

# AN ESSAY ON FIGHTING WITH ONE ARM TIED BEHIND ONE’S BACK, OR: THE RESPONSIBILITY TO PROTECT, GENERAL PRINCIPLES AND THE FUTURE OF HUMANITARIAN INTERVENTION

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*“Law and equity are two things which God has joined, but which man  
has put asunder.”*

-Charles Caleb Colton

## INTRODUCTION

The Responsibility to Protect initiative may be termed as a legal palliative to a moral dilemma with which international law appeared unable to grapple. The legal regime on the use of force had stagnated since the Second World War, in particular failing to evolve in tandem with the emergence of human rights as a legal concept. The final years of the twentieth century brought this fact into sharp relief through NATO's 1999 Kosovo intervention, which had failed to attract the backing of the UN Security Council, and which therefore seemed, *de lege lata* illegal. However, it was clear from the reaction of many within the international legal community that such a conclusion did not sit well. 1999 witnessed the beginning of a steady stream of publications – first articles, then books – defending NATO's actions, and drawing intricate frameworks that neatly distinguished the legality of humanitarian intervention from its 'legitimacy.' What this legitimacy – the (moral) standard behind the (legal) standard, if you will – actually entailed, however, was a matter of some dispute. Hundreds of eager legal and political scholars were seduced by the debate, each proffering his or her own standard of 'when' and 'how' to a question that ultimately amounted to 'whether' breaking the law might be justified. The academic community was treated to tests of 'near-legality,'<sup>1</sup> frameworks for 'saving strangers'<sup>2</sup> and weighing of 'values' in the international community.<sup>3</sup> Analogies to self-defence,<sup>4</sup> to *jus necessitatis*, and to domestic law were trotted out,<sup>5</sup> and we were

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1. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999).

2. NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 6 (2000).

3. See generally Antonio Cassese, *Ex iniuria jus oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community*, 10 EUR. J. INT'L L. 23 (1999).

4. F. Tesón, *Self-Defence in International Law and Rights of Persons*, 18 ETHICS & INT'L AFF. 87 (2004).

5. THOMAS M. FRANCK, *RECOURSE TO FORCE – STATE ACTIONS AGAINST THREATS AND ARMED ATTACKS* (2002).

permitted to marvel as *R. v. Dudley & Stephens* and *United States v. Holmes* were transposed to the international legal arena.<sup>6</sup>

It was into this world that the Responsibility to Protect entered, a world of one crucial question with many, thus far rather unsatisfying, approaches. Yet this question clearly warranted an answer, and a convincing one, at that. The members of the Atlantic Alliance had been prepared to flout an international legal regime in which they were greatly invested and which they had helped to design in order, so it seemed, to help a Muslim minority in an insignificant province in southern Serbia. Furthermore, the NATO allies most certainly realized that their action could risk provoking discord with China, and particularly Russia – a known Serbian ally – both of which would see their veto power in the UN Security Council set at naught if such actions were to become commonplace. Consensus, crucial for international law reform, was lacking in how to react to the Kosovo intervention. Legal scholarship was therefore left grappling with the *lex lata*, which appeared inflexible and unable to respond to gross human rights atrocities when committed by governments against their own citizens.

This article aims to examine the impact of the Responsibility to Protect initiative, placing it within the narrative of humanitarian intervention in international law. It adopts a critical perspective, outlining how a doctrine that was intended to reform international law ignored both the letter and the dynamics of the latter. In so doing, it is proposed that the Responsibility to Protect as a concept is necessarily overly utopian, and as such, was always doomed to its ultimate fate – subversion. Rather than ending on this despondent note, however, it is submitted that the legal response to injustice that the R2P sought to provide might in fact be found within the existing normative corpus of international law. It is argued that the long-neglected category of “the general principles of law recognized by civilized nations”<sup>7</sup> may impact upon how the regime governing the use of force and newer normative categories such as human rights interact with one another, to the extent that black-letter analyses of international law have heretofore been

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6. *Id.* at 179.

7. Statute of the International Court of Justice, art. 38, para. 1(c).

overly simplistic. Rather than crafting an external remedy, in other words, the authors of the Responsibility to Protect Report would have done well to improve their understanding of the law itself, wherein they might have found what they were looking for all along.

#### I. R2P: “ANOTHER CANADIAN CAPER”<sup>8</sup>

In a 1999 article, then UN Secretary-General Kofi Annan described the dilemma involved in the humanitarian intervention debate:

On the one hand, is it legitimate for a regional organisation to use force without a UN mandate? On the other, is it permissible to let gross and systematic violations of human rights, with grave humanitarian consequences, continue unchecked?<sup>9</sup>

The Secretary-General quickly proceeded to answer his own question:

[T]he world cannot stand aside when gross and systematic violations of human rights are taking place...intervention must be based on legitimate and universal principles.<sup>10</sup>

The fact that the most senior official of the United Nations was prepared to make such a statement was truly remarkable. The “use [of] force without a UN mandate” necessarily entailed a breach of the Charter rules on the use of force. The idea that the world could not “stand aside” ultimately amounted to a plea to would-be interveners to flout the international legal regime, in favor of forcible human rights protection based on a new, as yet undefined, framework.

The idea behind the Responsibility to Protect (or “R2P,” as it has been styled) was to provide the desired “legitimate and universal principles” to

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8. (Operation) Canadian Caper was the popular moniker ascribed to the joint covert rescue by the Canadian government and the United States Central Intelligence Agency of six American diplomats who had evaded capture during the seizure of the United States embassy in Tehran, Iran on November 4, 1979.

9. Kofi Annan, *Two Concepts of Sovereignty*, *ECONOMIST* (Sept. 16, 1999), available at <http://www.economist.com/node/324795>.

10. *Id.*

which Secretary-General Annan had referred, to concoct a framework for humanitarian intervention, and put the debate on threshold standards to bed for once and for all.

#### A. The Main Tenets of the Initiative

While I have written in more detail about the Responsibility to Protect elsewhere,<sup>11</sup> a brief synopsis of the main tenets of the initiative is warranted here, in order to contextualize the criticism that will follow. The R2P was proposed by the Canadian-sponsored independent International Commission on Intervention and State Sovereignty (ICISS). Building upon previous work undertaken by Francis M. Deng,<sup>12</sup> the ICISS built its framework around the idea that “State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the State itself.” However, per the ICISS, in cases of avoidable catastrophes, where States are “unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”<sup>13</sup> Framing sovereignty as responsibility, the ICISS sought, through the use of alternative language, to get governments to think afresh about the real issues involving sovereignty and intervention.<sup>14</sup>

The Report stresses certain concepts: first, evaluations of situations are to be made from the perspective of those persons in need of support. Secondly, primary (sovereign) responsibility rests with the State in question. Only where the State is unwilling or unable to protect its citizens, or when the State is itself the author of gross human rights violation, may other States or regional alliances intervene. Thirdly, the

11. See CIARAN BURKE, *AN EQUITABLE FRAMEWORK FOR HUMANITARIAN INTERVENTION* 59-65 (2013).

12. Francis M. Deng, *Frontiers of Sovereignty*, 8 LEIDEN J. INT’L L. 249 (1995); FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996).

13. Gareth J. Evans & Mohamed Sahnoun, *The Responsibility to Protect: Rep. of the Int’l Comm’n on Intervention and State Sovereignty*, xi (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

14. Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, 81 FOREIGN AFF. 99, 101 (2002).

R2P incorporates three key sub-elements, namely the Responsibility to React, the Responsibility to Prevent, and the Responsibility to Rebuild. Donnelly has correctly noted that “[t]he Responsibility to Protect implies a duty to react to situations in which there is a compelling need for human protection.”<sup>15</sup> This duty represents the rationale for military intervention. Evans and Sahnoun reject the Westphalian conception of international relations, where “the defining characteristic of sovereignty has always been the State’s capacity to make authoritative decisions regarding the people and resources within its territory.” Their position is that a ‘broad consensus’ has instead emerged, whereby “[s]overeignty as responsibility has become the minimum content of good international citizenship.”<sup>16</sup> The Report unequivocally emphasizes that the primary responsibility for the welfare of the persons present on the territory of a State rests with the State itself. However, such responsibility may be forfeited if certain threshold criteria are satisfied. Per the report, the satisfaction of such criteria may serve as a *casus belli* against the State in question.

In order to justify intervention, the report states that there must first be a just cause, comprising (anticipated) loss of life on a large scale or large-scale ethnic cleansing. Four further checks should then be carried out before an armed intervention may proceed, namely: right intention; last resort; the use of proportional means; and that the operation has a reasonable prospect of success. These ‘precautionary principles,’ are strikingly similar to Just War theory conditions of *animus*, *justa causa*, *persona*, and *res*. They are joined by the final and most controversial principle which represents the R2P equivalent of the Just War criterion of *auctoritas*,<sup>17</sup> namely right or legitimate authority.

The controversy surrounding this principle may be easily understood. While in Just War theory, *auctoritas* is the reserve of the sovereign

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15. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 251 (2003).

