).

89. *Id.* at 193.

90. *Id.* at 171.

91. DOMINIQUE MOISI, THE GEOPOLITICS OF EMOTION 13 (Doubleday 2009).

92. HANNAH ARENDT, ON VIOLENCE 56 (Harcourt, Brace & World, Inc. 1970).

93. *Id.*

94. *Id.*

modern terminology of "unique and exceptional" for interventions in civil wars.

Though there is still no amendment to the UN Charter incorporating the R2P, Chapters VI and VII could now be interpreted in the light of paragraphs 138 and 139 of the Summit Outcome. The UN Charter is an international treaty and the application of the World Summit Outcome might thus constitute "relevant rules of international law" in the sense of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. To be sure, the Summit Outcome is not a classic "rule" of international law in the orthodox sense of the word. It is not binding and not one of the classic sources of international law as indicated in Article 38 of the Statute of the ICJ. Rather, the Summit Outcome's interpretation of the R2P is a "rule of interpretation" of the Charter as endorsed by the UN General Assembly—the most representative of the UN institutions—and is open to further interpretation.

The recent Brazilian proposal—Responsibility While Protecting (RWP)—should be seen in this light. As a procedure for implementing the R2P, the RWP requires giving the international community (the principal) better access to information about the actions of the SC (the agent) while acting on behalf of the R2P. It does not change the law on the prohibition on force, but endeavors to integrate due process into the application of violence in the name of the R2P. The RWP is conceived as guiding the SC in its interpretation and implementation of the R2P.[95] In this regard, four points, among others, suggested by the RWP are worth emphasizing:

1. The use of force must produce as little violence and instability as possible and under no circumstance can it generate more harm than it was authorized to prevent;
2. In the event that the use of force is contemplated, action must be judicious, proportionate and limited to the objectives established by the Security Council;
3. Enhanced Security Council procedures are needed to monitor and assess the manner in which resolutions are interpreted and implemented to ensure responsibility while protecting;
4. The Security Council must ensure the accountability of those to whom authority is granted to resort to force.

In this regard, the R2P can be seen as a disciplinary project involving violence and this disciplinary project is open to further interpretation and improvement. Violent interventions as a consequence of the R2P are micro-disciplines.[96] Micro-disciplines could support the general juridical

95. Permanent Rep. of Brazil to the U.N., Letter dated Nov. 9, 2011 from the Permanent Rep. of Brazil to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/551–S/2011/701 (Nov. 11, 2011).

96. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 222 (Alan Sheridan trans., Pantheon Books 1977).

form guaranteeing a system of rights, which are egalitarian in principle[97]—the UN Charter is the general juridical form and micro-disciplines constitute nothing more than an infra-law.[98] The R2P does not negate supra-international law as represented by the UN Charter, which requires the prohibition of the use of force. Supra-law and infra-law co-exist. And, although the modern universal law of the international society seems to fix limits on the exercise of violence, on the underside of the supra UN-law, a machinery—the R2P—that is both immense and minute may undermine the limits that are traced around the law.[99] This is an example of the anti-fragile approach. It accepts randomness and uncertainty and the need for the room for maneuver against harmful stressors—that is, humanitarian crises. Violence producing humanitarian crises the world over cannot be eliminated, but the UN system has become anti-fragile vis-à-vis humanitarian crises by the adoption of the R2P in the World Summit Outcome—an infra-law.

With this approach, the survival of the whole system—its antifragility—may require some irregularities at the infra-level.[100] Formal UN law as a superstructure could co-exist with the informal R2P, while the non-violent superstructure of international law in respect to domestic humanitarian crises could tolerate sporadic interventions. The health and sustainability of the overall UN system, in the long term, might rely on these interventions in the name of the R2P.[101]

However, there is a risk that violence for the sake of the implementation of the R2P could backfire. Micro-discipline in the shape of the R2P might harm the macro-discipline—that is, the UN system, based on the non-intervention and the non-use of force, condoning only two exceptions. Micro-discipline can thus abuse macro-discipline. True, when norms of international law are abused, it does not automatically imply that those norms do not exist, but the effect of those norms begins to be disputed. In particular, increase in abuses could lead to the questioning of the fundamentals of the international system. Hence violent implementation of the R2P could signal the impotence of the idea of international law as represented by the UN Charter.

