A Few Words on the Responsibility to Protect

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1. PREFACE

In 2001, the International Commission on Intervention and State Sovereignty issued a report in which it presented the concept of a Responsibility to Protect (hereinafter 'R2P'). For the drafters of the report, R2P referred to the 'idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.'[1]

Peculiar about R2P is the connection its conceivers established between *sovereignty* and *responsibility*; a responsibility that first and foremost falls upon the state itself, but which subsequently – if the concerned state fails to live up to the obligations sovereignty brings along – falls upon the international community as a whole. This responsibility is perceived as an obligation. Whenever genocide, war crimes, ethnic cleansing or crimes against humanity take place, the international community cannot sit still; it must intervene.

This paper wishes to examine this aspect of responsibility which R2P appears to introduce. It has been argued before that sovereignty as responsibility is not a novelty introduced by R2P.[2] Mysterious remains however the jump from responsibility to duty: why is it that, once sovereignty is overridden, the international community has an obligation to intervene?[3] This paper wishes to trace the origins of the idea of such a duty to act, be it a perfect or an imperfect one.[4] To do this, it will explore different narratives which have played a role in

[1] The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, Canada: The International Commission on Intervention and State Sovereignty, 2001), VIII.

[2] C. Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?," *The American Journal of International Law* 101, no. 1 (2007): 111.

[3] The question has been asked before. See, for example Kok-Chor Tan, "The Duty to Protect," *Nomos* 47 (2005): 3.

[4] The notion of a perfect duty stems from Kantian ethics. Kant himself defined such a duty as one which 'allows no exception in the interest of [an agent's partial] inclinations.' See Immanuel

the just war debate. From these different narratives, a number of representative authors will be scrutinised. This paper does not pursue exhaustiveness (that would be impossible due to its limited length) but instead wishes to give an impression of the various voices in the debate; the combination of which has led to the transformation of a right to intervene, via a quasi-duty *not* to intervene, towards a duty to intervene. Apart from having a descriptive objective, this paper also wishes to evaluate R2P in the light of the tradition which came before it. A position will be taken and defended and suggestions for the future will be presented.

The paper consists of five parts. After having presented the rise of R2P discourse together with a working definition of R2P in a preliminary section I, section II goes back to medieval times and discusses the natural law narrative on a right to intervene. Here, it is argued that for the sake of humanity, states ought to intervene whenever 'natural law' is trampled upon, or whenever our 'common humanity' is disrespected. The following section (III) looks at the issue of intervention from the perspective of liberalism. Opposing conceptions of sovereignty will be compared, and the consequences these conceptions on sovereignty's corollary, the principle of non-intervention will be scrutinised. The current pluralism within the liberal narrative[5] is held to stem from these diverging conceptions of sovereignty. At the end of this overview, in section IV, an attempt is made to situate R2P within this larger tradition. It will here be argued that R2P, and the conception of sovereignty as a responsibility and thus a duty to act when faced with genocide, war crimes, ethnic cleansing or crimes against humanity at first sight seems to rehabilitate sovereignty, but in reality adds little new to the debate. Section V then finishes by formulating suggestions on a possible way forward.

2. INTRODUCTION

2.1. THE RISE OF R2P DISCOURSE

When the Berlin Wall was torn down and the Soviet empire collapsed, hopes were voiced that the UN-system of collective dispute resolution would finally start to work as it was intended. Put in place in the direct aftermath of the Second World War, the freshly constructed system was quickly paralysed by the dynamics of the Cold War, which divided the world in two camps and left no place for multilateral, collective approaches to the resolution of conflicts. Between 1945 and 1990, power politics dominated the international relations

Kant,, *Groundwork of the metaphysic of morals* (Herbert James Paton (ed.), Harper & Row, 1964), 413-414.

[5] I refer to the communitarian versus the cosmopolitan narrative, as presented by Michael Doyle in "International Ethics and the Responsibility to Protect," *International Studies Review* 13, no. 1 (March 2011): 72-84, http://doi.wiley.com/10.1111/j.1468-2486.2010.00999.x.

scene. While the UN-system explicitly prohibited the unauthorised use of force,[6] military interventions were commonplace.[7] In true realist fashion,[8] their rationale was in many cases the same: to further the national interests of the intervening power, and to preserve and defend their sphere of influence.

In 1989, when the Cold War came to an end, a feeling of relief and optimism was very much present.[9] The 1990s announced themselves as the 'decade of international law'. Finally, after fifty years of deadlock, the UN-system would start to work as it was intended. And initially, this is what appeared to happen. The first US intervention in Iraq was supported by a UN Security Council resolution, and the US went in together with a large coalition, under UN flag.

However, one could say that in the years after Iraq, this optimism and the belief in international law died at least three times. It died a first time in the little Bosnian town of Srebrenica, where between 7 000 and 8 000 muslim men were slaughtered by Bosnian-Serbian troops even though the zone where the muslims were gathered was proclaimed as 'safe ground' by the UN. Dutch UN forces were present but did not intervene.[10] The massacre of Srebrenica was the first genocide to be committed on the European continent since the Holocaust.

In 1994, the belief in international law died a second time. When approaching Kigali airport, a missile struck down the aeroplane bringing back Rwandan president Juvénal Habyarimana from a round of peace negotiations in the Tanzanian city of Arusha. All passengers including the Rwandan president were killed. Just hours later, in a context in which ethnic tensions between the Hutu majority and the Tutsi minority had reached unprecedented heights, all hell broke loose. An estimated 800 000 people were murdered in what most likely became the biggest organised mass murder since the Holocaust.[11] Prior and during the genocide,[12] a United Nations (UN) mission was present in the

[6] See article 2(4) of the UN Charter.

[7] Both blocs were very active. Think for example of the US intervention in Nicaragua and the USSR intervention in Afghanistan.

[8] In the literature (see for example Michael Walzer, *Just and unjust wars : a moral argument with historical illustrations*, 4th ed. (New York: Basic Books, 2006), chap. 1.), the work of the ancient Greek historian Thucydides is often referred to as the first realist account in the 'Just War' debate. See Thucydides, "The Melian Dialogue," in *History of the Peloponnesian War*, trans. Rex Warner (Harmondsworth; Baltimore: Penguin Books, 1972), 400-408.

[9] M. Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," *The Modern Law Review* 65, no. 2 (2002): 160; P. Allott, *Eunomia: new order for a new world* (Oxford University Press, 2001), vii et seq.

[10] For a full report, see Report of the Secretary-General pursuant to General Assembly resolution 53/35, 'The Fall of Srebrenica', 15 November 1999, A/54/549 accessible on http://www.un.org/News/ossg/srebrenica.pdf (last accessed on 27 June 2011).

[11] For an overview of the events, see UN, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, 1999, S/1999/1257.

[12] Shortly after the events, the UN Secretary-General concluded that 'the magnitude of the human calamity that has engulfed Rwanda might be unimaginable for its having transpired. On the basis

country. However, it did not intervene. The Canadian commander of the mission, Romeo Dallaire, had previously called upon the UN and its member states to provide the mission with 5 000 peacekeepers and the mandate to take hate-speech radio stations such as *Radio Milles Collines* out of the air. According to Dallaire, not more than that was needed to prevent the atrocities from taking place.[13] Due to a 'lack of political will',[14] the Security Council on 21 April – in the midst of the genocide – decided to reduce the size of the UN mission to about 270 peacekeepers.[15]

In 1999, the belief in international law died a third time. In the (then) Serbian province of Kosovo, a war had broken out between the Kosovo Liberation Army and the Serbian forces. When the news of ethnic cleansing taking place reached western capitals, attempts were made in the UN Security Council to come to a resolution allowing for an intervention. These attempts failed. Eventually, with the traumatising experiences of Srebrenica and Rwanda fresh in memory, a coalition of western states decided to intervene without a UN mandate. 500 Serbs were killed during the bombing of Serbian targets.[16]

The intervention in Kosovo was illegal: it constituted an obvious breach of article 2 of the UN Charter.[17] However, with international law having lost much of its credibility, the argument was raised: can such a breach not be morally justifiable? Can we not push international law aside for a moment when basic feelings of morality require us to intervene? Such was the plea of former British prime minister Blair, who in a 1999 speech called the NATO intervention in Kosovo a 'just war'.[18] By doing so, Mr. Blair pulled out of the

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of the evidence that has emerged, there can be little doubt that it constitutes genocide.' (UN Secretary-General, *Report of the Secretary-General on Rwanda*, S/1994/640, 10).

[13] Gareth Evans, *The responsibility to protect : ending mass atrocity crimes once and for all* (Washington D.C: Brookings Institution Press, 2008), 28.

[14] UN, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, 1999, S/1999/1257, 43.

[15] Ibid., 22. and UN Security Council, *Resolution 912 (1994)*, 21 April 1994, S/RES/912.

[16] Amnesty International, "NATO/Federal Republic of Yugoslavia. 'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force", 2000, 1, footnote 2.

[17] For an overview of the positions on the legality/morality of the Kosovo intervention, see M. Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," *The Modern Law Review* 65, no. 2 (2002): 162. The dominant account appears to have become the one holding that the intervention was both formally illegal and morally necessary. See, for example, A Cassese, "Ex iniuria ius oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?," *European Journal of International Law* 10, no. 1 (1999): 23.

[18] He continued by saying that the war was 'based not on any territorial ambitions but on values. We cannot let the evil of ethnic cleansing stand. We must not rest until it is reversed. We have learned twice before in this century that appeasement does not work. If we let an evil dictator range unchallenged, we will have to spill infinitely more blood and treasure to stop him later.' For the full text of the speech, see http://www.pbs.org/newshour/bb/international/jan-june99/blair_doctrine4-23.html (last accessed on 27 June 2011).

bottom drawer an ancient doctrine which was thought to have disappeared with the establishment of the UN in 1945.

The UN itself undertook similar steps. After being confronted again with its incapability to act during the Kosovo crisis, the then Secretary-General Kofi Anan called for radical change; an outcry which was followed up by the UN General Assembly in the United Nations Millennium Declaration adopted in 2000.[19] In two speeches before the General Assembly, the Secretary-General made clear what was at stake:

(...) if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systemic violations of human rights that affect every precept of our common humanity?

In other words, for such atrocities to be banned from the face of the earth, what was needed was an abandonment of the concept of sovereignty as 'a shield for gross violations of human rights'.[20]

The call issued by the Secretary-General was not left unanswered. In September 2000, the Canadian government led by liberal Prime Minister Martin brought together a panel of intellectuals. Their mission:

to promote a comprehensive debate on the issues, and to foster global political consensus on how to move from polemics, and often paralysis, towards action within the international system, particularly through the United Nations.[21]

Approximately one year later, the 'International Commission on Intervention and State Sovereignty' (ICISS) handed over to the Canadian government their final report, entitled 'The Responsibility to Protect'.

In the report, the authors – among whom former Australian foreign minister Gareth Evans as well as the by now former leader of the Canadian Liberal Party Michael Ignatieff – pleaded for the introduction of a new concept: the 'Responsibility to Protect' (in the following: 'R2P'). Even though they acknowledged that this novel concept corresponded to a great extent with the older concept of humanitarian intervention, they also argued that R2P went beyond then current international law.[22] However, changing positive international law was not their primary objective. Instead, what they wanted to achieve was a change of perspective. In the 1990s, Bernard Kouchner (the founder of *Médecins sans frontières* who later on became French foreign minister) had launched the idea of a *droit d'ingérence*, a right for states to

[19] UN General Assembly, *United Nations Millennium Declaration*, 2000, A/RES/55/2.

[20] P. Hilpold, "The Duty to Protect and the Reform of the United Nations-A New Step in the Development of International Law," *Max Planck UNYB* 10 (2006): 50.