16. Evans and Sahnoun, *supra* note 13, at 101–02.

17. See S Neff, *War and the Law of Nations: A General History* (Cambridge, Cambridge University Press, 2005) 14–20.

alone, the ICISS report takes a more nuanced view.<sup>18</sup> The report avows that the UN Security Council should undoubtedly be the first port of call when it comes to authorizing military intervention. “The difficult question – starkly raised by the Kosovo war – is whether it should be the last.”<sup>19</sup> The report notes that any undermining of the Security Council’s authority could potentially undermine international order. However, the authors of the report underline that they do not wish to rob the Security Council of its primary role matters relating to the use of force. Rather, they argue that the goal “is not to find alternatives to the Security Council as a source of authority, but to make the council work better than it has. Security Council authorization should, in all cases, be sought prior to any military intervention being carried out.”<sup>20</sup> It should be noted that the Kosovo intervention, in the wake of which the report was commissioned, would in any case be adjudged as impermissible under this criterion, since no such authorization was sought.

The R2P Report, in placing the Security Council center stage, suggests that conditions should be appended to the use of the veto by the five Permanent Members, stating that they should refrain from vetoing resolutions unless “vital state interests” are involved. In the event that the Security Council is ‘blocked’ – that is, that it is impossible to procure support for a resolution that seeks to exercise the Responsibility to Protect – two further institutional options exist, per the Report. Firstly, the General Assembly, acting under the 1950 ‘Uniting for Peace’ Resolution, may address a majority recommendation for urgent action to the Security Council, as happened in Korea (1950), Egypt (1956), and Congo (1960). Secondly, regional organizations, acting under Chapter VIII of the Charter, may intervene unilaterally, subject to seeking subsequent Security Council authorization, as was the case with the ECOWAS intervention in Sierra Leone and Liberia.

The merit of such institutional solutions may be debated. However, they still leave open the question of what happens when the Security Council – through one institutional means, fails to exercise its

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18. See L Glanville, “The Responsibility to Protect Beyond Borders”, 12(1) *Human Rights Law Review* (2012) 1.

19. Evans and Sahnoun, *supra* note 13, at 106.

20. *Id.*

Responsibility to Protect. “[W]hich of the two evils is the worse: the damage to the international order if the Security Council is bypassed, or the damage to that order if human beings are slaughtered while the Security Council stands by?”<sup>21</sup> Evans and Sahnoun’s question echoes the dilemma highlighted by Kofi Annan in 1999, and indeed the central dilemma underpinning the entire humanitarian intervention debate. It is in answering this question that the R2P Report becomes truly original. Much like many international legal scholars, the Report deems unauthorized intervention undesirable, but dubs it as preferable to *laissez-faire*, as a last resort.<sup>22</sup> The threshold criteria outlined above – right intention; last resort; the use of proportional means; and that the operation has a reasonable prospect of success – are then proposed.

#### B. Reception of the Responsibility to Protect in the International Arena

The R2P received a somewhat ambivalent welcome. Published in the aftermath of the September 11<sup>th</sup> terrorist attacks in the United States, it entered into a world less focused on humanitarian intervention than on a ‘war on terror,’ ‘rogue States’ and the ‘axis of evil.’ States were crafting new justifications for the use of force, but they had little to do with human rights protection. Aside from this, a number of the choices made by the Report’s drafters were somewhat surprising. The Report did not draw meaningful attention to the *jus cogens* status of human rights,

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21. *Id.* at 104.

22. See discussion in: M Byers and S Chesterman, ‘Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law’ in JL Holzgrefe and RO Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge, Cambridge University Press, 2003) 177; K-C Tan, ‘Enforcing Global Justice: The Problem of Intervention’ in R Pierik and W Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge, Cambridge University Press, 2009); O Corten, ‘Vers une “Déterritorialisation” de l’Interdiction du Recours à la Force dans les Relations Internationales?’ (2009) 5 *Annuário Brasileiro de Direito Internacional* 207; O Corten and P Klein, ‘L’autorisation de recourir à la force à des fins humanitaires: droit d’ingérence ou retour aux sources?’ (1993) 4 *European Journal of International Law* 506.

presumably fearing a riposte that the Article 2(4) prohibition is also preemptory.<sup>23</sup> As Chandler has noted, the Report adopts the criticism of many non-Western States, positing that the Security Council is in need of reform and is unrepresentative.<sup>24</sup> However, it argues against making the final authority for decisions on humanitarian intervention more democratic, rejecting the idea that the General Assembly should gain (final) authority in cases of Security Council deadlock.

As a result of the above, as well as the political climate resulting from the United States-led invasion of Iraq in 2003, one is forced to agree with Alex Bellamy that, “it is remarkable that a consensus was produced at the 2005 [United Nations] World Summit [in favor of the Responsibility to Protect].”<sup>25</sup> It is indeed remarkable, but, as Bellamy has acknowledged, not incomprehensible. Rather, the fact that the world warmed to the R2P was due to a number of significant compromises reached during the course of negotiations for the 2005 World Summit Outcome Document.

In the first instance, the question of the ‘unreasonable veto’ (and authorization by an authority other than the Security Council) was quietly dropped from the agenda. Indeed, Canada, sponsoring the initiative went so far as to posit that that if intervention could only be “*undertaken at the cost of undermining the stability of the state-based international order, then sovereignty should trump humanitarian action.*”<sup>26</sup> Secondly, the United Nations Secretary-General’s High-Level Panel on Threats, Challenges and Change added serious breaches of international humanitarian law to the ‘just cause’ thresholds. It also added a preventive component to the just cause criterion, allowing intervention to take place if an imminent threat was apprehended.

23. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392.

24. D Chandler, ‘The Responsibility to Protect? Imposing the Liberal Peace: A Critique’ (paper presented to the British International Studies Association annual conference at the London School of Economics, 16–18 December 2002 (amended version)).

25. AJ Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, 20 *ETHICS AND INTERNATIONAL AFFAIRS* 143, 153 (2006).

26. *Id.*

Finally, the UN General Assembly's to dilution of the concept was partially engineered to procure the support of the United States. The Bush administration's National Security Strategy of 2002 had a number of common tenets with the R2P. In assessing whether an intervention could take place, it proposed the classification of certain countries as 'rogue states.' Classification as such depended on internal factors within the State, albeit focusing on harboring terrorists and dangerous munitions rather than human rights violations. Both concepts, however, argued for lifting the veil of sovereignty in certain circumstances. The US appeared willing to cautiously engage with the R2P Report, but posited that the responsibility of the host State – legal responsibility – should be distinguished from that of the international community – moral responsibility. In keeping with this argument, the General Assembly hardened the test for transferring responsibility to international society, and weakened the nature of international responsibility.

With the above adjustments, the R2P doctrine adopted by the General Assembly in 2005 was a very different beast to that proposed by the ICISS in 2001, having placed the Responsibility to Protect squarely within the purview of the Security Council.

## II. FAULT LINES

The adoption of the R2P via the World Summit Outcome Document represented a boon for the ICISS. Further, in 2009, despite some debate, the UN General Assembly,<sup>27</sup> overwhelmingly reaffirmed the 2005 position,<sup>28</sup> and the Security Council has referenced it in twenty-one resolutions since 2006, most recently involving Syria.<sup>29</sup> The Canadian

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27. G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Sept. 14, 2009).

28. *Id.*

29. S.C. Res. 2139 U.N. Doc. S/RES/2139 (Feb. 22, 2014); S.C. Res. 2134, U.N. Doc. S/RES/2134 (Jan. 28, 2014); S.C. Res. 2121, U.N. Doc. S/RES/2121 (Oct. 10, 2013); S.C. Res. 2117, U.N. Doc. S/RES/2117 (Sept. 26, 2013); S.C. Res. 2019, U.N. Doc. S/Res/2019 (July 11, 2013); S.C. Res. 2095, U.N. Doc. S/RES/2095 (Apr. 25, 2013); S.C. Res. 2093, U.N. Doc. S/RES/2093 (Mar. 6, 2013); S.C. Res. 2085, U.N. Doc. S/RES/2085 (Dec. 19, 2012); S.C. Res. 2040, U.N. Doc. S/RES/2040 (Mar. 12, 2012); S.C. Res. 2016, U.N. Doc. S/RES/2016 (Oct. 27, 2011); S.C. Res. 2014, U.N. Doc. S/RES/2014 (Oct. 21, 2011); S.C. Res. 1996, U.N. Doc. S/RES/1996 (Jul. 8, 2011); S.C.

initiative had succeeded, convincing the UN General Assembly to resoundingly adopt an adapted version of the original concept, within four years of the original report. It is no exaggeration to say that this was a significant milestone. Just as Gareth Evans had hoped, this was not merely another blue riband report that would end up lining dusty bookshelves.<sup>30</sup> Brunnée and Toope brand the R2P's inclusion in the Outcome Document "*astonishing*," noting that now that the norm has been formally endorsed, it may "*present a fundamental challenge to structural imperatives*" and has the potential for "*transformative change in the deep structures of sovereignty*."<sup>31</sup> Despite this, both the R2P as a concept and its *mise en oeuvre* are certainly susceptible to criticism. This section will offer some observations as to the problems that may be identified with the framework.

As well as clouding the debate, it is clear that the R2P struggles to set the benchmark for when and how intervention may take place. As noted above, a doctrine prompted by NATO's Kosovo intervention would not have permitted such an intervention to take place. In this regard, Thomas Weiss underlines that the six threshold criteria set the bar extremely high for potential intervention, while two other 'obvious' causal factors for humanitarian intervention are omitted from 'just cause', namely the overthrow of democratically-elected regimes and massive abuses of human rights.<sup>32</sup> One may agree or disagree with Weiss about the overthrow of democracies, but gross and systematic human rights abuses would certainly seem a fitting *casus belli*, if indeed intervention is to be permitted.

