

RESPONSIBILITY TO PROTECT DOCTRINE

Analysis of its colonial traits compared to humanitarian
intervention

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1. INTRODUCTION

Due to their implications, humanitarian interventions have always been a contentious subject. both from the intervened's and the intervenor's point of view. A good example is the American invasion of Iraq, in which President Bush, among other things, cited the humanitarian intervention defense when he said, "Our mission is [...] to free the Iraqi people. One of the largest protests in American history was sparked by the statement, "the future of peace and the hopes of the Iraqi people now depend on our fighting forces in the Middle East".¹ Other more recent cases such as Ukraine, Libya, Venezuela, Libya, and South Sudan show how certain groups of states decide to intervene in other countries. This has often left them severely damaged and resulted in major loss of life on all sides, particularly among civilians². Since the US invasion of Iraq in 2003, between 186.265 and 209.502 civilians have died, and counting combatants, the figure rises to 288,000³. Humanitarian intervention, however, has helped to challenge authoritarian regimes and saved many people from the mass atrocity crimes, such as genocide, mass murder, war crimes, crimes against humanity, and ethnic cleansing,⁴ becoming one of the best mechanisms third parties had to protect civilians to suffer massive violations of human rights at the hands of their countries' authorities. On the other hand, the critics of this mechanism recall that adding the total number of people who have died and gone due to armed conflicts justified by humanitarian intervention, the total sum may be considered on the same scale as mass murder⁵.

The debate then revolves around whether these interventions are necessary and justifiable to help those countries in need or whether they are a form of social and global control resembling earlier practices of colonialism and imperialism. Acknowledging that the 'Responsibility to Protect' (herby "R2P") has often been relied upon to update, refine and improve the notion of humanitarian intervention, this thesis considers whether the R2P doctrine is theoretically and practically capable of overcoming the problems some

¹ George Walker Bush, "President Discusses Beginning of Operation Iraqi Freedom" Office of the Press Secretary, White House (March 22, 2003) President Bush Declaration

² Eggert, L. " *Harming the Beneficiaries of Humanitarian Intervention*", *Ethical Theory and Moral Practice* (2018) 21:1035–1050

³ Iraq Body Count, accessed online: <http://www.iraqbodycount.org> (10/06/2022)

⁴ United Nations Office on Genocide Prevention and the responsibility to protect. United Nations. <https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>

⁵ Clarke, S. " *Humanitarian Intervention as a Necessary Evil: Just War, Humanitarianism, and the Problem of Dirty Hands*", Ph.D. paper, University of Exeter Department of Sociology and Philosophy

scholars have associated with humanitarian intervention, or whether it replicates the colonial dynamics already identified by critical scholars about humanitarian intervention. To answer this question, I first consider the definition and components of R2P and what innovations it brings to the idea of humanitarian intervention. Hereafter, the thesis explores scholarly endorsements of R2P in more detail and the practice of R2P since the concept first emerged.

This thesis will specifically attempt to address whether R2P addresses the criticisms of colonialism that have been leveled at humanitarian intervention.

To do so, the first chapter will try to answer what is R2P while the second one will focus on whether or not R2P scholars overcome the neo-colonial critiques of humanitarian intervention.

1.1 SCHOLARLY DEBATE

Nowadays the state of affairs is a confrontation between some scholars, who advocate for the necessity of the R2P's introduction as an evolution from humanitarian intervention because of its morality and the "obligation" to protect human rights, perceiving them as a necessary evil.⁶ While others, even though they still believe in the necessity of these interventions, try to minimize the problems associated with them, such as unilateralism where the intervenors take more into account their interests than the protection of the civilian. Another problem or critique associated with this unilateralism is the colonial critique. As a response, the Responsibility to Protect was elaborated (henceforth "R2P")⁷. However, some scholars argue that this is not enough and that any humanitarian intervention, including R2P, continues to undermine the sovereignty of the targeted country.⁸

As it's going to be discussed in this thesis, some scholars argue that while the R2P tackles the problem of unilateralism, still has some flaws when it comes to overcoming others of the colonialism critiques. As an example, Cunliffe argues that R2P "puts in place an authoritarian vision of state power, with security elevated over self-determination and

⁶ *Idem*

⁷ Heraclides, A. "Humanitarian intervention: yesterday and today", *European Review of International Studies*, Vol. 2, No. 1 (Spring 2015), pp. 15-37

⁸ Bellamy, A. "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq." *Ethics & International Affairs* (2005) 19:2, 31–54

representation”⁹ provoking that weaker states unlikely can have something to say concerning when and how R2P can be implemented. In its view then, for Cunliffe “[t]aking away the right to non-intervention is like eroding civil liberties in domestic politics or reversing the presumption of innocence in criminal law”¹⁰, meaning, R2P’s reconceptualization of sovereignty posed a threat to the international system. On the same threat, Mamdani argued that R2P was a deliberate policy initiative to normalize Western rule in the region and bolster Western dominance of Africa.¹¹

1.2 CONCEPTUAL BACKGROUND

To resolve the question of whether R2P is a solution in front of the criticisms humanitarian intervention received due to its likeliness with colonialism, it is first necessary to define humanitarian intervention and R2P. Given the lack of a legal definition of the term, some scholars like J.L. Holzgrefe and Robert O. Keohane, have tried to define humanitarian intervention as “the threat of use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its citizens, without the permission of the state within whose territory force is applied”¹². Later, Taylor B. Seybolt, added to that definition “the use of military personnel to assist the delivery of humanitarian aid to people in need”¹³ is considered humanitarian intervention.¹⁴ However, for this thesis, the humanitarian intervention will be understood according to the definition given by J.L. Holzgrefe and Robert O. Keohane plus the addition of Taylor B. Seybolt. Despite the existence of this theoretical definition, humanitarian intervention is applied on a case-by-case basis. However, according to Alton Frye, there is general

⁹ Cunliffe, P. “*The Doctrine of the “Responsibility to Protect as a Practice of Political Exceptionalism.”* European Journal of International Relations (2016) 23:2, 466–486

¹⁰ Cunliffe, P. “*Dangerous Duties: Power, Paternalism and the “Responsibility to Protect”*” Review of International Studies 36 (2010), 79–96 (special issue)

¹¹ Mamdani, M. ‘*Responsibility to Protect or Right to Punish?*’, Journal of Intervention and Statebuilding (2010) 4:1, 53–67

¹² Holzgrefe, J.L., & Keohane, O., R. “*Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*” Cambridge University (2003)

¹³ Seybolt, T. B. “*Humanitarian Military Intervention: The Conditions for Success and Failure*” Oxford University Press, New York. (2007), (5-6)

¹⁴ Another definition can be found in the Danish Institute Of International Affairs (1999), where it was defined as “coercive action by states involving the use of armed force in another state without the consent of its government, with or without authorization from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law”. Danish Institute Of International Affairs “*Humanitarian Intervention Legal and Political Aspects*”. Gullanders Bogtrykkeri a-s, Skjern, Denmark (1999)

agreement on some of its essential characteristics. The first agreed feature is that it involves the threat and use of military force. The second consensual attribute is that it involves interference in the internal affairs of a state by sending military forces into the territory or airspace of a sovereign state that has not committed an act of aggression against another state. And finally, the third trait is that it acts in response to situations that do not necessarily pose a direct threat to the strategic interests of states but are, theoretically, motivated by humanitarian objectives, such as human rights violations.¹⁵

To overcome criticism about the likeness of interventions in third countries to curb human rights violations and colonialism, the R2P mechanism was introduced. This mechanism establishes that sovereign states have a responsibility to protect their citizens from avoidable catastrophes of large-scale human rights abuses. However, if they are unable or unwilling to do so, then the broader community of states should also bear that responsibility. changed the paradigm of sovereignty from “sovereignty as control” to “sovereignty as responsibility”¹⁶. With this new mentality, the R2P has as one of its main goals that the international community (as a whole) is responsible to protect the citizens from those states that prove unwilling or unable to fulfill their responsibilities. In this way, according to Hugh Breakey, “R2P aims to displace the controversial ‘right of humanitarian intervention’ and refocus attention on the needs of the vulnerable rather than the entitlements of interveners.”¹⁷ On the same page, in the topic of sovereignty, Ramesh Thakur and Thomas G. Weiss, architects of the 2011 ICISS’ report on ‘The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect’ regards the topic of sovereignty, argued that “sovereignty as responsibility is not really a North-versus-South issue other than at a misleadingly superficial level”¹⁸.

In keeping with the focus of this thesis, scholars largely defend R2P primarily for having overcome the criticism leveled against humanitarian intervention. For example, Evans

¹⁵ Frye, A. *Humanitarian Intervention: Crafting a Workable Doctrine*. New York: Council on Foreign Relations, (2000).

¹⁶ ICISS, International Commission on Intervention and State Sovereignty “ *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (2001) Ottawa: International Development Research Centre.

¹⁷ Breakey, H. *The responsibility to protect: Game change and regime change*. Norms of Protection: Responsibility to Protect, Protection of Civilians, and their Interaction (pp.11-39), (2012) United Nations University Press

¹⁸ Thakur, R. & Weiss, T.G. “R2P: From Idea to Norm—and Action?” *Global Responsibility to Protect* (2009) 1:1, 22–53

claims that there is an “overwhelming consensus, at least on basic principles”¹⁹ on R2P, and declared the discussion to be over about the debate of the controversy of R2P around the criticism that has ensued R2P and its colonialist traits.²⁰ On the same point, Monica Serrano rejected the critics' claim that R2P was a polarizing issue between North and South, and therefore controversial, as a "deliberate misrepresentation in a rhetorical war."²¹ Finally, Noele Crossley claims that the critique R2P receives nowadays “revolves around a lack of capacity and robust implementation of the principle (R2P as “too little”) while the critiques of being an imperialist doctrine are now much less common.”²²

Given the lingering effects of humanitarian justifications for intervention in R2P, it is worth investigating these claims further to determine whether R2P overcomes the critiques of humanitarian intervention, both theoretically and practically.

Finally, there are several possible standards for assessing whether R2P has overcome the critiques of humanitarian intervention. However, in line with the views of Serrano and Crossley above, the primary benefit appears to be in the relationship between the global north and the global south. Accordingly, this thesis takes as the key comparator colonial dynamics as they emerge or subside between nation-states, particularly between the industrial West (as former colonial powers) and the developing ‘rest’ or global south (as former colonial territories). To track these dynamics, it is crucial to define colonialism and neo-colonialism. For Martin Guy, “neo-colonialism is ‘the survival of the colonial system despite formal recognition of political independence in emerging countries which become the victims of an indirect and subtle form of domination by political, economic, social, military or technical means’”²³. He elaborates that; “the essence of neo-colonialism is that the State which is subject to it is, in theory, independent and has all the outward trapping of international sovereignty. In reality, its economic system and thus its political policy is directed from outside.”²⁴ This dependence entails that a State, regardless of how politically independent it may appear to be, will not have completely freed itself from the

¹⁹ United Nations A/63/677, G. “*End of the Argument: How We Won the Debate Over Stopping Genocide*” . Foreign Policy, December (2011)

²⁰ *Idem*

²¹ Serrano, M. “*The Responsibility to Protect—True Consensus, False Controversy*”, Development Dialogue, (March 2011)

²² Crossley, N. “*Is R2P still controversial? Continuity and change in the debate on ‘humanitarian intervention’*”, Cambridge Review of International Affairs, (2018) 31:5, 415-436,

²³ Martin, Guy. “Africa and the Ideology of Eurafrica: Neo-colonialism or Pan-Africanism. *The Journal of African Studies*”. (1982) 20: 221–238.