Furthermore, the R2P has a low-specificity output: it is difficult to determine when the R2P is successful, making abuse endemic in the prosecution of the R2P. Manipulation by powerful states is a distinct possibility, especially so when the violent prosecution of the R2P does not achieve its

97. *Id.*
98. *Id.*
99. *Id.* at 223.
100. TALEB, *supra* note 1, at 74–76
101. For example:

> Good systems such as airlines are set up to have small errors, independent from each other—or, in effect, negatively correlated to each other, since mistakes lower the odds of future mistakes. This is one way to see how one environment can be antifragile (aviation) and the other fragile (modern economic life with "earth is flat" style interconnectedness).

Id. at 72–73.

declared aims as the R2P's ultimate intelligibility, usefulness, and survival depend on its immediate success. Hannah Arendt put it succinctly when she talked about the relationship between violence and its purported goals:

> Moreover, the danger of violence, even if it moves consciously within a nonextremist framework of short-term goals, will always be that the means overwhelm the end. If goals are not achieved rapidly, the result will be not merely defeat but the introduction of the practice of violence into the whole body politic. Action is irreversible, and a return to the *status quo* in case of defeat is always unlikely. The practice of violence, like all action, changes the world, but the most probable change is to a more violent world.[102]

Thus, instead of regarding the R2P as infra-law, narrowing down the pretense and remit of the R2P and envisaging it simply as a concept and an instrument of communication would seem a more prudent option. On this approach, the "R2P talk" sends signals to all states that current international law does not meet the demands of the international community. The international community should use the concept of the R2P to "communicate" the desire to save persecuted peoples in sovereign countries. The R2P is to be conceived as a guideline to be followed. Whether one agrees with the language of the R2P or not, it creates a new platform on which communication is possible and highlights the "responsibility" of the SC. The R2P is an "argument" for the interest of the international community in humanitarian crises, an argument, moreover, that is not to be minimized as mere rhetoric.[103]

True, the language of the R2P is, at the end of the day, the language of violence. If warnings by the international community to the state concerned do not bear fruition then the use of force would be required by the R2P. This is still compatible with the contention that communication is always, to a certain extent, ambiguous and also always an expression of latent violence.[104] Communication is the signal of the implicit violence in the system and communication on the part of UN law is not an exception. The UN Charter is the result of the immense violence of the Second World War, representing the post-1945 *reification*, and it explicitly provides for violence in Articles 42 and 51. This, however, does not detract from the communicative quality of the UN Charter. Likewise, the violence inherent in the R2P does not eliminate its "communicative" quality.

The communicative quality of the R2P leads us to ask whether the R2P constitutes a coherent set of ideas and whether it hides new relations

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102. ARENDT, *supra* note 92, at 80.

103. NETA C. CRAWFORD, ARGUMENT AND CHANGE IN WORLD POLITICS: ETHICS, DECOLONIZATION, AND HUMANITARIAN INTERVENTION 12 (2002).

104. JURGEN HABERMAS, THE DIVIDED WEST 18 (Ciaran Cronin ed. & trans., Polity Press 2006).

of domination or not. In other words, does the communication of the R2P represent a new ideology?

VI. IDEOLOGY

Ideology refers to the process by which symbolic forms, shorn of the certainties of traditional societies, are communicated to make the modern world intelligible.[105] This intelligibility requires acceptance of relations of domination. In other words, ideology communicates the ways in which meaning serves to establish and sustain relations of domination.[106]

Does the "communication" of the R2P imply an ideology? Does the R2P constitute relations of domination through implicitly discriminating between "civilized" and "uncivilized" nations?[107] Can the "mature" and "civilized" international community intervene in "immature" and "uncivilized" nations in the name of the R2P?[108] A case in point is NATO's 1999 Kosovo intervention, with some underlining the undisputed democratic and constitutional character of the participating states.[109] The democratic and civilized credentials of interveners would seem to have been valid justification.