[21] The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, Canada: The International Commission on Intervention and State Sovereignty, 2001), 81.

[22] For Evans, R2P is 'a lot more than humanitarian intervention'. While humanitarian intervention is nothing more than 'coercive military intervention for humanitarian purposes', R2P is first and foremost about taking *preventive* action (Evans, *The responsibility to protect*, 56.) See also *infra*.

intervene – by military force if necessary – in another state committing mass atrocities.[23] While the concept certainly had its merits (it added to the already old idea of humanitarian intervention a layer of much needed legitimacy), it also provoked severe criticism. Especially developing states saw in the concept a possible pretext for the great powers to intervene for other reasons than purely humanitarian ones. As pointed out by Gareth Evans, the idea of '*ingérence'* has a double connotation: it can refer to 'intervention' as well as 'interference'.[24]

Therefore, the objective of R2P, as conceived by the authors of the ICISS report, was to restore the balance by stressing the responsibility of the state itself to prevent mass atrocities. In their own words:
intervention for human protection purposes, including military intervention in extreme cases, is supportable when major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or itself the perpetrator.[25]
The primary responsibility to tackle a humanitarian crisis within the borders of a given state thus lies with the state itself.[26] The members of the ICISS see this shift of perspective as a reconceptualisation: from sovereignty as *control* to sovereignty as *responsibility*.[27] International, external intervention is only justified if the state is 'unwilling or unable to halt or avert' the crisis.[28]

Hence, R2P should be seen as a new perspective, an attempt to change the language of the debate. Even though such a change in perspective is not a panacea, its importance should not be underestimated either, the members of the commission argue. In their own words:
this does not, of course, change the substantive issues which have to be addressed. There still remain to be argued all the moral, legal, political and operational questions (...) which have themselves been so difficult and divisive. But if people are prepared to look at all these issues from the new perspective that we propose, it may just make finding agreed answers that much easier.[29]
More concretely, they see three advantages. First, R2P implies an evaluation of the issues from the point of view of those seeking or needing support, rather

[23] Mario Bettati and Bernard Kouchner, *Le devoir d'ingérence : peut-on les laisser mourir ?* (Paris: Noël, 1987).
[24] Evans, *The responsibility to protect*, 33.
[25] The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 16.
[26] As indicated by the members of the commission themselves, the major issue at hand is the gap between on the one hand, the international legal system which is designed to maintain *international* peace and, on the other hand, the proliferation of *internal* conflicts. How can the UN and international society as a whole tackle these crises without giving up on the premises on which that very society is built, namely the principle of sovereignty and its manifestation in the principle of non-intervention? (Ibid., 13) The issue will be discussed at length below.
[27] Ibid.
[28] Ibid., XI.
[29] Ibid., 12.

than those who may be considering intervention. Second, it acknowledges that the primary responsibility rests with the state concerned. Third, it means not just the 'responsibility to react,' but the 'responsibility to prevent' and the 'responsibility to rebuild' as well.[30] In other words, the scope of R2P is larger than that of the traditional humanitarian intervention. While the latter is limited to the use of force, the former includes humanitarian *assistance* and the development of strategies to rebuild society after the advent of a humanitarian crisis.

After the publication of the report, things went fast. In 2002, the newly created African Union incorporated the concept in its constitutive charter.[31] While article 4(g) refers to the principle of non-interference in the internal affairs of other member states, article 4(h) establishes the 'right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.' The African Union thus became the first international organisation (albeit a regional one) to convert the R2P-principle into positive law.

Nevertheless, the global breakthrough of R2P took place in 2005 when the principle was taken up by the heads of state and government in the outcome document of the UN World Summit.[32] Shortly after, the Secretary-General endorsed the outcome of the Summit and embraced the concept of R2P in a report entitled 'In Larger Freedom: Towards Development and Human Rights for All'.[33] Even though some argue that a significant gap exists between R2P as conceived by the ICISS and the version that was eventually agreed upon by the states,[34] the president of the ICISS itself argues that the main principles of R2P have found their way into the World Summit Outcome.[35]

In the period following 2005, R2P made its way into some UN Security Council resolutions. In April 2006 the Council 'reaffirmed'[36] the outcome of the 2005 World Summit in a thematic resolution.[37] Just a few months later, in August 2006, it did so again in a resolution dealing with the situation in Darfur.[38] However, until now R2P has not been invoked in a consistent

[30] Ibid., 17.
[31] For an account, see B. Kioko, "The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention," *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* 85, no. 852 (2003): 807–826.
[32] 2005 World Summit Outcome, A/RES/60/1 of 16 September 2005.
[33] UN doc. A/59/2005.
[34] Hilpold, "The Duty to Protect and the Reform of the United Nations-A New Step in the Development of International Law," 38.
[35] Evans, *The responsibility to protect*, 47.
[36] Which is, admittedly, a rather odd term considering the short life of the concept of R2P at that moment.
[37] UN Security Council, *Resolution 1674*.
[38] UN Security Council, *Resolution 1706*.

manner. While R2P has indeed been mentioned on several occasions,[39] other situations have been dealt with without reference to the concept.[40]

All in all, R2P has already had an astonishing career. Conceived merely ten years ago, the question is already raised whether R2P has acquired the status of customary international law.[41] Its strongest opponents cannot but congratulate the conceivers of R2P with such a success.[42]

However, the R2P-story is not all roses. As often happens in international society, what is initially created out of idealistic ambitions is quickly taken over by more earthly forces[43]: while R2P was conceived as a concept encouraging states to *act*, it quickly came to be used by states to legitimise arguments *against* action. By stressing the primary obligation of the state in which atrocities occur, other states have found in R2P an argument *not* to intervene.[44] Furthermore, the objection of renewed imperialism has not disappeared either. Quickly after its conception, the Bush administration invoked R2P in support of its doctrine of pre-emptive strikes to prevent dictators from acquiring weapons of mass destruction.[45] R2P has thus been invoked in support of the invasion of Iraq.[46] In 2008, Russia called upon R2P in support of its invasion of Georgia.[47] Without going into details, one may nevertheless wonder whether these kind of actions were really what the members of the ICISS had in mind when developing R2P.

The proliferation of situations in which R2P is being invoked in recent years has led to growing criticism. While some are asking out loud whether R2P is not yet another tactic of the great powers to interfere in the domestic affairs of

[39] For an overview, see A. J Bellamy, "The Responsibility to Protect—Five Years On," *Ethics & International Affairs* 24, no. 2 (2010): 149-150.
[40] As indicated by Bellamy, the UNMIS peace operation in South Sudan, as well as the situations in Somalia, Iraq and Afghanistan have all been dealt with and justified without reference to R2P (Ibid., 150-151).
[41] J. Brunnee and S. J Toope, "The Responsibility to Protect and the Use of Force: Building Legality?," *Global Responsibility to Protect* 2, no. 3 (2010): 191–212.
[42] José E Alvarez, "The Schizophrenias of R2P," in *Human Rights, Intervention, and the Use of Force*, The Collected Courses of the Academy of European Law (Oxford: Oxford University Press, 2008), 276.
[43] Martti Koskenniemi, *From apology to utopia : the structure of international legal argument* (Cambridge NY: Cambridge University Press, 2005).
[44] Alex J. Bellamy, "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq," *Ethics & International Affairs* 19, no. 2 (September 2005): 33, http://doi.wiley.com/10.1111/j.1747-7093.2005.tb00499.x.
[45] L. Feinstein and A. M Slaughter, "A duty to prevent," *Foreign Affairs* 83, no. 1 (2004): 136–150.
[46] F. R Tesón, "Ending tyranny in Iraq," *Ethics & International Affairs* 19, no. 2 (2005): 1–20.
[47] Russia grounded its claims on its responsibility to protect its own citizens abroad, an argument that was quickly wiped off the table as it fell outside of the scope of R2P. See Global Centre for the Responsibility to Protect, "The Georgia-Russia Crisis and the Responsibility to Protect: Background Note", 2008, 1.

weaker states,[48] others consider R2P to be an empty box or too vague to be really operational.[49] Yet other scholars wish to safeguard sovereignty's central position in international society.[50]

Despite the ongoing confusion, the UN has not given up on R2P. On the contrary, R2P as a concept has become generally accepted at the UN level, which has allowed a shift from discussions on the concept itself to debates on the ways in which to implement it. In 2007, Columbia University professor Edward Luck was appointed by UN Secretary-General Ban Ki-Moon as special advisor on R2P.[51] In 2009, a report was issued containing a strategy to implement R2P.[52] In that same year, the General Assembly debated the matter. A consensus in support of the Secretary-General's approach was reached.[53]

The foregoing overview has briefly expounded on what the conceivers of R2P meant by that term and has also shown that R2P plays an important role in the contemporary discourse surrounding essential and ongoing debates in international law. Regardless of whether RP2 is genuinely a new concept or merely 'old wine in new bottles',[54] the coming into being of R2P has not gone unnoticed. In its short life, it has been used by many international actors as a speech act[55] in support of their foreign policy agendas. Because of this, it would not be wise simply to put aside R2P for bearing close resemblance to already well-known concepts such as the 'right of interference' or 'humanitarian intervention'.

2.2. A DEFINITION OF R2P

Even though R2P has played a prominent role in contemporary discourse on the question of a right of humanitarian intervention, its exact definition remains unclear. R2P is invoked by various actors, and concerns are raised that R2P misses the necessary conceptual clarity to be used effectively as a concept

[48] This question has been addressed by, among others, Bellamy in "Responsibility to Protect or Trojan Horse?". In this conception, sovereignty is regarded as a concept which *protects* the weaker states against the imperialism of the stronger (The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 7).
[49] C. Focarelli, "The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine," *Journal of Conflict and Security Law* 13, no. 2 (August 2008): 191-213, http://jcsl.oxfordjournals.org/cgi/doi/10.1093/jcsl/krn014.
[50] Alvarez, "The Schizophrenias of R2P."
[51] UN News Centre, "Secretary-General appoints special adviser to focus on responsibility to protect", 02 2008, http://www.un.org/apps/news/story.asp?NewsID=25702&Cr=ki-moon&Cr1.
[52] UN Secretary-General, *Implementing the Responsibility to Protect*, 2009, A/63/677.
[53] Office of the President of the General Assembly, "Concept Note on Responsibility to Protect Populations from Genocide, War Crimes, Ethnic Cleansing and Crimes against Humanity", 2009. See also Bellamy, "The Responsibility to Protect—Five Years On," 147.
[54] Stahn, "Responsibility to Protect." Cf. *infra*.
[55] On the notion of speech act, see J Austin, *How to do things with words*, 2nd ed. (Cambridge: Harvard University Press, 1975). And on R2P as a speech act, see Eli Stamnes, "'Speaking R2P' and the Prevention of Mass Atrocities," *Global Responsibility to Protect* 1, no. 1 (2009).

in the fight against genocide, war crimes, ethnic cleansing or crimes against humanity.[56]

This paper adheres to the definition of R2P as proposed by the UN Secretary-General, who – drawing from the wordings of the 2005 World Summit Outcome Document, identified R2P as a concept consisting of three pillars:

(1) The primary responsibility of states to protect their own populations from the four crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as from their incitement.

(2) The international community's responsibility to assist a state to fulfil its R2P.