²⁴ *Idem*

essence of colonialism as long as it is economically dependent on foreign actors, which can be other countries, international organizations, or private entities.

1.3 HISTORICAL BACKGROUND

Furthermore, it is important to consider the historical background of R2P and humanitarian intervention to comprehend the fundamental characteristics of colonialism and imperialism to determine whether or not R2P shares any of them.

Due to the unprecedented interventionism in the first post-Cold War decade, humanitarian intervention's main history started after 1989. Nevertheless, the history of humanitarian intervention is significantly longer. For example, it was invoked and recognized in the 1827–30 intervention in the Greek War of Independence and the US intervention in Cuba in 1898.²⁵ For some scholars, the 19th century was the century of humanitarian intervention²⁶ and place its origins further back in time, linking it to the just war doctrine.

The just war doctrine is the “moral predominant language” on war and warfare that offers specific criteria for judging whether a war is just.²⁷

This doctrine can be linked to Saint Augustine of Hippo in the fifth century, after which it was reintroduced and made systematic in the twelfth century. by Saint Thomas Aquinas.²⁸ It later evolved with the writings of early international law scholars such as Francisco de Vitoria and Francisco Suarez, among others. The outcome of all these writings were a set of requirements that must be fulfilled for a war to be just. The principles included: having the right authority to declare war, as Aquinas stated: “the ruler at whose command the war is to be waged have the lawful authority to do so”²⁹; a just cause, according to Francisco Suarez, this criterion includes that war to be just must have “an underlying cause of a legitimate and necessary nature,” which is “the infliction of a

²⁵ Heraclides, A "Humanitarian intervention: yesterday and today", European Review of International Studies, Vol. 2, No. 1 (Spring 2015), pp. 15-37

²⁶ Heraclides, A 'Humanitarian Intervention in the 19th Century: The Heyday of a Controversial Concept', Global Society: Journal of Interdisciplinary International Relations, Vol. 26, No. 2 (2012).

²⁷ Williams, J., O'Driscoll, C., & Lang, A. F. "Just War: Authority, Tradition, and Practice". Washington, DC: Georgetown University Press (2013).

²⁸ Fixdal, M., & Smith, D. "Humanitarian Intervention and Just War". Mershon International Studies Review (1998), 42(2), pp283-312. doi:10.2307/254418

²⁹ Aquinas, St. Thomas. "On Law, Morality and Politics," 2nd ed., Trans. Richard J. Regan. Indianapolis/Cambridge: Hackett Publishing Company, Inc.(2002)

grave injustice which cannot be avenged or repaired in any other way”³⁰; right intention, as Aquinas stated, “those waging wars need to have a right intention, namely, an intention to promote good and avoid evil.”³¹; proportionality, where the benefits of going to war must outweigh the costs³²; war as a last resort; a reasonable hope of success; being aware of relative justice; and making an open declaration. These principles aimed to limit the harmful effects of war and ensure that war is only used when it is absolutely necessary. However, the just cause is the component that has survived the most in the modern idea of humanitarian intervention.

Once seen what the just war theory stands for and how it is understood as the root of humanitarian intervention, some scholars find it quite complicated to justify the latest interventions from the West without falling into colonial reminiscence, since the same traits can be found in the interventions from that period and those done in recent years. This is mainly because the just war theory was made at the time of colonialism, and its cornerstone is to answer the question of whether war can be just, using mostly moral and also, religious justifications. Moreover, for the longest time, the wars that this doctrine was applied to were between the so-called, “civilized” people, and the “barbarian”³³. Therefore, the application of these principles in any modern mechanism to justify the intervention in third countries is criticized by Third World scholars.

1.3 METHODOLOGY

In relation to the methodology used in this thesis, the TWAIL approach will be the cornerstone of my analysis. TWAIL's methodology insists on a global historicization; on identifying continuities among discontinuities, such as the continuation of colonial domination after formal decolonization; focusing on the Third World (as opposed to purely Western visions); remaining suspicious of universal narratives; amending the tainted images of international institutions and law, which all too frequently rule the international legal imagination.³⁴ Furthermore, the scholars of this school of thought

³⁰ Suarez, F. “*On Charity*.” (1621). At: heinonline.org/HOL/Index?index=beal/sftw&collection=beal,800.

³¹ Aquinas, St. Thomas. “*On Law, Morality and Politics*,” 2nd ed., Trans. Richard J. Regan. Indianapolis/Cambridge: Hackett Publishing Company, Inc. (2002)

³² Vitoria, F.” *Political Writings*”, ed. Anthony Pagden and Jeremy Lawrance. Cambridge: Cambridge University Press. (1991)

³³ *Idem*

³⁴ Okafor, O.C “*Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?*” Obiora Chinedu Okafor, *International Community Law Review*. Volume 10 (2008), p. 371-378.

“share an ethical commitment to the struggle to expose, reform, or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair, or unjust global order, a commitment to center the *rest* rather than merely the *west*.”³⁵

As an example, that can also apply to the scope of this work, Makau Mutua critiques the international human rights law's fixation on the "savages-victim-savior" narrative.³⁶ Nowadays, this narrative is still observed in humanitarian interventions, not only by post-colonial authors but also by feminists such as Anne Orford, who exposes that these narratives, give the hero, the paper of white masculinity, “while representing the ‘space for and the resistance to the actions of the hero, is coded as female’”.³⁷ Moreover, from a post-colonial approach, this narrative is based on the identification of this colonized subject as “a reformed, recognizable “*Other*”, as a subject of a difference that is almost the same, but not quite’³⁸ This “other” must be stopped of their uncivilized acts and morals, if necessary by force, and assist to civilize but it will “never truly able to claim the full subjectivity or agency reserved for the heroic character.”³⁹ In this sense, and referring this “other” subject, Anghie goes one step forward and states that “the construction of the ‘other’ is crucial to the extension and universalization of international law”, which resonates with the importance that he gives between the correlation between colonialism and international law.⁴⁰ In conclusion, these narratives are not only justified by the paper of the victims and the “other”, but there is also the bad guy, a heartless tyrant, a barbarian, a clash between ethnic groups who are the source of the crisis and compiles the “hero” to intervene by force to save the situation, to later impose their modals and principles (civilization) to the region to avoid that it may happen again, and for some scholars, this is exactly what is observed in humanitarian interventions, and even maybe at R2P interventions as it will be discussed later on the thesis.

³⁵ Okafor, O.C, "Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective", *Osgoode Hall Law Journal* 43 (2005) p. 171.

³⁶ See M. Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights", 42 *Harvard International Law Journal* (2001) p. 201

³⁷ Orford, A. “*Muscular Humanitarianism: Reading the Narratives of the New Interventionism*”. Vol. 10 No. 4, *European Journal of International Law* 679-711 (1999)

³⁸ H. Bhabha, *The Location of Culture* (1994), Routledge

³⁹ Kristin R. “*Fast Cars, Clean Bodies: Decolonization and the Reordering of French Culture*” (1996). October Books

⁴⁰ Anghie, A. *The Evolution of International Law: colonial and postcolonial realities*. Third World Quarterly, (2006) Vo. 27, N°5, pp 739-753.

1.4 CHAPTER OUTLINE

Overall, this thesis aims to analyze R2P and its alleged improvement of humanitarian intervention and removal of the latter's colonial dynamics. The focus will be on the military intervention aspect of R2P given the effect on the rights and livelihoods of the communities intervened on. The first chapter examines R2P, its legal framework, and the innovations it brought to humanitarian intervention. This shift is elucidated through two examples, one of a claimed humanitarian intervention (Kosovo) and another as a claimed exercise of R2P (Libya). Chapter two evaluates the main scholarly arguments surrounding R2P as an improvement in humanitarian intervention to consider whether the latter's colonial dynamics have been overcome. A conclusion considers whether R2P is a legal tool capable of avoiding colonial features or, on the other hand, whether these remain the cornerstones of its functioning and what should be the next steps.

2. THE RESPONSIBILITY TO PROTECT

This chapter discusses the new legal doctrine of responsibility to protect (R2P). Firstly, it explains its legal framework (2.1), its introduction within the sphere of international law and its initial articulations (2.1.1), its global endorsement in the United Nations Global Summit (2.1.2), and its articulation. The chapter then will consider R2P's key elements, and its innovative traits in comparison to humanitarian intervention (2.2), at a theory level (2.2.1) and at a practice level (2.2.2). To continue, the chapter will expose the difference between the two concepts in practice, relying on the examples of Kosovo and Libya (2.2.2.1, 2.2.2.2). Finally, the chapter will analyze the main differences between both interventions (2.2.2.3).

2.1 LEGAL FRAMEWORK

2.1.1 INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY

The Responsibility to Protect as a legal doctrine was articulated in 2001 by the International Commission on Intervention and State Sovereignty (hereinafter "ICISS", 2001). The idea originated after the controversies that the humanitarian intervention, both for the failure of the international community to intervene or respond to the genocide in Rwanda, as well as NATO intervening in Kosovo due to the lack of activity from the United Nations and its Security Council. The UN Secretary-General Kofi Annan made compelling pleas to the international community to try to find, a new consensus and mechanisms on how to approach these issues. The outcome of these failures and pleas was the idea that there is a particular international duty to intervene to prevent, protect and rebuild communities in the aftermath of genocide, war crimes, ethnic cleansing, crimes against humanity, and any other human-caused "large-scale loss of life". The main goal of the R2P was to create a comprehensive framework that would include prevention and reconstruction. As well as at the same time building on, transforming, and transcending the hitherto prevailing concept of 'humanitarian intervention' focusing on the protection of the population at risk.