The choices made with regard to the threshold criteria, and the fact that gross human rights abuses (as well as systematic racial

Res. 1975, U.N. Doc. S/RES/1975 (Mar. 30, 2011); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006); S.C. Res. 1674, U.N. Doc. S/RES/8710 (Apr. 28, 2006).

30. Gareth Evans, *From Humanitarian Intervention to Responsibility to Protect*, 24 WIS. INT'L L. J. 703, 712 (2006).

31. Jutta Buunée & Stephen Toope, *Norms, Institutions and UN Reform: The Responsibility to Protect*, 2 J. INT'L L. & INT'L REL. 121, 127-28 (2006).

32. Thomas G. Weiss, *The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era*, 35 SEC. DIALOGUE 135, 138-39 (2004).

discrimination) are not included is reflective of an aversion toward international law in general (rather than just the current regime on the use of force) on the part of the ICISS, as the latter represent *jus cogens* principles.<sup>33</sup> This is symptomatic of a general rootlessness on the part of the R2P. While aiming to transform the international legal regime on the use of force, it fails to take sufficient account of the latter, either with regard to the letter of the law or the nature of international law in general.

A. “The Letter of the Law” – Detachment from the Factual State of International Law

The R2P Report, in expounding its sovereignty-as-responsibility central theme, makes extensive use of novel terminology. In particular, there is a conscious effort to change the labelling of the humanitarian intervention debate from ‘intervention’ to ‘protection.’ This highlights the idea that responsibility may be transferred – first from the State to the Security Council, and thereafter potentially further – in the event that the State fails to exercise its responsibility. It thus provides a neat link between forcible intervention and human rights abuses. However, such terminological framing, although stylishly presented, fails to change the legal picture in any way whatsoever. Employing alternative terms cannot and will not affect the legitimacy, legality, or justifiability of the act in question. In addition, it is worth highlighting that any instrument that purports to chart a normative framework is out of the authors’ control as soon as it leaves the printing press. Prosper Weil warned of the threat of relative normativity through the growth of soft law instruments, opining that such innovations can relativize and destabilize international law norms and create confusion concerning the expectations of States.<sup>34</sup> Public international law accords a meager role to *travaux préparatoires* for the purposes of interpretation, with more weight being given to subsequent practice. The real substantive content of the norms necessarily remains indeterminate, as their interpretation is left to the

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33. *See id.*

34. Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT’L L. 413, 423 (1983).

States, which may use (and/or abuse) them as they choose. Such a position is echoed by Bellamy, who notes that during debates concerning possible intervention in Darfur, the R2P “allowed traditional opponents of intervention to replace largely discredited ‘sovereignty-as-absolute’ – type arguments against intervention in supreme humanitarian emergencies with arguments about who had the primary responsibility to protect Darfur’s civilians.”<sup>35</sup> Thus, the Report’s contents may be used to oppose as well as enable intervention.

Despite efforts to gain support for R2P, neither State practice, nor widely ratified treaties have embraced the concept, and while UN Security Council Resolution 1674 “[r]eaffirm[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,” this did not entail legal incorporation of the R2P’s threshold criteria, nor did it constrain the Security Council’s future actions. The Report clearly aims to marry the moral prerogative to intervene with some sort of international legal framework. However, in doing so, it strays too far from the essence of international law, and has no meaningful legal basis.<sup>36</sup>

Determining why the drafters of the R2P Report made this decision is a difficult – if essential – exercise. We might perhaps begin with the *jus cogens* nature of the prohibition on the use of force. The peremptory nature of the norm may discouraged the ICISS from challenging it head-on, as any normative framework in contravention of this general prohibition would surely founder. However, if this was indeed the case, it was surely worth noting that many basic human rights norms are also popularly accorded *jus cogens* status,<sup>37</sup> and that *cogentes* norms may (exclusively) be altered by other norms of the same character.

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35. Alex J. Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq*, 19 ETHICS AND INT’L AFFAIRS 31, 52 (2005).

36. Dieter Janssen, *Humanitarian Intervention and the Prevention of Genocide*, 10 J. OF GENOCIDE RES. 289, 293 (2008).

37. Ottavio Quirico, *A Formal Perspective Approach to General Principles of (International) Law*, 19 EUR. UNIV. INS. WORKING PAPERS: L. 1, 20 (2007).

Furthermore, such peremptory human rights norms apply *erga omnes*. The *erga omnes* nature of the obligation to protect such rights could potentially have been used as a basis upon which to ground the interest of all States and/or the international community as a whole, since “even the consent or acquiescence of the state directly injured does not prevent other states from judging the breach” in cases of breaches of *erga omnes* obligations.<sup>38</sup> The ICISS’ short-sightedness with regard to international law is lamentable, since affirming the *jus cogens* and *erga omnes* nature of human rights – as well as noting the existing exceptions to the prohibition on the use of force, thereby potentially undermining its absolute status as a peremptory norm<sup>39</sup> – could have served the authors’ purposes rather well.

Instead, the ICISS adopts a different tack:

The Commission does not start from the UN Charter rules on whether intervention is permissible but theorizes the legitimacy of intervention from the starting point of the ‘protection’ of the potential victim. This enables the Commission to come up with a set of moral criteria for military intervention which are held to exist independently of international law or any particular political decision or consensus in the Security Council.<sup>40</sup>

The ICISS may also have been wary of engaging with the prohibition on the use of force due to the dictum of the ICJ in the *Nicaragua* judgment, that where a breach of a legal rule is accompanied by a justification of said breach referring to the rule in question, “the significance of that attitude is to confirm rather than to weaken the

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38. *Id.* at 30-31.

39. In this regard, see James A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 MICH. J. INT’L L. 215, 228 (2011). Green notes the myriad problems associated with the classification of the prohibition of the use of force as a peremptory norm, including the inherent flexibility of the law on the use of force, the variety of associated rules and sources, the debated exceptions and the uncertain scope of the regime.

40. David Chandler, *The Responsibility to Protect? Imposing the Liberal Peace: A Critique*, 11 INT’L PEACEKEEPING 59, 68-69 (2004).

rule.”<sup>41</sup> The fear of falling into such a trap might well have been a motivating factor for the ICISS, but the proper solution was hardly to ignore the normative framework that was the root of the problem the Report was designed to remedy.

R2P fits within the broader discourse championing an extensive right, or even a duty, or humanitarian intervention; it removes the question from the realm of law *stricto sensu* to that of law *lato sensu*, ultimately amounting to a model based on legitimacy and values rather than legality and rules.<sup>42</sup> As Francioni has noted, such theories tend to underestimate the fact that the international rule of law is a value in itself, and there is no doubt that the rule governing the use of force remains a fundamental tenet of the international legal apparatus.<sup>43</sup> I have previously described the R2P as a ‘bastard son,’ a concept rooted in legal nothingness that deliberately disassociates itself from international law, rather than using its rules and principles to argue for law reform or an alternative interpretation of the existing legal framework.<sup>44</sup> This entails that, until such a day as it is formally embraced by the Security Council, it will remain ‘pie in the sky’ – a theoretical framework, but little more, and certainly of little help with regard to resolving the humanitarian intervention conundrum.

## B. The Nature of International Law – The Cartesian Trap

The dissonance – some might call it naïveté – of the ICISS did not merely extend to the letter of international law, but also to its nature. The R2P Report employs a simplistic and linear approach, setting out a number of threshold criteria. Compliance therewith is then assessed in

41. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Merits) [1986] ICJ Rep 14, 98.

42. M Koskeniemi, ‘The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law’ (2002) 6 *MLR* 159.

43. F Francioni, ‘Balancing the Prohibition of Force with the Need to Protect Human Rights: A Methodological Approach’ in E Cannizzaro and P Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Leiden, Koninklijke Brill NV, 2005) 276-7.

44. C Burke, *An Equitable Framework for Humanitarian Intervention* (Oxford and Portland, Oregon, Hart Publishing, 2013) 72.

order to determine the permissibility of intervention. Compliance in this context is defined as “the degree to which state behavior conforms to what an agreement prescribes or proscribes.”<sup>45</sup> However, such a definition assumes that the content of an agreement is fully determinate, a Cartesian trap, presuming a single, authoritative answer in a legal regime peppered with open-textured norms. The problem is exacerbated by a plurality of norm interpreters. States may justify their action with regard to certain standards of legitimacy or security interests – as NATO did in 1999<sup>46</sup> – while other States, organizations, or commentators may adopt diverse standards to assess the legality and/or legitimacy of such action.