(3) The international community's responsibility to take timely and decisive action, in accordance with the UN Charter, in cases where the state has manifestly failed to protect its population from one or more of the four crimes.[57]

It has been argued by Carsten Stahn that R2P entails both tradition and innovation.[58] As for tradition, it was argued that sovereignty as responsibility is an idea which has a long history; one in which illustrious philosophers such as Grotius and John Locke have played an important role. Furthermore, it was submitted that the fact that responsibility as responsibility entails duties is not a novelty either. 'Sovereignty never meant that a state could act in its territory regardless of the effect of its acts on another state,' Stahn argued.[59] Moreover, the criteria for the legitimacy of an intervention also find their origins in just war doctrine.[60] As for the innovative character of R2P, Stahn mentions the link between R2P and *human security*, which in turn refers to a basic feeling of global solidarity. R2P is thus held to transform this until recently merely moral notion into a legal obligation, one which goes further than the legal framework developed in the ILC Articles on State responsibility.

This paper focuses on the idea of sovereignty-as-responsibility, that of human security, as well as the relationship between both. Therefore, the main questions of this paper are 1) whether in international ethics[61] traces can be found of a conception of sovereignty as responsibility, and 2) whether traces can be found of a notion of collective responsibility.

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[56] See on this point Focarelli, "The Responsibility to Protect Doctrine and Humanitarian Intervention."
[57] UN Secretary-General, *Implementing the Responsibility to Protect*, 2009, A/63/677.
[58] Stahn, "Responsibility to Protect," 110 et seq.
[59] Ibid., 112.
[60] Ibid., 114. Noteworthy are the criteria of just cause, right intention, last resort and proportionality of means.
[61] For the purpose of this paper, 'international ethics' is conceived as an area of international relations theory which concerns the extent and scope of ethical obligations between states.

This enquiry starts by looking at the natural law tradition.

3. NATURAL LAW

A crucial thinker in the natural law tradition was Grotius. Grotius, a Dutchman who lived at the time of the Eighty Years' War between Spain and the Netherlands and the Thirty Years' War between catholics and protestants, is considered as one of the founding fathers of modern international law. The tradition he started together with men such as Gentili and de Vitoria is based on the assumption that above positive law (which Grotius calls 'civil law') there is a *natural law*, a law
which prevailed long before the foundation of states, and which still exists in all its force, in places, where the community consists of families distinct, and united as the subjects of one sovereign.[62]
This law is based not on the authority of God, but on a notion of a *societas humana*: the idea that all men are part of one human society.[63]

Relevant for our account is Grotius' book *De jure belli ac pacis*,[64] in which he expounds on the notion of 'just war'. Published 26 years prior to the publication of Hobbes' *Leviathan*,[65] but several years after that of Bodin's *Six livres de la République*,[66] one can already identify strong influences of sovereignty thinking.[67] Sovereignty was originally developed as a concept to introduce peace and stability on the then turbulent, war-torn European continent. Because of this, Grotius is careful not to develop a general right to intervene in other states, and is in general remarkably tolerant towards peoples of other faiths.[68] He does, however, identify two cases in which a state or a prince has the right to intervene:

[62] Hugo Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations*, trans. A.M. Campbell (New York: M. Walter Dunne, 1901), 179, http://oll.libertyfund.org/title/553.
[63] J Holzgrefe, *Humanitarian intervention : ethical, legal, and political dilemmas* (Cambridge: Cambridge University Press, 2003), 26. Note that, as indicated by the same Holzgrefe, natural law thinking actually predates Christianity. Cicero held that natural law is 'right reason in harmony with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions… we cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it.' (Marcus Cicero, *De re publica, De legibus* (Cambridge Mass.: Harvard University Press, 1928), 211; Holzgrefe, *Humanitarian intervention*, 25).
[64] Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations*.
[65] Thomas Hobbes, *Leviathan* (Meppel [etc.]: Boom, 1985).
[66] Jean Bodin, *Six books of the commonwealth* (B. Blackwell, 1955).
[67] Interesting in that regard is that Grotius wrote his book on just wars while in exile in Paris. It is not inconceivable that he was thus influenced by the works of Bodin who was active in Paris at the same time.
[68] Grotius thus rejects the idea that a state can go to war against another state for reasons related to a different interpretation of the Christian faith, or a rejection of the Christian faith all together (Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations*, 177-178, 183).

(1) he has the right to intervene as a form of punishment for 'gross violations of the law of nature and of nations, done to other states and subjects,'[69]

(2) he has the right to intervene and go to war 'to help others.'[70]

As for the first category (war as punishment), Grotius had in mind the battle against pirates, general robbers, and 'enemies of the human race'.[71] The idea of a war to *punish*, in my view, implies that war is here seen as an *ex post* intervention. It therefore does not correspond with what is today regarded as a humanitarian intervention, which is intended to be put in place while atrocities are still taking place.[72]

The second category (war to help others), however, comes closer to the idea of an intervention to stop atrocities from taking place. Especially interesting are Grotius words when he relates the right to go to war for others with the notion of sovereignty. Here, he holds that

Every sovereign is supreme judge in his own kingdom and over his own subjects, in whose disputes no foreign power can justly interfere. Yet where a Busiris (...) provoke[s] [its] people to despair and resistance by unheard of cruelties, having themselves abandoned all the laws of nature, they lose the rights of independent sovereigns, and can no longer claim the privilege of the law of nations.[73]

In other words, whenever a state commits 'unheard of cruelties' against its population, sovereignty disappears. Grotius thus connects sovereignty with legitimacy. As in the liberal tradition which will be discussed further on, Grotius does not regard sovereignty as the *de facto* exercise of power. What distinguishes his account from the liberal one, however, is the source of this legitimacy. While the former looks at natural law to provide the required legitimacy, the latter looks at a Lockean social contract between the state and its people.

Regardless of this discussion, the point remains that Grotius makes a strong case for a right of foreign states to intervene whenever mass atrocities take

[69] Ibid., 178.
[70] Grotius identifies four categories of states against which a state can go to war : (1) states which attack one's own citizens, (2) allies, (3) friends, and (4) states with peoples 'of one common nature' (Ibid., 205-207.
[71] Ibid., 178.
[72] Contra: see Terry Nardin, "The Moral Basis of Humanitarian Intervention," *Ethics & International Affairs* 16 (2002): 62.
[73] Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations*, 207. Emphasis added.

place.[74] This right however, remains a mere right, and does not impose duties on the foreign states. Grotius had the following to say on this point:
...In the first place it is certain that no one is bound to give assistance or protection, when it will be attended with evident danger. For a man's own life and property, and a state's own existence and preservation are either to the individual, or the state, objects of greater value and prior consideration than the welfare and security of other individuals or states.
Nor will states or individuals be bound to risk their own safety, even when the aggrieved or oppressed party cannot be relieved but by the destruction of the invader or oppressor. For under some circumstances it is impossible successfully to oppose cruelty and oppression, the punishment of which must be left to the eternal judge of mankind.[75]
As mentioned by Chesterman, Grotius thus regards a 'humanitarian' intervention more as a legal *right* than a moral *duty*.[76] Nardin added to that that Grotius' position can be explained by the basis of his morality, which is first and foremost one of self-preservation.[77] Later scholars such as Samuel Pufendorf did not agree with Grotius. Pufendorf talked of an 'imperfect duty' to intervene, which Nardin interpreted as a 'duty of beneficence to be performed insofar as it can be performed without disproportionate inconvenience.'[78]

All in all, one can say that in Grotius' work, a bias towards non-intervention is present. In extreme cases, states have a right to intervene, but the default position is that sovereigns do not mingle in the affairs of one another. The explanation for this bias is not difficult to find: preventing war from braking out was one of the main incentives for Grotius to develop his theory.

As liberal as well as positivist thought grew in importance and the notion of sovereignty and non-intervention transformed along the way, so did the theories on 'just war' deriving their legitimacy from natural law. Even though context changed radically, the natural law stream of thought never

[74] A remarkable feature of Grotius theory of a just war is that he does not allow citizens to rise up against the state when such 'unheard of cruelties' take place. In Hobbesian fashion, Grotius argues that subjects are and remain subjects; they have to obey. Other states, which are not subject to the will of the same sovereign, are not bound by such a requirement. Therefore, they have the possibility to intervene (Ibid., 208.) By this claim, it becomes clear that Grotius' theory dates from a different timeframe than that of – for example – John Stuart Mill. Mill, one of the founding fathers of modern liberalism, argued in his 'A Few Words on Non-Intervention' the exact opposite. If citizens of a state wish to be free, it is first and foremost their own responsibility to achieve such freedom. Freedom cannot be imposed from the outside (John Stuart Mill, "A few words on non-intervention," *New England Review (1990-)* 27, no. 3 (2006): 252–264). This contrast illustrates the shift in thinking on the idea of 'just war' due to the advent of modern liberal thought.
[75] Ibid., v. II, xxv, 7. Emphasis added.
[76] Simon Chesterman, *Just war or just peace? : humanitarian intervention and international law* (Oxford: Oxford University Press, 2003), 14.
[77] Nardin, "The Moral Basis of Humanitarian Intervention," 61.
[78] Ibid., 62.

disappeared. Until today, there are those pleading for a right of humanitarian intervention in the name of our 'common morality'.[79]

Terry Nardin is one of these scholars.[80] He starts his analysis with a reference to Kant. A straight line can be drawn between Kant's principle of respect[81] and what we now know to be human rights. Human rights, Nardin argues, are the manifestations of a 'common morality', which is based on the requirement to respect one another. Such a morality is minimal, and it is a morality of constraint.[82] Since it does not depend on the recognition by either peoples nor states, it encompasses the whole of what Grotius would call the *societas humana*. Human rights, it is argued, are in most cases universal moral rights.[83]

In other words, in the twentieth century, natural law-thinking reappeared in the shape of human rights.[84] Amartya Sen, in a contribution to a symposium dealing with the distinction between human rights and culturally determined values, defined the notion of human rights in a particularly precise way. In one sweep, he applied that definition to the question of interventionism:
In the most general form, the notion of human rights builds on our shared humanity. These rights are not derived from the citizenship of any country, or the membership of any nation, but taken as entitlements of every human being. (...)Since the conception of human rights transcends local legislation and the citizenship of the person affected, it is not surprising that support for human rights can also come from anyone — whether or not she is a citizen of the same country as the person whose rights are threatened. (...)This basic recognition does not, of course, suggest that everyone must intervene constantly in protecting and helping others. (...)Ubiquitous interventionism is not particularly fruitful or attractive within a given country, or across national boundaries. There is no obligation to roam the four corners of the earth in search of liberties to protect. The claim is only that the barriers of nationality and citizenship do not preclude people from taking legitimate interest in the rights of others and even from assuming some duties related to them.[85]

[79] Ibid., 64.
[80] Nardin, "The Moral Basis of Humanitarian Intervention."
[81] Immanuel Kant, *Foundations of the metaphysics of morals and, what is enlightenment?*, 1st ed. (Indianapolis: Bobbs-Merrill, 1976), 66-67.
[82] Nardin, "The Moral Basis of Humanitarian Intervention," 65.
[83] Ibid.
[84] One might raise one's eyebrows by this jump from an idea of common morality to that of human rights. Marrti Koskenniemi, for his part, does not agree with this connection. 'Rights depend on their meaning and force on the character of the political community in which they function'. (Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 167) Even though one can agree with that position, the fact nevertheless remains that the nuance is in most cases overlooked. Human rights are presented as something 'given to human society instead of created by it, like God's words.' (Ibid.). In cosmopolitan discourse (cf. *infra*) this is particularly true.
[85] Amartya Sen, "Human Rights and Asian Values" (presented at the Sixteenth Morgenthau Memorial Lecture on Ethics and Foreign Policy, New York: Carnegie Council on Ethics and International Affairs, 1997), 28-30. Emphasis added.