The ICISS formally elaborated on the concept of "*Responsibility to Protect*", evolving and differing from the concept of humanitarian intervention since it was believed that a new approach was needed. This new approach focused on the so-called "right of

humanitarian intervention”, and tried to “answer the question of when, if ever, it is appropriate for states to take coercive – and in the particular military – action, against another state to protect people at risk in that other state”⁴¹. This report had the ambition to undertake the legal, moral, operational, and political questions that humanitarian intervention posed and come up with a common ground, on how to respond to grave atrocities & human rights abuses internally within states. Based on the above information, the R2P appeared as the mechanism to cover the interventions carried out through humanitarian justifications. This report assessed the innovative idea that “state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself”⁴² which means that the state is the main responsible to ensure the security of its citizens. The 2001 report further stated that ““where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect””.⁴³ Again, there is a change in policy since the focus has shifted to the importance of sovereignty as a right limited to the state's ability to ensure the protection of its civilians, and only when this is not discharged is intervention allowed.

Accordingly, the ICISS argued that the foundations of this new mechanism were observed in its identification as a guiding principle for the international community. This identification was based on four reasons. The first reason is the inherent obligations in the concept of sovereignty. Since Hugo Grotius emphasized the principle of humanitarian intervention, sovereignty has been seen as an instrument for the protection of the life and safety of the subjects under that jurisdiction. The second point stems from the responsibility of the Security Council, under Article 24 of the UN Charter⁴⁴, for the maintenance of international peace and security; where the Member States, via the

⁴¹ International Commission on Intervention and State Sovereignty. “*The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*”. (2001) Ottawa: International Development Research Centre)

⁴² *Idem*

⁴³ *Idem*

⁴⁴ Article 24 UN:1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf. 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII. 3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration. United Nations, Charter of the United Nations, 24 October 1945 (Art. 24)

Security Council, prompt effective actions to uphold peace. The third reason is due to specific legal obligations under human rights and human protection declarations, covenants, treaties, international humanitarian law, and national law; where its parties agree to, for example, seek to limit the effects of armed conflict. Finally, the last argument is the developing practice of states, regional organizations, and the Security Council itself, as the international state practice has evolved in the 56 years since the Charter was signed since it has developed more accordingly to the Charter's principles over the years.

However, since 2001, there have been questions about the status of R2P as a legal norm and where R2P is located in the international legal system. Some still see it as a guiding principle, while others have started to argue that it is becoming an emerging norm under customary law. In this discussion, there are scholars in opposition to the understanding of the R2P as a norm under customary law, some claim that R2P cannot be understood as a norm or even as a potential norm under customary international law, only as a comprehensive set of common principles not reaching the level of custom for the prevention and containment of massive human rights violations.⁴⁵ Others, emphasize the importance of the World Summit Outcome Document (hereby "Outcome Document"), identifying the R2P *concept* before 2005, and the R2P *principle* after the summit.⁴⁶ Scholars like Tom Kabau observe that "the citation of the responsibility to protect concept in the Libya intervention"⁴⁷ indicates the concept's continued crystallization into a proper legal norm.⁴⁸ Nevertheless, for some other authors, this same resolution was more of an exception than a norm or the confirmation of it becoming one.⁴⁹

On a similar line of argument about the status of R2P, other scholars explain the importance of R2P comes from moral grounds over legal foundations.⁵⁰ Finally, another interesting view is the one proposed by Carsten Stahn, who proposes that it might be worth it to distinguish the separate status of each of the pillars of R2P. In this view, he

⁴⁵ Mehrdad Payandeh, "With Great Power Comes Great Responsibility - The Concept of the Responsibility to Protect within the Process of International Lawmaking" (2010) 35 Yale J Int'l L 469

⁴⁶ Bellamy, A. "Responsibility to Protect: The Global Effort to End Mass Atrocities". (2009) Cambridge: Polity.

⁴⁷ UNSC Resolution 1973 (17 May 2011)

⁴⁸ Kabau, T. "The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union's Interventions". Goettingen Journal of International Law 4 (2012), 49–92.

⁴⁹ Bellamy, A. "Libya and the Responsibility to Protect: The Exception and the Norm". Ethics & International Affairs V.25 n°.3 (2011): 263-269

⁵⁰ Welsh, J, Thielking, C & MacFarlane, S.N "Responsibility to Protect - Assessing the Report of the International Commission on Intervention and State Sovereignty" (2002) 57 Int'l J 489

separates the first pillar and the others, identifying the first one as a norm and the latter as principles. However, what is clear is that even though R2P is accepted by some scholars, supranational entities, states, and private actors as a mechanism within the sphere of international law, its status is still debated. And this may have implications in its justification in case it has to be applied and how its critics or defenders may adjust its arguments in favor or against it.

The introduction of the R2P in 2001 was only the beginning of a process to develop the concept and differentiate it from humanitarian intervention. The clearest difference in the new paradigm compared to humanitarian intervention was its change in the understanding of the concept of sovereignty, the core element of the R2P, which is a shift in the way massive violations of human rights are answered by the international community. This shift comes in the new understanding of sovereignty, which has gone from “sovereignty as control” to “sovereignty as responsibility”⁵¹. This deviation in its meaning denotes that sovereignty is no longer understood as a right to perform whatever domestic activities the state authority desires within its jurisdiction. On the contrary, the very reason for sovereignty is at its base the protection of the people’s most fundamental rights from egregious acts of violence. In conclusion, R2P no longer allows sovereignty to be the justification for allowing atrocities to be committed without any consequences for that State.

This shift can be observed in the three components it embraces, which shows how the sovereignty of states can be reduced and intervened in cases where responsibility is not fulfilled. The first element, as mentioned, is that sovereignty is no longer only a right but also a duty. The second element of R2P is that the international community as a whole has a heightened, auxiliary responsibility to protect or help protect those populations – including, if need be, by using military force – in case the state proves unwilling or unable to fulfill its responsibilities. This was the primary aim regards its differentiation from the controversial “right of humanitarian intervention” and refocuses attention on the apparent needs of the vulnerable rather than the entitlements of interveners. Finally, the third element dictates how interventions or interferences in States may occur, i.e., by placing importance on a principled and multilateral response consistent with international law.

⁵¹ Evans, G., Sahnoun, M. *"Responsibility to Protect"* The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre, (December 2001)

This means that the United Nations in general (and the UNSC in particular) is the primary agent for international decision-making and authorization regarding sanctions and interventions.

Regarding this core idea, the R2P can be divided into three different responsibilities: responsibility to prevent, responsibility to react, and responsibility to rebuild. First and foremost, there is the obligation to prevent, which concentrates on addressing both the underlying and immediate causes of conflict within countries and other man-made crises endangering populations.⁵² The second element is the responsibility to react; based on the ability to take appropriate action in response to situations of urgent human need, and these might entail coercive measures like sanctions and international prosecutions, in addition to instances of imminent danger, military intervention.⁵³ The third and final component is the responsibility to rebuild, which aims to offer complete assistance, especially following a military intervention, with recovery, reconstruction, and peacemaking while addressing the root causes of the harm the intervention was intended to stop or avert.⁵⁴ Although theoretically, the three types of responsibilities described had the same importance, the second aspect is the most controversial due to the permission of military interventions and it's the only one inside the scope of this thesis.

2.1.2 UNITED NATIONS WORLD SUMMIT

The 2001 ICISS report introduced, pointed out, and identified the core basis of the R2P. Yet. It was not until 2005, at the 2005's UN World Summit that the R2P was globally supported with all 192 UN members endorsing it. This Summit outcome was a document where States asserted both the right and the responsibility of the international community to intervene, with or without the consent of the host government, in cases where genocide, war crimes, ethnic cleansing, and/or crimes against humanity can be reasonably expected or are being committed.⁵⁵

However, this global acceptance of the R2P came since the content of the Outcome Document version of R2P differed in several ways from that advanced by the ICISS in

⁵² International Commission on Intervention and State Sovereignty. *"The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty"*. (2001) Ottawa: International Development Research Centre)

⁵³ *Ibid*

⁵⁴ *Ibid*

⁵⁵ United Nations (2005) World Summit Outcome. General Assembly A/60/L.1

2001. These changes made it more appealing for the UN member states to endorse and structure what is today understood as R2P and its applicability test. The first and most important change was the limitation of the international bodies that can authorize R2P action. Since, according to 2005's WSOD, only the UN Security Council has the power to approve an R2P. However, the document doesn't rule out the legitimacy of other authorizations, such as unilateral actions, so although not under the R2P regime they remain possible. This lack of limitation in front of unilateral actions against third parties in addition to its lack of any serious implementation strategy or new legal requirements raised doubts about the WSOD conceptualization and was called by Weiss as "R2P lite" as it did not meet all the needs and blanks to ensure its full development as an international mechanism to regulate the participation of armed forces in third countries. More worryingly, the 2005 WS failed to resolve the authority dilemma, and finally, introduced the prerequisite of a 'manifest failure' (in the 139 paragraph) which according to A. Gallagher may have unintentionally created an additional obstacle to genocide prevention in the future.⁵⁶

Moreover, related to the R2P and UNSC, another differentiation between the 2001's ICISS and the 2005's WSOD criteria is the abolition of the clause that urged the five permanent members of the Security Council not to veto actions aimed at halting or preventing genocide or ethnic cleansing. Likewise, its skeptics pointed out the ambiguity in the way R2P and argued that the World Summit paragraphs had implicitly rejected the more far-reaching ICISS version of R2P. Those critics were based on the narrower scope in comparison to the ICISS since it mentioned that R2P would only apply to the four specific atrocity crimes (cases of genocide, war crimes, ethnic cleansing, and/or crimes against humanity) and it didn't include the "large-scale loss of life" among the cases where R2P was supposed to intervene.

In conclusion, it could be said that regardless of its endorsement and the belief of its supporters that it was a success, there were still different critiques of R2P due to its vagueness, which appeared to raise more questions and spark new controversies.

2.1.3 EARLY ARTICULATION OF THE R2P

⁵⁶ Gallagher, A. "*The Responsibility to Protect*", Genocide and its Threat to Contemporary International Order. (pp 122-144) New Security Challenges Series. Palgrave Macmillan, London. (2013)

In 2009, to surpass the vagueness and controversies that had surrounded the R2P during its first years and to strengthen the R2P's capacity for action and overcome the previously described "R2P lite," the UN Secretary-General Ban Ki-moon presented the report 'Implementing the R2P'. This report defined the R2P with a three-pillar approach based on the provisions of paragraphs 138 and 139⁵⁷ of the 2005's WSOD to facilitate the implementation of the R2P's core idea and focus on the shift of the understanding of the term sovereignty and how it affected the moment to apply the R2P.

The first pillar concerns the protection responsibilities of the State; which refers to "the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and their incitement".⁵⁸ According to paragraph 138 of the WOSD, this state responsibility also includes the need to inculcate appropriate social values; build institutions facilitating protection; and consider the use of various learning devices and training capacities.