In addition to the flexible nature of international legal norms, one must remain conscious of the question of forum. While in the context of judicial settings such as the ICJ, the malleability of norms is constrained by rules of interpretation, and while this is also the case – albeit to a lesser degree – in institutional fora, it is important to bear in mind that the R2P is intended to devise a framework for intervention without institutional approbation. Therefore, the plasticity of any norms proposed will necessarily be significant, given that they may be employed by a vast array of self-interested norm interpreters, namely States. In light of this fact, the drafters of the R2P ought to have employed language grounded in existing legal concepts, referring where possible, to specific interpretations thereof, in order to ‘cage’ the terms employed. Instead, as noted, they embraced a novel nomenclature that was essentially rootless, leaving the interpretation – and ultimately the meaning – thereof to be determined by the whimsy of individual States. This is particularly regrettable, since the few nods to restrained drafting within the R2P Report merely serve to exclude gross and systematic human rights abuses from the threshold criteria, ensuring that great swathes of vulnerable people are prevented from ever benefitting from the doctrine, while

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45. J von Stein, “The Engines of Compliance,” in JL Dunoff and MA Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, New York: Cambridge University Press (2012)

46. For a discussion of NATO’s justifications, see MC Pugh, Pal Waheguru & S Singh, *The United Nations & Regional Security: Europe and Beyond*, Boulder, Colorado, Lynne Rienner (2003).

leaving it to the States to determine the interpretation of the conditions of when ‘responsibility’ might shift from the State to the international community.

The choice of terminology is reflective of a general naïveté on the part of the Report’s drafters, illustrated through the concept of ‘good international citizenship,’ repeatedly referred to in the Report, which posits that it is in the interest of every State to intervene anywhere in the world when serious crises emerge, due to the interdependence of the world community. This notion is used to counterbalance opportunism and self-interest. However, the falsehood of such a doctrine should be immediately apparent. We are not likely to see South Korean troops in Eastern Ukraine, nor Danes in the Western Sahara. This fact renders the idea, proposed by the Report whereby the Permanent Members of the Security Council refrain from exercising their veto unless vital national interests are at stake rather fanciful. It will usually be the powerful States (or their close allies) that will intervene in such crises; one could thus argue that every crisis worldwide concerns the vital interests of the Permanent Members. It is, after all, their role to look after international peace and security. The Report’s drafters admit that “[t]hose who advocate action to protect human rights must inevitably come to grips with the nature of political self-interest to achieve good ends.”<sup>47</sup> However, little heed is paid by the report to the inherent conflict between self-interest and ‘good international citizenship’ that will arise in many cases.

### III. “A VALIANT ATTEMPT”/ “MORE HARM THAN GOOD?”

The main tenets of the R2P are certainly susceptible to a good degree of criticism. However, the implementation of the initiative was to give rise to further complications. A framework drafted to revolutionize the way the world thought about sovereignty was transformed into something the Report’s drafters never intended. Some of this was perhaps foreseeable. Elements of the R2P were certainly overly utopian.

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47. ICISS, *Research, Bibliography, Background (to the R2P Report)* (2001), 140.

However, the Report's implementation was overtaken by real-world circumstances.

#### A. A Series of Unfortunate Events

The temporal 'zemblanity'<sup>48</sup> of the September 11<sup>th</sup> attacks was undoubtedly important in how the R2P Report was received internationally. The attacks against the United States were characterized as an armed attack, triggering the threshold of self-defense. This fact was affirmed by Security Council Resolutions 1368 and 1373, passed in the immediate aftermath of 11 September 2001.<sup>49</sup> These resolutions were subsequently employed by the US in waging its so-called 'war on terror,' classifying the terrorists' activities as a threat to international peace and security, thus invoking the right to use of force under both Article 51 and Chapter VII of the UN Charter, and employing these legal bases as a *casus belli* for the invasion of Afghanistan.

However, even before the true implications of the events of September 2001 became clear, there was recognition on the part of the report's drafters that political will would be an important obstacle to be overcome before R2P could garner acceptance. Nonetheless, Evans and Sahnoun struck a positive tone, noting that "[t]oo often more time is spent lamenting the absence of political will than on analyzing its ingredients and how to mobilize them."<sup>50</sup> The mobilization of State opinion was undertaken in earnest, and one could argue, perhaps even too earnestly. The effort to reach consensus at the 2005 World Summit inevitably involved significant compromises with regard to the original tenets of the Report. The view of the R2P's proponents was that a limited degree of progress was preferable to none at all.

It was immediately clear that the Permanent Members were unlikely to countenance any dilution of their veto power. As a result, the

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48. The word zemblanity is often described as the antonym of serendipity. The term's origin comes from Novaya Zemlya, the Russian Arctic archipelago, the discovery of which was supposedly an unfortunate accident.

49. Security Council Resolutions 1368 and 1373, available at <http://www.un.org/en/sc/documents/resolutions/2001.shtml> (last visited Oct. 28, 2014).

50. Evans and Sahnoun, *supra* note 13, at 109.

'unreasonable veto' component was quietly discarded. In addition, the revised framework entailed that the Security Council would, regardless of veto use, remain the final arbiter concerning uses of force. This represented a significant setback, effectively rendering a 'future Kosovo' both illegal and illegitimate under the framework as adopted. Despite bullish rhetoric on the part of proponents of the R2P in the wake of the 2005 World Summit Outcome Document and UN Security Council Resolution 1674 of 2006, it is nonetheless the case that both endorsed a mutation of the doctrine that had strayed a great distance from the 2001 Report. As Bellamy has noted, "[p]erhaps the most worrying development is that in attempting to forge a consensus, the ICISS and its supporters sacrificed almost all of the key elements of their twin strategies."<sup>51</sup> This represents a depressing conclusion for champions of the R2P as originally constituted, but is indicative of the extent of the wrangling that was needed to achieve consensus and placate the Permanent Members in particular.

Further to the above, the legal effect of the World Summit Outcome Document is far from concrete. A good deal of its rhetoric is purely aspirational, not amounting to definitive obligations for States. Resolution 1674, adopted outside Chapter VII of the UN Charter, was no improvement, as it lacked the normative force to impact upon the Security Council's unfettered discretion to decide on issues concerning the use of force in any way whatsoever.

## B. Scruples and Exploitation

A further problem that beset the R2P was one that the Report's drafters had spent a good deal of time discussing, namely abuse. This was a preoccupation that applied to many of the formulas devised to provide for humanitarian intervention, and the R2P was no exception, although Thomas G. Weiss argued that this was less of a concern than ensuring that the United States did not secure backing for preventive or pre-emptive wars.<sup>52</sup> In the event, the R2P in fact proved to be closely

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51. Bellamy, *supra* note 25, at 169.

52. T.G. Weiss, 'The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era', *SECURITY DIALOGUE*, (35) 2004-2, 137.

related to both concepts. The main tenets of the Report were employed, *inter alia*, by Fenstein and Slaughter to develop a corollary – the ‘Duty to Prevent’ acquisition of weapons of mass destruction by States without internal checks on their power.<sup>53</sup> It was quite clear that such a doctrine could serve as an excuse for pre-emptive war. In addition, although not uniquely concerning the R2P, it is germane to note how the myriad justificatory frameworks for humanitarian intervention advanced post-1999 were, in time, used by commentators to justify the 2003 US-led invasion of Iraq.<sup>54</sup> It was quite clear that the principles underpinning the R2P were deeply susceptible to the most wanton abuse.

#### IV. TIME FOR A CHANGE OR MORE OF THE SAME? GENERAL PRINCIPLES OF LAW AND THE R2P

##### A. The Letter of the Law (reprise)

As noted previously, one central criticism of the Responsibility to Protect initiative is that it made little effort to engage with positive international law as it stood at the time that the ICISS Report was drafted, rather opting for a utopian model based upon shaky premises regarding ‘good international citizenship.’ I am not the first to make such an observation. However, it is, perhaps, worthwhile to dwell on the fact that the R2P failed to adequately assess not just the UN Charter regime, and the interpretation of the ICJ thereof, but also customary law, *ius cogens*, and general principles of law. The foregoing reads like a laundry list of sources of public international law, and yet, with regard to the final source mentioned, namely general principles, the R2P was certainly far from unique. Overlooking general principles has long since been the *mode du jour* in international legal scholarship. The last comprehensive study of the category in the English language was undertaken by Bin

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53. L Fenstein and A-M Slaughter, ‘A Duty to Prevent’ (2004) 83 FOREIGN AFFAIRS 136, 149.

54. F Tesón, ‘Eight Principles of Humanitarian Intervention’ (2006) 5 JOURNAL OF MILITARY ETHICS 93.

Cheng in 1953.<sup>55</sup> The fact over six decades have passed since then reflects the relative level of interest in the normative category. Yet, such neglect would seem, on the face of it, rather unwarranted. Article 38(1) of the ICJ Statute – generally accepted as the authoritative encapsulation of the sources of international law, and itself an integral component of the UN Charter<sup>56</sup> – provides that general principles shall constitute one of the three principal sources of international law, alongside treaty and custom. Moreover, there would seem to be no explicit hierarchy between the three.

### B. Unpacking the Humanitarian Intervention Conundrum

Despite such consistent neglect, however, as shall be demonstrated anon, general principles undeniably represent an important source of legal rights and obligations. A preliminary question poses itself, however, namely, how are such principles relevant to the humanitarian intervention debate? The answer may be demonstrated by unpacking the essential components of the debate, and thereafter by reference to a historical analogy. The question of humanitarian intervention may be described as one brought about by the stagnation of law. The fact that the UN Charter rules governing the use of force by States are insusceptible to reform – due to the lack of will on the part of certain powerful stakeholders and the *jus cogens* nature of the norms themselves – gives rise to problems. The moral consensus – and indeed, the normative corpus of international law itself – has evolved since the UN Charter was drafted. The inability of the latter to engage with human rights norms in an adequate manner results in what is commonly perceived as a manifest injustice occurring when States engage in gross and systematic human rights abuses against their own citizens. This is despite the fact that there exists an identifiable and potentially effective solution – namely

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55. B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge, Grotius, 1953, republished unrevised in 1987). It is worth noting, however, that a generalist text has recently been published in German. See P-Y Marro, *Allgemeine Rechtsgrundsätze des Völkerrechts: zur Verfassungsordnung des Völkerrechts* (Dissertation Zurich, Schulthess, 2010).