With these words, Sen takes a nuanced position on the question of the permissibility of intervention by one state in another. Because of the universal character of human rights, their reach goes beyond national borders. Consequently, one cannot invoke sovereignty when human rights are at under threat. However, Sen does not regard this right to intervene as an obligation.

This position begs the obvious question: why is there not an obligation to intervene? It is interesting to note, as indicated by Holzgrefe, that in many cases natural law/human rights thinkers oppose too strict an interpretation of non-intervention.[86] However, many if not most of them refuse to reject non-intervention all together. Perhaps ironically, Kant himself argued in favour of non intervention.[87] Hence, while many (as Pufendorf) identified an *imperfect* duty to intervene in other states for the sake of a common morality, others were and are in favour of an (almost) *perfect* duty of non-intervention. I believe the quest for an explanation to this peculiar situation cannot be found inside of the natural law tradition. Instead, one has to widen the scope of one's inquiry and look at what has been said in the liberal narrative on the topic of sovereignty and its corollary, the principle of non-intervention. As will be discussed later on, from the contact between liberal thought and human rights discourse, a 'transformation' of international legal discourse will come forth.[88] As cosmopolitan thought grew in importance, the usefulness of state sovereignty was more and more questioned.

4. LIBERALISM

When talking about sovereignty and its corollary non-intervention, one cannot help but notice that a fascinating evolution has taken place within the liberal tradition.[89] Based on a diverging interpretation of sovereignty which can be traced back to Locke and Hobbes, two competing narratives today co-exist. First, communitarianism will be discussed; the narrative that can be regarded as the traditional liberal account. Communitarianism has been a strong influence on the drafters of the UN Charter. The principle of sovereign equality of all states undoubtedly finds its origins in the writings of John Stuart Mill which will be discussed in the following. However, in more recent years a competing liberal tradition has seen the light. Equating sovereignty with the

[86] Holzgrefe, *Humanitarian intervention*, 28.

[87] See, most famously, the fifth principle of Kant's *Perpetual Peace*: 'No state shall violently interfere with the constitution and administration of another.' (Immanuel Kant, *Perpetual Peace - A Philosophical Essay*, trans. M. A. Campbell Smith (London: George Allen & Unwin Ltd., 1917), 112).

[88] R. G Teitel, "Humanity's Law: Rule of Law for the New Global Politics," *Cornell Int'l LJ* 35 (2001): 356 et seq.

[89] For the purpose of this paper, I use a very wide conception of liberalism which I borrow from Michael Doyle, who distinguished between a realist, a Marxist and a liberal account on humanitarian intervention. For Doyle, liberalism includes both the communitarian account and the cosmopolitan one. See Doyle, "International Ethics and the Responsibility to Protect," 74.

Hobbesian, statist version of it, this cosmopolitan narrative proclaims the end of sovereignty and the state-centred paradigm of international law. Instead, cosmopolitanism makes use of the human rights discourse to create a 'transnational' legal regime which focuses on the rights of individuals and peoples.[90]

This section first draws the distinction between the liberal Lockean conception of sovereignty and its statist counterpart which is inspired by Hobbes. Subsequently, it discusses both communitarianism and cosmopolitanism.

4.1. SOVEREIGNTY: BETWEEN LIBERALISM AND STATISM

Sovereignty is not an invention of states. Those philosophers who are today best known for having developed the theoretical underpinning of a quasi-absolute authority for the state, were in reality driven by feelings of solidarity towards those suffering due to endless religious wars. The main concern of Jean Bodin, one of the earliest philosophers using the term sovereignty and calling it 'la puissance absolue et perpetuelle d'une République'[91], was to end religious wars on the European continent.[92] Hobbes too regarded sovereignty as a concept to get all people out of the state of nature, which Hobbes – as is well known – regarded as 'solitary, poore, nasty, brutish, and short.'[93]

Unsurprisingly however, the concept of sovereignty, presented as the conferral of absolute authority to a *Leviathan* was quickly picked up by the states. As argued in realist thinking,[94] states are often driven by a desire to further their self-interests. While philosophers as Bodin and Hobbes thus looked at a strong state to *protect* its citizens, the states themselves downplayed the second part of the social contract concluded between them and their population. As pointed out by Fernando Tesón, sovereignty came to be seen as an end in itself; the end being the survival and the self-interest of the state.[95] It is from this statist conception of sovereignty that was derived the quasi absolute prohibition for states to mingle in the affairs of other states.[96] Entrenched in positive law in

[90] Teitel, "Humanity's Law," 362.
[91] Bodin, *Six books of the commonwealth*.
[92] Telling is the fact that Bodin's last publication was one in which representatives of all faiths discussed the virtue of tolerance (Jean Bodin, *Colloquium of the seven about secrets of the sublime* (University Park Pa.: Pennsylvania State University Press, 2008)).
[93] Hobbes, *Leviathan*, chap. XIII.
[94] Thucydides, "The Melian Dialogue."
[95] Fernando R. Tesón, "The liberal case for humanitarian intervention," in *Humanitarian intervention : ethical, legal, and political dilemmas*, ed. J Holzgrefe (Cambridge: Cambridge University Press, 2003), 110.
[96] As pointed out by Chesterman, there have been some philosophers pleading for an absolute prohibition of intervention. However, when reading them more carefully, their account appears more nuanced. Interesting here is the distinction between 'intervene' and 'interfere'. When all goes well, foreign states ought not to interfere. If, however, severe oppression is taking place, an oppression against which the population revolts, then foreign states have a legal right to assist the population. This is the position of Vattel (see Chesterman, *Just war or just peace?*, 18). Kant

1648 in the series of treaties together constituting the Peace of Westphalia,[97] the principle of non-intervention has been one of the cornerstones of international law ever since. By over-simplifying the concept and ignoring one of both legs upon which sovereignty was intended to stand (namely the aspect of *legitimacy*,[98] the requirement for the state to protect its own population), the states incorporated sovereignty in their discourse and used it as a self-legitimising concept.

As mentioned, such was not the original meaning of sovereignty. Hobbes himself regarded sovereignty as being part of a social contract between the state and its people. Curiously enough, and logically hard to understand, this contract was not subject to cancellation. Once the people (who at the time of conclusion of the contract were regarded as rational actors) had signed the agreement, they were submitted to the rule of the sovereign *per aeternitatem*.[99]

John Locke, another important 17th century English thinker, noticed this peculiarity. In his famous work *Two Treatises of Government*[100] Locke presents us with a two-way social contract. The people – regarded by Locke as the ultimate holders of authority – delegate authority to the state. As long as the state holds the trust of the people, it has the *legitimacy* to exercise authority. Therefore, and even though Locke himself never used the term 'sovereignty' but instead preferred to talk about 'absolute' or 'supream' power[101], sovereignty by Locke is conceived as serving a goal external to sovereignty itself: its *raison d'être* is to protect the rights of its population. If a state fails to do so, then the social contract ends, and sovereignty disappears. This liberal conception of sovereignty reappears at the end of the twentieth

himself said something similar. While taking the principle of non-intervention as one of the cornerstones of international society, Kant also held that 'In this connection, it is true, we cannot count the case of a state which has become split up through internal corruption into two parts, each of them representing by itself an individual state which lays claim to the whole. Here the yielding of assistance to one faction could not be reckoned as interference on the part of a foreign state with the constitution of another, for here anarchy prevails. So long, however, as the inner strife has not yet reached this stage the interference of other powers would be a violation of the rights of an independent nation which is only struggling with internal disease. It would therefore itself cause a scandal, and make the autonomy of all states insecure.' (Kant, *Perpetual Peace - A Philosophical Essay*, 113-114.) Emphasis added.

[97] As stressed by Jean Cohen, we should not equate sovereignty as conceived by the drafters of the Westphalia treaty with the conception of it which has inspired the UN Charter. The former leans closely to the statist conception, the latter to the liberal (communitarian) conception. See Jean L. Cohen, "Whose Sovereignty? Empire Versus International Law," *Ethics and International Affairs* 18, no. 3 (December 2004): 12, http://doi.wiley.com/10.1111/j.1747-7093.2004.tb00474.x.

[98] On sovereignty-as-legitimacy, see also D. Luban, "Just war and human rights," *Philosophy and Public Affairs* 9, no. 2 (1980): 167.

[99] Eric Driscoll, "Locke and Hobbes," *Classics of Social and Political Thought, J.P. McCormick*, 2008, 2-3.

[100] John Locke, *Two Treatises of Government* (London: for Thomas Tegg; W. Sharpe and Son; G. Offor; G. and J. Robinson; J. Evans and Co.: Also R. Griffin and Co. Glasgow; and J. Gumming, Dublin, 1823).

[101] Driscoll, "Locke and Hobbes," 5.

century when thinkers such as Luban stress the presence of legitimacy as a component of sovereignty.[102]

Quite evidently, this second, competing conception of sovereignty is more favourable towards a right of humanitarian intervention, while the first, statist conception shows a strong tendency to look at the protection and survival of the state as an end in itself.[103] Obviously, the advent of a humanitarian intervention against the state itself is something a state wishes to prevent. Nevertheless, the liberal, Lockean conception of sovereignty too pleads for the upkeep of a principle of non-intervention. As will in later times be further elaborated by John Stuart Mill, sovereignty – both in the Hobbesian and the Lockean sense – is a concept developed to establish a platform of stability, allowing citizens to live their lives in safety (as in Hobbes), or allowing them to enjoy the benefits of the rights they possess (as in Locke). Therefore, non-intervention is presented – ironically – as a means to an end which is in many ways similar to that of those today pleading for a right to intervene: thanks to non-intervention, no mass wars would take place and no mass atrocities would be committed any more.

However, as is now widely accepted, the presupposition on which these theories are constructed is in itself incorrect. The 'collective analogy' whereby a state is equated to the sum of its individual citizens is flawed. In this analogy, persons and states are considered to be alike:

Just as persons are autonomous agents, and are entitled to determine their own action free from interference as long as the exercise of their autonomy does not involve the transgression of certain moral constraints, so, it is claimed, states are also autonomous agents, whose autonomy is similarly deserving of respect.[104]

As the examples of governments committing mass atrocities against their own population show, this analogy does not always hold. States are more if not less than the sum of its citizens, and they pursue objectives which can differ from, and go against those of its population.[105]

This being said, the collective analogy continues to inspire liberal international relations theory on the question of a possible right of intervention. The double conception sketched out in the above has led to the establishment of (at least) two competing narratives on the question of a right of intervention: a

[102] Luban, "Just war and human rights." Note however, that Luban makes a distinction between an 'horizontal' social contract, which – in Lockean fashion – establishes the political community which is the nation, while a 'vertical' contract is needed to establish a *state* (Ibid., 167). The reasoning behind this argument is not straightforward. Does it not undermine the very point he wishes to make, namely that sovereignty requires legitimacy?

[103] Tesón, "The liberal case for humanitarian intervention," 110.

[104] Jeff McMahan, "The Ethics of International Intervention," in *Ethics and international relations*, ed. Anthony Ellis and United States-United Kingdom Educational Commission (Manchester University Press ND, 1986), 28-29.

[105] Holzgrefe, *Humanitarian intervention*, 28.

communitarian and a cosmopolitan one. The former will be treated in sub-section B, the latter in C.

4.2 SOVEREIGNTY FROM A COMMUNITARIAN PERSPECTIVE: A FEW REASONS NOT TO INTERVENE

John Stuart Mill is the English philosopher who is best known for his principle of liberty according to which one is free to do as one pleases, as long as one does not harm others.[106] Although liberalism was not a new phenomenon (Locke has already been discussed above), it gained momentum in the 19th century and developed into the leading intellectual tradition of that time.

