

RESPONSIBILITY TO PROTECT: AN EXPLANATION

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I. INTRODUCTION

The *Responsibility to Protect* (R2P) is the term proposed by a Commission convened by Canada in 2001 to counter humanitarian crises the world over.¹ The R2P was referred to in the United Nation's 2005 World Summit Outcome,² Security

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1. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT VIII (2001), *available at* <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

2. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/1, ¶¶ 138–39 (Oct. 24, 2005). The text of the of the document states:

Council resolutions,³ and General Assembly (GA) resolutions.⁴ In the event of a nation-state's unwillingness or failure to prevent genocide, crimes against humanity, war crimes, or ethnic cleansing within its own borders, the international community is given the responsibility by the R2P to warn the

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

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

3. The R2P principle has been referred to by the Security Council for the protection of civilians in intra-State armed conflicts. S.C. Res. 1674, ¶ 4, U.N. Doc. S/Res/1674 (Apr. 28, 2006); S.C. Res. 1706, ¶ 12, U.N. Doc. S/Res/1706 (Aug. 31, 2006); S.C. Res. 1814, ¶ 17, U.N. Doc. S/Res/1814 (May 15, 2008); S.C. Res. 1973, pmb., ¶ 3, U.N. Doc. S/Res/1973 (Mar. 17, 2011); S.C. Res. 2071, pmb., U.N. Doc. S/Res/2071, at 2 (Oct. 12, 2012). On top of that, the Security Council has implicitly or explicitly approved some unilateral humanitarian interventions after they took place. S.C. Res. 788, U.N. Doc. S/Res/788, at 2 (1992); S.C. Res. 1132, U.N. Doc. S/Res/1132, at 2, 4 (Oct. 8, 1997).

4. On September 14, 2009, the General Assembly passed its first resolution on the R2P and a General Assembly debate in July 2011 reasserted its support for the R2P concept. G.A. Res. 63/308, U.N. Doc. A/RES/63/307 (Oct. 7, 2009); Mónica Serrano, Exec. Dir., Global Centre Resp. Protect, Remarks to the General Assembly (July 12, 2011), available at <http://www.globalr2p.org/media/files/monica-2011-debate-statement-1.pdf>.

State and, if deemed necessary, militarily intervene.⁵ The R2P is not, however, ratified by an international treaty, and whether it has become a customary rule of international law or a general principle of law remains open to debate.

The R2P is an equalizer that helps opposition groups in sovereign countries. It is the new instrument that allows opposition groups to challenge sovereign states. The R2P bolsters this challenge by inviting scrutiny of the dealings of states with opposition groups within their boundaries. This scrutiny not only brings knowledge to opponents within the country, but also garners worldwide focus and censure of governments. It reinforces third-party judgments of competition and conflict inside state borders.

Thus, within the framework of the R2P, states are now being held to a higher standard. That is, the R2P generates an underdog advantage of sorts by focusing a spotlight on those (over-) powerful governments that persecute, or intend to persecute, opposition groups.⁶ The R2P is a doctrine that challenges the long-established understanding that human rights are ultimately a profoundly national question, rather than an international matter.

Underdogs can be defined as individuals or groups that are a disadvantaged and lacking in power.⁷ However, those that appear as underdogs have, in fact, greater resources at their disposal than would initially seem the case. Conversely, the “strong,” and the “powerful,” are not always what they seem. Indeed, the notion of the underdog can be said to be linked to the notion of the “failure”, or demise, of the most successful group, team or party. Underdogs are outcasts and misfits who aim to overcome the dominant power. They respond to adversity and

5. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 1, at 29.

6. Jack Donnelly, *Human Rights, Humanitarian Crisis and Humanitarian Intervention*, 48 INT'L J. 607, 636 (1993) (demonstrating that there is not a single case, with the possible partial exception of South Africa, in which the United Nations has been willing to be intrusive on humanitarian grounds when an existing government has resisted).

7. Joseph A. Vandello et al., *The Appeal of the Underdog*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 1603, 1603 (2007) (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2006)).

place themselves ahead of others and ahead of the game.⁸ Power can thus come in surprising forms.⁹ Those who seem weak at the outset can resort to unconventional methods to override their seemingly indomitable enemies;¹⁰ they can break and circumvent established rules in the name of strength. The underdog thus has the ability, and perhaps the freedom, to turn disadvantage into advantage. The underdog may therefore have greater strength and purpose than previously and traditionally envisaged.

Within national borders, the notion of the underdog fits opposition groups, who are outside of government and thus outside the game, namely international law. Defining opposition groups through the notion of the underdog is a metaphorical simplicity, and, through this metaphor, this Article aims not to make a policy description, but to contribute to the understanding of the relationship between opposition groups and governments.

Opposition groups, as a principle, are neither recognized nor protected in classical international law because the ultimate pillar of the international legal system is a sovereign state.¹¹ The notion of sovereignty appears in international law under the doctrine of positivism, according to which only rules expressly recognized as international treaties and customs are the sources of international law.¹² That is, the will of states, as expressed by treaty and custom, is the ultimate and exclusive source of law.¹³

8. MALCOLM GLADWELL, *DAVID AND GOLIATH* 6 (2013).

9. *Id.* at 13.

10. *Id.* at 6, 8, 9, 15.

11. ZYGMUNT BAUMAN, *CULTURE IN A LIQUID MODERN WORLD* 75 (Lydia Bauman trans., 2011). “Communities saw no fundamental difference between the faces of nationalism and liberalism presented by the new nation-states: nationalism and liberalism preferred different strategies, but strived towards similar ends.” *Id.* “There was no room for communities, certainly not autonomous and self-governing ones, in either of their plans.” *Id.* “There was no room for them either in the nationalist vision of ‘one nation’ or in the liberal model of a republic of free and unconstrained citizens.” *Id.*

12. Frédéric Gilles Sourgens, *Positivism, Humanism, and Hegemony: Sovereignty and Security for Our Time*, 25 PENN ST. INT’L L. REV. 433, 447 (2006); Tai-Heng Cheng, *Making International Law Without Agreeing What It Is*, 10 WASH. U. GLOBAL STUD. L. REV. 1, 12–14 (2011).

13. HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF*

International law has its own “positivity” and “self-sufficiency” based on sovereign states, and in this positivity, there is no place for opposition groups. Self-sufficiency rejects the taking over of rules and precepts from sources other than international treaties and customs.¹⁴ “Such borrowing, it is alleged, destroys the independence of international law and [hinders] its free development.”¹⁵ Interference in the relationship between states and opposition groups therefore cannot be imported from another source into international law.

The argument of this Article is that the R2P—though still not a norm of international law—may be a convenient instrument in the toolkit of persecuted opposition groups. The R2P is the response to the straitjacket imposed by classical international law. Through this challenge, the concepts of intervention, recognition and diplomacy can be questioned, and this questioning might lead to a legalization of the R2P and a further clarification of the handling of opposition groups in the future.

This Article first discusses intervention in domestic affairs, after which, the concept of recognition in international law will be explored. It will then discuss the diplomacy of the R2P. Relational Contract Theory (RCT) is covered in the ensuing section, followed by an analysis of the disillusionment with international law with respect to mass atrocities. The Article concludes by arguing that the R2P might be a useful instrument for opposition groups for conceptualizing and contextualizing international law in their own favor.

II. INTERVENTION IN DOMESTIC AFFAIRS

Although human rights law, as developed after the Second World War, challenged the sovereignty of the state, the state remains the ultimate arbiter of domestic affairs.¹⁶ However, the

INTERNATIONAL LAW 43 (Longmans, Green & Co. 1927) (2002).

14. See Jorge L. Esquirol, *The Fictions of Latin American Law (Part i)*, 1997 UTAH L. REV. 425, 439 (1997) (explaining that positivism makes claims of unachievable self-sufficiency, and is found in codes, legislation, and given rules).

15. LAUTERPACHT, *supra* note 13, at 7.

16. See Stephen P. Marks & Nicholas Cooper, *The Responsibility to Protect: Watershed or Old Wine in a New Bottle?*, 2 JINDAL GLOBAL L. REV. 86, 118 (2010) (“In

R2P, which was endorsed by the 2005 United Nations World Summit Outcome, as well as by resolutions passed by the General Assembly and the Security Council,¹⁷ is an acknowledgement on the part of the international community of the insufficiency of states in regards to domestic affairs. The R2P shows that the international community is interested in the relationship between governments and opposition groups. The R2P respects national autonomy, but at the same time requires state participation and accountability in the international system via respect for opposition groups. The international community, through the concept of R2P, wishes to bring rational calculations into disputes between governments and opposition groups and aims to rationalize the repercussions of these disputes on international law. The question is whether this rationalization is a new type of covert intervention into the domestic affairs of states.

Arguably, there has always been intervention by the international community in the internal affairs of sovereign states. There is a sliding scale of diplomatic language—that is, intervention is carried out under a number of names. Indeed, in the past, intervention was hidden under terms such as “lease,” “rectification of frontier” and “concession”—inventions and expressions of the cynical spirit of imperialism.¹⁸ In the post-World War II era, intervention took on three new monikers: trusteeship, developmentalism and neo-liberalism.

After World War II, the most prominent and institutionalized type of intervention was the trusteeship system, as recognized by the United Nations Charter.¹⁹ For all practical purposes, it was a continuation of the mandate system

January 2007, Russia and China vetoed a resolution that characterized the situation in Burma as constituting a threat to international security. In their explanatory statements, the Chinese and Russian representatives, in addition to the South African representative, stated that the proposed resolution fell outside the mandate of the Security Council, as the situation did not threaten international or regional peace, and was therefore not appropriate for action by the Council.”).

17. G.A. Res. 60/1, *supra* note 2; G.A. Res. 63/308, *supra* note 4; Serrano, *supra* note 4.

18. J.A. HOBSON, IMPERIALISM: A STUDY – INTRODUCTORY, NATIONALISM AND IMPERIALISM 11 (1902).

19. U.N. Charter arts. 86–91.

of the League of Nations.²⁰ It provided for a hierarchy among nations, and permitted massive intervention by one nation into the domestic affairs of another.²¹ Following the 1994 independence of Palau—the last of the trust territories and formerly part of the Trust Territory of the Pacific Islands—the Trusteeship Council has been left without responsibilities.²²

The second type of post-World War II intervention was developmentalism, which emerged from the then-ruling milieu of Keynesian economics, protectionism and domestic regulation.²³ According to developmentalism, the prestige of a government stems from its success in economic policy.²⁴ Governments are the primary motor for lifting populations out of poverty and dire conditions. In the process, the governments of developing countries are to demand expertise and financial help from developed countries, either directly or through international organizations in which developed countries play a dominant role.²⁵ Even though, on paper, governments of developing countries are the directors and coordinators of the development process, the intellectual, financial and human capital behind developmentalism came from developed countries.²⁶ In other words, developmentalism was a western social science and a top-down affair.²⁷

20. Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOREIGN AFF. 385, 396 (2003).

21. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 1, at 43.

22. *International Trusteeship System*, U.N., <http://www.un.org/en/decolonization/its.shtml> (last visited Apr. 15, 2014).

23. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 10 (2005); Ruth E. Gordon & Jon H. Sylvester, *Deconstructing Development*, 22 WIS. INT'L L.J. 1, 9–11 (2004).

24. See, e.g., Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L.J. 1, 30 (2011) (discussing China's approach to international human rights in light of developmentalism).

25. E.g., *The IMF and the World Bank*, INT'L MONETARY FUND (Sept. 30, 2013), <https://www.imf.org/external/np/exr/facts/imfwb.htm>.

26. See Declaration of the Group of 77 South Summit, Apr. 10–14, 2000 (Havana, Cuba) (“In particular, the international economic governance institutions must promote broad-based decision making which is essential if we are to have a more equitable global political economy.”).

27. David McDonald, *It's Not Easy Being Green: Environmental Politics in South Africa*, S. AFR. REP., Jan.–Feb. 1993, at 54.

However, developmentalism did not bear the promised fruit. First, the so-called developed countries experienced a crisis of capital accumulation in the 1970s.²⁸ The post-World War II world economic system—the Bretton Woods system—was thrown into disarray by the actions and policies of the United States, as seen, for instance, by the abandonment of the gold standard for exchange rates.²⁹ Concordantly, the less affluent nations could not achieve and maintain a sustainable development and prosperity, and thus, felt they were being hindered by the ideology and practice of developmentalism.³⁰

Following this disappointment with developmentalism, the new paradigm of neo-liberalism took center stage in the 1980s and 1990s.³¹ The developed state-developing state relationship gave way to deregulation, private enterprise, the free movement of capital and a far more diminished role for the state. It is a fundamental tenet of the neo-liberals that the key requirement for individual liberty (and prosperity) is the free market;³² in other words, the scope of the government was and is to be limited. Systems of state regulation and intervention were viewed as inefficient, stagnating and corrupt.³³ The neo-liberal state is to persistently seek out internal reorganizations and new institutional arrangements for the national private sector, which would, in turn, indirectly improve its competitive position as an entity vis-à-vis other states and foreign private sectors in the global market.³⁴ This is also in line with the current incarnation of developmentalism—neo-developmentalism.

28. HARVEY, *supra* note 23, at 12.

29. *Id.*

30. *Id.* at 11.

31. See ROBERT BOCOCK, HEGEMONY 11 (1986) (“In Britain, more specifically, the development of ‘Thatcherism’ from 1979 through the 1980s has been of paramount importance in affecting the political agenda in the society. Such a new type of right-wing political economy as that of Thatcherism has had parallels in the United States under Reagan, in West Germany, in Japan and, after the 1986 elections, in France too.”).

32. JOHN GRAY, BLACK MASS: APOCALYPTIC RELIGION AND THE DEATH OF UTOPIA 120 (2008).

33. F. Charles Sherman, *Law and Development Today: The New Developmentalism*, 10 GER. L.J. 1257, 1264 (2009).

34. HARVEY, *supra* note 23, at 65.

A demand of neo-developmentalism is that the state merely facilitate the participation of its own citizens and companies on the world stage.³⁵ The state is to ensure the full integration of its subjects in the world capitalist system by creating mechanisms for their full participation.³⁶ Neo-developmentalism demands only the semi-active role of the state, in contrast to developmentalism, which necessitated the complete control of the conditions under which the population operated. Neo-developmentalism can therefore be said to signal the ineffectiveness of developmentalism. The former demands a convergence between bureaucracies (i.e., governments) and the private sector.³⁷ At the same time, it criticizes the *laissez-faire* approach, which does not sufficiently recognize the state's crucial role as a bridge between its people and the international community.³⁸

The politico-legal concept of the R2P should be seen in the light of the economic concept of neo-developmentalism. The state has an intermediate role in both. Neo-developmentalism tries to find a middle ground in the economic sphere between outright economic *laissez-faire*, on the one hand, and the incontestable sovereignty of governments on the other. While the R2P, respecting the sovereignty of the state, aims to avoid direct military intervention in the first place and tries instead to co-opt states in the international system via persuasion. Indeed, the 2005 World Summit Outcome "promotes" intervention only as a last resort in the case of civil wars and warns governments that, notwithstanding their autonomy, they are under constant surveillance by the international community.³⁹

35. See Alice H. Amsden & Takashi Hikino, *The Bark Is Worse Than the Bite: New WTO Law and Late Industrialization*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 110–11 (2000) (explaining that although states can subsidize industries, they generally choose to merely steer the economic order in an informal manner by political pressures).

36. See *id.* (explaining that although states may interfere in the economic order on a more intrusive scale, most approach it in an informal manner by merely applying pressure by the state on the markets).

37. Sherman, *supra* note 33, at 1269.

38. See WILEY-BLACKWELL, LOCATING NEOLIBERALISM IN EAST ASIA 7 (2012) (noting developmentalism's criticisms of *laissez-faire*).

39. G.A. Res. 60/1, *supra* note 2, at 31.

With regard to the issue of state sovereignty, the R2P constitutes a criticism of international law as it draws attention to the ineffectiveness of conventional methods in international law. It represents a deregulation of sorts in international law, thus conjuring shades of neo-developmentalism. Put more clearly, the concept of international peace and security is deregulated and augmented by the R2P which enlarges the concept of international peace and security to include civil wars. Indeed, the R2P may become part of the unconventional strategy of opposition groups—underdogs—vis-à-vis the state, which relies on the positive international law: for states, international peace and security is limited merely to cross-border conflicts. However, a deregulated and enlarged “international peace and security” would include civil wars on a case-by-case basis.

The shift away from universal formulae toward a more sophisticated and nuanced, yet practical, results-oriented consideration of how to affect economic development parallels the “case-by-case” approach adopted in the 2005 World Summit Outcome formulation of the R2P.⁴⁰ Where there was uniformity and orthodoxy, there is now heterodoxy. This unconventional method consists of substituting effort with formal competence.⁴¹ It relies on the efforts of alliances between like-minded states and opposition groups, rather than on the abstract formalism of “universal” international law or international organization.⁴² In other words, neither classical international law, nor the 2005 World Summit Outcome, gives any “conventional” competence or right to purported opposition groups in a country to counter government monopoly on jurisdiction within state borders.⁴³ They do not constitute a legal basis for intervention.⁴⁴ The

40. See Marks & Cooper, *supra* note 16, at 120 (“Of similar concern is the fact that the Security Council has not formalized any standards, principles or guidelines for the use of force when a state is manifestly failing to fulfill the R2P, seemingly as a result of its commitment to reviewing situations on a case-by-case basis.”).

41. *Id.*

42. *Id.*

43. *Id.* at 129–30 (explaining that since the R2P is based on neither a treaty nor a customary rule, the question of whether it constitutes a general principle of law emerges; in its present state, the R2P risks remaining an ideal thinking of justice and being framed in the framework of *ex aequo et bono*).

44. BAUMAN, *supra* note 11, at 13 (“Culture today consists of offers, not

commitments of member states at the World Summit did not create new human rights, nor did it create any additional obligations for states.⁴⁵

Indeed, the 2005 World Summit Outcome makes it clear that the ultimate authority for R2P decisions and actions remains the Security Council.⁴⁶ The R2P is understandably co-opted into the U.N. system, as there has always been a “will to order” in the functioning of classic international law, and this “will to order” does not tolerate the notion of legal acknowledgement of opposition groups.⁴⁷ The established perception is that international law, which remains positive and conventional both in foundation and in construct, constricts the status of opposition groups.

Yet, after the General Assembly declarations and the Security Council resolutions on the R2P, opposition groups may be potential agents of change—underdogs with favorable prospects. Opposition groups can be non-class-based agents of historical, political and legal change on the world stage. In that regard, they may challenge the institution of recognition in international law. That is, the R2P may provide a platform for recognition. Indeed, only mutual recognition between the international community, states and opposition groups within the framework of international law are rational calculations possible in the first place.

III. RECOGNITION

The generally established and unfavorable perception of opposition or dissident groups leads us to recognize three stages of civil war: rebellion, insurgency, and, ultimately, belligerency.⁴⁸ Rebels and insurgents have no status in

prohibitions; propositions, not norms . . . culture today is engaged in laying down temptations and setting up attractions, with luring and seducing, not with normative regulation.”).

45. Marks & Cooper, *supra* note 16, at 129.

46. G.A. Res. 60/1, *supra* note 2, ¶ 139.

47. George Lawson & Luca Tardelli, *The Past, Present, and Future of Intervention*, 39 REV. INT'L STUD. 1233, 1235 (2013).

48. Richard Little, *Intervention and Nonintervention in International Society: Britain's Responses to the American and Spanish Civil Wars*, 39 REV. INT'L STUD. 1111,

international law.⁴⁹ The difference between the two is a mere question of conspicuousness. Rebels turn into insurgents when they become visible in the eyes of the international community.⁵⁰ Only the status of belligerency is recognized in international law. Belligerency status confers war rights, and belligerents also have rights and obligations stemming from international humanitarian law.⁵¹ Other countries are not to intervene in the war between belligerent groups and the state; the customary rule of neutrality comes into play.⁵² Domestic conflict, on the other hand, comes under the legal scrutiny of the international community.⁵³

In this respect, the R2P aims to bring a new dimension to this scrutiny and can be said to represent the fourth level of civil war. That is, the R2P is a further extension of the status of belligerency. The underdog—the opposition group—is to be strengthened through the R2P. It will no longer simply be argued that the manner in which opposition groups are treated is a matter of the relationship between a government and belligerent group. Governments will no longer be able to argue that there are merely some duties pertaining to the laws of war stemming from Geneva Conventions to which they are incumbent.⁵⁴ In contradistinction to the Geneva Conventions and Additional Protocols, which lay out the duties of states in terms of the laws of war and the implementation of these military observances, it is the international community which is the focus of the responsibilities expounded by the R2P.

The R2P can be said to be an acknowledgement (of sorts) by the U.N. that opposition forces and their struggles within state

1117 (2013).

49. JORDAN J. PAUST ET AL., *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 20 (3d ed. 2009).

50. *Id.*

51. *Id.*

52. *Id.*

53. Hans-Peter Gasser, *International Humanitarian law and the Protection of War Victims*, INT'L COMM. RED CROSS (Nov. 30, 1998), <http://www.icrc.org/eng/resources/documents/misc/57jm93.htm>.

54. See Paul R. Williams et al., *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis*, 45 CASE W. RES. J. INT'L L. 473, 483–86 (2012).

boundaries are to be carefully scrutinized. At issue is a fresh conceptualization of the relationship between the international community and opposition groups in the event of mass atrocities. In that regard, the R2P aims to speed up the reaction of the international community to civil wars by creating a (suitable) terminology and language, which will be used by all involved, thereby creating an increased consensus and uniformity of language.⁵⁵ As a result of the ensuing categories of speech and thought, it can be argued that the R2P would create a consensus and an atmosphere conducive to effective real-time responses to domestic crises. The key to this purported change is the notion of recognition.