Nevertheless, the world system, since the 1648 Treaty of Westphalia is purportedly ideology-neutral. Each state is accepted as a legitimate and equal subject of the system without reference to ideology.[110] Non-interference in domestic affairs and neutrality towards ideologies are the cornerstones of the current international law, an understanding that has *reified.* As mentioned earlier, reification helps "to build and support relations of domination by making those relations seem eternal, rather than historically specific, and necessary, rather than contingent."[111] Social practices and institutions become static, natural, and immutable. The UN system is part of the reification, which started with the Westphalia Peace. The "modern" reified UN Charter is conceived as ideology-neutral vis-à-vis sovereign States. However, there are two caveats.

First, the assertion that "there is no ideology of international law" is itself an ideology. The purportedly ideology-free veil of international law hides inequalities and relations of domination, the most prominent example being the existence of five permanent member states with veto powers on the SC. The R2P may be a new tool of this "unequal" SC.

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105. MARKS, *supra* note 66, at 10 (citing CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES ch. 8 (1973)).

106. *Id.* at 18.

107. HEHIR, *supra* note 57, at 53. In an address to the General Assembly, Bouteflika, president of the African Union, described sovereignty as the final defense against the rules of an unjust world. Accessible at https://disarmament-library.un.org/UNODA/Library.nsf/22087aa235d6a295852576310051 52ca/f5f877bdc6876b0b852576550050985d/$FILE/A-54-PV4.pdf (accessed on 23 February, 2014)

108. Robert Cooper, *The New Liberal Imperialism,* THE OBSERVER, Apr. 7, 2002, *available at* http://www.guardian.co.uk/world/2002/apr/07/1.

109. HABERMAS, *supra* note 104, at 29.

110. HIRST, *supra* note 75, at 16.

111. MARKS, *supra* note 66, at 21.

Second, "ideology is at one level self-confirming, but at another level contains the seeds of its own undoing."[112] In short, ideological change is normal,[113]which means the ideology of "ideology-lessness" is also subject to change. The question that therefore arises is, "Has the time arrived to revise international law's ostensible lack of ideology—impartiality—on the subject of domestic political regimes?" Can we, in the twenty-first century, still argue that internationally recognized human rights do not presuppose a particular national political system? Has the discursive strategy of international law changed? Is a new international legal ideology, which shapes state sovereignty through the R2P, in the process of imposing itself on national ideologies? Or has the UN system reified to such an extent that the R2P will remain ineffective? Humanitarian intervention has subsisted on the shadowy periphery of international law[114]—will the R2P incur the same fate?

The modern discursive ideology most often associated with international law is universalism. "Universalism is an epistemology . . . [t]he essence of this view is that there exist meaningful general statements about the world—the physical world, the social world—that are universally and permanently true . . . ."[115] Sovereignty does not place an obstacle to universalism. The state is "sovereign" since it is subject only to "universal" (international) law, not to the national law of any other State. Universalism and state sovereignty are mutually reinforcing. The state's sovereignty under universal law is merely the state's legal independence from other states.[116] Sovereignty in the sense of universal law means the legal authority or competence of a state limited and limitable only by international law, and not by the national law of another state.[117]

The question therefore is whether the R2P has matured enough to become a "universal" ideology instead of a pretext employed by some countries for selective intervention in the domestic affairs of others. Put differently, the criticism of the application of humanitarian intervention—and the R2P as its purported replacement—is based on its selectivity. Selectivity has, throughout history, undermined the normative quality of humanitarian intervention. In this respect, has the R2P upgraded humanitarian intervention—which powerful states have used against weak states as a pretext—and made it universal? Does, indeed, such a prospect and possibility exist? Can the R2P rid itself of selectivity?

The plausible answer is that the R2P is a new concept—only twelve years old—which needs more test cases to prove its sustainability, validity, and universality. At the moment, it remains a conundrum for theorists. Only time and challenges ahead will tell whether the R2P will have the

112. *Id.* at 27.