56. See U.N. Charter art. 92.

humanitarian intervention. The problem is that the latter is not legally permitted.

The kernel of the conundrum, then, lies in the stagnation and inflexibility of the legal framework. The fact is, however, that this is not a problem that is unique to international law. Rather, domestic legal systems have, in the past, found themselves confronted with broadly similar systemic blockages, whereby, for one reason or another, the law failed to evolve with the prevailing moral consensus, or where manifest injustices resulted from a rigid application of the letter of the law. In this regard, it is somewhat surprising that neither the drafters of the R2P, nor the various scholars who tackled the problem of humanitarian intervention post-Kosovo, thought to have reference to the solutions employed in such situations.

To use but one example, in 16<sup>th</sup> century Tudor England, a situation of legal stagnation also arose. The problem was principally one of unadaptable procedure. In order to commence a case, plaintiffs were obliged to submit "writs." These writs could only be procured for specific offences, such as trespass and trespass to the person. If the plaintiff's case fell outside the scope of a prescribed writ, he could not be granted compensation for any injury vested upon him or his property. Faced with an inflexible legal system, resourceful lawyers would attempt to 'shoehorn' wrongs committed into the framework of existing writs. However, since the legislation was quite specific concerning the elements necessary for the procurement of a given writ, such actions were generally in vain. This resulted in a situation where many parties who had suffered an injustice were unable to claim any compensation whatsoever. In addition, those who managed to frame their actions within the scope of an existing writ faced an additional problem, namely that the writs prescribed that the only compensation obtainable was generally in the form of monetary damages. This ignored the fact that in many cases, such compensation was either insufficient (since the limits thereof were determined by statute) or unsuitable (when the owner might have preferred *restitutio in integrum* or specific performance of an obligation as a remedy). The legislator was entirely indisposed toward any legal reform, and it was clear that this situation was unlikely to change. Here, again, legal stagnation and rigidity resulted in recognizably unjust results, despite the fact that an identifiable and potentially effective

solution existed, namely the creation of new writs and the admission of new remedies to existing writs.

Parallels between writs in 16<sup>th</sup> century Tudor England, and humanitarian intervention in 21<sup>st</sup> century public international law might seem rather fanciful on the face of it. However, both situations arose from legal rigidity and stagnation. It is therefore germane to examine how the problem was solved in the former context.

The importance of finding a solution to the inflexibility of common law writs was brought into sharp relief by the near-anarchy that followed the War of the Roses, due to the need to restore order without being restricted by antiquated procedures.<sup>57</sup> Ultimately, a solution was found within the common law itself. It had long been possible to engage in a special appeal ‘to the King’s conscience’ by way of an individual petition, when the bare application of the common law had resulted in a manifest injustice. The King, unfettered by statute, would then decide whether to entertain the plaintiff’s submission, and if so, what remedy to award. This system reposed upon the medieval precept that the monarch, who is not the subject of written laws, retains power to impose remedies to enforce a natural obligation where positive law is unable to do so.

With the progressive development of the commercial economy, cases of injustice in the face of writs abounded, and the attractiveness of resort to individual appeals to the monarch increased exponentially. The King, overburdened, delegated authority for individual appeals to a law officer called the Lord Chancellor. However, dealing with such appeals quickly became too time-consuming even for a full-time legal functionary. A separate system of ‘courts of conscience’ – also known as courts of equity – was thus established. Such courts functioned in parallel to common law courts until the Union of Judicature (Acts), 1873 & 1875, combined the two jurisdictions. The chief precept of the Acts was that where conflicts between equity and the law might arise, equity should prevail. Ever since, equity has operated as a softening influence upon legal rigidity, both in England, and in other common law jurisdictions.

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57. Stuart E. Prall, *The Development of Equity in Tudor England*, 8 AM. J. LEGAL HIST. 1 (1964).

While equitable jurisdiction developed as a means of mitigating legal rigidity, even prior to the Judicature Acts, its functioning was dependent upon the framework provided by the common law. In the words of Lord Denning, “[e]quity comes in, true to form, to mitigate the rigours of strict law.”<sup>58</sup> As Greene MR pointed out, in common law, if such injustice leading to a claim in equity exists, “it must be shown to have an ancestry founded in history and in the practice and precedents of the courts administering equity jurisdiction.”<sup>59</sup> Such a formulation was necessary to guard against wanton subjectivity on the part of judges when employing equitable doctrines. As equitable jurisprudence developed, aided by *stare decisis*, certain general principles of law began to emerge. Too broad to be described as rules, such principles were described via ‘maxims,’ crafted through generations of equitable decisions, thereby establishing a guiding quasi-precedent upon which future judgments might be based. These maxims prescribed the legal principles according to which equity was to be applied. However, an element of flexibility in the exercise of such principles was necessarily retained, since, after all, equity was intended to be tailored to the justice of the individual case, and any more steadfast rules could themselves have become stagnant and rigid, thereby provoking the very problem they were intended to solve. Nonetheless, the development of such principles meant that any charge of arbitrariness concerning the doctrines of equity was necessarily answered.<sup>60</sup>

### C. Equity and General Principles – A Worldwide Phenomenon

While the common law history of the equity’s development is oft-quoted and well-known, other examples of equity’s development in domestic systems are abundant. The modalities of this development are

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58. *Crabb v. Arun*, [1975] 3 W.L.R. 847 (D.C.) at 865, Ch. 179 at 187 (Lord Denning M.R.) (Eng.).

59. *Diplock v. Wintle (In Re Diplock)*, [1948] Ch. 465 (A.C.) at 481-82 (Lord Green M.R.) (Eng.).

60. This had been a significant problem for the fledgling doctrine, with one commentator comparing the extent of equitable relief that one was likely to receive from the Courts of Chancery to the length of the Lord Chancellor’s foot, i.e., that such a measure was arbitrary and unrelated to the justice of the case. JOHN SELDEN, *THE TABLE-TALK OF JOHN SELDEN / WITH NOTES BY DAVID IRVING* 62-63 (2010).

divergent from one jurisdiction to another. However, what is remarkable is that the general principles that emerge in such instances are comparatively uniform.<sup>61</sup> The very concept of equity has its roots in Greek and Roman philosophy. Aristotle described equity (*epieikeia*) as “better than that error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of the law where it is defective owing to its universality.”<sup>62</sup> Since statutory law could not account for every circumstance, equity would act as a corrective in favor of justice. In the Roman context, Cicero dubbed equity (*aequitas*) the spirit of justice, which may mold the law according to right reason.<sup>63</sup> Although the Tudor common law was not directly influenced by such writings, it is remarkable that equity as it eventually played out in the English context bore a strong similarity to the Greek and Roman conceptions thereof.

Elsewhere, notions of equity found favor in a wide array of legal systems. Per the codification model adopted by continental European jurisdictions, equitable provisions were inserted directly into the codes. In this regard, one may, for example, draw attention to Article 1134, *alinéa* 3 of the French Civil Code, by virtue of which parties are under a duty to exercise their contractual obligations in good faith. This extends to the prohibition of the abuse of rights (*théorie de l’abus du droit*), achieved by judicial ‘stretching’ of the various *Code civil* provisions, stipulating that rights may be abused if used not for their owner’s interest, but as a means of harming others. This stretching of the law, derogating from unthinking application of rights and obligations where to do so would result in an injustice, bears a strong similarity to the role of equity in the common law.<sup>64</sup> Section 242 of the German *Bürgerliches*

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61. See generally BURKE, *supra* note 11, at 127-203.

62. ARISTOTLE, *Nicomachean Ethics* bk. V, ch. 10 (Joe Sachs ed., London: Philosophical Library Series 2004) (c. 384 B.C.E.).

63. MARCUS TULLIUS CICERO, *On the Republic on the Laws* 42 (Clinton W. Keyes trans., William Heinemann Ltd. 1977).

64. B. Jeanneau, *The Reception of Equity in French Public and Private Law, in EQUITY IN THE WORLD’S LEGAL SYSTEMS: A COMPARATIVE STUDY* 223-24 (Ralph A. Newman ed., Établissements Émile Bruylant 1973); see also E.H. Perreau, *Origine et Développement de la Théorie de L’abus du Droit*, *REVUE GÉNÉRALE DU DROIT* 481 (1913).