Recognition is consent regarding the nature and the extent of inter-state relations,⁵⁶ and is a reflection of the pre-eminence of sovereignty in international law. Only through recognition by other states can a state participate in international affairs.⁵⁷ There is no authoritative supranational entity, which makes decisions (*vis-à-vis* recognition) that are binding upon the international community. Recognition is the prerogative of independent sovereign states. Only sovereigns recognize, and, in turn, only sovereigns are recognized.

The first and foremost objective of opposition groups is to acquire legal status through recognition.⁵⁸ However, when premature, recognition is erroneous and illegal.⁵⁹ Classic international law prohibits any “intervention” whatsoever into the internal affairs of states.⁶⁰ The scope of the term

55. ASIA PACIFIC CENTRE FOR THE RESPONSIBILITY TO PROTECT, A COMMON STANDARD FOR APPLYING R2P (2012).

56. Philip Marshall Brown, *The Legal Effects of Recognition*, 44 AM. J. INT'L L. 617, 617 (1950).

57. Elshad Nasibov, *How States are Recognized in International Law?*, CASPIAN WKLY. (Mar. 4, 2010), <http://www.en.caspianweekly.org/main-subjects/others/international-law/930-how-states-are-recognized-in-international-law.html>.

58. See Stefan Talmon, *Recognition of States and Governments in International Law*, WORDPRESS (Mar. 4, 2010), <http://fichasmarra.wordpress.com/2010/03/04/recognition-of-states-and-governments-in-international-law> (explaining that recognition can confer status, access to courts, privileges and immunities, and more).

59. BOLESŁAW A. BOCZEK, *INTERNATIONAL LAW: A DICTIONARY* 92 (2005).

60. Philip Kunig, *Prohibition of Intervention*, OXFORD PUB. INT'L L. (Apr. 2008), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434?rskey=U3SsCM&result=1&prd=OPIL>.

“intervention,” however, is so large that it may encompass both direct and indirect intervention, armed or unarmed.⁶¹ Once a state is recognized by the international community (outsiders) and its own people (insiders), the people or section of the people within the borders can no longer lay claim to a distinct legal personality.⁶² There is no legal way to recognize a mere segment of a population within the boundaries of the state. This impossibility of establishing a direct legal contact between the population and the international community has thus led to the practice of some states (e.g., the United States) and some legal doctrines to distinguish between political recognition (*de facto*) and legal recognition (*de jure*).⁶³

The general explanation made for such a political-legal distinction is that recognition proceeds in an incremental way—recognition constitutes a process, and the legal consequences attached to the different stages of this process are not the same. At the preliminary stage, some sort of moral support may be given to an opposition group within a country that is still deemed to be at the stage of insurgency.⁶⁴ This support is a signal by the recognizing state that the opposition group may have legitimate claims, which could, in time, solidify into legal rights and resultant obligations in the future. The politically recognized opposition group can thus receive nonlethal aid and financial backing and can, in some instances, be treated as an interlocutor.⁶⁵

At a certain point, political recognition is transformed into legal recognition when the international community decides that

61. G.A. Res. 2625 (XXV) U.N. GAOR, 25th Sess., Supp. No. 18, U.N. Doc. A/8018, at 122–24 (Oct. 24, 1970).

62. See THOMAS W. SIMON, PROTECTING MINORITIES IN INTERNATIONAL LAW, (2000), available at http://files.studiperlapace.it/spp_zfiles/docs/simon.pdf (promoting the important role “outsiders” need to embrace in order to protect the minority factions of the “insiders” from losing their identity when a new country is recognized).

63. NURULLAH YAMALI, TURK. MINISTRY OF JUST., WHAT IS MEANT BY STATE RECOGNITION IN INTERNATIONAL LAW? 8, available at <http://www.justice.gov.tr/e-journal/pdf/LW7081.pdf>.

64. DAVID GALULA, COUNTER-INSURGENCY WARFARE: THEORY AND PRACTICE 28 (1964).

65. See *id.* at 28–29 (discussing the different types of support typically provided to an opposition group).

the opposition group represents a sound and legitimate resistance to the central government.⁶⁶ Insurgents, thus, become belligerents and acquire a discernible legal position within international law. Concomitantly, they are to honor and obey the obligations of international human rights law and international humanitarian law.⁶⁷ In this manner, civil war can be likened to international war, as evidenced by common article 3 of the 1949 Geneva Conventions.⁶⁸

Nonetheless, to acquire the status of belligerent, these opposition forces must dominate a certain (and sizeable) amount of territory in the country, which constitutes a stable base from which operations may be conducted.⁶⁹ Crucial to this issue is the effectiveness of the insurgents. The recognition of the insurgents as a belligerent power therefore resembles recognition as a state. Via the effective control of the insurgent forces over parts of the (national) territory and over a segment of the state's population, an entity is formed which indeed resembles a state in the sense of international law.⁷⁰

A high degree of force and consistency brings belligerent status. The magnitude of the struggle is decisive, in that the international community should feel "affected" by the depth and magnitude of the civil war.⁷¹ For instance, if the struggle

66. EDRE U. OLALIA, THE STATUS IN INTERNATIONAL LAW OF NATIONAL LIBERATION MOVEMENTS AND THEIR USE OF ARMED FORCE 2–3 (2002), available at <http://www.iadllaw.org/files/THE%20STATUS%20IN%20INTERNATIONAL%20LAW%20OF%20NATIONAL%20LIBERATION%20MOVEMENTS%20AND%20THEIR%20USE%20OF%20ARMED%20FORCE%20by%20Edre%20Olalia.pdf>.

67. Andrew Clapham, *Human Rights Obligations of Non-State Actor in Conflict Situations*, 88 INT'L REV. RED CROSS 491, 498–99 (Sept. 2006).

68. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art 3, Aug. 12, 1949.

69. See OLALIA, *supra* note 66 (requiring occupation of a large portion of territory as a key component of elevating any insurgency to a belligerency).

70. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 616–17 (1941).

71. See CLIFFORD BOB, THE MARKETING OF REBELLION: INSURGENTS, MEDIA, AND INTERNATIONAL ACTIVISM 43–47 (2005) (linking a movements success in acquiring international support to six key factors: (1) high international standing, (2) preexisting contacts with international gatekeepers or matchmakers, (3) knowledge of the NGO hierarchy and public relation techniques, (4) a large monetary resource, (5) organizational resources to promote a sense of unity among the group, and (6) a

is maritime, recognition is almost a necessity;⁷² tacit acknowledgement that maritime conflict almost inevitably affects third parties. Likewise, the R2P, as mentioned in the World Summit Outcome, the Security Council and the General Assembly resolutions, is acknowledgement of the fact that third parties—in this respect, other countries—are “affected” by mass atrocities in a civil war.

In fact, belligerency remains a cross between political and legal recognition. The legal status of the belligerent is restricted by political concerns, which, on the one hand, do not confer on the opposition group the same rights as extended to government (for instance, belligerents cannot lay claim to the state’s embassies and assets abroad),⁷³ whilst on the other hand, the state and the international community, as a result of human rights and humanitarian law, are to respect the rights of the opposition group.⁷⁴ The opposition group is transformed on the international stage from a legal non-entity into an entity that is visible on the radar of international law, albeit one with a lower status than the state.

If things proceed according to the wishes and aims of the belligerent group, the final stage consists of the group being recognized as a state by the wider community of states.⁷⁵ It is here that the return to the purely political nature of recognition is made. There is no legal obligation to recognize a state. That is to say, every country acts according to its own discretion in terms of recognizing (or not recognizing) a successful belligerent force as a fully-fledged and legitimate member of the international community. Thus, the first and last stages of

charismatic leader to be the “face” of your movement).

72. Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 AM. J. INT'L L. 398, 407 (1937).

73. See Duncan Gardham, *Libya: £61 Billion in Assets to be Unfrozen*, TELEGRAPH, Aug. 24, 2011, <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8721075/Libya-61-billion-in-assets-to-be-unfrozen.html> (discussing the United Nation's plan for allowing Gaddafi's frozen assets to be transferred to the NTC).

74. G.A. Res. 2625, *supra* note 61, at 123.

75. See YAMALI, *supra* note 63, at 5 (describing recognition as the ultimate signal of a country determining there is a worthwhile advantage to conducting international relations with this group and noting that Formal Recognition of this group as a state serves as an icebreaker to forming the basis for an international relationship).

recognition are politicized and fully discretionary.⁷⁶ Only recognition during the middle stage—acknowledgement of the group as a belligerent—relies on concrete facts on the ground and concomitant legal necessities. Only belligerency approximates “legal” recognition.

Yet, this purported orderly division of recognition into stages may not fit reality at all times. It may not always be clear where the transition from one stage to the next lies. To a great extent, political and legal considerations may be intertwined. This is all the more true with regards to the currently popular terminology employed by the international community to recognize opposition groups: “a/the legitimate representative of the people.”⁷⁷

To be recognized as “a/the legitimate representative of the opposition group, signaling that the opposition group is approachable and that interaction between the opposition group and the international community may take place. The international community acknowledges and registers the existence of such a group and signals to the state concerned that it is being supervised in its dealings with that group. But, crucially, states recognizing the opposition group also acquire the advantage of controlling it. They acquire certain leverage in the civil war and play a role in the politics of civil war.

But if we are to ask why we go to these lengths to examine and conceptualize these different stages of recognition and the complex terminology they generate, we can respond by saying that it is because the international community does not dare to change the basic parameters of classic international law. There is little evidence of any intention to automatically recognize the legal personality of subgroups in a country. Yet, due to the inadequacy of classic international law—based on

76. *Id.* If a state has recognized capacity to maintain external relations with other states, then recognition may be deemed adequate. *Id.* Recognition is not about definite borders and definite people, but about being affected by a well-organized group. *Id.*

77. See, e.g., Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHINESE J. INT'L L. 219 (2013); Aaron Kalman, *US, France Recognize Syrian Opposition as 'Legitimate Representative' of the People*, TIMES ISRAEL (Nov. 13, 2012, 11:29 PM), <http://www.timesofisrael.com/france-us-recognize-syrian-opposition-as-legitimate-representative-of-the-people>.

sovereignty—in countering civil wars worldwide, the international community has tried to inaugurate a more flexible understanding of recognition through terminology that is variable. The terminology of recognition has been the augmenting factor.

Recognition is not a right possessed by insurgents, belligerents and governments.⁷⁸ Interference in the internal affairs of states by outside powers is not a right of opposition groups.⁷⁹ It is only when the interests of third parties and third countries become part of the equation—that is, when the interests of these third parties may be affected or threatened—that recognition becomes imperative. Thus, the R2P is an open declaration by the international community that it has been “affected” by the atrocities caused by the civil war in question. The R2P can be conceptualized as a new dimension of the institution of recognition in international law, one couched in terms of “responsibility” rather than in terms of rights and obligations. It adds the notion of “responsibility” to the terminology of recognition. Neutrals’ rights and interests are so affected by civil wars as to require a definition of their own relation to the parties—the persecutor government and the persecuted opposition group. This new dimension to recognition means treading a fine line between international law and diplomacy.