In order to implement timely and effective prevention strategies and avoid the binary choice between military intervention or standing still, Ban Ki-moon emphasized the importance of inculcating appropriate social values. Moreover, this first pillar is related to paragraph 138 of the 2005 World Summit Outcome which states that Heads of State and Government "accept that responsibility and will act by it"⁵⁹ which consists of the

⁵⁷ Paragraph 138 of the 2005 UN World Summit. *"Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability."* United Nations (2005) World Summit Outcome. General Assembly A/60/L.1

Paragraph 139 of the 2005 UN World Summit. *"The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity and to assisting those which are under stress before crises and conflicts break out"* United Nations (2005) World Summit Outcome. General Assembly A/60/L.1

⁵⁸ United Nations (2009) *"Implementing the Responsibility to Protect: Report of the Secretary-General"*, United Nations A/63/677

⁵⁹ United Nations (2005) World Summit Outcome. General Assembly A/60/L.1 (par.138)

bedrock of the responsibility to protect. That responsibility, states affirmed, lies first and foremost within the State in question since it derives both from the nature of State “sovereignty and from the pre-existing and continuing legal obligations of States, not just from the relatively recent enunciation and acceptance of the responsibility to protect”.⁶⁰

The second Pillar, based on international assistance and capacity-building, is the commitment of the international community to assist States in meeting those obligations concerning sovereignty responsibility. This pillar seeks to draw on the cooperation of the different international actors, Member States, regional and subregional arrangements, civil society, and even the private sector, as well as on the institutional strengths and comparative advantages of the United Nations system. In the 2009 report, the UN itself recognized that this pillar was too often ignored by pundits and policymakers alike, and is critical to forging policies, procedures, and practices that can be consistently applied and widely supported. Additionally, in 2010, the UN Secretary-General asserted that this pillar also includes the obligation to persuade individual states to perform their Pillar One duties and to help them build capacities to do so. This can include providing a UN or regional presence, supporting states against violent insurgencies, granting development assistance, aiding states’ security sectors, and building mediation and dispute resolution capacities.⁶¹

Lastly, the third Pillar focuses on “the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection”⁶². In other words, is the pillar that justifies the military intervention. In its report in 2009, the UN Secretary-General stated that this third pillar was generally narrowly understood. He exposed the example of Kenya, whereby the conflict and bloodshed following the disputed elections in 2008 came to a halt after the involvement of the international community.

According to Ban Ki-Moon, this case showed that if actions are carried out with early warning and with enough assessment, the number of options on how to intervene in these conflicts goes beyond not taking action or using force. Through the usage of the three-

⁶⁰ United Nations “*Implementing the Responsibility to Protect: Report of the Secretary-General*”, United Nations A/63/677 (2009)

⁶¹ UNSG (2010) *Report of the Secretary-General: Early Warning, Assessment and the Responsibility to Protect*, A/64/864, 14 July 2010.

⁶² United Nations “*Implementing the Responsibility to Protect: Report of the Secretary-General*”, United Nations A/63/677 (2009)

pillar mechanism, the solution could involve any of the broad range of tools available to the United Nations and its partners, including pacific measures (under Chapter VI of the Charter), coercive measures (under Chapter VII), and/or collaboration with regional and subregional arrangements (under Chapter VIII). Ban Ki-moon, therefore, tried to relate this third pillar to diplomacy as opposed to military intervention and the continued work of the international community to avoid extreme situations whereas the people R2P are trying to save, however, end up suffering more negative effects. From a theoretical point of view and in accordance with the idea that Ban Ki-moon tried to express in his report, the three pillars mentioned should work in synchrony, as the report itself says that in the case that “the three supporting pillars were of unequal length, the edifice of the responsibility to protect could become unstable”⁶³. Nonetheless, the international community did not adopt the concept as he intended and nowadays the R2P is especially identified with the third pillar. Some authors even call it “the heart of the R2P”⁶⁴. Hence, this thesis focuses only on the coercive measures and the conceptual problems they create in relation to humanitarian interventions. This is because if this pillar itself does not overcome the scholarly and practical critiques, it means that the R2P doesn’t prevail over the humanitarian intervention, which it’s the main reason for its creation.

2.2 R2P & HUMANITARIAN INTERVENTION

2.2.1 THEORY

After highlighting the fundamental characteristics of R2P, including its foundations, core elements, and three pillars introduced by Ban Ki-moon, it is important to shift the focus to the necessary requirements to carry out military intervention under R2P. This will be compared with the requirements pre-2001 according to the doctrine of humanitarian intervention.

The R2P currently requires adhering to six criteria, in order to legitimize intervention against the state, which are based on the just cause theory. Those requirements are the just cause, right intention, last resort, proportional means, reasonable prospects, and the right authority.

⁶³ *Idem*

⁶⁴ Ingiyimbere, F. "*Humanitarian Intervention as Neocolonialism*". *Domesticating Human Rights: A Reappraisal of their Cultural-Political Critiques and their Imperialistic Use* (pp. 57.121). Springer International Publishing Springer, Cham (2017)

Regarding the just cause threshold, although initially very broad, the 2005's WSOD narrowed it down to assert that intervention is justified in cases to stop or prevent genocide, war crimes, ethnic cleansing, and crimes against humanity.⁶⁵ However, what was retained from the 2001's ICISS was the necessity of clear evidence, as it said that "it will still be necessary in each case to determine whether events on the ground do in fact meet the criteria presented".⁶⁶

In relation to the right intention requirement, the R2P does not justify any military intervention or legitimize overthrowing of regimes. It states that "the primary purpose of the intervention must be to halt or avert human suffering"⁶⁷ and that is necessary to look to whether the intervention is supported by the people for whose benefit the intervention is intended⁶⁸ and, the opinion of other countries in the region.⁶⁹ Concerning the last resort standard, R2P actions within the responsibility to react can only be justified when the responsibility to prevent has been fully discharged since it has failed or there is no time for it to resolve itself.⁷⁰ With regards to the proportional means criterion, the ICISS explained that the measures taken must be appropriate to the ends and consistent with the severity of the initial provocation, so international law should be strictly observed in these situations, and even that these kinds of interventions should hold even higher standards since they are way more narrowly targeted than all-out warfighting.⁷¹ Regarding the requirement of reasonable prospects, the framework established that military action can only be justified if it has a reasonable chance of succeeding in halting or preventing the atrocities that prompted the intervention. This precautionary principle also limits the scope of the R2P against the (permanent) members of the Security Council.⁷² Finally, the last threshold to apply the R2P mentioned is the right authority. This criterion holds a higher agency regarding the other requirements since is the one that gives credibility and legitimacy to the interventions within the R2P. This legitimacy is related to the collective meaning of the UN since it is a representative international body.

⁶⁵ United Nations (2005) World Summit Outcome. General Assembly A/60/L.1 (ph. 138-139)

⁶⁶ Evans, G, Sahnoun, M. *"Responsibility to Protect"* The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre, (December 2001) (ph. 4.28)

⁶⁷ *Idem* (ph. 4.33)

⁶⁸ *Idem* (ph. 4.34)

⁶⁹ *Idem* (ph. 4.34)

⁷⁰ *Idem* (ph. 4.37)

⁷¹ *Idem* (phs. 4.39 – 4.40)

⁷² *Idem* (phs. 4.41 – 4.43)

Contrary to the regulated framework of the R2P that nowadays is in function, the criteria pre-2001 that a military operation had to comply with to be properly called a humanitarian intervention were more blurred. The reason behind this ambiguity was that humanitarian intervention was founded in the custom and practices of states, so there is no recognized standard established to recognize and evaluate them and the requirements for the humanitarian intervention can only be drawn upon would be from past practices of intervening states.⁷³

Nonetheless, this framework which could be assembled from state practices includes five basic criteria. For the intervention to take place, the intervening power must first have solid proof. Second, there must be concrete or likely proof of widespread and severe violations of human rights. Third, before using military force to resolve the problem, the intervenor must exhaust all non-violent options. Fourth, the victims of violations of human rights cannot be against the intervention. The military operation's nature must also be addressed, with the main goal being to put an end to it completely and limit its duration to the time needed to settle the issue.⁷⁴

The major discrepancy between the criteria for justifying humanitarian intervention against R2P intervention is the degree of clarity and legitimacy required of the intervenor. While the R2P has its requirements expressed in two different international documents – the 2001's ICISS and the 2005's WSOD –, the humanitarian intervention criteria must be extracted from past state practices, which may explain its misuse and how states made it look like a tailor-made mechanism to justify their interventions in third countries. Related to this discrepancy, the humanitarian intervention is based on the just war theory and the moral duty while the R2P is based on the shift of the understanding of the concept of sovereignty.

2.2.2 PRACTICE

Having noted the characteristics of R2P and its theoretical differentiation between humanitarian intervention and R2P, this section will underline how the two concepts have differed in their practical consequences. To do so, two of the most important cases where

⁷³ Horesh, K. *"Humanitarian Intervention and The Responsibility to Protect: A Theoretical Approach"* Ph.D. paper (2006)

⁷⁴ Merriam, J., J. *"Kosovo and the Law of Humanitarian Intervention"* Case Western Reserve Journal of International Law, vol. 33 issue 1 (2001), (pp126-127).

humanitarian intervention and R2P were used are going to be analyzed. Namely, the NATO intervention in Kosovo in 1999 is an example of humanitarian intervention, and the NATO-led intervention in Libya in 2011 is an example of R2P in action.

2.2.2.1 HUMANITARIAN INTERVENTION EXAMPLE: KOSOVO 1999

The Kosovo intervention is relied upon here as an example of humanitarian intervention practice. Moreover, it is also a relevant moment in the evolution of humanitarian intervention as a concept since the International Commission on Kosovo later recommended that the UN adopt a "principled framework for humanitarian intervention which could be used to guide future responses to imminent humanitarian catastrophes."⁷⁵

In terms of the wider context, in March 1999 NATO launched a unilateral, pre-emptive bombing campaign against the Federal Republic of Yugoslavia (FRY) under the rationale of rescuing Kosovar Albanians from an imminent Serbian incursion. This humanitarian operation was done unilaterally since the UN Security Council could not agree on a solution. This was a controversial outcome since it was the first time that sovereignty had been breached through the unilateral use of force on humanitarian grounds since the establishment of the UNSC. Nevertheless, in the wake of the intervention, NATO was considered to have fulfilled the requirements to intervene, as observed below.

Firstly, related to the threshold of the need for clear evidence, the UN and NATO possessed a large amount of hard evidence of human rights abuses. Taking into consideration that the criterion requires that the evidence must point to widespread and extreme human rights abuses, it was clear that the evidence gathered showed a widespread pattern of killing, torture, and forced expulsion. Following the criteria exposed, the intervention was justified considering that the NATO intervention was only carried out after months of diplomacy by the UN. An example is UNSC Resolution 1199, where it was stated that "the Security Council demands that all parties, groups, and individuals immediately cease hostilities and maintain a ceasefire in Kosovo, the Federal Republic of Yugoslavia, which would enhance the prospects for a meaningful dialogue between the authorities of the Federal Republic of Yugoslavia and the Kosovo Albanian leadership and reduce the risks of a humanitarian catastrophe"⁷⁶.