In a rather short article, entitled 'A Few Words on Non-Intervention', Mill reconsidered the principle of non-intervention. Rejecting a depiction of England as acting solely out of self-interest (whereby he thus rejected realism), Mill argued that non-intervention itself was a liberal principle, a principle allowing citizens to acquire freedom without interference from the outside.

As mentioned, according to Mill, England does not merely act out of a need to protect its interests. Self-interest should not be confused with the preservation of one's security. National security, Mill holds, is a precious good, and an intervention for reasons of self-defence is justified.[107] But apart from such a hypothesis, are there any other reasons for which a state is morally allowed to intervene in another state?[108]

In essence, Mill's defence of the principle of non-interventionism boils down to the following argument: one cannot import freedom. A people has to deserve its own freedom; and to acquire such freedom, its needs to fight its oppressors. As Mill puts it:
The only test possessing any real value, of a people's having become fit for popular institutions, is that they (...) are willing to brave labour and danger for their liberation. (...) If a people (...) does not value it sufficiently to fight for it, and maintain it against any force which can be mustered within the country (...), it is only a question of how few years or months that people will be enslaved.[109]

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[106] John Mill, *On liberty and other essays* (Lawrence Kan.: Digireads.com Publ., 2010), 21-22.
[107] John Stuart Mill, "A few words on non-intervention," *New England Review (1990-)* 27, no. 3 (2006): 3.
[108] Note that Mill seems to be talking about intervention in a wider way than we have done until now. The use of force does not seem to be required in Mill's view for an action to be labelled 'intervention'. Furthermore, Mill here makes a distinction between 'barbarians' and 'civilised peoples'. The distinction is interesting, as it tells us quite a lot about the then prevailing worldview. However, it need not bother us here. Doyle has said interesting things on that point : M. W Doyle, "A few words on Mill, Walzer, and nonintervention," *Ethics & International Affairs* 23, no. 4 (2009): 363-366.
[109] Mill, "A few words on non-intervention," 6.

Hence, Mill does not believe it is justified for a foreign state to intervene in another state to 'liberate' its population. If one attempts to 'impose' freedom, it will necessarily perish.[110]

This being said, Mill does not regard the principle as an absolute one. In his article 'A Few Words on Non-Intervention', he identifies two exceptions,[111] namely the case of a 'protracted civil war', and that of the 'struggle of a people against their government for free institutions'.

The first case is that of a 'protracted civil war'.[112] For Mill, another state can intervene in such a war in two hypotheses. First, if 'the contending parties are so equally balanced that there is no probability of a speedy issue', and second, 'if the victorious side cannot hope to jeep down the vanquished but by severities repugnant to humanity, and injurious to the permanent welfare of the country.'[113] The underlined words are important. They will be discussed below.

The second case is that of 'the struggle of a people against their government for free institutions'. Here, yet another distinction can be made, Mill argues. If this struggle is a purely domestic one, then foreign states should not intervene. As mentioned, a people has to deserve its own freedom. However, if this struggle takes place by a people against a foreign oppressor, then the situation becomes completely different. Here, one is already confronted with a violation of the principle of non-intervention by another state. For Mill, a third state can then intervene in the first in order to chase the second away. The argument is quite clever:

A people the most attached to freedom (...) may be unable to contend successfully for them against the military strength of another nation much more powerful. To assist a people thus kept down, is not to disturb the balance of forces on which the permanent maintenance of freedom in a country depends, but to redress that balance when it is already unfairly and violently disturbed.[114]

In other words: Mill makes a liberal case for intervention in order for the liberal principle of non-intervention to survive. This position appears to be contradictory. However, by looking at more recent contributions, such as those of Michael Walzer and Michael Doyle, the seeming inconsistency is explained. Key to understanding it is the notion of *self-determination*.

[110] In the advent of a foreign intervention, Mill envisages three scenarios. First, such a government, put in place by foreign powers, will begin to rule as the previous government; that is, as an oppressor. Second, the state will collapse in a civil war. Third, it will become dependent on the interveners for a long time. Doyle, "A few words on Mill, Walzer, and nonintervention," 353. The example of Iraq sufficiently illustrates this third point, I believe.

[111] In other writings, Mill develops these ideas further. For reasons of feasibility, I do not take these into account. See, however Ibid., 356 et seq.

[112] Mill, "A few words on non-intervention," 5.

[113] Ibid.

[114] Ibid., 6.

As indicated by Doyle, Mill stands at the starting point of a tradition which came to be known as communitarianism. In this tradition, Mill's claim that a people needs to acquire its own freedom became reconceptualised: from a responsibility it became a right; a right we today call that of self-determination. This notion lies at the heart of the ambiguity within liberalism on the principle of non-intervention: for communitarians on the one hand, an intervention can be justified in order to safeguard the possibility for a people to exercise its right to self-determination. Cosmopolitans, on the other hand, tend to emphasise the need for a humanitarian commitment to assistance in the advent of mass atrocities and generally tend to look at sovereignty from the statist perspective sketched out in the above.[115]

Within this communitarian liberal tradition, a 'right of humanitarian intervention' is not rejected, although it is treated with restraint. Mill established two explicit exceptions to the principle of non-intervention. However, the words 'severities repugnant to humanity' (underlined in the above) give the impression that he implicitly established a third exception as well. Walzer further elaborated on this third exception and made a case in favour of a right of humanitarian intervention whenever acts take place that 'shock the moral conscience of mankind'.[116] For communitarians as Walzer, the principle of non-intervention is important within international society, but in some cases, discussing the importance of a right to self-determination simply becomes ridiculous and cynical.[117] However, such exceptions need to be handled with care. Communitarians are deeply concerned with the possibility of abuse of a right of humanitarian intervention and require a special 'burden of proof' to allow for a humanitarian intervention to take place.[118]

In sum, communitarianism is a first tradition *within* liberal thought upholding sovereignty – as did Locke – as a liberal concept. Sovereignty is presumed to be legitimate,[119] and it lies at the basis of a principle of non-intervention,

[115] Doyle, "A few words on Mill, Walzer, and nonintervention," 350.
[116] Michael Walzer, *Just and unjust wars : a moral argument with historical illustrations*, 4th ed. (New York: Basic Books, 2006), 107.
[117] Ibid., 90.
[118] In the words of Walzer: 'Interventions are so often undertaken for "reasons of state" that have nothing to do with self-determination that we have become sceptical of every claim to defend the autonomy of alien communities. Hence, the special burden of proof (...), more onerous than any we impose on individuals or governments pleading self-defense: intervening states must demonstrate that their own case is radically different from what we take to be the general run of cases, where the liberty (...) of citizens is best served if foreigners offer them only moral support.' Ibid., 91.
[119] Such is certainly not the case in the cosmopolitan narrative, where sovereignty is looked at with great suspicion. This presumption of legitimacy is perhaps the weakest point in the communitarian narrative. It fails to incorporate the empirical fact that in today's world many states lack such legitimacy. Unsurprisingly, cosmopolitans do not hesitate to point out this weak point.

which in turn is regarded as a guarantee that every community has the possibility to acquire its own freedom without interference by foreign powers.

The difference with earlier accounts as that of Grotius is that for Mill and Walzer and for liberal thinkers in general, a right of intervention is claimed not to be derived from any particular conception of the good. Liberalism proclaims moral neutrality and rejects any external 'higher norm'. Starting from the main tenet that every man (and – by means of the collective analogy[120] – every community) ought to decide how he/she lives his/her life, an intervention can only be justified when the events that are taking place are of such as nature that it is beyond doubt that no particular moral system could allow them. In a certain way, communitarians uphold a degree of moral relativism on a community level.

Such a relativism distinguishes communitarianism from natural law thinking, epitomised by Kant's principle of respect; the difference lying in the requirement of recognition.[121] In Kantian ethics, on the one hand, the validity of a right to intervene does not depend on its recognition by others. In a communitarian account, on the other hand, such a recognition is necessary. The conviction that no particular moral system could oppose such an intervention explains the need, within the communitarian paradigm, for an exceptionally high burden of proof. The risk of abuse is central in communitarian liberalism, since the very aim of an intervention is to allow every community to have the means to struggle for its own freedom. In a Kantian, natural law paradigm, less attention is given to this idea of communal liberty. The unacceptability of a certain set of events is already ascertained *a priori* and is not based on the conclusion of a hypothetical contract. Therefore, it can be imagined that those adhering to the natural law tradition will be more willing to intervene than those adhering to communitarian liberalism.[122] This point will reappear in section IV on cosmopolitanism.

[120] Cf. *supra*.

[121] Such was also the argument of Nardin. See Nardin, "The Moral Basis of Humanitarian Intervention," 64.

[122] The risk of abuse which a human rights based account of humanitarian intervention entails, has always been a central argument in favour of the communitarian principle of non-intervention. Today as well, with the cosmopolitan narrative becoming the dominant one, concerns are still raised. American interventionism under the Bush administration has provoked quite some thought. Fierce defenders of interventionism were very active in these days (think of Tesón, "The liberal case for humanitarian intervention."), but reactions did not fail to come (Terry Nardin, "Humanitarian Imperialism," *Ethics & International Affairs* 19, no. 2 (September 2005): 21-26, http://doi.wiley.com/10.1111/j.1747-7093.2005.tb00497.x.). Coming from the critical tradition, a debate emerged on the use of the humanitarian intervention doctrine in support of possible imperial ambitions from the part of the US. For a discussion, see Cohen, "Whose Sovereignty?". and for a leading work in the debate, see Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2001).

Mill conceived sovereignty as a progressive, egalitarian concept.[123] This article claims that this conception underlies the UN legal framework as laid down in the UN Charter as well. The way in which sovereignty is referred to already gives a hint as to the way it was intended to be conceived: the Charter speaks of the 'sovereign equality of all its Members'. The international community is thus depicted as a club of friends which stand on an equal footing. The Charter legally entrenches this idea of equality and thus creates a possible counterweight for the material imbalance that obviously exists between the different states. The right of self-determination plays a central role in that regard. If one looks at the UN General Assembly Resolutions on the issue of colonialism, the rationale underpinning the UN framework clearly shines through:

Conscious of the need for the creation of conditions of stability and well-being and peaceful and friendly relations based on respect for the principles of equal rights and self-determination of all peoples...[124]

Let there thus be no doubt: the international system as laid down by the UN Charter is meant to be an egalitarian one.[125]

4.3. COSMOPOLITANISM: REPLACING SOVEREIGNTY WITH HUMAN RIGHTS

When reading the article 'Just War and Human Rights' by David Luban,[126] one is confronted with quite a different vision on sovereignty and its corollary, the principle of non-intervention. While communitarians such as Mill and Walzer regard sovereignty as the *conditio sine qua non* for a people to be self-determining, cosmopolitans as Luban but also Anne-Marie Slaughter,[127] as well as Buchanan and Keohane[128] consider sovereignty to be the main impediment for people to live their life in a decent manner, with their basic human rights respected. While communitarians seem to take the liberal conception of sovereignty for granted, cosmopolitans are sceptical towards sovereignty as it risks being abused by the states.