IV. DIPLOMACY

Diplomacy can be defined as the manner in which international relations are conducted.⁸⁰ It is the nonconfrontational understanding of international politics that the representatives of nations and national interests converge under, in order to negotiate and ensure the (relatively) smooth

78. Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 AM. J. INT'L L. 398, 402–04 (1937).

79. *Id.*; see also Pierre-Emmanuel Dupont, *The Supply of Arms to Opposition Groups in Syria and International Law*, ARMS CONTROL LAW (May 27, 2013), <http://armscontrollaw.com/2013/05/27/the-supply-of-arms-to-opposition-groups-in-syria-and-international-law> (discussing how the supply of guns to Syrian forces might be a breach of the customary principle of nonintervention).

80. MERRIAM-WEBSTER'S NEW COLLEGIATE DICTIONARY 357 (9th ed. 1991).

and peaceful enactment of international dealings. In this effort, specific techniques and rules of conduct are employed. The R2P, as a new way of recognizing the existence of opposition groups, can be included in a toolkit of techniques as a new way of conducting diplomacy vis-à-vis with those governments that clash with domestic opposition forces. It is the new discourse of diplomacy.

Nonetheless, a new discourse and technique of diplomacy does not necessarily become incorporated into international law. Diplomacy is the daily practice of international relations whereas international law is the conceptualization and solidification of that practice in an intelligible and enforceable set of rules. International law claims to dictate the frontiers of diplomacy. That is, diplomacy possesses fluidity, whereas international law purports to freeze that fluidity. Diplomacy is about satisfying the needs of inter-state relations for international peace and security through flexibility. By contrast, international law is concerned with rules and exceptions. Still, the daily practice of international diplomacy may challenge the limits set by international law.

In this respect, the R2P engages three tracks or methods of diplomacy as it confronts the notion of intervention in sovereign states for the sake of human rights:⁸¹ Track 1 diplomacy involves decision-making political leaders and is concerned with official posturing and the underlying threat of the use of force contained therein.⁸² On this track, leaders are stuck in rigid, pre-defined roles. The great majority of states indicated their approval for the R2P on this track at the 2005 World Summit, expressing respect and support for the principle through the active involvement of the United Nations Security Council on a case-by-case basis.⁸³ The proclamation of the R2P is an acknowledgement of the United Nations that it is ready to interpret the nonintervention clause in the United Nations

81. DEV RAJ DAHAL, TRACK II DIPLOMACY IN SOUTH ASIA – LIMITS AND POSSIBILITIES FOR REGIONAL COOPERATION 1 (2010), available at http://www.nepaldemocracy.org/documents/Track%20ii_drd.pdf.

82. *Id.*

83. G.A. Res. 60/1, *supra* note 2, ¶ 139.

Charter permissively.⁸⁴ The quasi-universal approval by the community of states demonstrates that states recognize the weaknesses of classic international law in dealing with civil wars. The R2P is diplomatic acknowledgement of the failure of international law to deal with mass atrocities and represents the efforts of international diplomacy to recognize the plight of persecuted opposition groups, the underdogs of international law.

Track 2 is about unofficial dialogues among intermediary actors that use alternative political channels of communication.⁸⁵ At issue here is the interaction of unofficial or semi-official channels through academics, retired government officials, think tanks and persons of social or cultural eminence. Indeed, the R2P was initially proclaimed by individuals that had convened for the International Commission on Intervention and State Sovereignty in Canada in 2001.⁸⁶ The recognition of “opposition groups” under the R2P label began with a report released by this Commission.⁸⁷ Indeed, the social construction of a social class involves organic intellectuals actively and consciously endeavoring to produce the class as an agent of change.⁸⁸ From 2001 onwards, the members of this Commission have been promoting the concept of the R2P on various platforms,⁸⁹ which has resulted in the emergence of a class that advocates the R2P.

84. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII. U.N. Charter art. 2, para. 7.

85. Diana Chigas, *Track II (Citizen) Diplomacy*, BEYOND INTRACTABILITY (Aug. 2003), <http://www.beyondintractability.org/essay/track2-diplomacy>.

86. Mient Jan Faber, *R2P, Humanitarian Intervention and Independence: The Proof of the Pudding is in the Eating*, AMSTERDAM L. F. (2009), <http://ojs.ubvu.vu.nl/alf/article/view/73/116>.

87. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT VIII (2001).

88. BOCK, *supra* note 31, at 106.

89. See, e.g., GARETH EVANS, <http://www.gevans.org> (last visited Apr. 15, 2014) (demonstrating how Commission member Professor Evans uses his website to advocate for R2P through publicizing his books, speeches, and other organizations).

Track 3 involves micro actors—that is, grassroots, bottom-up initiatives, and citizen activism.⁹⁰ This track is under the constant influence of the primary actors of Track 2 and constitutes a necessary base for the implementation of the R2P in future crises.⁹¹ Indeed, national and international public opinions are necessary for the activation and effective implementation of the R2P.

The R2P is the acknowledgement by global diplomacy that civil wars are not to be seen solely through the prism of Track 1 diplomacy, but also through those of Track 2 and Track 3. That is, the issue of intervention is not to be regarded solely as a matter of state-to-state relations, but also as a problem for academics, civil society, retired officials, opinion leaders and grassroots networkers. This intense engagement of three types of diplomacy necessarily leads to speculation and theorization about the United Nations Charter and international law in general. In particular, it can be held that international law is to be conceptualized and contextualized under a specific legal theory—that is, relational contract theory (RCT).⁹²

According to RCT, the R2P challenges the view that the UN system is restricted by contractual promises made in 1945, as embodied by the U.N. Charter—it is open to influences from three types of diplomacy.⁹³ In other words, the U.N. Charter is to be seen as a long-term contractual involvement. The R2P is an acknowledgement by the international community that the U.N. Charter is dynamic. Expressed in alternative terms, the 2005 World Summit Outcome and the subsequent Security Council and General Assembly resolutions on the R2P embody the acceptance of a significant part of the international community that the United Nations has implicit rules.

90. DAHAL, *supra* note 81.

91. See U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 59, U.N. Doc. A/63/677 (Jan. 12, 2009) (noting that states and intergovernmental organizations are not the only influential actors in implementing the R2P and that the role of advocacy groups, while not well-known, can be powerful).

92. Jared Wessel, *Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations*, 60 N.Y.U. ANN. SURV. AM. L. 149, 166 (2004).

93. DAHAL, *supra* note 81; *Diplomacy: Introduction*, PEACE PALACE LIBR., <http://www.peacepalacelibrary.nl/research-guides/international-organisations-and-relations/diplomacy> (last visited Apr. 15, 2014).

International law cannot be deduced merely from the clear wording of the U.N. Charter. Instead, inductive, dynamic and long-term international law-making is the issue.

V. RELATIONAL CONTRACT THEORY

Relational contract theory (RCT) is, in effect, a general theory of the social order.⁹⁴ It can be employed to understand international law, which purports to regulate the global social order, but fails to acknowledge the existence of the underdogs, i.e., opposition groups. Hence, the United Nations Charter can be envisaged as a “relational” contract among states, giving underdogs a platform.

The U.N. Charter could be conceptualized in terms of private law,⁹⁵ and in particular, from the perspective of “RCT.”⁹⁶ Granted, the “doctrine of sovereignty, with its conception of eternal and inalienable interests protected by the State and of their public and absolute character, was bound to reject any recourse to private law as concerned with interests deemed to be of an economic and lower order.”⁹⁷ Ordinary standards and the instruments of private law, which are concerned chiefly with the evaluation of economic interests,⁹⁸ may not be sufficient for public international law. Still, one cannot deny the historical influence of property—an institution of private law—on the formation of the theory of sovereignty.⁹⁹ After all, classic

94. William C. Whitford, *Ian Macneil's Contribution to Contracts Scholarship*, 1985 WIS. L. REV. 545, 545 (1985).

95. See August Reinisch, *Convention on the Privileges and Immunities of the United Nations*, U.N. AUDIOVISUAL LIBR. INT'L L. 1-2 (2009), available at http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf (explaining the legal status of the U.N. was a prerequisite for the exercise of certain private law rights, and indicating that the U.N. enters into private law contracts).

96. See Gidon A. G. Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567, 600 (1983) (noting that the “relational order” that prevails in the United Nations has had the effect of transforming the Charter over time).

97. HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW ix (1927).

98. *Id.* at 8.

99. *Id.* at 6.

international law, as it now stands, relies on an analogy with the institution of property.¹⁰⁰

The relational contract is defined in contradistinction to the discrete contract. A discrete contract is a transaction of short duration, involves limited personal interactions,¹⁰¹ and does not tolerate indefiniteness.¹⁰² The interested relevant parties bring the future wholly into the present.¹⁰³ At issue is a fully articulated plan for a single, mutually beneficial exchange.¹⁰⁴ Indeed, classical contract law relies on the assumption that all contracts are discrete.¹⁰⁵

In contrast, a relational contract does not reduce the critical terms of the arrangement to pre-defined obligations.¹⁰⁶ A relational contract supposes transactions by actors who are in an ongoing relationship.¹⁰⁷ Classical contract law is axiomatic and deductive; relational contract theory is open and inductive.¹⁰⁸ Relational contracts lack a grand meeting of the minds at a certain point in time and cannot be reduced to a discrete notion of a promise indicated at the conclusion of an agreement. Relational contracting takes place not at a single moment but over a period of time. Thus, the aim of the parties in

100. See David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 124, 133 (1997) (explaining that sovereignty described a relation to territory analogous to the relationship between individuals and their property, and that classic international law has been criticized for “allowing an international law deduced from sovereignty”).

101. Paul J. Gudel, *Relational Contract Theory and the Concept of Exchange*, 46 BUFF. L. REV. 763, 764 (1998).

102. See *id.* (explaining that in such transactions, parties “bring the future wholly into the present” and essentially treat the future as the present via completely planning the transactions; the author goes on to state that nothing binds the parties apart from this planning for a single exchange).

103. *Id.*

104. *Id.*

105. See Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805 (1999) (arguing that relational contract theory, as opposed to discrete contract theory, “stands in opposition” to classical contract law).

106. *Id.* at 815.

107. *Id.* at 812.