⁷⁵ Independent International Commission on Kosovo. *"The Kosovo report: conflict, international response"* Lessons learned 10 (2000).

⁷⁶ UNSC Resolution 1199 (1998) <http://www.nato.int/kosovo/docu/u980923a.htm>.

Furthermore, related to the second requirement, it is clear that the victims of the Serbian attacks wanted the intervention, and it was distinctly observed on the Albanian political leader, Ibrahim Rugova, called for direct NATO intervention to secure the peace on January 2, 1999.⁷⁷

Thirdly, the last threshold that the intervention must comply with to be justified as a humanitarian intervention according to the legal framework established by state practice is its own limits in time and manners regarding the aim of the intervention, and the Kosovo one accomplished it by self-imposing to itself limited goals, never mentioning the surrender of Yugoslavia's sovereignty over Kosovo and it stopped after the cease-fire was signed.

In conclusion, the debate about the NATO intervention was not about whether it satisfied the requirements of humanitarian intervention since it has been proved that it fulfilled all of them with ease. On the contrary, the debate was about whether this kind of intervention can be carried out under the international legal framework by third actors without the approval of the UN, and this debate sparked the move to the R2P doctrine.

2.2.2.2 R2P EXAMPLE: LIBYA 2011

Concerning Libya, the uprising occurred during the Arab Spring in December 2010 against Muammar Qadhafi's dictatorship. As an answer to the protests, Qadhafi's forces answered and it became an armed conflict around the country with widespread violence. As an answer to this conflict, the UNSC approved two resolutions, 1970 and 1973. The first resolution expressed that the UNSC was ready to take additional appropriate measures, as necessary, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance and referred to the ICC. However, the more important resolution was UNSC resolution 1973 which "authorized Member States [...] to take all necessary measures, [...] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya"⁷⁸. This was the first resolution where the UNSC authorized the use of military force for human protection purposes against the government's consent.

⁷⁷ Merriam, J., J. "Kosovo and the Law of Humanitarian Intervention". Case Western Reserve Journal of International Law, (2001).vol. 33 issue 1, p146.

⁷⁸ UNSC Resolution 1973 (17 March 2011)

I now turn to consider whether the intervention complied with the requirements of R2P and how the doctrine is implemented in practice. The first criterion that must be observed is whether the intervention had a just cause, which can be confirmed since it had the aim to stop the humanitarian catastrophe that was occurring in Libya against its population⁷⁹. Proceeding with the analysis, the next threshold is the right intention, which in this case is not clearly fulfilled since there are some critics that expose that there were ulterior motives, such as changing the regime and imposing a government more friendly to secure access to its natural resources⁸⁰.

Another requirement of the R2P that generates controversy in the Libya intervention, is the last resort obligation since the first UNSC resolution happened only thirty-one days after the first protests. However, the promptness of the intervention is something to be hailed and not to be denounced, and even though it happened so fast it doesn't affect the belief that it was considered as the last resort. Keeping with the controversy, the next criterion is the necessity to use the minimum amount of military force to accomplish the objectives of the mission, which the participation of NATO and its strategy to end Qadhafi's regime all over Libya made the force used during the intervention disproportional in comparison to the actual threat, which was focused on Benghazi. One threshold that seemed clear was the reasonable chance of succeeding in halting or preventing the atrocities that prompted the intervention, however looking back now, since the intervention in 2011, Libya hasn't been able to become a stable country and some mention the intervention as the cause since the country was left to the rebels without any control or supervision from the UN. So, altogether with the proportionality, becomes another threshold that is not fully fulfilled. Finally, the right authority threshold, and therefore, the legitimacy of the intervention, is satisfied since it was approved by the UNSC and supported by regional organizations.

In conclusion, the intervention in Libya through the R2P, was not a perfect translation from theory to practice, even though there was a consensus around the need to intervene. Still, even though the criteria would have been completely fulfilled, the disbelievers and critiques of the R2P exposed how this mechanism exhibited how imperfect it is and how some traits are reminiscent of past eras. On the other hand, the enthusiasts of R2P argue

⁷⁹ *Idem*

⁸⁰ Hingst, Z., A. "Libya and the Responsibility to Protect: Building Block or Roadblock?" *Transnational Law & Contemporary Problems* 22(1), (2013) p250.

that from a holistic approach, considering that the main goal of is to guarantee human rights and eradicate sovereignty as the shield that has allowed some states to commit mass atrocities, the Libya intervention pleased its main aim.

2.2.2.3 EXAMPLE COMPARISON

As can be observed, the two interventions differ from each other in many ways. For instance, one difference is that while the intervention in Kosovo was considered illegal but legitimate (as humanitarian intervention bases its action on moral discourses), the intervention in Libya did not confront this problem given its approval by the UNSC. R2P thus appeared to centralize the UN's role in permitting and regulating intervention in ways that were not available during the Kosovo intervention. It has also, therefore, enhanced the UNSC's legitimate authority to authorize military interventions.

Moreover, another important difference was the promptness of the intervention. While in Kosovo it took almost a decade for any actor to mobilize during the protracted breakup of Yugoslavia, in Libya it only took a month for the UNSC to approve an action by all necessary means to stop mass atrocities. These two differences show how the R2P can act as a more efficient mechanism ending the debate about the legal and legitimacy of the interventions and ensuring a quick response to protect civilians against humanitarian catastrophes.

In relation to this last point and the debate, it is important to note that there will always be a debate before an intervention. Nonetheless, from the intervention in Libya under the R2P can be extracted a change of paradigm about the necessity to act in front of mass atrocities. The debate was not anymore about whether to act, but about how to act. And even though this shift was hinted at in the resolutions of the past crisis in Kenya, Guinea, Côte d'Ivoire, Darfur, eastern DRC, and Somalia, it wasn't until Libya that R2P became an explicit basis for UNSC approval of and the rationale for intervention.

2.2.2.4 MAIN DIFFERENCES

Overall, once seen how the two mechanisms work both from the theoretical and the practical point of view, is possible to organize the principal differences between humanitarian intervention and R2P, as Rashed Thakur does, into four different sections. In terms of the concept, R2P capsizes state-citizen relations internally, and confronts the

authority and jurisdiction between states on the one side and the international community on the other, while 'humanitarian intervention' does so amid states. Normatively, 'humanitarian intervention' is a normative term that opposes non-intervention and prioritizes intervening governments' views and rights. By redefining sovereignty as a responsibility, R2P aligns it to human protection standards, avoiding non-intervention without rejecting it, and approaches the problem from the victims' point of view. In terms of its procedure, R2P is limited to UN authorization, whereas "humanitarian intervention" is unconstrained by either the UN or unilateral authorization. On an operational level, R2P proposes that protecting victims of mass crimes calls for specific guidelines and rules of engagement as well as varied interactions with civil authorities and humanitarian organizations, always putting the safety and security of the assisting soldiers second to protecting civilians.⁸¹

Nevertheless, these differences do not make the R2P a panacea for the protection of human rights globally. On the contrary, as has been observed in the practice, Lybia also generated a considerable amount of critique even though it was developed under the new R2P mechanism.

⁸¹ Thakur, R. "*The futures of women, peace and security*" *International Affairs* (Royal Institute of International Affairs 1944-), pp. 415-434 (20 pages), Vol. 92, No. 2. Published By: Oxford University Press (March 2016)

3. EVOLUTION AND CRITIQUES OF THE R2P

Until now, this thesis has focused on the theoretical and practical differentiation of R2P and humanitarian intervention. Per contra, this chapter will focus on whether, and if so, how R2P's new characteristics adequately respond to the critiques of humanitarian intervention, with a special focus on colonial dynamics as identified by TWAIL scholars. To do so, the first part of the chapter will recap the main updates that R2P has brought in comparison to humanitarian intervention and focus on those traits where R2P innovates (3.1). The second part fixates on the scholarly endorsement of R2P and whether R2P in fact overcomes the apparent limitations of humanitarian intervention raised by scholars (3.2)

3.1 RECAP ON TRAITS OF R2P

This chapter, as mentioned above, is going to focus on the novelties that R2P offers in comparison to humanitarian intervention. Therefore, the primary focus is to unravel which are these novelties. The foremost innovation and the main chore of the R2P is the shift in the understanding of “sovereignty”, not as “sovereignty as control” but “sovereignty as responsibility”⁸², so this is going to be the first trait to be observed. Following this novelty, another keystone of the R2P is the legitimacy issue, since only the UNSC is able to authorize intervention in comparison to humanitarian intervention when states could act unilaterally, therefore this evolution will also be analyzed.

3.1.1 SOVEREIGNTY

As labeled during the whole thesis, sovereignty is the main question when referring to the R2P, and its approval in 2005's WSOD made the term “state sovereignty” change its meaning. This concept was once seen as a cornerstone of the international system created in 1945 and meant that international law was based on the principle of non-intervention. Yet, in the last few decades, especially after the introduction of the R2P its meaning has altered. Nonetheless, this new approach is seen as a danger for small and non-Western states since that understanding of sovereignty was the cornerstone of their creation and as a safeguard against the meddling of bigger and more powerful states. As Bricmont

⁸² Evans, G, Sahnoun, M. *"Responsibility to Protect"* The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre, (December 2001)

observed, the international law based on non-intervention “is the paper shield that the Third World believed could protect it from the West at the time of decolonization.”⁸³ Furthermore, some other authors as Anghie, identify the “sovereignty doctrine as consisting in part of mechanisms of exclusion which expel the non-European society from the realm of sovereignty and power”⁸⁴ and “expels the non-European world from its realm, and then proceeds to legitimize the imperialism that resulted in the incorporation of the non-European world into the system of international law.”⁸⁵ Put simply, the reduction of state sovereignty is a legitimization of imperialism and reinforces colonial dynamics similar to a time when non-European peoples had less involvement in the creation and practice of international law.

Nevertheless, even before this new approach was introduced, the inviolability of national sovereignty enshrined in Article 2(4)⁸⁶ of the United Nations Charter was the cornerstone of the international system created in 1945 and meant that international law was based on the principle of non-intervention. Yet, the United Nations Charter itself had some exceptions where national sovereignty could be intervened, one being self-defense, exposed in Article 51,⁸⁷ and the other exception being the use of force authorized by the United Nations Security Council, defined in Chapter VIII. Moreover, the humanitarian intervention for some scholars was also a reason to attempt against the national sovereignty, however, it was not endorsed by international law documents or by the vast majority of scholars and international actors.