Luban rejects non-interventionism. In his article, he remarks that the communitarian justification of sovereignty and non-intervention, even if *in abstracto* it would make sense, fails to provide for a useful theory of just war

[123] Koskenniemi, *From apology to utopia*, 237.
[124] UN General Assembly Resolution 1514, *Declaration of the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960.
[125] Chris Brown, *Sovereignty, rights and justice: international political theory today* (Wiley-Blackwell, 2002), 145.
[126] Luban, "Just war and human rights."
[127] A. M Slaughter and W. Burke-White, "An International Constitutional Moment," *Harvard International Law Journal* 43, no. 1 (2002); Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2005).
[128] Allen Buchanan and Robert O. Keohane, "The Preventive Use of Force: A Cosmopolitan Institutional Proposal," *Ethics & International Affairs* 18, no. 1 (March 2004): 1-22, http://doi.wiley.com/10.1111/j.1747-7093.2004.tb00447.x.

in today's world, if only because today's world dramatically differs from that of thinkers such as Mill. While the international community in the 19th century consisted of a limited number of nation-states, today's world has quite a number of states which claim to enjoy the benefits of sovereignty, but which actually fail to meet the requirements to be considered sovereign as put forward by Locke.[129] Therefore, cosmopolitans reject the presumptive legitimacy of sovereignty upheld in communitarian thought. In general, their perception of sovereignty leans very closely to the statist one sketched in the above.

To get around this wrongful focus on states and the accompanying ambiguity – a focus which became part of the UN legal framework in which every act of aggression *ipso facto* becomes illegal (unless it is a case of self-defence[130] or if it is authorised by the UN Security Council[131]) – Luban wishes to abandon the statist paradigm, and instead look into a human rights one.[132] If we by-pass the state, he argues, and instead focus on the rights of the men and women who make up the state, we can come to a more fertile moral ground upon which the debate on the possibility of a just war can be held.[133]

A right is a claim of one person on another, Luban holds. Human rights are claims of the whole human community on the whole of the human community.[134] It is possible to make distinctions between different human rights, Luban seems to indicate. Some of them are considered to be *socially basic human rights*.[135] Examples of these are subsistence rights (right to healthy air and water, adequate food, clothing and shelter) and security rights (right not to be subject to killing, torture, assault...).[136] For Luban, it is justified to go to war to defend such rights (even in defence of the human rights of others, not living in the same state).[137] Here as well, a condition of proportionality is present, but the impression is given that this safety measure plays a less prominent role than in communitarian discourse.[138]

[129] Luban, "Just war and human rights," 172.
[130] Article 51 UN Charter.
[131] Chapter VII UN Charter.
[132] Luban, "Just war and human rights," 174.
[133] Ibid., 187.
[134] Ibid., 174. See also the reference to Amartya Sen in footnote 85 above.
[135] In the words of Henry Shue : 'Socially basic human rights are everyone's minimum reasonable demands upon the rest of humanity.' (Ibid., 175.) This notion of 'basic human rights' was further developed by Shue in his book *Basic rights: subsistence, affluence, and U.S. foreign policy* (Princeton University Press, 1996). It continues to inspire the debate, as illustrated by a recent collection of essays: Charles R. Beitz and Robert E. Goodin, *Global basic rights* (Oxford University Press, 2009).
[136] Luban, "Just war and human rights," 175.
[137] Ibid.
[138] Cf. *infra*.

4.4 EVALUATION: WHY SOVEREIGNTY ISN'T ALL BAD

When examining the transformation of the discourse on humanitarian intervention which has taken place in recent years and has led to the rise of cosmopolitanism, the important role played by human rights can hardly be overlooked. As indicated by Teitel, humanitarian law has merged with international human rights discourse.[139] From an evolutionary perspective, it seems that natural law discourse (cf. Grotius) lost much of its appeal as Millian, communitarian liberalism grew in importance. While liberalism did presuppose the existence of a set of civil rights[140] natural law discourse nevertheless was snowed under by the focus on moral neutrality characterising the liberal narrative.

Being confronted with the deadlock in which the UN collective security system was trapped during the Cold War, this communitarian liberal narrative in turn came to be attacked. Sovereignty came to be seen as the main impediment for the international community to intervene when faced with events that 'shock the moral conscience of mankind'.[141] This perception became general, as even the former UN Secretary-General agreed.[142] As a way to get out of this deadlock, philosophers and lawyers alike started looking for alternatives. The most obvious alternative for the liberal communitarian narrative in which non-intervention played such an important role was natural law thinking, a tradition which as mentioned already took on the clothes of a human rights discourse.[143]

However, this turn to human rights has far-reaching consequences. In the UN legal system, the communitarian narrative on sovereignty was entrenched into formal international law. As will be further developed in the following section, by rejecting sovereignty, cosmopolitans *ipso facto* rejected formal international law in its entirety.[144] Walzer, in his 1977 book talked of the 'legalist paradigm'.[145] It was this 'legalist' conception of sovereignty that prevented the international community from acting. The cosmopolitan narrative thus acquired a new dimension: it not only pleaded against sovereignty, but in one

[139] Teitel, "Humanity's Law."
[140] In Lockean contract theory the state is seen as a means to allow its citizens to enjoy the benefits of these rights.
[141] Walzer, *Just and unjust wars*, 107.
[142] In his acceptance speech of the Nobel Peace prize of 2001 he said that 'the sovereignty of states must no longer be used as a shield for gross violations of human rights.' (Kofi Annan, speech given to the Nobel Foundation, Oslo, Norway, 10 December 2001; available at http://nobelprize.org/nobel_prizes/peace/laureates/2001/annan-lecture.html. (last accessed on 25 June 2011)).
[143] I come back to this evolution when presenting Koskenniemi's article on a 'turn to ethics'. Cf. *infra*.
[144] On the de-formalisation of international law and the subsequent 'turn to ethics', see Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law." Cohen mentioned this as well: Cohen, "Whose Sovereignty?," 7.
[145] Walzer, *Just and unjust wars*, 58 et seq.

sweep wished to get rid of international law all together. The Kosovo case is particularly enlightening in that regard. All observers agree that the intervention without UN mandate was illegal. Nevertheless, these same observers argue that, even though illegal, it nevertheless was legitimate.[146] Some even went as far as to argue that out of such illegal acts an international custom can come forth and that legality needs to be breached for law to develop.[147]

It is submitted that this move away from sovereignty and away from formalism in international law must be regarded with great suspicion. The alternative international legal regime which is presented by cosmopolitans has one major disadvantage. By rejecting sovereignty and its corollary, non-intervention, as well as by rejecting the formal legal system which mitigates the power struggle taking place between states, one opens the door for imperialist adventures.[148] The sovereign equality of states has on many occasions functioned as an ultimate defence against foreign interference. Even if this defence is merely discursive, its force should not be underestimated as it creates a relationship between the intervening state and the attacked state as one of 'trespasser' and 'victim'.[149] The burden of proof here lies with the intervening state: it needs to have strong reasons to intervene.[150] Taking away this defence would lead to limitless interventionism by a limited number of states. Justifications for intervention would boil down to *ex post* apologies.[151]

However, this is not to say that communitarianism does not have its downsides. While non-intervention has indeed functioned as a barrier against imperialism, one should not forget that the cosmopolitan reproach holding that sovereignty often functions as a shield used by dictators against outside interference does hold water.[152] Today, the presupposition on which communitarianism is founded can be questioned. Legitimacy can no longer be assumed. Furthermore, the role attributed to the right of self-determination has a problematic side to it as well. The emphasis on self-determination begs the

[146] See, on this point, Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 162. and also Chesterman, *Just war or just peace?*, 231.
[147] See here A Cassese, "Ex iniuria ius oritur: are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?," *European Journal of International Law* 10, no. 1 (1999): 23. The argument that illegal acts are sometimes necessary to make the law evolve, is strongly inspired by the ideas developed by Hannah Arendt on 'civil disobedience'. See Hannah Arendt, *Crises of the Republic: lying in politics, civil disobedience on violence, thoughts on politics, and revolution* (Harcourt Brace Jovanovich, 1972).
[148] See Teitel, who warned against this risk of abuse: 'The fact that the same norms can pull in potentially conflicting directions underscores the indeterminacy and extent to which the global rule of law, as it is currently framed, constitutes a highly manipulable regime that lends itself to politicization.' (Teitel, "Humanity's Law," 387).
[149] Michel Foucault, *L'archéologie du savoir* (Paris: Gallimard, 1969).
[150] I refer to the quote from Walzer mentioned *supra*. See Walzer, *Just and unjust wars*, 91.
[151] See, for example, Tesón's plea in favour of the intervention in Iraq in Tesón, "Ending tyranny in Iraq."
[152] On this point, see Luban, "Just war and human rights," 173. and footnote 129.

question: what exactly constitutes a people? Attributing a big role to people leads to a risk of focussing all together too much on ethnicity; an emphasis which has the paradoxical potential of nurturing internal strife.[153]

Does this imply then that sovereignty ought to be abandoned altogether? The risk of ending up in a utilitarian calculus lurks around the corner.[154] What has caused the most harm in the past? Interventionism or non-interventionism? Apart from the fact that this is a calculation impossible to make, it also entails the risk of getting stuck in serious dichotomous reasoning.[155] Are there not alternatives to the cosmopolitan cry for a sovereignty-free world? Can we not save sovereignty (this article claims we should) and provide for a right or even a duty to intervene, without running the risk of unwillingly opening the door for imperialism and abuse?

To avoid any misunderstanding, this article does not reject cosmopolitanism in its entirety. What is troubling, however, is the fact that cosmopolitan thinkers tend to take their wishes for reality. Cosmopolitan thinkers such as Anne-Marie Slaughter[156] claim that the cosmopolitan legal order is already installed. This is hardly the case. While there are elements of a 'global rule of law' (one can think of the role of the International Criminal Court), it is nevertheless hard to ignore the fact that states are still the predominant actors in the international community.[157] Ignoring this point is to give states *carte blanche*. Blinded by an ambiance of utopia, the risk of abuse of the legal system by the states will disappear from the radar of international law.

This is the challenge R2P was intended to address. The following section examines in the light of the foregoing analysis to what extent (if any) R2P has pushed this debate further.

5. R2P: 'OLD WINE IN NEW BOTTLES'?

The exploration of the different narratives on a right/duty of humanitarian intervention leads to the conundrum which international law as well as international ethics face today: is it possible to design a legal regime which allows for a right to intervene or even imposes a duty to intervene, while at the same time limiting as much as possible the risks of abuse?

[153] I believe there is a strong tension within the UN legal framework between, on the one side, the discourse on self-determination and, on the other side, the discourse pleading for international stability and peace. Self-determination hereby paradoxically undermines the very objectives of the discourse of which it forms part; a discourse aimed at establishing a stable world order.
[154] On the role of utilitarianism in the humanitarian intervention debate, see Holzgrefe, *Humanitarian intervention*, 20-25.
[155] Susan Marks, *The riddle of all constitutions : international law, democracy, and the critique of ideology* (Oxford: Oxford University Press, 2000), 22.
[156] Slaughter, *A New World Order*.
[157] Cohen, "Whose Sovereignty?," 12.

R2P as presented in section I has three pillars. First, a responsibility of every state to protect its population from the four crimes of genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as from their incitement. Second, a responsibility of the international community to assist a state to fulfil its R2P. Third, a responsibility of the international community to take timely and decisive action, in accordance with the UN Charter, in cases where the state has manifestly failed to protect its population from one or more of the four crimes.[158]

Stahn identified two interesting elements which form part of R2P: a conception of sovereignty as responsibility and the establishment of a duty to intervene in the name of *human security*.[159] With the information gathered in the previous sections, we can now explain these elements.