108. *Id.*

relational contracts is to preserve and enhance the relationship.¹⁰⁹

Relational contracts are characterized by the long duration of elements that are otherwise difficult to monetize or measure.¹¹⁰ The beginning and end of relations tend to be gradual and incremental; the relation is an ongoing integration of behavior developing and varying with events in a largely unforeseeable and unpredictable future.¹¹¹ In the process, parties gather greater quantities of information and gradually agree to more and more as they proceed.¹¹²

RCT stands in opposition to mechanical historical materialism. The latter “does not allow for the possibility of error, but assumes that every political act is determined, immediately, by . . . structure,”¹¹³ whereas relational contract theory is irrational—it entails spontaneity, novelty, and unpredictability and acknowledges the fact that knowledge of society is mostly embodied in practices. As such, contracting states could never possess the knowledge they need to organize international relations efficiently. Thus, human progress cannot be viewed as linear or teleological. Relational contract theory replaces faith-based politics like developmentalism, neo-liberalism and neo-developmentalism. It does not believe that particular methods will transport humanity towards an end-time in which humanity will achieve something akin to eternal happiness.¹¹⁴

At issue in RCT is flexibility in dealing with continuously changing circumstances. Contractual obligations cannot always be derived from a primary act of initial agreement; they may be derived from norms other than the expressed (or even implied)

109. Richard E. Speidel, *The Characteristics and Challenges of Relational Contracts*, 94 NW. U. L. REV. 823, 829–30 (2000).

110. Gudel, *supra* note 101, at 765.

111. *Id.*

112. Whitford, *supra* note 94, at 546.

113. BOCK, *supra* note 31, at 87.

114. See Gudel, *supra* note 101, at 777–78 (noting that utility maximization is not the controlling factor in contractual relations, and setting out a number of other factors that govern such relations).

consent of the parties.¹¹⁵ A relational contract relies on dynamic processes, such as the course of negotiations over time and the evolution of a contractual relationship. It allows the traditional legal understanding of the concept of assent to be challenged. Although classical contract theory necessitates the enforcement of promises and assent given at the conclusion of the contract, problems emerge if the object of the contract is not amenable to immediate enforcement. Indeed, that can be said to be the case with enforcing international peace and security, the object of the United Nations. Providing international peace and security is an ongoing process. Thus, interpreting the U.N. Charter as a classical contract is difficult.

RCT favors the continuation of relationships, notwithstanding serious obstacles, rather than the repudiation of relationships. The contract can adapt to new conditions, which is compatible with U.N. law. Indeed, notwithstanding complaints about its nature and functioning, no country could conceivably wish to abandon the United Nations. States do not wish to repudiate the U.N. Charter, as if it were a discrete contract that no longer fulfilled its expected objectives.¹¹⁶ It is believed that preserving the U.N. “relationship” serves the ultimate goal of international peace and security.¹¹⁷

This is all the more true as the United Nations designates member countries as recognized participants in the international system.¹¹⁸ Being a member of the United Nations confers legal and political standing on the world stage, and no member state wishes to be shorn of that standing. For instance, even though Indonesia declared withdrawal in 1965, its

115. *Id.* at 769.

116. Charles Pierson, *Preemptive Self-Defense in an Age of Weapons of Mass Destruction: Operation Iraqi Freedom*, 33 DENV. J. INT'L L. & POL'Y 150, 173 (2004).

117. *See, e.g., The UN in Brief: How the UN Works*, U.N. <http://www.un.org/Overview/uninbrief/about.shtml> (last visited Apr. 15, 2014) (noting that States that agree to become members of the United Nations accept the obligations of the U.N. Charter, which sets out basic principles of international relations, including maintaining international peace and security).

118. *See* art. 2, paras. 2–6 (imparting obligations on Members to, in part, settle international disputes by peaceful means, refrain from the threat or use of force in international relations, and ensure that non-Member states act in accordance with the charter's principles in order to maintain international peace and security).

delegation soon returned to the United Nations.¹¹⁹ Likewise, Saudi Arabia recently rejected temporary membership of the Security Council in protest at the limited number of permanent member seats on the Council.¹²⁰ However, Saudi Arabia did not quit the United Nations.¹²¹ Notwithstanding inequality as embodied by the limited number of permanent seats on the Security Council, Saudi Arabia clearly wishes to continue its “relationship” with the United Nations.

Another example is the now well-established custom of abstention from voting of the permanent members of the Security Council.¹²² Although permanent members abstain, Security Council resolutions on substantive issues are still carried, albeit in contravention of the explicit wording of the U.N. Charter, which requires the consensus of the permanent members for a resolution to pass.¹²³ However, it is the practicalities of international politics that have established such a custom. The ongoing U.N. “relationship” between the great powers with permanent seats on the Security Council has paved the way for a twist to the written rule of the Charter. Permanent members of the Security Council wish to maintain their relationship, albeit sometimes at the expense of the clear wording of the U.N. Charter. Indeed, NATO’s intervention in Libya in 2011—a classic R2P case—was based on Security Council Resolution 1973, which was adopted despite the

119. Press Release, Dep’t of Public Information, United Nations Member States, U.N. Press Release ORG/1469, n.8 (July 3, 2006).

120. Nate Rawlings, *Saudi Arabia Rejects Seat on U.N. Security Council and Confuses Everyone*, TIME WORLD (Oct. 18, 2013), <http://world.time.com/2013/10/18/saudi-arabia-rejects-seat-on-u-n-security-council-and-confuses-everyone/print>.

121. *Member States of the United Nations*, U.N., <http://www.un.org/en/members/index.shtml> (last visited Apr. 15, 2014).

122. See, e.g., U.N. S.C., Repertoire of the Practice of the Security Council: Chapter IV Voting, 9–11 (Supp. 2004–2007), http://www.un.org/en/sc/repertoire/2004-2007/04-07_04.pdf#page=9 (explaining the practice of voluntarily abstention from voting by permanent members of the Security Council, and providing examples in which such abstention occurred).

123. U.N. Charter art. 27, paras. 2–3; see also Leo Gross, *Voting in the Security Council: Abstention from Voting and Absence from Meetings*, 60 YALE L.J. 209, 210 (1951) (providing an example of a legally valid substantive Security Council vote from which some permanent members abstained).

abstention of two of its permanent members: China and Russia.¹²⁴

The 1950 “Uniting for Peace” resolution of the General Assembly is another example of the inherent fluidity of the relationships in the U.N. system.¹²⁵ Notwithstanding the lack of a legal basis in the U.N. Charter providing for the use of force as a result of a General Assembly resolution, the General Assembly adopted a resolution endorsing military intervention in Korea.¹²⁶ Even after a deadlock in the Security Council, the Western powers, led by the United States, chose to remain within the framework of the United Nations and did not go to war without any endorsement on the part of the United Nations.¹²⁷ Instead, a resolution was sought within the confines of the United Nations.¹²⁸ Although a Security Council resolution could not be achieved, a General Assembly resolution providing for the “use of force” was made.¹²⁹ Yet under the U.N. Charter, such resolutions endorsing the “use of force” fall within the auspices of the Security Council.¹³⁰ The thinking behind the General Assembly Resolution was supposed to be that the U.N. Charter constituted a “relational” contract, which would allow such changes in the balance between its organs.

124. Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, By Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

125. Uniting for Peace, G.A. Res. 377 (V) A, U.N. Doc. A/RES/377 (Nov. 3, 1950), available at <http://www.un.org/Depts/dhl/landmark/pdf/ares377e.pdf>.

126. G.A. Res. 376 (V), U.N. Doc. A/RES/376(V) (Oct. 7, 1950) (recognizing the recommendations made for intervention made in Security Council Resolution 84); see generally U.N. Charter arts. 9–22 (establishing the scope and obligations of the General Assembly, and omitting any reference to allowing for a use of force). Article 14 is particularly noteworthy, and provides that the General Assembly “may recommend measures for the peaceful adjustment of any situation.” U.N. Charter art. 14.

127. Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT’L L. 21, 32 (1995); see Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 VILL. L. REV. 149, 176 (2006) (explaining that the 1950 Uniting for Peace Resolution established the ability of the General Assembly to act in situations where the Security Council is deadlocked).

128. Fisher, *supra* note 127.

129. G.A. Res. 377 (V), *supra* note 125, ¶ 1.

130. U.N. Charter arts. 41–43.

This is the case also in those situations where the U.N. option is discarded. The NATO intervention in Kosovo in 1999 was carried out without a Security Council Resolution.¹³¹ However, after the intervention, a return to the fold of the United Nations was made via Security Council Resolution 1244, a legitimization of sorts imparted by the United Nations.¹³² The United Nations was found to be sufficiently “relational” to co-opt a past illegal intervention into the U.N. mechanism.¹³³ This is a result of the ultimate objective of the U.N. Charter—international peace and security. It is an overriding aim for which even past illegalities could be *ex post facto* integrated into the United Nations and transformed into legality.

Indeed, the objective or objectives being pursued constitute a further difference between the classical contract and the relational contract. While the linchpin of classical contract law is wealth maximization¹³⁴—a singular objective—relational contract theory advances other values besides wealth maximization.¹³⁵ RCT sets forth the thesis of a multiplicity of goals. A similar analysis could be made with regard to the objectives of the U.N. Charter. The linchpin of the U.N. Charter is international peace and security, thus it is concerned with conflicts that cross borders. Yet, by analogy, a RCT perspective on international law would also require looking at civil wars that do not directly endanger international peace and security.

131. David Wippman, *Kosovo and the Limits of International Law*, 25 *FORDHAM INT'L L.J.* 129, 129 (2001).

132. *Id.* at 134; S.C. Res. 1244, ¶¶ 3, 7–9, U.N. Doc. S/RES/1244 (June 10, 1999).

133. See Gudel, *supra* note 101, at 765 (explaining that “relational” transactions involve an ongoing integration of behavior that varies with events in an unforeseeable future); Louis Henkin, *Kosovo and the Law of “Humanitarian Intervention”*, 93 *AM. J. INT'L L.* 824, 827 (1999) (noting that formal ratification of Resolution 1244 “effectively ratified what earlier might have constituted unilateral action questionable as a matter of law”).

134. Marco J. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 *UCLA L. REV.* 59, 60–61 (2008).

135. Barbara Colledge, *Relational Contracting – Creating Value Beyond the Project*, 2 *LEAN CONSTRUCTION J.* 30, 31 (2005) (“The adoption of relational contracting approaches can make a significant contribution to the development of sustainable communities through the building of ‘social capital’ and the contribution to the four pillars of sustainable communities, those of connectedness, citizenship, creative citizens and competitiveness.”).

While the U.N. “contract” was being negotiated in 1945, most rights, obligations and issues were not indicated at all—including those pertaining to civil wars.¹³⁶ Indeed, when joining the United Nations, there were numerous unknowns. From a classical contract perspective, this would not be deemed a reason to expand and augment the concept of “international peace and security.”

However, RCT would argue that a contract comprises the idea of joining a “relation.” “[W]hen committing to a relation, we cannot specify all the obligations and responsibilities that the relationship will entail.”¹³⁷ We merely commit ourselves to preserving and sustaining the health of the “relation.” In the process, conflict with elements of the initial explicit consent may take place. For instance, Security Council Resolution 1973¹³⁸ on Libya in 2011 advancing the R2P, and the subsequent NATO intervention in the country, could be seen in this light.¹³⁹ The contract made in 1945—the U.N. Charter—did not provide any remedy for the civil war in Libya in 2011.¹⁴⁰ The internal situation in Libya was considered to be an integral part of international peace and security in 2011, but it would not have been so in 1945.¹⁴¹ Hence, the R2P changes the character of a

136. Zenon Stavrinides, *Human Rights Obligations Under the United Nations Charter*, 3 INT'L J. HUM. RTS. 38, 38–39, 46–47 (1999).