Notwithstanding what has just been mentioned, the scope of this thesis is not related to the legal justifications in relation to humanitarian intervention. On the contrary, this

⁸³ Bricmont, J. “*Humanitarian Imperialism: Using Human Rights to Sell War.*” Trans. Diana Johnstone. New York: Monthly Review Press. (2006)

⁸⁴ Anghie, A. “*The Evolution of International Law: colonial and postcolonial realities.*” Third World Quarterly, (2006) Vo. 27, N°5, pp 739-753

⁸⁵ *Ibid*

⁸⁶ United Nations, *Charter of the United Nations*, 24 October 1945 (Art. 2(4): *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*

⁸⁷ United Nations, *Charter of the United Nations*, 24 October 1945 (Art. 51): *Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*

passage represented the disbelief of the international community regarding humanitarian intervention since it received a huge number of critiques. In particular, colonialism critiques were one of the main reasons for not endorsing it since its foundation was based on the just war theory which was introduced and gained strength during the colonial times. Nonetheless, this thesis aims to find out whether R2P also falls short in front of these same criticisms.

An example, beyond the humanitarian intervention, is the thoughts of Anghie, who defended that colonialism greatly influenced the basic foundations of international law, including the theoretically neutral idea of sovereignty, in addition to the theories of international law that were specifically designed to repress the Third World. Although hugely crucial, colonial relations did not stop with the end of formal colonialism. Instead, neo-colonialism, in the eyes of Third World countries, has taken the place of colonialism. Due to their economic dependence on the West, third-world countries remained to have a subservient position in the international system, and the principles of international economic law sustained to assure this would be the case.⁸⁸

Moreover, these criticisms for its likeness to colonial dynamic are plainly visible in the humanitarian interventions since they illustrate how the West hinders the sovereignty of the Third World nations. Notwithstanding these interventions appear to emerge on moral grounds (limiting the violence that one nation can inflict on its own citizens), at the same time, certain states are subject to greater instability and are judged on different sovereignty criteria to Western countries or are judged to the same standard but being much more likely to fall short of that standard.

Especially taking into consideration how all states have had violence in their history while in their state-making process without too much influence from third parties, or at least that violence was not justified as a protection of the human rights of their citizens, and that marked the culture of those. It is, therefore, a valid question why these states are judged to a different standard, especially since this also permits intervention to a greater degree. This raises the question of whether Western nations should act in such a paternalistic manner because they are more knowledgeable or whether more recently

⁸⁸ Anghie, A. *"The Evolution of International Law: colonial and postcolonial realities."* Third World Quarterly, (2006) Vo. 27, N°5, pp 739-753

developed nations should instead develop in accordance with their own culture and time rhythms. This question can be related to the “dynamic of inferiority”.

This concept identifies the non-Western citizens as victims, while the Western countries are the hero that saves the day. This is reflected in how are defined the different actors in a conflict, while the civilians that do not appear as a threat (women, elder people, and children) are defined as “victims”, the Western is viewed as the white, male, and free hero that protects and saves the so-called “victims”⁸⁹. As Ingiyimbere exposes, even though for the promoters of humanitarian intervention, it pretends to protect human rights. He displays that in practice, it erodes them. He argues that the reason behind this is that humanitarian intervention is “built on the helplessness of the victim, who is unable to act by him/herself unless a messianic savior comes from afar. The only available actors in the situation are the killers/slaughterers versus helpless victims”⁹⁰ Another scholar with a similar mentality is Orford, who bares that such discourse undermines the human rights movement's revolutionary potential.⁹¹

Following the same thread, Orford identifies that “the values of the new world order are defined through actions taken against just such secondary character –those disordered or evil rogue states, whose leaders need to be taught that the hard body of the international community can impose its will on them”⁹² and adds to this opinion that the heroic narrative is subject to a second passive character which the hero is able to shape. Keeping on this narrative, “international organizations and major powers are imagined as the bearers of human rights and democracy, while local peoples [...] are portrayed as childlike, primitive, barbaric, or unable to govern themselves victims of abuses conducted by agents of local interests”⁹³. Therefore, as can be seen, by authors like Orford, humanitarian intervention is an example of the use of heroic narratives of the encounters between Europe, (or ‘The West’ or the ‘international community’), and those colonized or enslaved by Europeans. Making, hence, the spectator identifies with a white hero, which

⁸⁹ M. Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights", 42 *Harvard International Law Journal* (2001) p. 201

⁹⁰ Ingiyimbere, F. "Humanitarian Intervention as Neocolonialism". *Domesticating Human Rights: A Reappraisal of their Cultural-Political Critiques and their Imperialistic Use* (pp. 57.121). Springer International Publishing Springer, Cham (2017).

⁹¹ Orford, Anne. 2003. *Reading Humanitarian Intervention and the Use of Force in International Law.* Cambridge: Cambridge University Press. (2003)

⁹² *Ibid*

⁹³ *Ibid*

represents freedom, creativity, authority, civilization, power, democracy, sovereignty, and wealth in contraposition of a second character, the black, native, or colonized subject that “not only must the black man be black; he must be black in relation to the white man”⁹⁴. Likewise, even in the case that moral obligations are invoked in front of the violations of human rights⁹⁵ that are occurring in those countries and with the excuse of the protection of the civilians, humanitarian intervention still sounds like the justification the Western countries used during colonial times when they intervened in “barbarian” countries to bring their liberal ideas and their morals principles ignoring the culture that was already there.

Related to this understanding of the “barbarian” countries in counterpart with the West, there is Anghie’s concept, “the dynamic of difference”. This term discloses that “international law posits a gap, a difference between European and non-European cultures and peoples, the former being characterized, broadly, as civilized and the latter as uncivilized”⁹⁶. According to Anghie, this dynamic started with the League of Nations positivist jurisprudence and the sophisticated techniques and technologies of pragmatism, which exposed the “cultural difference between advanced Western states and backward mandate people in the other”⁹⁷. This mandate meant that “each rendition of difference, in turn, created a project for the Mandate System, as the native’s deficiency must in some way be remedied.”⁹⁸ In these lines, it is important to look at the terms used to describe the non-Western people, since as Wright writes, “the concept of ‘backwardness’ connotes a lack of self-determination, a lack of Europeanization and a lack of economic progress”⁹⁹.

This dynamic of difference can be resumed in the idea that certain cultures had all the powers of the sovereignty of their territory and of those that they found in need of civilization while others were excluded from this power. This “cultural difference

⁹⁴ Fanon, F, “*Black Skin, White Masks*” (1952), Pluto Press.

⁹⁵ It is important to remark that humanitarian intervention also poses doubts about whether it is morally justified or even right. But this discussion is beyond the scope of this text.

⁹⁶ Anghie, A. “*The Evolution of International Law: colonial and postcolonial realities*. ” *Third World Quarterly*, (2006) Vo. 27, N°5, pp 739-753

⁹⁷ Anghie, A. “*Imperialism, Sovereignty and the Making of International Law*. ” (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press (2005)

⁹⁸ *Ibid*

⁹⁹ Wright, Q. “*Mandates under the League of Nations*”. Chicago: University of Chicago Press, (1930).

precedes and profoundly shapes the doctrine of sovereignty.”¹⁰⁰ That is because of the relationship between culture and sovereignty. Since Francisco de Vitoria jurisprudence, where morality was a particularly prominent issue, the culture of a determined society was related to their ability to enjoy the full rights of sovereignty or not.

The narrative of this cultural difference was based on the identification of this colonized subject as “a reformed, recognizable “*Other*”, as a subject of a difference that was almost the same, but not quite’¹⁰¹ This “other” must be stopped of their uncivilized acts and morals, if necessary by force, and assist to civilize but it will “never truly able to claim the full subjectivity or agency reserved for the heroic character.”¹⁰² These narratives are not only justified by the paper of the victims and the “other”, there is also the bad guy, a heartless tyrant, a barbarian, a clash between ethnic groups who are the source of the crisis and compiles the “hero” to intervene by force to save the situation, to later impose their modals and principles (civilization) to the region to avoid that it may happen again.

In this sense, and referring to the “other” subject, Anghie goes one step forward and states that “the construction of the ‘other’ is crucial to the extension and universalization of international law”¹⁰³, which resonates with the importance that he gives between the correlation between colonialism and international law.

This phenomenon persists to be prevalent throughout humanitarian interventions to a large extent, as Orford mentions. Since there are obvious parallels in the argumentation based on this “dynamic of difference” used in the Francisco de Vitoria jurisprudence, the League of Nations positivist legal theory (and its Mandate System), and the humanitarian intervention to violate the sovereignty of this called “Other” and “to justify or to cover atrocities committed by Westerners against non-Westerners.”¹⁰⁴ It can be observed in the Kosovo intervention, and how the massive bombing from the Westerns seemed a good

¹⁰⁰ Anghie, A. “*The Evolution of International Law: colonial and postcolonial realities*”. Third World Quarterly, (2006) Vo. 27, N°5, pp 739-753

¹⁰¹ H. Bhabha. “*The Location of Culture*” (1994), Routledge

¹⁰² Kristin R. “*Fast Cars, Clean Bodies: Decolonization and the Reordering of French Culture*”. (1996), October Books.

¹⁰³ Anghie, A. “*The Evolution of International Law: colonial and postcolonial realities*”. Third World Quarterly, (2006) Vo. 27, N°5, pp 739-753

¹⁰⁴ Ingiyimber, F. “*Humanitarian Intervention as Neocolonialism*”. Domesticating Human Rights: A Reappraisal of their Cultural-Political Critiques and their Imperialistic Use (pp. 57.121). Springer International Publishing Springer, Cham (2017).

option since the only affected were “*the others*”, while their troops weren’t affected by the war.

To conclude, it can be argued that there was a need to implement R2P in order to overcome the critics of colonialism and neocolonialism that humanitarian intervention suffered. As Ingiyimbere said, “whenever humanitarian intervention was invoked, it involved an unbalanced relationship between the entities involved and the prejudices in its justification”¹⁰⁵. Hence, when in 2001 R2P was introduced at ICISS, with the main idea of modifying the concept of sovereignty from “sovereignty as control” to “sovereignty as responsibility”, appeared to settle the criticism related to how the sovereignty of non-Western countries was less inviolable compared to the ones of the West since it shifted the whole paradigm on how international order was established prioritizing specific human rights over state sovereignty. However, in the second part of this chapter (3.2) it is going to be analyzed whether it really overcame the criticisms.

3.1.2 LEGITIMATE AUTHORITY

Another major criticism of humanitarian intervention was related to one of the principles of the just war theory, which was a legitimate authority to authorize an intervention on a third state’s sovereignty. It is clear in those cases where intervention was approved according to Chapter VII and Chapter VIII of the United Nations Charter, where it exposes the authority of the UN Security Council to approve the implementation of as many measures as may be necessary to maintain or restore international peace and security. However, if the UNSC does not act, which more often than not occurred for a variety of reasons outside the purview of this thesis, conflict will arise. Then, who has the right to determine whether a military intervention should be carried on?