As for sovereignty-as-responsibility, a first hypothesis is to look at it as a rejection of the cosmopolitan and thus statist conception of sovereignty and a return to the communitarian conception which is – as mentioned earlier – a progressive and egalitarian one. This tradition which gained momentum in the 19th century (think of Mill) can actually be traced back to Locke and his liberal social contract theory. R2P, by presenting sovereignty as entailing a set of responsibilities, thus at first sight seems to go back to this communitarian conception.[160]

However, there is one big difference with the communitarian narrative: while in communitarianism and in Lockean liberalism, legitimacy needs to stem from the *inside*, R2P makes the legitimacy of sovereignty dependent on the *outside.* This would come down to a significant reconceptualisation of sovereignty: a state will be considered legitimate and thus be sovereign as long as the international community deems it worthy to be sovereign.[161] This point in fact shows that R2P and the link installed between sovereignty and responsibility is of quite a different nature than one would expect at first sight. With the foundation of legitimacy lying at the international level, R2P suddenly reveals itself as a form of disguised cosmopolitanism. Sovereignty is automatically trumped by human rights considerations.[162]

Indeed, R2P is conceivably more a cosmopolitan than a communitarian concept. It pays lip service to sovereignty, but in between the lines one cannot

[158] UN Secretary-General, *Implementing the Responsibility to Protect*, 2009, A/63/677.
[159] Stahn, "Responsibility to Protect," 110 et seq.
[160] Such was also the idea of Stahn, who she herself referred to Locke. See Ibid., 111.
[161] Alvarez, in his article 'The Schizophrenias of R2P' referred to the words of Richard Haas who talked about sovereignty in the R2P discourse as being a bumper sticker saying 'abuse it and lose it'. Alvarez continues by saying that 'R2P supporters may object to his lack of nuance, but they can hardly claim his bumper sticker violates the core idea that (...) statehood only has an 'instrumental' rather than an 'intrinsic' value'. See Alvarez, "The Schizophrenias of R2P," 179.
[162] For a clear example of this cosmopolitan way of reasoning, see Tan, "The Duty to Protect," 3-6.

but notice a perception of sovereignty as being part of the problem instead of the solution.

Especially revealing in that respect is the presentation of sovereignty by Gareth Evans, the main promoter of R2P and president of the ICISS.[163] In his book *The Responsibility to Protect*, he equates sovereignty with the statist conception of it. He goes back to the Peace of Westphalia, and presents sovereignty as a principle which

effectively institutionalized the long-standing indifference of political rulers toward atrocity crimes occurring elsewhere, and also effectively immunized them from any external discipline they might conceivably have faced for either perpetrating such crimes against their own people or allowing others to commit them while they stood by.[164]

He then continues by listing the number of mass atrocities having been committed in the twentieth century. In short, Evans presents a thoroughly one-sided picture of sovereignty. Equating it with its statist conception, and ignoring the link made in the UN Charter between, on the one hand, non-intervention and, on the other hand, the system of collective security,[165] Evans puts all his eggs in the basked of a human rights discourse, a discourse he regards as the tool *par excellence* to by-pass the state-centred, cynical system which has led to such massive bloodshed.[166] Evans, the driving force behind R2P, is a firm supporter of the cosmopolitan narrative.

The idea of human security, to which the notion of a responsibility of all states to act when the state committing mass atrocities loses its sovereignty, again confirms the nature of R2P as a cosmopolitan concept. As mentioned by Jean Cohen, human security is presented by R2P as the new *Grundnorm* of international law.[167] Sovereignty and the state-centred paradigm that goes with it have to go, and the focus of international law has to shift towards the individual right to live a safe life.[168]

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[163] See, in general, Evans, *The responsibility to protect*, chap. 1.
[164] Ibid., 16.
[165] In defence of sovereignty, see Cohen, "Whose Sovereignty?", to whom I will come back later on.
[166] Evans, *The responsibility to protect*, 19-20. Revealing is the use of the words 'our common humanity' (Ibid., 17.) indicating the 'turn to ethics' as described by Koskenniemi in "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law."
[167] Hans Kelsen, *Pure theory of law*, California Library reprint series ed. (Berkeley: University of California Press, 1978).
[168] See Buchanan and Keohane, "The Preventive Use of Force," 4. and also Cohen, "Whose Sovereignty?," 5. Cohen also identified a number of other concepts put forth to replace sovereignty. She refers to Walzer's idea of a 'human right to protection' (Michael Walzer, "Au-delà de l'intervention humanitaire: les droits de l'homme dans la société globale," *Esprit*, 2004.) and to the principle of 'civilian inviolability' as presented by Anne-Marie Slaughter and William Burke-White in "An International Constitutional Moment." and further developed in Slaughter, *A New World Order*. Notice the shift in Walzer's thought: he too has fallen for the temptation of cosmopolitanism.

R2P, being a cosmopolitan concept, falls into the same traps as do other versions of the cosmopolitan narrative: it opens the door for abuse. Alvarez, in his article with the telling title 'The Schizophrenias of R2P' pointed out that since its conception, R2P has been used in a wide series of circumstances.[169] Not all of the examples Alvarez puts forward are convincing,[170] but some of them certainly are. He refers, for example, to Anne-Marie Slaugther (whom was already mentioned earlier on) and Lee Feinstein who built upon R2P to develop a duty to intervene to prevent states from acquiring weapons of mass destruction.[171] Another, even more significant example is the article written by Fernando Tesón, in which he makes an attempt to justify *ex post* the Iraq invasion by claiming the main motivation was a humanitarian one.[172] In his argument, he refers several times to the work of the ICISS and to R2P.[173]

To understand in what way R2P allows for abuse, it is interesting to refer back to the critique of scholars as Koskenniemi and Cohen on cosmopolitanism. Their account allows one to pinpoint where exactly R2P becomes problematic.

Koskenniemi, in his article '"The Lady Doth Protest Too much" Kosovo, and the Turn to Ethics in International Law' described with extraordinary clarity an evolution which has taken place in post-Cold War international law. From the desire to bring exceptional cases (such as the humanitarian intervention debate) into the realm of normality (whereby Koskenniemi means, the law), the scope of what is regarded as law expanded dramatically. At the same time, however, its nature changed along. From formal international law, Koskenniemi identified a movement towards individual, personal and even emotional morality; a movement he called a 'turn to ethics'. We no longer rely on formal legal rules, but came to regard decisions on the (lack of) necessity to intervene as personal, moral choices. This evolution is troubling, Koskenniemi argues, as it turns out to be the fulfilment of what Carl Schmitt proclaimed already seventy years ago.[174] In Koskenniemi's words:
For [Schmitt], legal normality was dependent on the power of the one who could decide on the exception: legal normality – rules and processes – was only a surface appearance of the concrete order that revealed its character in the dramatic moment when normality was to be defended or set aside.[175]

[169] Alvarez, "The Schizophrenias of R2P," 277-278.
[170] He refers, for example to the cosmopolitan theory for intervention as developed in Buchanan and Keohane, "The Preventive Use of Force." Nowhere is there any reference made to R2P whatsoever.
[171] Feinstein and Slaughter, "A duty to prevent."
[172] Tesón, "Ending tyranny in Iraq." This article is to me the clearest example of the tendency of international legal doctrine and theory to develop apologies of state action. On this topic, see Koskenniemi, *From apology to utopia*.
[173] Tesón, "Ending tyranny in Iraq," 4, 14, 17, 19.
[174] Carl Schmitt and George Schwab, *Political theology: four chapters on the concept of sovereignty* (University of Chicago Press, 1985).
[175] Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 171.

The 'turn to ethics' has brought us to this situation: the solution of international humanitarian crises does not depend on the proper application of legal rules, but instead on the moral conscience of the leaders of the Western world. Serbia was bombarded in 1999 because – as argued by Mr. Blair – the international community had a 'moral duty' to do so.

Koskenniemi describes the rhetorical processes which have brought us to this situation.
In a first step, formal law came to be questioned. Focus shifted from the application of law to its interpretation. From interpretation, attention shifted to the '"underlying" social, historical, systemic or other such "values".'[176] In a third step, international law was made dependent on the objective it was designed to serve. 'If law is just a "practical guide" to reach a point, then we have no need for it if we already know the point,' the argument went.[177] In a fourth step, having now already rejected formal international law, decisions on the question whether or not to intervene become a matter of utilitarian calculus. But, looking at the Kosovo example, how can such a calculus be made? What are the relevant values? What is the ratio? Do 500 civilian casualties weigh more than 100 military victims? From criticism on such cold calculations, in a fifth step the focus shifted towards human rights. It is in the name of human rights that states ought to intervene. However, such rights are not absolute. They 'depend on their meaning and force on the character of the political community in which they function'.[178] What do we regard as a severe violation of human rights? When does a situation become a humanitarian crisis? These are not objective observations; they depend to a large extent on what the intervening state thinks of as important. Such considerations thus, again, boil down to utilitarian calculus. The problem is not solved. Therefore, a sixth step is made. Attempts are made to legislate the problem away. Rules and principles[179] are designed in which criteria are incorporated; criteria which tell us when and how to intervene. However,
this is to restate the difficulty with rules. However enlightened, peaceful and rational the appliers are, rules cannot be applied in the automatic fashion that their proponents suppose. This is because any rule or criterion will be both over and under-inclusive.[180]
An automatic criterion would be impossible anyway, for it would be a 'trap for the innocent and a signpost for the guilty,' Koskenniemi – drawing from Stone

[176] Ibid., 163.
[177] Ibid., 165.
[178] Ibid., 167.
[179] By principles, we need to think of the concept as developed by Dworkin in Ronald Dworkin, *Taking rights seriously* (Cambridge: Harvard University Press, 1978).
[180] Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 167. Koskenniemi hereby indicates not to follow Dworkin's theory, I believe. Principles are not the solution for the problem an automatic application of rules create.

– mentions.[181] Thus, criteria are designed that are necessarily vague and open-ended.[182] If so, can we then not limit the task of international law to that of providing a decision-making process that allows controlled treatment of the situation? In the last-but-one step, this option is also wiped off the table. What procedure would that be then? Some still look at the UN Security Council as the sole organ capable of dealing with these 'exceptional' cases. Others find that regional organisations have sufficient legitimacy to intervene.[183] Yet others believe in ad hoc coalitions. Because of this ongoing disagreement, a different kind of agreement arises: there is no need for a procedure, it is held. Koskenniemi says:

if formal law is anyway unclear and cannot be separated from how it is interpreted, then much speaks for the individualisation of Kosovo. A decision has to be made and that decision – as (...) Carl Schmitt (...) would say – is born out of legal nothingness.[184]

Such is the situation we are in today. The ideal of a Rule of Law appears to be thrown overboard by the supporters of R2P. Instead, the answer to the question whether states have to intervene or not depends on the individual moral judgment of their leaders; and for this judgment, international law yields. Kosovo for a moment revealed this:

[it] was the exception that revealed, for a moment, the nature of the international order which lay not in the Charter of the United Nations nor in principles of humanitarianism but in the will and power of a handful of Western civilian and military leaders.[185]

Koskenniemi's argument was presented at length, as R2P fits remarkably well in the picture he sketched. The return to medieval just war theory,[186] the trust in criteria as 'just cause' and 'right authority'[187] are the missing link for international law to become dependent on what political leaders conceive as their 'moral duty'.

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[181] Julius Stone, *Conflict through consensus: United Nations approaches to aggression* (Johns Hopkins University Press, 1977); Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 167.

[182] The comparison was here made with the search for a definition of 'aggression'. A UN General Assembly Resolution (UNGA Res 3314 (XXIX) 14 December 1974) listed a long series of cases which should be considered aggression, but finished by saying that 'the Security Council may determine that other acts constitute aggression under the provisions of the Charter'. What is the use of such a definition then? The same accounts for R2P. The concept has elements which are necessarily open-ended. See Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 168.

[183] Such was the case in Kosovo.

[184] Schmitt and Schwab, *Political theology*, 31-32; Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 170.

[185] "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 171.

[186] A point Evans does not hide. See Evans, *The responsibility to protect*, 140.

[187] The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, XII.