113. WALLERSTEIN, *supra* note 67, at 60.

114. HEHIR, *supra* note 57, at 103.

115. WALLERSTEIN, *supra* note 67, at 80–81.

116. KELSEN, *supra* note 82, at 35.

117. *Id.*

universal nature it purports to have. The international community's intervention in Libya, which was supported by SC Resolution 1973 referring to the R2P, increased hopes for the establishment of the R2P. However, the regime change pushed by interveners has increased the suspicions of major powers like Russia and China as well as much of the Third World. The ambiguity and dispute with regard to the current Syrian crisis—the divergence of opinion between the western world on the one hand and Russia and China on the other—signifies the weakness of the R2P concept. The R2P is still seen by some sectors of the international community as a continuation of the "imperialist" and "selective" humanitarian intervention tradition. It is seen as a new ideology masking the pre-existing relations of international power struggles and does not constitute a meaningful general statement about the world. Uncertainty, dishonesty, and selectivity are seen as linked to the R2P.

Viewed from this perspective, the R2P is the third phase, after World War II, of intervention by powerful and affluent countries in the domestic affairs of weaker states.[118] The first ideology—roughly 1945–70—was developmentalism, which aimed at bringing technical and expert knowledge to developing countries.[119] However, developmentalism was seen as a failure, the evaluation being that the Third World was, to its detriment, under the sway of rich nations rather than international organizations.[120] This lack of satisfaction in the developing world was expressed in the GA declarations on "the new international economic order"[121] and "the full and permanent sovereignty over natural resources."[122] The second ideology was neoliberalism (1970–2008), with the rich democracies of the north positing the crucial importance of liberalization of world trade, consumer participation in the global market, and the protection of individual rights against the state. These arguments were advanced against the demands for equality by the South. Neoliberalism sidelined the United Nations and promoted the World Bank and the IMF instead—two institutions controlled by the West.[123] After the 2008 World Economic Crisis, the ideology of neoliberalism has come under increasing fire. In this connection, does the R2P (2001–Present) represent the third phase of intervention in the domestic affairs of weak countries? Will the R2P be used as an ideology

118. MAZOWER, *supra* note 50, at 8.

119. *Id.* at 273–76. "It [developmentalism] required simultaneously dismantling European empires and replacing them with teams of scientific expterts, bankers, and technical advisers." *Id.* at 275–76.

120. "It is therefore not surprising that given the powerful American role in funding, staffing, and shaping the UN system, the line dividing global agencies from American ones was hard to trace from the start." *Id.* at 277. "No other country came close to having the influence over international development that was enjoyed by the United States." *Id.*

121. *See* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, U.N. Doc. A/RES/S–6/3201 (May 1, 1974).

122. *See* Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, U.N. Doc. A/5217 (Dec. 14, 1962).

123. MAZOWER, *supra* note 50, at 317.

justifying a certain hierarchy among countries? Will it be used as a pretext for intervention?

For the moment, only speculative answers can be provided which is why an anti-fragile perspective on the R2P is necessary. The R2P should be conceptualized in such a way that it absorbs the volatility of humanitarian crises worldwide. A case-by-case approach should be adopted as recommended by paragraph 139 of the World Summit Outcome. Policy recommendations such as the RWP should, as much as possible, be incorporated into the functioning of the R2P. In the process, a coherent and automatic reaction to every humanitarian crisis is not to be expected. The international community should regard each humanitarian crisis as a new opportunity to improve the R2P. The fact that the R2P has not been legalized as an international treaty, custom, or a general principle of law should be of little concern. The R2P can only be feasible if it is understood as an anti-fragile response—a non-linear response—to humanitarian crises, and not as a mechanistically predetermined reaction. The R2P is a process, not a norm.

VII. Conclusion

Modern UN law does not answer the calls for the prevention and halting of humanitarian crises. The concept of R2P is an important step in acknowledging this problem. It reconceptualizes violence on the international stage and attempts to establish a new balance between sovereignty and human rights. Nevertheless, it is a moot point as to whether the R2P represents a new ideology hiding new relations of domination in international politics or not.

The success of the R2P does not depend on its legalization, but its successful communication and implementation by the SC. Only an anti-fragile and informal R2P, which would acknowledge the uncertainty and volatility inherent in humanitarian crises, and which would not insist on complete consistency in reacting to them, would survive the complexity of international politics.