*Gesetzbuch* contains similar notions, with a rather innocuous-sounding paragraph concerning good faith having been stretched far beyond a literal interpretation thereof. Courts in fact often use Section 242 as an ‘escape clause’ from the rigidity of the written law, combining Section 242 with the notion of *Unzumutbarkeit* (disproportionate burden, unreasonableness) to justify derogations from the *lex lata* in the interests of justice.<sup>65</sup> Elsewhere, I have explored equitable general principles in the world’s legal systems, building upon Newman’s 1973 edited volume, concluding that one may trace strong similarities between jurisdictions as diverse as England, France, Germany, the Netherlands, Switzerland, the United States, China, Japan, Scotland, Italy, Spain, Argentina, Sweden, and a number of Muslim countries.<sup>66</sup> While the historical development of law in the various mentioned jurisdictions is distinct and dissimilar in a great number of ways, it is nonetheless the case that principles such as good faith, *abus de droit*, the doctrine of unjust enrichment, the doctrine of reasonable expectations (and estoppel), and the prioritization of substance over form have found almost universal acceptance in one form or another throughout the world’s developed legal systems.<sup>67</sup>

#### D. General Principles of International Law

In the international legal context, both Grotius and Pufendorf reserved an important space for equity within their respective conceptions of international law, including its potential use as a corrective mechanism.<sup>68</sup> However, they both held that ‘bare’ equity was ill-advised as a doctrine for the regulation of inter-state relations, and that, as such, equity should be applied with some degree of restraint. As a result, it is perhaps

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65. U. Diedrichsen, *Principles of Equity in German Civil Law*, in EQUITY IN THE WORLD’S LEGAL SYSTEMS: A COMPARATIVE STUDY 279 (Ralph A. Newman ed., Établissements Émile Bruylant 1973).

66. See BURKE, *supra* note 11, at 198-99.

67. See Justice M. White, *Equity – A General Principle of Law Recognised by Civilised Nations?*, 4 QUEENSLAND L. J. 103, 103-07 (2004).

68. See HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (1715) (explaining the laws and claims of nature and nations, and the principle points that relate either to public government or the conduct of private life); SAMUEL VON PUFENDORF, THE LAW OF NATURE AND NATIONS (1749).

unsurprising that, in order to counter charges of subjectivity, rather than an overarching conception of justice, firm principles emerged in early international arbitral practice that mirrored those that had been received into the various domestic legal systems.<sup>69</sup>

Concerns about the role – if any – that should be accorded to equity and general principles of law surfaced during the lengthy discussions which took place in The Hague in 1920 amongst a panel of renowned legal scholars, selected by the League of Nations to advise on the creation of the Permanent Court of International Justice (PCIJ). An important question that arose in the course of these discussions concerned the sources of law that could be applied by the putative court. While treaties and customary law were comparatively uncontroversial, the role that general principles and equity might play was a matter of some dispute. A *Kulturkampf* was visible, as in many civil law systems, the common law idea of a separate conception of equity was perceived as rather alien. The continental taste for codification was resistant to any such conception, though there was nonetheless a recognition that through the ‘general clauses’ inserted into civil law codes, many of the principles would, in practice, be rather similar in nature.<sup>70</sup>

After detailed debate on the content of this category, it was eventually framed as “the general principles of law recognised by civilised nations.” Although the majority of the learned committee of jurists was ready to concede that equity would play a role in judicial decisions, they were not prepared to list it as a separate free-standing source of law, given its different connotations in different legal systems.<sup>71</sup> The formulation arrived at for the Statute of the PCIJ is identical to that in Article 38(I)c of the Statute of the International Court of Justice (ICJ), which is an integral component of the United Nations Charter.<sup>72</sup> This amounts to the

69. CHRISTOPHER R. ROSSI, *EQUITY AND INTERNATIONAL LAW: A LEGAL REALIST APPROACH TO INTERNATIONAL DECISION MAKING* 9-10 (1993).

70. WOLFGANG G. FRIEDMANN, *LEGAL THEORY* 543-45 (Columbia Univ. Press 1967).

71. P Van Dijk, ‘Equity: A Recognised Manifestation of International Law?’, in M Bos, & W Heere, (eds.), *International Law and its Sources* (The Netherlands: Kluwer Law and Taxation, 1989) 1; 11.

72. *See* UN Charter, Article 92.

authoritative description of the sources of international law, and is binding upon all Member States of the United Nations.

The formulation adopted was found to have normative consequences, when in the years and decades that followed, first the PCIJ and then the ICJ made use of a number of such general principles of law in their judgments, and separate and dissenting opinions. However, as Schwarzenberger has noted, “[i]nternational courts and tribunals fight shy of laying bare the equitable and common-sense reasons on which, in fact, their interpretative work is based.”<sup>73</sup> This is above all true with regard to general principles. Few instances have occurred where the PCIJ and ICJ have explicitly had recourse to the normative category. Remarkably, the ICJ has only ever referred explicitly to general principles once in its judgments, and this was to rule out the application of a particular legal principle in the circumstances rather than to apply a general principle of law,<sup>74</sup> though such principles have been more frequently referred to in dissenting opinions and *ad hoc* judgments.<sup>75</sup> Such a trend is curious, given that it is common ground amongst scholars that there exists no explicit hierarchy between treaty, custom and general principles. Perhaps the reluctance to explicitly refer to general principles may be explained by reference to the proliferation of treaties, meaning

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73. 1 Georg Schwarzenberger, *A MANUAL OF INTERNATIONAL LAW* 153 (4th ed. 1960).

74. South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6, 47 (July 18).

75. See *Lighthouses in Crete and Samos*, Judgment, 1937 P.C.I.J. (Ser. A/B) No. 71, at 137–38 (Oct. 8) (separate opinion of Judge Séfériadès); see also *International Status of South West Africa*, Advisory Opinion, 1950 I.C.J. 128, 148 (July 11) (separate opinion of Sir McNair); see also *Anglo-Iranian Oil Co. (U.K. v. Iran)*, Preliminary Objection, 1952 I.C.J. 93, 161 (July 22) (dissenting opinion of Judge Levi Carneiro); see also *Application of the Convention of 1902 Governing the Guardianship of Infants (Neth. v. Swed.)*, Judgment, 1958 I.C.J. 55, 107 (Nov. 28) (separate opinion of Judge Moreno Quintana); see also *Right of Passage Over Indian Territory (Port. v. India)*, Judgment, 1960 I.C.J. 66-67 (Apr. 12) (separate opinion of Judge Wellington Koo); see also *Temple of Preah Vihear (Cambodia v. Thai.)*, Judgment, 1962 I.C.J. 6, 42-43 (June 15) (dissenting opinion of Judge Alfaro); see also *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 308-09 (July 8) (declaration of Judge Fleischhauer); see also *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 66, 74 (Nov. 6) (separate opinion of Judge Simma).

that there is usually a *lex specialis*, which can decide a legal dispute, obviating the necessity for recourse to broader principles. Perhaps the PCIJ and ICJ were wary of employing a norm less dependent upon State consent than treaty or custom. Whatever the cause, both courts abstained from referring to such principles explicitly, or calling them by name. Nonetheless, the PCIJ and ICJ have had recourse to a number of such principles, albeit in what may be termed a rather quiet manner. This has invited criticism, even within the ICJ itself, with Buergethal J critically opining that “*rules of international law cannot be brought [into legal disputes] through the back door.*”<sup>76</sup> Despite the qualms of Judge Buergethal, however, it would seem as though the back door is indeed the most frequent entry point for general principles of law into the judgments and opinions of the successive World Courts.<sup>77</sup>

Here is not the place for an exhaustive enumeration of every occasion upon which the PCIJ and ICJ have had recourse to general principles of law. However, it is perhaps useful to have reference to a number of principles that have been employed by the successive courts, insofar as such reference demonstrates their proximity to domestic general principles of law, and more particularly, to principles of equity recognized by a plurality of domestic legal systems.

In the *Chorzów Factory* (jurisdiction) judgment, the PCIJ invoked the *nullus commodum capere de sua iniuria propria* (no one may profit by his own misdeeds) principle in order to confirm the decision that it had reached.<sup>78</sup> In the *Jurisdiction of the Danzig Courts* Advisory Opinion, the same principle was applied. Here, it was held that a State could not plead the fact that it had failed to implement its international legal obligations within its domestic law as a defense to rights that might arise by virtue of

76. *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, 281 at ¶ 28 (Nov. 6) (separate opinion of Judge Buergethal).

77. Perhaps we should not be so surprised in this regard. Indeed, the PCIJ and ICJ are not unique in this regard. As French has noted, “*there are numerous examples of where a tribunal relies upon ‘other’ law, but without any clear attempt to clarify either what it is doing or why it has done so.*” See Duncan French, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, 55 INT’L & COMP. L. Q. 281, 292 (2006).

78. *Factory at Chorzów, Claim for Indemnity*, 1927 P.C.I.J. (Ser. A) No. 9, at 25-27 (July 26).

such obligations.<sup>79</sup> This case was followed by Reed J of the ICJ in his dissenting opinion in the *Interpretation of Peace Treaties* Advisory Opinion. According to Reed, no government ought to be allowed to raise such legal objections which would “*let such a government profit from its own wrong.*” Reed also raised the doctrine of estoppel, as a general principle of international law, to bolster his argument.<sup>80</sup>

In the *Chorzów Factory* (Merits) case, the PCIJ based its judgment on the principle *ubi ius, ubi remedium*, that is, that equity will not suffer a wrong to be without a remedy. The Court stated that “[*it is*] a general conception of law that any breach of an engagement involves an obligation to make reparation.”<sup>81</sup> The 1970 *Barcelona Traction, Light and Power Company Limited* case<sup>82</sup> elaborated further upon this principle, with the ICJ holding that for reasons of equity, a State should be able to set aside certain provisions of diplomatic formalism, in order to exercise diplomatic protection over its nationals. However, in declining *locus standi* to Belgium, the ICJ outlined the practical difficulties in this particular case, holding that this principle could only come into play *in extremis*, and that in cases sound and settled rules of law are involved, this principle could not operate, since to do so might have “*opened the door to legal anarchy.*”<sup>83</sup>

The *Chorzów Factory* (Merits) case is also notable for the dissenting opinion of Ehrlich J, who, commenting on the principle of good faith in international law, held that the principle *ex re sed non ex nomine* is a component of the good faith principle. This principle encapsulates the

79. Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (Ser. B) No. 15, at 26–27 (Mar. 3).

80. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. No. 8, 244 (July 18) (dissenting opinion of Judge Reed).

81. Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (Ser. A) No. 17, at 29 (Sept. 13). The Court here repeatedly stated its preference for full and adequate restitution wherever possible – *restitutio in integrum* – but warned that measures needed to be taken to avoid compensating twice for any one wrong, echoing the English common law maxim that ‘equity guards against double portions.’

82. Barcelona Traction, Light and Power Co., Ltd (Belg. v Spain), 1970 I.C.J. 3 (Feb. 5).

83. Shabtai Rosenne, *The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law*, in FORTY YEARS OF THE INT’L COURT OF JUSTICE 102 (Arie Bloed & Peiter Van Dijk eds., 1988).

prioritization of substance over form, stating that in cases of disputes, regard shall be had to the real substance of a particular legal transaction, and not the mere formalities pertaining thereto.<sup>84</sup> The *Barcelona Traction and Diversion of Water from the River Meuse*<sup>85</sup> cases also demonstrate, albeit implicitly, the willingness of the ICJ and PCIJ to be unconstrained by formal criteria if such criteria will amount to the frustration of substantive justice. In the *Diversion of Water from the River Meuse* case, the PCIJ excused Belgium's breach of its international legal obligations on the basis that its co-contractor, the Netherlands, had failed to keep its side of the bargain.

In the *Serbian and Brazilian Loans* case,<sup>86</sup> the doctrine of estoppel was applied, in much the same manner in which it applies in common law. In this particular instance, it was decided that a case of estoppel did not arise, as the representation had not been unequivocal, and as there had been no change of position on the part of the debtor state. The doctrine was applied with full vigor in the 1962 *Temple of Preah Vihear* case.<sup>87</sup> The 1908 acceptance as accurate by Thailand of a map, and 50 years of subsequent practice, failing to contest the resulting frontier, constituted an act of acquiescence. The component elements of assurance, reliance (change of position) and detriment were fulfilled; ergo an estoppel arose, and Thailand was prevented from contesting the frontier it had accepted. As noted above, the opinion of Judge Reed in the *Interpretation of the Peace Treaties* Advisory Opinion also referred

84. *Factory at Chorzów*, *supra* note 81, at 87 (dissenting opinion of Judge Ehrlich).

85. *Diversion of Water from the Meuse (Neth. V. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 70 (June 28). This case is often cited as the high water mark for equity in international law, and is undoubtedly one of the most important cases in this regard. *See* C. WILFRED JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 320–24 (1964); *see also* Edward McWhinney, *Equity in International Law*, in *EQUITY IN THE WORLD'S LEGAL SYSTEMS* 581 (Ralph A. Newman ed., 1973); *see also* M.W. Janis, *Equity and International Law: The Comment in the Tentative Draft*, 57 *TUL. L. REV.* 80, 80, 86 (1982).

86. *Payment of Various Serbian Loans Issued in France (Fr. v. Yugo.)*, 1929 P.C.I.J. (ser. A) No. 20, p. 39.

87. *Temple of Preah Vihear*, *supra* note 75.

to the estoppel principle, as did the separate, concurring, opinion of Vice-President Weeramantry in the *Gabcikovo-Nagymaros* case.<sup>88</sup>

Finally, special attention should be paid to the opinion of Judge Hudson in the *Diversion of Water from the River Meuse* case.<sup>89</sup> Here, in a case involving the breach of reciprocal obligations with respect to the erection of international waterways, Judge Hudson stated:

It would seem to be an important principle of equity that where two parties have assumed an identical or reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the Anglo-American law. Some of these maxims are, 'equality is equity, 'he who seeks equity must do equity'. ...a very similar principle was received into Roman Law.

Here, Judge Hudson reaffirmed the conception of general principles of international law, or a subset thereof, at least, as bearing a strong similarity to the maxims of equity developed by the common law, and their equivalent principles in Roman law. Further, in mentioning "equality is equity" and "he who seeks equity must do equity," Judge Hudson noted that equitable doctrines would not become a tool for the unscrupulous. Rather, the employment thereof must necessarily be for the benefit of the party seeking to achieve substantive justice. This may also be described via the maxim "he who comes to equity must come with clean hands."

The above examples unequivocally demonstrate the reception of equitable doctrines, via general principles of law, into the normative corpus of public international law. There are a number of further examples in this regard, but explaining them all in detail, or indeed devising a 'test' to determine which general principles are generally accepted by a broad plurality of domestic legal systems and might be ripe for transposition to international law, exceeds the scope of the present

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88. *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, 1997 I.C.J. 3, 7 (Feb. 5).

89. *Diversion of Water from Meuse*, *supra* note 85, at 81.

study. What is intended herein, rather, is to illustrate the fact that these principles, forming part of the prescriptive framework of international law, may be relevant to a broad number of legal questions, not least that of humanitarian intervention, something which the drafters of the R2P Report entirely failed to consider.

#### E. Harnessing the Power of General Principles – A Real Responsibility to Protect

As noted above, in the *Chorzów Factory*, *Jurisdiction of the Danzig Courts* and *Interpretation of the Peace Treaties* cases, the principle that a State may not profit from its own misdeeds (*nullus commodum capere de sua iniuria propria*) was upheld. If we apply this to the context of a typical case in which humanitarian intervention may be called for, we can imagine a State that has signed up to international human rights treaties or has failed to persistently object to the formation of customary law on human rights protection – in essence, all States meet this threshold – that is engaging in gross and systematic human rights abuses against its own citizenry. Much like in the *Danzig Courts* case, it is in breach of its own international obligations, many of which are *ius cogens* and thus apply *erga omnes*. However, like in the *Danzig Courts* case, the State in question is benefitting from the fact that it has failed to ensure that its obligations are respected domestically. In such circumstances, its fellow members of the international community may consider themselves doubly wronged, firstly by virtue of the breach of the *erga omnes* obligations, and secondly due to the fact that the State in question would seem to be attempting to profit from its own misdeeds.

Following from the above, resort should be had to the fact that “[it is] a general conception of law, that any breach of an engagement involves an obligation to make reparation.”<sup>90</sup> Per the maxim *ubi ius, ubi remedium*, upheld, *inter alia* in the *Barcelona Traction* case, the State in

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90. *Factory at Chorzów*, *supra* note 81, at 29, 49.

The Court here repeatedly stated its preference for full and adequate restitution wherever possible – *restitutio in integrum* – but warned that measures needed to be taken to avoid compensating twice for any one wrong, echoing the English common law maxim that ‘equity guards against double portions’.

question is under an obligation to make good to its fellow States for its infractions. While no remedy would seem to be forthcoming in such circumstances, assuming that the UN Security Council is not prepared to act, it is well to bear in mind that the principle *ex re sed non ex nomine* was also upheld in the *Barcelona Traction* case, as well as being referred to in both the *Meuse* and *Chorzów Factory* (Merits) cases. This principle entails that formal strictures may, on occasion be set aside when the justice of the case so demands. In *Barcelona Traction*, for example, it was held that diplomatic protection – a doctrine crafted for the protection of certain natural persons while the latter were abroad – could also be exercised in favor of corporate entities. This was important in the context of achieving justice, insofar as otherwise, companies operating in foreign jurisdictions could have been subjected to unreasonable levels of prejudice. However, extending the law in this manner went far beyond the boundaries of previously available remedies. While the Court would not take the principle further – allowing Belgium to sue on behalf of a Canadian company despite the fact that the latter had a good number of Belgian shareholders – this was because it was dealing with what it described as a sound and settled rule of law. In the context of humanitarian intervention, one could also argue that the Charter regime on the use of force is sound and settled legal framework. However, such a position ignores the fact that this regime predates the advent of much of the modern human rights corpus, or certainly its elevation to the status of *ius cogens* and *erga omnes* norms. Thus, there would certainly seem to exist scope for looking to the substance of the situation rather than the form, and for resort thereafter to the principle *ubi ius, ubi remedium*. If a remedy is required to put an end to an ongoing breach of the international obligations of a particular State, particularly when the latter is profiting by its own misdeeds, and no remedy exists in international law, the operation of this principle and the case law of the PCIJ and ICJ would suggest that international law will permit the creation of such a remedy.