How well intended the efforts of the members of the ICISS and the army of scholars who have taken great pains in further developing R2P might have been,[188] a solution for the problems international law faces today in relation with the conundrum humanitarian intervention has become, cannot be found in R2P since this concept falls in the same trap as other cosmopolitan concepts and theories.

What this shows, is two things.

First, one should not ask too much from international law. One cannot legislate genocide away; one cannot simply proclaim sovereignty as a responsibility.[189] Instead, the real problem – and unsurprisingly, Koskenniemi mentioned this as well[190] – is the profound inequality which continues to exist in this world. As long as 'failed states' dot the face of the earth, atrocities will continue to take place. Dictators live of the misery of their population. Here, a severe hypocrisy can be found: these same states that cry outrage when facing genocide and ethnic cleansing (this is not to say that such outrage is unjustified), in many cases were the biggest sponsors of such regimes.[191] Thus, the top-down efforts made today need to be seen in connection with bottom-up strategies to tackle the fundamental problems these 'failed states' face.

Obviously, this suggestion does not bring us very far in the short run. Poverty will not be eradicated in the near future. However, here R2P makes a second error: R2P rejects sovereignty, and consequently rejects the UN collective system of security which is seen as too state-centred. A *Leitmotiv* in cosmopolitan accounts on intervention is the fact that the UN Security Council does not function the way it should.[192] Because hopes of reform of the Security Council are low, cosmopolitans thus look for alternatives. R2P does so as well. While in the ICISS report the Security Council is presented as the primary locus for decision-making on the question of a military intervention, the report

[188] See, for an impression, the website of the Australian foreign ministry, where a 2009 announcement mentions a AUS$4,5 million support package is announced to further develop R2P ; $1,8 million is granted to the 'Asia-Pacific Centre for the Responsibility to Protect' based at the University of Queensland. In 2008, the same ministry already granted $2 million to the 'Australian Responsibility to Protect Fund', this to 'advance the R2P concept and help states build capacity to protect their own civilians.' See http://www.foreignminister.gov.au/releases/2009/fa-s090721b.html (last accessed on 27 June 2011).

[189] Cohen, "Whose Sovereignty?," 23.

[190] Koskenniemi, "'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law," 172.

[191] A reference to the support the US provided Iraq in fighting Iran in the 1980s might already suffice to make this point.

[192] For R2P, see Evans, *Responsibility to protect. Ending mass atrocity crimes once and for all*, n.d., 146 et seq. For another cosmopolitan example, see Buchanan and Keohane, "The Preventive Use of Force." Where the authors propose alternatives to what they call the 'Legal Status Quo'. They think, for example, of an abolishment of the veto in the Security Council, or of the creation of a community of democratic states which would function in parallel with the Security Council.

does not exclude other procedures.[193] A hierarchy of decision-making fora is presented. If the Security Council fails to act, the UN General Assembly must intervene by means of the *Uniting for Peace* resolution.[194] If that track fails as well, regional organisations such as NATO or the AU could act.[195] As a last resort, ad hoc coalitions are also considered an option.[196] Hence, R2P rejects the cornerstone of the UN system of collective security, namely the monopoly for the Security Council to decide on the use of force. By investigating these options, the need for reform of the Security Council no longer gets the attention it is in dire need of.[197] R2P (and cosmopolitanism in general) gives up on the UN. As interventions without UN Security Council mandate grow in number, the legitimacy which used to be the Security Council's strongest asset will be further undermined. Here as well, a form of hypocrisy can be found: States who invoke their moral duty to intervene without a UN Security Council mandate are the same states that refuse to give up their veto as a member of the Permanent Five and thus are they themselves responsible for the paralysis of the UN collective security system.[198]

In sum, R2P is a continuation of an ongoing, double movement in international legal discourse. First, it turns away from formalism and instead relies on the individual moral appreciations of political leaders. Second, but in a way ingrained in the first point, it turns away from the sovereignty paradigm on which the UN collective security system is based. The argument put forward in this paper was that both movements are to be rejected as they inevitably lead to abuse. R2P, unfortunately, fails to provide a remedy.

However, stopping here would be unsatisfactory. Are there not alternatives to the 'turn to ethics', and the move away from sovereignty? A few suggestions will be given in the final section of this paper.

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[193] The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 48.
[194] Ibid., 53. See UNGA Res. 377 (V), 3 November 1950.
[195] Ibid.
[196] Here, the ICISS acknowledges the difficulty in allowing an ad hoc coalition to intervene. It rejects nor allows such an intervention in any direct way, but indirectly the message is clear. The Commission raises the familiar question: 'It is a real question where lies the most harm: in the damage to international order if the Security Council is bypassed or in the damage to that order if human beings are slaughtered while the Security Council stands by'. (Ibid., 55) Again, the ICISS appeals to 'the moral conscience of mankind' (Walzer, *Just and unjust wars*, 72), but by doing so falls into the utilitarian trap: the choice is not or-or; it should be and-and. We need to save the role of the Security Council *and* the lives at stake on the field.
[197] In that respect, it was perhaps revealing to note that many states have been eager to take over the R2P discourse, as long as it remained voluntary and did not acquire any legal status. I refer to the vague language used in the Outcome Document of the 2005 World Summit ; a language walking on the line between legal and political discourse (see on this point Stahn, "Responsibility to Protect."). Evans pointed to the arguments of a number of governments who interpreted the Outcome Document as a rejection of R2P instead of an acceptance of it. See Evans, *The responsibility to protect*, 52.
[197] Cohen, "Whose Sovereignty?," 23.
[198] Ibid.

6. BEYOND R2P: OR HOW TO PUSH THE DEBATE FURTHER

Having revealed R2P as a next step of the cosmopolitan project, and having rejected cosmopolitanism's project of abandoning sovereignty, the question in need of answering is now this: what else can we do? This article argues that there is work to be done on two fronts. First, on the front of the restoration of formal international law. The project of international law as started by the UN Charter should not be abandoned. Second, it should be realised that legitimacy cannot be imposed from the *outside*, but can only be established from the *inside*; that is through a bottom-up process. Proclaiming sovereignty as a responsibility simply will not do.

Taking Koskenniemi's critique as a starting point, Jean Cohen in her article 'Whose Sovereignty?' gives us an indication of the way in which the debate on a right to intervene might evolve in the future.

It is perhaps ironic to witness that after having seen a rise of cosmopolitan discourse in the last couple of decades, Cohen's article can be interpreted as a return to Millian, communitarian sovereignty-thinking. In the article, Cohen – without referring to Mill, but with clear references to the rationale underpinning the UN Charter – reminds us of the advantages of an international legal system built around the concepts of sovereignty and non-intervention. She stresses the egalitarian, progressive side of sovereignty and rejects the statist vision on it.

At the end of her article, Cohen formulates a series of proposals intended to push the debate further. A first, obvious step is the rejection of statism. She proposes to leave behind us the 'absolutist and decisionistic concept of sovereignty in favour of the relational model.'[199] By this first step, Cohen immediately attacks the main presupposition on which cosmopolitanism is based. In a next step, she reintroduces the Millian conception of the international society as a club of equal friends: 'the articulation of sovereignty within a community of states that decides to consider one another as equals is the political precondition for feasible and effective international law.' In other words, due to sovereignty, the material inequality between states is partly countered by the voluntary adherence of all states to a scheme in which every state is considered equal. In short, Cohen rehabilitates the idea of an international *community* based on the collective analogy. The various states agree to be part of that community by adhering to the UN charter which proclaims respect for sovereign equality, but also human rights.

[199] Ibid., 19.

Subsequently, Cohen points out the benefits of sovereignty when it comes to the possibilities for a people to acquire political freedom. What she appears to do is to reconstruct the right of self-determination. She no longer regards self-determination as the right of oppressed peoples to remove the yoke of colonialism, but goes back to the original conception proposed by Mill in the previous century. Sovereignty creates the necessary conditions for a people to acquire political freedom, and thus 'popular sovereignty'. In a cosmopolitan world order in which states no longer exist (or at least no longer play the first fiddle[200]) it is hard to see on what platform democracy can develop. The question is complex, and leads us to the debate on the (non-)existence, or the (absence of) necessity of a single *demos* for democracy to function.[201] Cohen does not seem to believe in something as a 'global democracy' and instead sees the national arena as the preferred platform to establish a system of democratic accountability.[202]

Together with the rehabilitation of sovereignty, Cohen wishes to reinforce international law. Instead of relying on a 'law of humanitarian intervention',[203] a law which Cohen believes does not exist,[204] investments should be made in the reform of international law itself.[205] Cohen here refuses to go along in the R2P-project of 'postulating a human right to (...) security'.[206] In line with the remarks made in the above, Cohen points out that the current focus on such a de-formalised international law 'has undermined existing international law,' and shows 'how it is being used to block the creation of new, coherent, legal rules that could and should regulate humanitarian intervention in ways that respect the principle of sovereign equality'.[207] In other words, Cohen agrees with Koskenniemi when he warns against the dangers of too much trust in moral philosophy when it comes to the question of a military intervention. In a

[200] As argued by Slaughter in Slaughter, *A New World Order*, Introduction.
[201] A question which in the European context is very much debated. An interesting read on this topic is Larry Siedentop, *Democracy in Europe* (Columbia University Press, 2001).
[202] Be aware that Cohen does not conceive of this principle of popular sovereignty as a human right; an idea defended in W. Michael Reisman, "Sovereignty and Human Rights in Contemporary international Law," *American Journal of International Law* 84, no. 4 (1990): 866-876. A military intervention can never be intended as a means to 'spread democracy', as proposed in Buchanan and Keohane, "The Preventive Use of Force."
[203] Cohen, "Whose Sovereignty?," 22.
[204] We can here refer to the debate on whether an international custom in favour of a 'right of humanitarian' does or does not exist. Chesterman concluded the following on this point: 'analysis of the relevant state practice is confused by the imprecise use of the term 'intervention' and the failure to distinguish humanitarian concerns from other motives, with the result that few (if any) bona fides examples of humanitarian intervention can be discerned.' See Simon Chesterman, *Just war or just peace? : humanitarian intervention and international law* (Oxford; New York: Oxford University Press, 2001), 42.
[205] In her own words: 'We do not have a global rule of law today or a constitutionalised international order, but we do have hard international law that can be developed in the right direction.' See Cohen, "Whose Sovereignty?," 23.
[206] Ibid.
[207] Ibid.

telling footnote, she holds that 'moral philosophy cannot adjudicate among these different lists of "fundamental" human rights.'[208]

What should be done instead, is a thorough reform of the UN itself. The Security Council needs to be made more accountable; something that can be done by expanding the permanent membership of the Council to include new superpowers, by a voluntary renunciation of the veto when 'humanitarian intervention' is at issue,[209] or an expanded, deliberative advisory role for the General Assembly.

At the end of her account, Cohen gives the impression of not giving up on R2P completely. If R2P were to take the idea of sovereignty-as-responsibility seriously, R2P could perhaps serve different means: it could contribute to a rebalancing of the debate on humanitarian intervention. From a one-sided cosmopolitan discourse which occasionally takes its wishes for reality and thereby opens the door for abuse, R2P might become part of a more balanced narrative which rehabilitates the sovereign equality of states and thus the UN collective security system, as well as incorporates a well determined set of human rights into hard international law. Such a project still needs to be started up. It requires a shift in perspective and a reformulation of the basic premises on which R2P stands. In that respect, the contribution of Cohen is significant and warmly welcomed.

[208] Ibid., 23, footnote 66.
[209] Admittedly, the ICISS mentioned this possibility as well. A proposal of a 'constructive abstention' was made, whereby members of the P5, when national interests are not at stake, agrees not to block a decision by use of its veto whenever humanitarian interventions are being discussed. See The International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, 51.