Answering this question would solve the question of the lack of legitimate authority that drags humanitarian intervention.

Some argue that in front of a halted violation of human rights in a determined state, any other state has the legitimate authority to intervene. As it is the way it used to be during the whole history until recently, and even nowadays, the North Atlantic Treaty

¹⁰⁵ *Ibid*

Organization (hereby "NATO") decides when and where to intervene, as was observed in the Kosovo intervention. This way of solving this conflict, generates other concerns, such as the faith in the states themselves to implement, enforce and safeguard human rights (or as Cristina Lafont states it: to respect, protect, and fulfill ¹⁰⁶). For some authors as Henry Shue, "If we do not believe that anyone beyond their own state can reasonably be asked to bear the responsibility of protecting these people against the single most serious threat to their lives—their own state—we do not believe in any practically meaningful way that they have a basic right not to be killed."¹⁰⁷ But, this way of thought, even if it may have a point, exposes a paradox: states are, at the same time, the most dangerous threat to human rights, and their most valuable protectors. Thus, if the State remains in the central position of the protection of human rights, "it is a lure and 'we do not believe in any practically meaningful way' in the 'basic right not to be killed.'"¹⁰⁸ And with humanitarian intervention, that is the case, because even though the United Nations sets limits on how governments can treat their citizens and theoretically has the monopoly on the authorization of military intervention in third countries, its lack of enforcement mechanisms and its dependence on national armies leaves a situation where *de facto* there is no supra-state body that can intervene on their own will. Therefore, the powerful states (or regional organizations such as NATO), through the mechanism of humanitarian interventions are the ones who uphold human rights in third countries and decide whether to intervene or not.

This power in the powerful state's hands can lead to a situation reminiscent of colonialism, which is peripheral violence. This concept is the idea that violence always takes place away from Western countries and within the territory of the "non-civilized", thus attacking their sovereignty. It is said that the second half of the 20th century and the 21st century is the most peaceful period of time of history. Well, this is true if one only looks at the Western countries, because the reality is vastly different if you observe the recent events of non-Western countries: Kosovo, Yemen, Syria, Libya, Afghanistan, Iraq, Iran, Nigeria, and the list could go on. Moreover, in many of these wars, the international

¹⁰⁶ Lafont, C. "Global Governance, Human Rights and the Responsibility to Protect. " Paper presented at Boston College Clough Center for the Study of Constitutional Democracy. (2003)

¹⁰⁷ Shue, H. "Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy. " Princeton: Princeton University Press. (1980)

¹⁰⁸ Ingiimbere, F. "Humanitarian Intervention as Neocolonialism". Domesticating Human Rights: A Reappraisal of their Cultural-Political Critiques and their Imperialistic Use (pp. 57.121). Springer International Publishing Springer, Cham (2017)

community has participated, however, all of them have happened in the land of, what can be called, “the global South.”

This feature can be traced back to the eighteenth and nineteenth centuries when the Great Powers were the subjects of international law, while the “barbaric” were excluded. This term can also be related to the “dynamic of difference” from Anghie mentioned in the section before. Meaning that non-Western nations must be invaded in order to spread Western culture and morals, and thus civilization, whereas Western nations are already “civilized,” so there is rarely a need for intervention, peripheral violence can be understood as the exclusion of the non-Western in the international order, allowing this way any intervention on them. This trait is closely related to the principle of non-intervention and its exception, as Tesón says, “strict non-intervention is justified only among states where basic civil and political rights are respected – where liberty is given priority.”¹⁰⁹ And keeping on the same idea, which also links it with the cultural differences trait when he states that “the principle of non-intervention is based on his distinction between civilized nations and barbarian ones, and the two categories are not under the same regime”¹¹⁰. Likewise, Mill’s theory is on the same page, differentiating the rank between civilized and non-civilized in the international community “to suppose that the same international customs and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error, and one which no statesman can fall into, however, it may be with those who, from a safe and irresponsible position, criticize statesman.”¹¹¹ He goes even further, affirming that “barbarians have no rights as a nation, except a right to such treatment as may, at the earliest possible period, fit them for becoming one.”¹¹²

In accordance with these scholars that justify the intervention in non-civilized countries, it is straightforward the belief that humanitarian intervention can be found in some notions of colonialism traits, such as peripheral violence and the “dynamic of difference” when discussing the legitimate authority of the states to carry out humanitarian interventions that affect third country’s sovereignty. A clear example can be found in the case that only

¹⁰⁹ Tesón, F.R. *Humanitarian Intervention: An Inquiry into Law and Morality*. New York: Transnational Publishers. (1988)

¹¹⁰ *Ibid*

¹¹¹ Mill, J.S. “A Few Words on Non-intervention.” *New England Review* (2006) 27: 252–264.

¹¹² *Ibid*

non-Western countries are subject to humanitarian intervention, which can be explained due to the difference in culture between the effect countries and the Western culture and the intent of the latter to obligate the former to adopt their culture. Moreover, this is more pronounced due to the fact that the mentality underneath human rights is from a Western point of view.

As an answer to these critiques, R2P creates a framework where the responsibility to protect against the violations of human rights shifts from the own country to the whole international community, avoiding this way, unilateral intervention. Yet, even though this modification seems to appease the critiques related to colonialism since any intervention depends on a larger number of actors, the second part of this chapter is going to discuss whether it really overcomes them.

3.2 CRITIQUES AROUND R2P

Once observed the main critiques humanitarian intervention received related to colonialism. It is time to discuss whether the scholarly endorsement of R2P and whether R2P in fact overcomes the apparent limitations of humanitarian intervention raised by TWAIL scholars. To do so, the same traits that were criticized in the humanitarian intervention are going to be analyzed with the novelties R2P brought and focus on whether these innovations overcome the critiques of colonialism that humanitarian intervention drags with.

3.2.1 SOVEREIGNTY AS RESPONSIBILITY

One of the main key introductions of the R2P is the shift in the understanding of sovereignty. Therefore, sovereignty is no longer understood as a right to carry out any domestic activity that the state authority wishes. On the contrary, sovereignty is granted when the protection of the people's most fundamental rights is secured. Hence, sovereignty is no longer a defense against atrocity but a privilege the states must earn.¹¹³

¹¹³ International Commission on Intervention and State Sovereignty. *"The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty"* (2001) Ottawa: International Development Research Centre)

For the proponents of this shift, the R2P and the comprehension of sovereignty as responsibility, allow the international community to take responsibility for the failure of the states to protect their own citizens and protect human rights more efficiently without having to deal with sovereignty as an excuse to not intervene. For these proponents, this new shift in responsibility does not weaken the sovereignty of the states, as the 2001 ICISS report recalls, R2P is an "ally of sovereignty, not an adversary, one that seeks to 'strengthen sovereignty, not weaken it'".¹¹⁴ As an example, Serrano exposes that R2P is meant to improve sovereignty by making it more accountable and responsible for the protection of human rights.¹¹⁵ This means that states are responsible for upholding and defending the human rights of their citizens, and they can be held in contempt for violating those rights. By linking sovereignty to the upholding of fundamental human rights, the Responsibility to Protect (R2P) doctrine is regarded as a way to conceive a stronger sense of sovereignty.¹¹⁶

Nevertheless, these vindications do not change the fact that in countries where there is no political stability and, therefore, more chances that the human rights of its citizens may be violated, their sovereignty is weakened, giving the West the perfect excuse to intervene under the R2P. A good example of this is Libya, where the West intervened and as a consequence, the country hasn't had a proper government structure since then, which has only provoked more human rights violations. As Charlie exposed, with the implementation of R2P, international relations have become increasingly hierarchical with "stratified forms of sovereignty".¹¹⁷ Chandler asserted in the same vein that "[w]hile leading Western states are acquiring special privileges of hegemony, other states are losing the basic rights of sovereignty". In other words, R2P could delegitimize the sovereignty of states with weak institutions.¹¹⁸ These differences in the strength of sovereignty between the West and the non-Western, international law framework is going back to colonial times when there was a "dynamic of difference" since this shift does not really tackle the appraisal humanitarian intervention had concerning its colonial traits. It

¹¹⁴ United Nations "Implementing the Responsibility to Protect: Report of the Secretary-General", United Nations A/63/677 (2009)

¹¹⁵ Serrano, M. "Implementing the Responsibility to Protect: The Power of R2P Talk." *Global Responsibility to Protect*, vol. 2, no. Issues 1-2, 2010, pp. 167-177.

¹¹⁶ *Ibid*

¹¹⁷ Chandler, D. "From Kosovo to Kabul and Beyond: Human Rights and International Intervention". London and Ann Arbor, MI: Pluto Press (2006)

¹¹⁸ *Ibid*

could be argued, nonetheless, it deepens the arguments against it. That is because since as Bricmont evidenced, the international law based on non-intervention “is the paper shield that the Third World believed could protect it from the West at the time of decolonization.”¹¹⁹. So, decreasing the strength of the sovereignty of the Third World countries seems contrary to what should be done to overcome humanitarian intervention criticisms. This can be seen, furthermore, in the Libya case, since compared to the Kosovo case the narrative from the West was very similar only aggravated by the shift of the understanding of sovereignty which led to a major incidence in the government structure of Libya.

However, the scholars who advocate for R2P argued that its multilateralism can get over this colonial critique since it takes control over the unilateral actions of the state (limiting the unilateral interventions), which undermines the debate about whether or not non-Western countries’ sovereignty is strengthened or weakened since limiting the number of interventions means that the countries’ sovereignty will be less affected. Nonetheless, this idea that with R2P the only legitimate authority is the UN Security Council does not clear up all the doubts and critiques. First of all because, as Bellamy, alongside other authors supported, unilateral action remains a possible action outside of the R2P aegis.¹²⁰ Moreover, as it is going to be scrutinized in the following section, the centralization of the legitimate authority in an intent to lead the response as the international community can not overcome the whole critiques of colonialism they face. R2P does not answer the critiques that were related to the humanitarian intervention and its colonial traits related to how it affects the sovereignty of non-Western states, such as the dynamic of difference and the dynamic of inferiority.