137. Gudel, *supra* note 101, at 786.

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

139. Yevgeny Shestakov, *Russia: Nato Has Overstepped UN Mandate on Libya*, TELEGRAPH, Apr. 21, 2011, <http://www.telegraph.co.uk/sponsored/rbth/politics/8466680/Russia-pressure-Nato-Libya.html> (describing Russian opinions that NATO had “overstepped its UN mandate through use of excessive force” with respect to its intervention in Libya).

140. See Mary Ellen O’Connell, *Continuing Limits on UN Intervention in Civil War*, 67 IND. L.J. 903, 903 (1992) (noting that the U.N. Charter prohibited the Security Council from taking any enforcement action in response to non-international issues); U.N. Charter arts. 39–51.

141. While the 1945 U.N. Charter contains no express provisions for authorization of peacekeeping forces, over time the use of such forces has grown from observational capacity to its role today, where they are deployed into armed conflicts and authorized to use force to promote human rights and maintain law and order. SCOTT SHEERAN, *CONTEMPORARY ISSUES IN UN PEACEKEEPING AND INTERNATIONAL LAW* (2011), available at http://www.idcr.org.uk/wp-content/uploads/2010/09/02_11.pdf (last visited Apr. 15, 2014).

contract in regards to the U.N. Charter in that it ushers in a “relational” dimension. The R2P is a signal of the international community that it does not see the U.N. Charter as a discrete contract concluded in 1945, but as a dynamic instrument.

VI. INTERNATIONAL LAW AND MASS ATROCITIES

As a framework for analysis, RCT may be a vital tool, particularly in light of the failure of international law in limiting excesses of international politics such as mass atrocities.¹⁴² International law has proven to be inadequate in countering many of the humanitarian catastrophes that have struck the world over. However, at the beginning of the 20th century, the framers of international law, and the United States in particular, held certain optimistic conceptions as regards the place and the function of international law.¹⁴³

First was the conception that clearly written “universal” international treaties would define the rights and obligations of the subjects of international law.¹⁴⁴ International law, with its fundamental principles, would be above all nations and regulate their relations for the sake of international peace, security and prosperity. Second, adjudication would be of utmost importance.¹⁴⁵ That is to say, compulsory “universal” international courts would direct the developments and functions of international law.¹⁴⁶ Third, in cases in which there

142. See MARK A. DRUMBL, *ATROCITY AND PUNISHMENT* 25 (2005), available at <http://www.law.uga.edu/intl/drumbl.pdf> (discussing the importance of relational contract theory in atrocity law); see generally MILTON LEITENBERG, *DEATHS IN WARS AND CONFLICTS IN THE 20TH CENTURY* (2006) (discussing a number of genocides, among other massive loss of life events, which occurred in the twentieth century).

143. See Ole Spiermann, *Twentieth Century Internationalism in Law*, 18 *EUR. J. INT'L L.* 785, 786–87 (2007) (describing influential ideas promulgated during the 20th century).

144. See Titus Corlăţean, *Universal International Treaties on the Protection of Human Rights*, 60 *ROMANIAN STAT. R. SUPPLEMENT* 84, 84 available at http://www.revistadestatistica.ro/suplimente/2012/2/srrs2_2012a12.pdf (describing universal international human rights treaties in the twentieth century).

145. Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 *N.Y.U. J. INT'L L. & POL.* 709, 749 (1999).

146. See Ram Prakash Anand, *Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement*, 5 *MAX PLANCK Y.B. U. N. L.* 1, 14 (2001) (noting fears that fractionalization of the International Court of Justice may “disrupt the

were no international treaties, customary international law would fill the gaps.¹⁴⁷ This would be comprised of *opinio juris* together with consistent and robust practice.¹⁴⁸ The web of international treaties, courts and customs would restrain the states in their dealings with each other.

This vision reflected a belief in expert and technician knowledge. “[T]he common interests of the arts and sciences would everywhere be weaving an elaborate network of intellectual internationalism, and both economic and intellectual community of needs and interests would contribute to the natural growth of such political solidarity as was required to maintain this real community.”¹⁴⁹ This development may be termed “scientism.”¹⁵⁰

“Scientism holds that there are no meaningful forms of discourse other than those of science.”¹⁵¹ If it is to generate societal norms and policies, then this would also include the social sciences.¹⁵² International lawyers, under scientism, are seen as “competent scientists” in advising governments and the international community in the methods, techniques and norms of legal science.¹⁵³ They, therefore, play important roles in international institutions. Belief in the scientific knowledge of a professional class of legal experts was an important contributing factor to the conceptualization of international law in the twentieth century.¹⁵⁴ There was an internationalism of sorts of

universal development of international law.”).

147. Curtis A. Bradley, *The Chronological Paradox, State Preferences, and Opinio Juris* 1, (June 1, 2013), http://law.duke.edu/cicl/pdf/opiniojuris/panel_1-bradley-the_chronological_paradox_state_preferences_and_opinio_juris.pdf.

148. See *id.* (bisecting customary international law into two components: “an objective, state practice component, and a subjective, sense of legal obligation component,” termed “*opinio juris*”).

149. HOBSON, *supra* note 18, at 385.

150. See BOCOCCO, *supra* note 31, at 64 (identifying the notion that science will be the driving force behind the organization and order of the world as “scientism”).

151. *Id.*

152. *Id.*

153. See Michael A. Blickman, *F.S.C. Northrop’s Legal Science and International Law: A Solution to Ideological Conflict Through Law*, 1 B.C. INT’L & COMP. L. REV. 337, 338, 351 (1977) (speaking about legal science in the context of international law).

154. See MARK MAZOWER, *GOVERNING THE WORLD – THE HISTORY OF AN IDEA* 95 (2012) (“Social science was *the* critical new instrument for doing this, and it was

technical, intellectual, and scientific specialism. But, more than that, the self-image of an emerging superpower—the United States—was the primary motor behind this international legal thinking.¹⁵⁵ The American public, senate and president expressed an interest in international law being overseen by an international court issuing binding judgments.¹⁵⁶ A “hegemony” of international law was being constructed.

Hegemony can be said to be the creation and construction of modes of “naturalness” regarding thinking about social, economic, political and ethical issues.¹⁵⁷ Hegemonic work has to be done at the highest intellectual level in philosophy and the social sciences. Hegemony is moral and philosophical leadership, and this leadership is achieved “through the active consent of major groups in a society.”¹⁵⁸ That is, there is a distinction between “domination” based upon force, and leadership based upon hegemonic consent. Hegemony implies a coherent world-view, a convincing philosophy and a related morality.¹⁵⁹ In such terms, the state should be seen not only as the apparatus of government, but also as the “private” apparatus of hegemony—that is, civil society. When successfully achieved, hegemony is “unnoticeable in everyday political, cultural and economic life.”¹⁶⁰ Indeed, a society which has a hegemonic world-view is one in which a relatively coherent philosophy is shared by the ruling groups and by all major groups composing the society.¹⁶¹

supposed to promote international cooperation too since this new professional class generally assumed that reason and science would show men what they shared and help to set aside prejudices.”).

155. MICHAEL BYERS, *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 1, 7 (Michael Byers & Georg Nolte eds., 2003).

156. The United States unsuccessfully pressed for the creation of an international court at the 1907 Hague Peace Conference; however, following World War I, the U.S. Senate failed to ratify the permanent International Court of Justice. Sean D. Murphy, *The United States and the International Court of Justice: Coping with Antinomies*, *THE SWORD AND THE SCALES* 46, 58–59 (Cesare P.R. Romano ed., 2008).

157. BOCOCK, *supra* note 31, at 8.

158. *Id.* at 11.

159. *Id.* at 17.

160. *Id.* at 76.

161. *Id.* at 123.

Civil wars, however, have led to the hegemony of international law losing its vigor and prestige. The standing of international law has also sustained considerable damage by not countering crimes on a global scale. In response, international law has tried to define, categorize and punish different types of crimes, leading to the formation of a new branch of international law—international criminal law.¹⁶² Presently, the primary problem caused by this challenge concerns the legal definition of mass atrocities.¹⁶³

Indeed, three out of the four crimes targeted by the R2P—genocide, crimes against humanity, and ethnic cleansing¹⁶⁴—are arguably indistinguishable from one another. The fourth crime—war crimes—had already been regulated by the nineteenth century and had received further clarification during the Hague Convention of 1907,¹⁶⁵ the Geneva Conventions of 1949,¹⁶⁶ and the Additional Protocols of 1977.¹⁶⁷ The primary aim of these conventions was to somehow render war “manageable.”¹⁶⁸ As a result, the norms and manners in

162. Beth Van Schaack & Ron Slye, *A Concise History of International Criminal Law* 27–28 (Santa Clara Univ. Sch. of Law, Working Paper No. 07-42, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1016152.

163. Scott Straus, *Identifying Genocide and Related Forms of Mass Atrocity* 1 (U.S. Holocaust Mem'l Museum Working Paper, 2011), available at <http://www.ushmm.org/m/pdfs/20111219-identifying-genocide-and-mass-atrocity-strauss.pdf> (noting difficulties in accurately defining the term).

164. Muna Ndulo, *Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes Against Humanity*, UNITED NATIONS 1, <http://www.un.org/ga/president/64/thematic/responsibility/ndulo.pdf> (last visited Apr. 15, 2014).

165. Hague Convention (IV) Respecting the Laws and Customs of War on Land Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague IV].

166. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 Aug. 1949, 75 U.N.T.S. 287 (establishing that grave breaches of the Geneva Convention would constitute a war crime).

167. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977, 1125 U.N.T.S. 3 (describing war crimes committed willfully in violation of Additional Protocol I as grave breaches); Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Additional Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (prohibiting war crimes similarly to Additional Protocol I).

168. See Hague IV, *supra* note 165, at pmbl. (explaining the need to confine and

which hostilities are conducted and the limits of military engagement are deeply rooted in international law.¹⁶⁹

However, the conceptualization of atrocities carried out in civil wars and domestic conflicts has not matured to the same extent. To be more precise, delineating clear definitions of genocide, crimes against humanity, and ethnic cleansing remain problematic. This is in line with the more overarching criticisms of international law: that “the boundaries between legal and illegal, domestic and foreign, and civilian and combatant are more blurred than ever.”¹⁷⁰

As the 1948 Genocide Convention was reaching a finalized state, the term “crimes against humanity,” or “crimes against civilization,” had already seeped into usage.¹⁷¹ Indeed, it was for crimes against humanity that Nazi defendants were punished at the Nuremberg trials.¹⁷² The term “genocide” appeared only in the indictment of the prosecutor, but not in the body of the decision of the Nuremberg court.¹⁷³ Although the 1948 Genocide Convention went on to nominally distinguish between genocide and crimes against humanity by labeling genocide as a crime that could be committed in peace and in war (whereas crimes against humanity could only be committed during wartime), the International Criminal Tribunal for the Former Yugoslavia

limit war and its severity as much as possible).