In addition, it is germane to have regard to the doctrine of estoppel in international law, as upheld, *inter alia*, in the *Temple of Preah Vihear* case. The doctrine of estoppel relies on the tripartite condition of assurance, reliance and detriment. In the present context, an assurance is furnished by any State which either ratifies human rights treaties, or

which refrains from persistently objecting to the formation of customary human rights norms in international law. This criterion is effectively satisfied by all States. The assurance thus furnished entails that those persons on the State's territory will be provided with a specific level of human rights protection. The element of reliance may be divined from the behavior of the citizens of the State, who love their lives free from fear of abuse. In addition, an element of reliance on the part of the other States in the international community is evident, since they rely upon the assurance in a number of ways. In modern times, engaging with States that commit gross human rights abuses against their own citizenry is perceived as unacceptable by the people of a good many States. Evidence of this is provided by the distaste that arose in Western Europe and North America concerning the maintenance of friendly relations with the South African apartheid government. This distaste eventually led to a deterioration in relations between South Africa and the West during the 1980s, despite the obvious utility of the former for the latter as an arms producer and foe of Communism. Evidence of reliance upon assurances pertaining to human rights may also be garnered from the drawn-out process surrounding Turkey's potential accession to the European Union. One of the major stumbling blocks in this regard has been Turkey's human rights record. Turkey's potential accession would only be countenanced were certain specific assurances pertaining to human rights to be furnished. The final element, namely detriment, is clearly suffered, firstly by the State's citizens, who are subjected to gross human rights abuses, and by the other States of the international community, which have changed their position and their policy toward the abusing State on the basis of the assurances furnished by the latter, and which are no longer able to rely upon such assurances. It should further be underlined that *ius cogens* norms pertaining to human rights protection, such as the prohibition of genocide, are owed *erga omnes*, and every State is thus entitled to view itself as wronged (or, to feel detriment) when such obligations are infringed upon. In such a case, when the tripartite test of assurance, reliance and detriment is satisfied, the offending State will be estopped from denying the veracity of the assurance given. In ideal circumstances, this would be ordered by an injunction of the ICJ, as was discussed in the *Serbian Loans* case. However, due to the rather limited jurisdiction of the Court, this scenario is rather unlikely. As a result, we

are faced in such circumstances with an unenforceable estoppel. This procedural cul-de-sac can be cured by reference to the maxim *ubi ius, ubi remedium*. The impotence of the ICJ entails that an effective remedy must be found elsewhere. Assuming that the Security Council is either unwilling or unable to act under Chapter VII of the UN Charter, the combination of these equitable general principles of law may serve as a legal basis to permit a State or group of States to intervene to enforce the injunction by whatever means are required, which may include the use of force.

The equitable general principles discussed above would seem to suggest the possibility of the beginnings of a legal framework upon which to build a new model for humanitarian intervention within the law. Such a model also contains a code of conduct for would-be interveners. In this respect, it is germane to recall the pronouncements of Judge Hudson in the *Meuse* case. The ideas of 'he who seeks equity must do equity', and clean hands doctrine entail that any intervening powers, in order to maintain the equitable right to intervene, must themselves be free of iniquity. Clean hands doctrine precludes the involvement of States in operations to end gross human rights abuses which themselves engage in similar practices. This principle creates an incentive for states to keep their hands clean, thereby permitting them a greater degree of free choice in their foreign policy. 'He who seeks equity must do equity' represents the prospective corollary of clean hands doctrine. Ergo, if one resorts to equity, one must be prepared to act equitably, and not derive undue profit from equity's operation. This may potentially have immense importance in the conduct of humanitarian intervention, requiring that intervening powers, in undertaking an intervention to protect human rights, respect human rights norms (including international humanitarian law) in their conduct of such an intervention. Failure to do so may rob the operation of its legality under general principles of law.

On the basis of the principles discussed above, a framework for humanitarian intervention within the law begins to emerge, including a code of conduct for would-be interveners, restraining and prescribing the conditions under which such activities may be carried out. It presupposes the commission of a series of gross and systematic human rights abuses by a State against its own citizens; the unavailability of a peaceable means of halting these abuses; the impracticability of a UN Security

Council Resolution in favor of enforcement action; and the reasonable determination that armed intervention will represent the only remedy that is likely to be effective in halting the abuses. Further, no State which itself engages in similar violations may dispose of a right to intervene, and States must intervene for the purpose of ending such violations, and must not act unscrupulously or cause unnecessary loss of life or human suffering in executing the operation.

#### F. Whither the R2P?

The description above is admittedly rather brief. Elsewhere, I have elaborated upon this framework in considerably greater detail.<sup>91</sup> However, for the present purposes, the sketch provided herein ought to be broadly sufficient. It serves to illustrate that the third principal source of international law – namely general principles – may conceivably be employed to soften the rigor of the UN Charter regime on the use of force by States and render it more flexible in the name of equity. This is an important point. Article 31(3)(c) of the Vienna Convention on the Law of Treaties – also reflecting customary law – prescribes that extraneous norms of international law must be taken into account in the interpretation of international conventions. This provision makes it clear that general principles are not merely a discretionary consideration, but rather a prescriptive component of any interpretation of the Charter's norms, including those that pertain to the use of force. The fact that this is the case, and that the R2P was explicitly crafted with the aim of presenting a framework for humanitarian intervention that would solve the impasse that had previously been seen to exist in international law, renders the decision not to minutely examine all the component elements of the law itself rather baffling. It is true that, as already noted, the study of general principles had long ceased to be *en vogue*. However, any international lawyer with a modicum of education should have been aware of their existence. The R2P presented a framework replete with many faults, which have been discussed in some detail above. Over and above the other problems with the Responsibility to Protect initiative,

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91. See BURKE, *supra* note 11, at 297-332.

however, was the fact that it was rooted in legal nothingness. It thus implied either the outright rejection of current international law – unlikely for a model that endeavored to engage with legal concepts such as State sovereignty and institutions such as the Security Council – or a wholesale reform thereof, something that was never likely, and ultimately proved beyond its powers. Worse still, R2P, or a rather deformed version thereof, became a starting point for the crafting of an analogous ‘duty to prevent’ acquisition of Weapons of Mass Destruction, providing a *casus belli* in circumstances far removed from those for which the framework was originally conceived.

Critiques of the R2P now have a rather superfluous ring, and may be compared to beating a dead man.<sup>92</sup> The initiative’s supporters, in their belief that some progress was better than none, watered down the concept to near-meaninglessness, with the principal tenet of the 2005 World Summit Outcome Document’s formulation of the R2P merely serving to reconfirm the role of the Security Council as the ultimate arbiter of when force might be used within the law, and restating that Permanent Members should be unfettered in their discretion, thus entirely defeating the purpose of the original concept. However, with any model that was so detached from the normative corpus of international law, the assent of States to changes in positive law was always likely to be a *sine qua non* of its success. The regrettable truth, however, is that it did not have to be this way. As illustrated in this essay, the means of softening the rigors of the regime on the use of force – or elements thereof – lay within the law itself. Taking account of the general principles of law discussed above, along with placing emphasis on the *ius cogens* and *erga omnes* nature of certain human rights obligations would have added considerable weight to the conclusions of the R2P Report. It would have been difficult for any State to argue that such principles did not form part of international law, since they underpin many of the essential legal and contractual relationships between States. Rejecting principles such as estoppel – effectively emanations of good faith – would have been complicated and impracticable. The debate

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92. Conversation with Francesco Francioni, Emeritus Professor & Co-Director of the Academy of European Law, The European Institute, in Florence, It. (2010).

would have been one of *interpretation*, rather than implementation. A *de minimis* interpretation of the impact of general principles – flexible as they are – would certainly have less of an impact upon the regime on the use of force. However, in such circumstances, the power would already have been taken away from the Security Council, as it would be for the international community of States to determine how such principles ought to be applied in concrete terms. An Advisory Opinion of the ICJ could potentially have been sought as part of the R2P initiative if a conclusive legal determination were needed. Things could have been considerably different. However, the Report’s drafters ignored general principles, and thus denied themselves the usage of an important – though oft-overlooked – component of the international lawyer’s toolkit. In essence, they were fighting with one hand tied behind their back, though they were seemingly oblivious to this fact.

## CONCLUSION

A reformed conception of the Responsibility to Protect may, in time, be possible. Alternatively, a new initiative may supersede it. However, in truth, the R2P is merely one of a great number of utopian frameworks proposed to solve the humanitarian intervention conundrum. The Canadian report appeared contemporaneously to reports sponsored by the Dutch and Danish governments. At the same time, the leading lights of international law were queuing up to cast their respective two cents into the debate. Generally, each proposal contained a framework based upon some sort of standard of quasi-legality or legitimacy, and a series of threshold conditions. The model proposed in this essay, based upon general principles, appears superficially rather similar, and the thresholds would be at home in many of the tests proposed over the past fifteen years or so. There is, however, a crucial difference. While the R2P and its contemporaries were legally rootless, the roots of the framework sketched above run deep into some of the most rudimentary principles of public international law. The framework based on general principles permits resort to humanitarian intervention without straying outside the law. In return for being granted this right, however, States must present clean hands, and comport themselves equitably in the execution of the intervention. This goes some way towards guarding against abuse.

The model presented is rudimentary. It leaves a number of important questions open – not least regarding enforceability, the reaction of States to such a proposal, and its implications for international stability. However, its superiority to the R2P as a doctrine grounded in the *lex lata* rather than the *lex utopia* must surely be obvious. Based upon pre-existing and pre-defined norms that have been subject to the interpretation of the PCIJ and ICJ, its terminology is not entirely indeterminate as was the case with the R2P, and therefore cannot be twisted every which way but loose by unscrupulous State actors to suit their individual agendas. It offers hope that answers lie within the law, rather than beyond it. While resurrecting the dead man R2P would seem beyond the power of general principles, however, the latter may offer an alternative to the former if the possibilities offered by their normative power are properly explored. The next blue riband commission established to chart a solution to the humanitarian intervention problem must not ignore the full array of sources of international law. One is much more likely to win a fight if one has both fists at one's disposal.