3.2.2 LEGITIMATE AUTHORITY

As mentioned in the previous section, the legitimate authority evolution that is introduced with the implementation of R2P also comes with several critiques. Another of the main ideas of the R2P is the centralization of the authorization to intervene. As the 2005 World Summit Document exposes in its paragraphs 79 and 80, the UN Security Council has the

¹¹⁹ Bricmont, J. “*Humanitarian Imperialism: Using Human Rights to Sell War*”. Trans. Diana Johnstone. New York: Monthly Review Press. (2006)

¹²⁰ Bellamy, A. “*Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*”, (2006) *Ethics and International Affairs* 20(2): 143–169.

primary responsibility and the authority to mandate coercive action to maintain and restore international peace and security.¹²¹ This idea is based on the collective answer in front of situations where there is a gross and massive violation of human rights, opposite to unilateral actions by different international actors. In principle, this collective idea based on the authority of the UN can overcome the colonialism critiques since it's no anymore a Western state against a non-Western state. On the contrary, each intervention is approved by the whole international community. And nowadays, collective intervention is the norm, as is globally understood that the international community has a righteous interest in "easing and defusing the crisis" in light of the "massive humanitarian crisis," making clear the scope of the shift in "mainstream normative views."¹²²

Nonetheless, in a more profound analysis of the construction of the UN and international law from authors such as Anghie, it can be argued that "the construction of the 'other' is crucial to the extension and universalization of international law"¹²³. In the same vein, Krisch exposes, "the Great powers made it clear to the smaller powers that their choice was to accept an organization with great power privilege or no organization at all. Expressed in more positive terms, the veto power was designed 'to transform a wartime alliance into a big-power oligarchy to secure the hard-won peace that would follow'".¹²⁴

Another argument against the idea that giving the authority to the UN Security Council overcomes the critiques against humanitarian intervention and the legitimacy of its authority to intervene in third countries, it has to be considered the need for military force to realize these interventions approved by the Security Council. This exposes that in the

¹²¹ Paragraph 79 of the 2005 UN World Summit. "We reaffirm that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security. We further reaffirm the authority of the Security Council to mandate coercive action to maintain and restore international peace and security. We stress the importance of acting in accordance with the purposes and principles of the Charter." United Nations (2005) World Summit Outcome. General Assembly A/60/L.1

Paragraph 80 of the 2005 UN World Summit. "We also reaffirm that the Security Council has primary responsibility in the maintenance of international peace and security. We also note the role of the General Assembly relating to the maintenance of international peace and security in accordance with the relevant provisions of the Charter." United Nations (2005) World Summit Outcome. General Assembly A/60/L.1

¹²² Serrano, M. "Implementing the Responsibility to Protect: The Power of R2P Talk." *Global Responsibility to Protect*, (2010) vol. 2, no. Issues 1-2, pp. 167-177.

¹²³ Anghie, A. *The Evolution of International Law: colonial and postcolonial realities*. Third World Quarterly, (2006) Vo. 27, N°5, pp 739-753

¹²⁴ Krisch, N. "The great powers and the Security Council. In V". Lowe, A. Roberts, J. Welsh, & D. Zaum (eds.), *The United Nations Security Council and War* (p. 136). Oxford: Oxford University Press. (2008)

end, the military force still depends on the Great Powers.¹²⁵ Referring to the Libya case, even though it was approved by a UN resolution, and was a multi-state coalition, it was still led by NATO.

To conclude, acknowledging the vision that the UN cannot be understood as a completely neutral entity, the idea that the UN Security Council acts as the legitimate authority does not overthrow the colonial critiques. What this shift can result in, is centralized colonialism in front of the decentralized colonialism that was happening with the humanitarian intervention. In other words, while on the humanitarian intervention, the countries that were intervening in other countries were criticized as colonialists. With the R2P doctrine, the so-called “international community” as a collective can be outlined as falling into colonialism dynamics. Especially, taking into consideration that the interventions happen to protect or prevent the human rights established by this international community while downgrading the culture and beliefs of the regions more intervened.

On the same hand, this legitimated authority hasn't buried the judgment about peripheral violence, meaning that the violence is only still happening in the same regions. And even though there are gross violations of human rights around the world, the international community isn't responding due to different political interests. To provide two distinct examples: Russia's invasion of Ukraine and the violence against Palestinians by the government of Israel.¹²⁶

¹²⁵ In this case, these Great Powers refer to the new great military and economic powers, even if it defers from the Great Powers from the colonialism era, the dynamics between states haven't changed that much.

¹²⁶ Some scholars even qualify as worse than the South African apartheid, for example:

Pappé, I. “*Israel and South Africa: The Many Faces of Apartheid*”. London: Zed Books Ltd. (2015).

4. CONCLUSION

To bring up the Responsibility to Protect is to dialogue about human rights. About how its protection can be established in regions where there are massive violations of human rights. A balance between the ostensible protection of human rights and state sovereignty's inviolability. By concentrating, as this thesis does, on the military intervention related to the R2P, it means specifically discussing the intervention of the so-called modern states into the sovereignty of the Third World countries. Overall, the study of R2P is related to the history of military intervention (the just war theory) justified by a higher purpose, which directly links to colonialism. As it stands, since W.V. Harcourt's 1863 description of military humanitarian interventions as "a high and summary procedure which may sometimes snatch a remedy beyond the reach of law ... In the case of intervention as that of revolution, its essence is illegality, and its justification is its success"¹²⁷ still holds true today. Furthermore, Luke Glanville explains how the idea of sovereignty as a responsibility to protect dates back to the sixteenth and seventeenth centuries, noting that non-intervention as an inherent feature of sovereignty doesn't precede the right to wage a just war to punish oppression and free the oppressed.¹²⁸

As it has been discussed in the first chapter, the military intervention in the R2P, according to the authors of the ICISS report is innovative and revolutionizes the international law sphere in comparison to the humanitarian intervention. In the own words of its authors, "the differences between the two concepts are real and consequential".¹²⁹ Nevertheless, the introduction of R2P does not conclude the discussion about whether interventions of any sense should happen or not. In this matter, Bjorn Gomes defend that intervention on humanitarian grounds is not just permissible but may indeed be obligatory.¹³⁰ But can any external intervention, under the name of humanitarian intervention or R2P avoid being criticized as a reminiscence of colonial times?

¹²⁷ W. V. Harcourt, *Neutrality or Intervention?*. "Letters by Historicus on Some Questions of International Law". London: Macmillan (1863), p. 41.

¹²⁸ Glanville, L. *Sovereignty and the Responsibility to Protect: a new history* (Chicago: University of Chicago Press, 2014)

¹²⁹ Thakur, R. "The futures of women, peace and security" International Affairs (Royal Institute of International Affairs 1944-), pp. 415-434 (20 pages), Vol. 92, No. 2. Published By: Oxford University Press (March 2016)

¹³⁰ Gomes, B. "The duty to oppose violence: humanitarian intervention as a question for political philosophy". Review of International Studies 37: 3, July 2011, pp. 1045–1067.

The R2P doctrine is based on a good analysis of the problems that humanitarian interventions formulate due to their colonialism traits in comparison to what it brings in the protection of human rights and it proposes interesting advances and differences towards the humanitarian intervention. Before the R2P, some states were able to advance their geopolitical interests under the fictitious guise of the protection of human rights due to the absence of a set of guidelines for military interventions, legal exceptions to the inviolability of sovereignty inside the UNHCR, unilateralism, and the absence of a single legitimate authority.

Therefore, Thakur among other authors affirms that R2P is an improvement in almost every aspect of humanitarian intervention that the majority of the international community identified as unsettling. As a result, they believe, military intervention under R2P has significantly better chances of achieving legality and legitimacy in the use of force.¹³¹

However, the second chapter of the thesis focuses on how identifying problems is more difficult than determining an effective solution. Even though the R2P doctrine, with its emphasis on conflict prevention and nonviolent conflict resolution, can be seen as a victory, when it comes to military intervention, R2P still falls under the equivalent dilemma of humanitarian intervention. And while offering innovative elucidations, it doesn't really solve the dilemma or the critiques. The own Thakur also identifies these critiques but still argues that even though its limitations are still a better mechanism than humanitarian interventions prior to the introduction of R2P. Some other authors don't share this optimism, Kassim exposes that "R2P merely provides a more respectable cloak to the geopolitical drivers of major power action"¹³².

Another entanglement is the political willingness of the states to approve R2P as an obligation. Hehir proposes the need to strengthen international law based on obligations rather than discretionary rights.¹³³ However, settling an international agreement, in this sense, appears to be eminently complex. On one hand, the BRICS (Brazil, Russia, India,

¹³¹ Thakur, R. "*The futures of women, peace and security*" International Affairs (Royal Institute of International Affairs 1944-), pp. 415-434 (20 pages), Vol. 92, No. 2. Published By: Oxford University Press (March 2016)

¹³² Kassim, Y.R. "*The geopolitics of intervention: Asia and the Responsibility to Protect*" (New York: Springer, 2014)

¹³³ Hehir, A. "*The permanence of inconsistency: Libya, the Security Council, and the Responsibility to Protect*", *International Security* 38: 1, Summer 2013, pp. 137–59.

China, and South Africa) have endorsed R2P as a principle but occasionally diverge from Western countries regarding when and how to apply the coercive measures.¹³⁴ On the other hand, it's certain that the United States is by far the most influential UN member state, and therefore, its policy on R2P will continue to be the most decisive in conditioning the UN's record of R2P implementation.¹³⁵

Therefore, for some scholars, any humanitarian intervention, including R2P, isn't anything other than an external intervention that attacks the sovereignty of the country targeted assuming traits of neocolonialism, especially taking into consideration that the most innovative character of the R2P is reducing the sovereignty of those states normally more affected by internal violence. An example of this thought is Smith's opinion on R2P's framing, which doesn't include atrocity prevention efforts from previous types of intervention, particularly those by states in the global South. Undercutting the notion that atrocity prevention and R2P are issues of global concern and serve to deny agency to actors outside of the West.¹³⁶ This belief also questions the argumentation that R2P does not mirror past European imperial-protectionist projects as straightforwardly since it was endorsed by all states.¹³⁷ Because this fact does not necessarily imply that R2P abandons colonial aspects, but rather that the international legal system globally embraces such colonial roots.

Looking onwards, regardless of the criticism against R2P, there is considerable agreement between the authors and international actors on the need for a mechanism that allows to intervene in the event of the vulnerability of human rights in a specific location, and that R2P can grow into this apparatus. Some alternatives that I believe should be looked into are the development of the relational R2P, which would imply a shift towards the local populations and the empowerment of local and regional non-violent actors, using the example of South Sudan (2013) as a blueprint.¹³⁸

¹³⁴ Stuenkel, O. 'The BRICS and the future of the Responsibility to Protect', *GR2P* 6: 1, 2014, pp. 3–28

¹³⁵ Coates, D, "*The Oxford companion to American politics*", Vol. 2. New York: Oxford University Press, (2012), pp. 388–96.

¹³⁶ Smith, K. "R2P at the UN: The Problem of Selective History and Incomplete Narratives". *Global Responsibility to Protect* 14 (2022) 273–276

¹³⁷ Glanville, L. "*Wrestling with R2P's Colonial Parallels*". *Global Responsibility to Protect* 14 (2022) 269–272

¹³⁸ Gray, F. "*Protection as connection: feminist relational theory and protecting civilians from violence in South Sudan*", *Journal of Global Ethics*, 18:1, 152-170, (2022) DOI: [10.1080/17449626.2022.2052152](https://doi.org/10.1080/17449626.2022.2052152)

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