169. Ramesh Thakur, *Global Norms and International Humanitarian Law: An Asian Perspective*, INT'L COMM. RED CROSS (Mar. 31, 2001), <http://www.icrc.org/eng/resources/documents/article/other/57jqzd.htm>.

170. *E.g.*, Thomas E. Ricks, *The Future of War (II): As the Nature of War Changes, the Familiar Dividing Lines of our World are Blurring Across the Board*, FOREIGN POL'Y (Jan. 15, 2014), http://www.foreignpolicy.com/posts/2014/01/15/the_future_of_war_ii_as_the_nature_of_war_changes_the_familiar_dividing_lines_of_ou.

171. See David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 86 (2004) (noting the usage of both terms by different countries).

172. George A. Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 20 (1947).

173. OFFICE OF MILITARY GOVERNMENT FOR GERMANY, Case No. 8 Indictment, 5, in NURNBERG MILITARY TRIBUNALS: INDICTMENTS (1947); JUDGE BOHDAN A. FUTEY, LEGAL RECOGNITION OF THE HOLODOMOR AS GENOCIDE: INTERNATIONAL COVENANTS, AGREEMENTS, AND COURT DECISIONS 2 (2013), <http://usukrainianrelations.org/images/pdf/%5BHESSE%202013%5D%20FuteyLegal%20Recognition%20of%20the%20Holodomor%20as%20Genocide%20International%20Covenants%20Agreements%20and%20Court%20Decisions.pdf>.

(ICTY) approximated crimes against humanity to genocide by accepting that crimes against humanity could be committed both in war time and peace time.¹⁷⁴

Although it is widely accepted that a specific intention to eradicate an entire (cultural or ethnic) group is the ultimate benchmark of the crime of genocide,¹⁷⁵ proving the existence of such intent remains highly difficult. Consequently, the real difference between these two crimes is often simply a matter of perception, selection of data and where the adjudicators choose to look. In other words, crimes against humanity are inductive, whereas genocide is deductive. The number of people killed under both crimes could be the same, but while the crime of genocide would look at the group as a whole, crimes against humanity would look at individuals.¹⁷⁶ Genocide focuses on groups in opposition whereas a crime against humanity is “merely” a high number of individuals—and, crucially, not a group—being massacred by a state.¹⁷⁷ However, for the practicalities of R2P, such a distinction could be said to be too abstract and, ultimately, academic.

The term “ethnic cleansing” came into vogue in the 1990s as a result of the war in Yugoslavia.¹⁷⁸ Nowadays it has become a popular epithet for civil wars the world over.¹⁷⁹ However, doubts remain as to whether it has become a self-standing crime in international law. There is no codified prohibition of ethnic

174. In 1995, the first ruling of the appeals chamber of the ICTY established that crimes against humanity no longer had any nexus with aggressive war. Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 140 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Furthermore, the ICC Statute confirmed that crimes against humanity could be committed in peacetime. *Id.*

175. *E.g.*, Yavuz Aydin, *The distinction between crimes against humanity and genocide focusing most particularly on the crime of persecution*, REPUBLIC TURKEY MINISTRY JUST. 4, http://www.justice.gov.tr/e-journal/pdf/Genocide_Crimes.pdf (last visited Apr. 15, 2014).

176. Interview by Robert Coalson with Philippe Sands, Professor, Univ. College London, (Mar. 19, 2013), available at <http://www.rferl.org/content/interview-philippe-sands-genocide-crimes-against-humanity/24932784.html> (last visited Apr. 15, 2014).

177. Aydin, *supra* note 175, at 5–7.

178. See *Ethnic Cleansing*, HISTORY, <http://www.history.com/topics/ethnic-cleansing> (last visited Apr. 15, 2014).

179. *Id.*

cleansing, nor is there a universally agreed upon definition. There is no convention distinguishing crimes against humanity from ethnic cleansing. One cannot pre-determine at which stage ethnic cleansing becomes a crime against humanity. Ethnic cleansing may be a part of a wider genocide;¹⁸⁰ it can also be seen as an element or strategy of a broader crime against humanity.¹⁸¹ It may even refer to “mere” population transfer. However, with the latter, the absence of a single international instrument on population transfer leads to inaccessibility and overlap in the level of protection available to the victims of the various modes and forms of population transfer.¹⁸²

Though the 2005 World Summit Outcome mentions ethnic cleansing as a self-standing cause for triggering the R2P,¹⁸³ it is difficult to distinguish ethnic cleansing from both crimes against humanity and genocide. Ethnic cleansing seems, rather, to be a generic “supporting argument” and a “style of language” for making the case for genocide or crimes against humanity. Indeed, in the *Krstic* case, the appeal judgment of the International Criminal Tribunal for the Former Yugoslavia held that forcible transfer does not, in and of itself, constitute a genocidal act.¹⁸⁴ Likewise, the International Court of Justice held that deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to the destruction of that group.¹⁸⁵

180. The ICTY found that a plan of ethnic cleansing in Srebrenica escalated into a genocidal plan designed to guarantee that the Bosnian Muslim population would be permanently eradicated. *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment, ¶ 619 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), available at <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

181. *Id.* Under the Rome Statute, crime against humanity is broadly defined, and includes the forcible transfer of population, murder or extermination, all of which can qualify as ethnic cleaning. See Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 90, available at http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

182. Eur. Parl. Ass'n, *Enforced Population Transfer as a Human Rights Violation*, Doc. No. 12819, ¶ 53 (2012), available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=13204&Language=EN>.

183. G.A. Res. 60/1, *supra* note 2.

184. *Prosecutor v. Krstic*, Case No. IT-98-33-A, Appeal Judgment, ¶ 33 (Apr. 19, 2004), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>.

185. Application of Convention on Prevention and Punishment of the Crime of

The reservations placed by a number of signatories to the Genocide Convention regarding the jurisdiction of the International Court of Justice are a further cause for complication.¹⁸⁶ The Convention clearly provides recourse before the International Court of Justice in the interpretation of the crime of genocide.¹⁸⁷ Yet, certain signatory countries indicated a lack of confidence in the adjudication, suspecting there may be a plethora of definitions of genocide.¹⁸⁸ This counters the optimistic view that a compulsory world court could adjudicate sensitive and controversial issues in international law for the sake of international peace and security.

This is confirmed by the European Court of Human Rights in *Jorgic v. Germany*.¹⁸⁹ The applicant in the *Jorgic* case was Nicola Jorgic, a citizen of Bosnia and Herzegovina of Serb origin.¹⁹⁰ He argued that the German courts did not possess the

Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 2007 I.C.J. 43, ¶ 190 (Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

186. Albania, Algeria, Argentina, Bahrain, Bangladesh, China, India, Malaysia, Morocco, the Philippines, Rwanda, Singapore, Spain, the United States, Venezuela, Vietnam, Yemen and Yugoslavia all reserve to Article IX. Legality in the Use of Force (Yugoslavia v. U.K.), Verbatim Record, 1999 I.C.J. 35 ¶ 2.18 (May 11, 1999), available at http://www.ess.uwe.ac.uk/Kosovo/Kosovo-International_Law10.htm. For instance, the United States refused to allow a charge of genocide brought against it by Yugoslavia in the aftermath of the 1999 Kosovo War. See *id.* ¶ 2.16–.18 (“My second point is that the United States reservation to Article IX is not contrary to the Convention’s object and purpose. The possibility of recourse to this Court for settlement of disputes is not central to the overall system of the Convention, which has as its essential elements the definition of the crime of genocide and the creation of obligations to try and punish those responsible for genocide.”).

187. Convention on the Prevention and Punishment of the Crime of Genocide, art. 6, 9, Dec. 9, 1948, 78 U.N.T.S. 277 (“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”).

188. Legality in the Use of Force, *supra* note 186, ¶ 2.17–.18 (noting the number of countries that have joined the genocide convention with reservations, not submitting to International Court of Justice jurisdiction for crimes of genocide).

189. *Jorgic v. Germany*, 2007-III Eur. Ct. H.R. 1, ¶¶ 113–14, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81608#{"itemid":\["001-81608"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81608#{) (finding that Jorgic could be found guilty of genocide under German law).

190. *Id.* ¶ 1.

jurisdiction or the authority to convict him of genocide.¹⁹¹ He argued that the German national courts' broad interpretation of that crime had no basis in German or in public international law.¹⁹² Therefore, the applicant argued that his punishment in Germany for genocide constituted a violation of Article 7(1) of the European Convention on Human Rights prohibiting punishment without legal basis.¹⁹³

The judgment contains repeated references to legal doctrine.¹⁹⁴ Such references indicate that the contours of genocide are still being debated by the legal doctrine. Moreover, the Court makes it clear that national jurisprudences in the field of genocide cannot constitute a coherent legal definition of genocide.¹⁹⁵ It goes on to stress that national courts, the European Court of Human Rights, *ad hoc* international criminal tribunals¹⁹⁶ and the International Court of Justice may have differing conceptions of genocide.¹⁹⁷ In other words, the

191. *Id.* ¶ 3.

192. *Id.*

193. *Id.*; European Convention on Human Rights, art. 7, Sept. 4, 1950, 213 U.N.T.S. 222 (“No one should be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”).

194. *Jorgic*, 2007-III Eur. Ct. H.R. ¶ 36 (“At the time the applicant committed his acts in 1992, a majority of scholars took the view that genocidal intent to destroy a group under Article 220a of the Criminal Code had to be aimed at the physical-biological destruction of the protected group. . . . However, a considerable number of scholars were of the opinion that the notion of destruction of a group as such, in its literal meaning, was wider than a physical-biological extermination and also encompassed the destruction of a group as a social unit.”).

195. *Id.* ¶ 46 (“According to the material available to the Court, there have been only very few cases of national prosecution of genocide in other Convention states. There are no reported cases in which the courts of these States have defined the type of group destruction the perpetrator must have intended in order to be found guilty of genocide, that is, whether the notion of “intent to destroy” covers only physical or biological destruction or whether it also comprises destruction of a group as a social unit.”).

196. *Prosecutor v. Krstic*, Case No. IT-98-33-T ¶ 576. The tribunal established that under customary international law the destruction of the human group which the International Criminal Tribunal for the Former Yugoslavia Statute refers to shall be either physical or biological, and that the annihilation of the linguistic, intellectual, or historical identity does not fall under the definition of genocide. *Id.*

197. *Jorgic*, 2007-III Eur. Ct. H.R. ¶ 112 noting that the ICTY expressly disagreed with the interpretations of “intent to destroy” as adopted by the U.N. General Assembly).

jurisprudence of genocide has still not uniformly established itself with its all parameters.¹⁹⁸

Indeed, it took forty years before an international court—the International Criminal Tribunal for the former Republic of Yugoslavia—found genocide to have occurred.¹⁹⁹ Although we now have international and national court decisions on genocide, one cannot talk about a uniform approach in terms of definition and assessment.²⁰⁰ This is understandable in view of the fact that the post-World War II paradigm of human rights is based on the individual, as was first confirmed by the 1948 Universal Declaration of Human Rights.²⁰¹ Genocide confronts groups with groups and is thus incompatible with a conception of human rights that presumes the individual to be foundation, object and objective.

Distinguishing between genocide, crimes against humanity, and ethnic cleansing remains a bone of contention. Perhaps such ambiguity was the price that had to be paid for international criminal law to be created. The so-called definition of genocide in the 1948 Genocide Convention makes no mention of political genocide, cultural genocide, ethnic cleansing, or population transfers.²⁰² The Convention smacks of contextual and temporal

198. *Id.* ¶ 111 (“The Court notes in this connection that at the material time the scope of Article II of the Genocide Convention, on which Article 220a of the Criminal Code is based, was contested amongst scholars as regards the definition of “intent to destroy a group.” Whereas the majority of legal writers took the view that ethnic cleansing, in the way in which it was carried out by the Serb forces in Bosnia and Herzegovina in order to expel Muslims and Croats from their homes, did not constitute genocide, a considerable number of scholars suggested that these acts did indeed amount to genocide.”).

199. *Bosnian Genocide*, HISTORY, <http://www.history.com/topics/bosnian-genocide> (last visited Apr. 15, 2014).

200. *Jorgic*, 2007-III Eur. Ct. H.R. ¶¶ 113–14 (“In view of the foregoing, the Court concludes that, while many authorities had favoured a narrow interpretation of the crime of genocide, there had already been several authorities at the material time which had construed the offence of genocide in the same wider way as the German courts. . . . [I]t was for the German courts to decide which interpretation of the crime of genocide under domestic law they wished to adopt. Accordingly, the applicant’s conviction for genocide was not in breach of Article 7(1) of the Convention.”).

201. See Universal Declaration of Human Rights, U.N. GAOR (1948), <http://www.un.org/en/documents/udhr/index.shtml> (listing the rights afforded to each individual man, woman or child).

202. Convention on the Prevention and Punishment of the Crime of Genocide, Dec.

choices made by great powers. There is no mechanism for enforcement as indicated by the Convention. “[W]hile genocide is prohibited under international law, there is no legally binding norm of humanitarian intervention” requiring states to act to prevent it,²⁰³ nor is there a legal obligation that compels the Security Council to take military action to prevent or stop genocide. Although there is a convention on genocide, use of the word “genocide” has increased in frequency and recklessness, “so much so that the crime of the twentieth century for which the word was originally coined often appears debased.”²⁰⁴ The politics of genocide overshadows the legal definition of genocide.

Granted, there is a belief that international criminal law will, in the long run, deter future criminals and indirectly ensure international peace and security. Since World War II, starting with the International Criminal Courts of Nuremberg and Tokyo, which judged and convicted Nazi and Japanese war criminals respectively, it is believed that individual criminal responsibility can assure international peace and security.²⁰⁵ The Statute of the International Criminal Court (ICC) confirms this belief through its preamble.²⁰⁶

International criminal law is a sort of intervention into domestic affairs of states. Two evidences can be invoked in this context. First, under the Statute of the International Criminal Court (ICC), if the authenticity of national proceedings is questionable, the final decision to proceed with adjudication at the ICC level remains with the ICC.²⁰⁷ That is, the ICC judges

9, 1948, 78 U.N.T.S. 277.

203. Amy Dowell, *The International Community and Intervention in Cases of Genocide*, 1 POLIS STUDENT J. 1, 14 (2009), available at <http://www.polis.leeds.ac.uk/assets/files/students/student-journal/amy-dowell-summer-09.pdf>.

204. EDWARD S. HERMAN & DAVID PETERSON, *THE POLITICS OF GENOCIDE* 103 (2010).

205. Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 2187 U.N.T.S. 90, available at http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (recognizing that such grave crimes threaten the peace, security and well-being of the world and it is the duty of every country to prevent them).

206. *See id.* (“Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”).

207. *Id.* at 12–13 (“[T]he Court shall determine that a case is inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it,

the quality of national proceedings—a serious intervention into domestic legal system. Second, Part 9 of the ICC Statute entrusts the ICC to rule authoritatively on the respective state obligations as regards the support to be given to the functioning of the ICC.²⁰⁸ Thus, the ICC has a certain primacy over national legal jurisdictions. From this perspective, international criminal law constitutes a fourth type of intervention, after trusteeship, developmentalism and neo-liberalism, into the domestic affairs of states. Still, there may be considerable objections to international criminal law.

First, the establishment of international criminal courts for specific conflicts (i.e., Yugoslavia, Rwanda, Sierra Leone, East Timor, Bosnia, Cambodia and Lebanon)²⁰⁹ and not for others smacks of selectivity. Second, the permanent ICC acts selectively.²¹⁰ Specific international players of weight (the United States, China, Russia, and India) have not joined the court and the objectives of the court's operations are the weaker countries.²¹¹ A telling example is the Security Council's referral to the International Criminal Court concerning events in Darfur²¹² thanks to the abstaining votes of both China and the United States—neither of which is party to the Rome Statute.²¹³

unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”).

208. *Id.* art. 87 (“The Court shall have the authority to make requests to state parties for cooperation.”).

209. *International Criminal Tribunals and Special Courts*, GLOBAL POLICY FORUM, <http://www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts.html> (last visited Apr. 15, 2014); *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, 18 HUMAN RTS. WATCH 1, 1 (2006), available at <http://www.globalpolicy.org/images/pdfs/02wccbosnia.pdf>.

210. See Eugene Duru, *The ICC's Question of Selective Justice*, GUARDIAN, Dec. 1, 2013, <http://www.nrguardiannews.com/index.php/opinion/outlook/139840-the-icc-s-question-of-selective-justice> (criticizing the ICC for seemingly not venturing outside of the African continent).

211. *The States Parties to the Rome Statute*, INT'L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Apr. 15, 2014) (listing the member states of the treaty, which does not include U.S., India, Russia and China).

212. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

213. *The States Parties to the Rome Statute*, *supra* note 211 (listing parties adhering to the statute, not including the U.S. and China).

Furthermore, international criminal law risks “naturaliz[ing] the structural and systemic sources of conflict and violence.”²¹⁴ International criminal law may have functioned as an ideological euphemism for intervention into domestic affairs of sovereign states. It could also have been merely palliative to previous interventions into countries’ political economies in the shape of developmentalism and neo-liberalism. However, it could be these very political economy interventions that establish the environment from which conflict and violence emanate.²¹⁵ Structural adjustments in line with developmentalism and neo-liberalism have caused socio-economic inequality and concomitant insecurity.²¹⁶ However, international criminal law is exclusively focused on individual criminal responsibility without contextualizing civil wars and mass atrocities. That is, international criminal law endorses the neutrality of the rule of law and legal discourse vis-à-vis political economy interventions in the past.

The lack of clear linkage between the three crimes (genocide, crimes against humanity and ethnic cleansing), the lack of a mechanism for enforcement regarding prevention of genocide, the lack of coordination among international courts, the objection to the adjudication of the International Court of Justice on the part of a number of countries and the ineffective invocation of international criminal law as a cure to the problem of mass atrocity all point to the weakness of international law with regard to the regulation of civil wars involving mass atrocities. The R2P, as mentioned in the World Summit Outcome, General Assembly resolutions and Security Council resolutions, does not mention these problems at all.

Still, this vagueness and the deficiencies of international law may actually represent an advantage for opposition groups. The all-embracing coverage of the R2P could be a useful instrument in countering governments: First, opposition groups could use these three crimes—genocide, crimes against humanity and

214. Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LEIDEN J. OF INT’L L. 702 (2013).

215. *Id.* at 703.

216. Joe Wills, *The World Turned Upside Down? Neo-Liberalism, Socioeconomic Rights, and Hegemony*, 27 LEIDEN J. INT’L L. 11, 12 (2014).

ethnic cleansing—interchangeably in their case against their governments. Second, the notions of genocide, crimes against humanity and ethnic cleansing may support each other without a need for clear demarcation between them. Third, instead of limiting themselves to definite and harmonious legal standards through national and international courts, using the R2P to mobilize the United Nations could be a more effective strategy. Fourth, the R2P may create a level playing field where the reaction to all types of humanitarian crises would be the same. Fifth, opposition groups and minorities who have still not incurred the wrath of their governments could be well informed about the process and implications of the R2P in invoking these three crimes interchangeably and could learn how to acquire and benefit from the attention of the international media, the United Nations, actors from all three types of diplomacy, and the international community at large. They may very well be aware that they are vulnerable groups with certain advantages and disadvantages.

Having no status in international law, opposition groups might find creative ways of making themselves known to the international community using the language of the R2P. Their efforts as underdogs might overcome the restraints of classic international law. That is, the R2P may create a new atmosphere for making all opposition groups and outside states allies. The R2P may send the message to governments the world over that conventional and purportedly definite rules of international law may be stretched and that persecuting governments cannot hide behind sovereignty. The R2P may be the acknowledgement that power comes in other forms, too—in stretching rules and in substituting global public opinion for conventional rules. A certain practice may establish itself through this effort. Indeed, “[t]he most general abstractions arise on the whole only when concrete development is most profuse, so that a specific quality is seen to be common to many phenomena, or common to all.”²¹⁷ And that specific quality may, in the future, be embodied in the shape of a norm of the R2P.

217. KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 210 (Maurice Dobb ed., S.W. Ryazanskaya trans.) (1970).

VII. CONCLUSION

The international community cannot afford to remain indifferent to mass atrocities in civil wars, the R2P being the most significant indication thereof. The R2P signifies a new label for intervention in domestic affairs—the fifth in the post-World War II period after trusteeship, developmentalism, neo-liberalism and international criminal law. It provides a new dimension to the institution of recognition in international law. Intensive diplomacy, in its three primary tracks, is a part of the process of establishing the R2P. The challenges brought about by this diplomacy question classical international law, a challenge that could be resolved through relational contract theory (RCT). Indeed, RCT could be a strong response to the loss of hegemony of international law vis-à-vis the increasing number of civil wars. This is all the more important, as international criminal law alone does not respond adequately to the challenges posed by mass atrocities.

Thus, the R2P is the acknowledgement by the international community of states that the current modes of international law cannot solve—let alone palliate—the question of mass atrocities. The R2P is a strong argument in favor of opposition groups. It influences institutions of intervention, recognition and diplomacy, and prompts us to conceptualize international law under a new theory. Whether the R2P will be transformed into a norm of international law is a moot question. Nevertheless, the R2P may find its place in the toolkit of opposition groups—the perennial underdogs of international law.