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THE RESPONSIBILITY TO PROTECT AND THE USE OF FORCE IN INTERNATIONAL LAW

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ABSTRACT: The following article deals with the developments in recent years on the debate concerning humanitarian intervention and the framework of public international law regarding the use of force. It specifically focuses on how the doctrine of the Responsibility to Protect (R2P) has developed over the years and why it cannot be seen as a contribution to the affirmation of a so-called “right” of humanitarian intervention.

Keywords: international law; force; intervention; responsibility to protect.

1. Introduction

In 2001 the International Commission on Intervention and State Sovereignty (ICISS) presented a report named “The Responsibility to Protect”². The aim of this report was to bring new light into the long-standing controversy around the so-called right of humanitarian intervention. The question to be answered was given by Kofi Annan, the former Secretary-General of the United Nations, at the United Nations General Assembly in 1999 and again in 2000: “if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity?”.

Since the publication of the Commission’s Report, the idea of a responsibility to protect has generated great enthusiasm and great controversy in the international arena. It has been said that apart from the prevention of genocide after the Second World War, no other idea has moved faster in international fora than the Responsibility to Protect (R2P)³. This paper will examine and discuss the contributions and effects the doctrine of the responsibility to protect has brought to the underlying problem of military intervention for humanitarian purposes.

The main problematic here is to determine whether the responsibility to protect provides or not a firm basis for the affirmation of a right of humanitarian intervention. In order to reach an answer to this issue, it is essential to make preliminary distinctions concerning the term “humanitarian intervention”. As we understand it, humanitarian intervention consists of “coercive action by one or more states involving the use of armed force in another state without the consent of its authorities, and with the purpose of preventing widespread suffering or death among inhabitants”⁴. One must draw a line between humanitarian intervention and other legal arguments for the use of force that may include a humanitarian component. Apart from actions in self-defence or with Security Council authorization, these

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² ICISS (2001)

³ WEISS (2006, p.741)

⁴ ROBERTS (1999, p.4)

include claims of intervention by invitation of the target state, the protection of nationals abroad or authorization by treaty.

Finally, it is of paramount importance to differentiate enforcement actions properly authorized by the Security Council under Chapter VII of the U.N. Charter from a unilateral "right" of humanitarian intervention. Has the claim to such a right been strengthened by the responsibility to protect? In the following topics we will try to answer this question by analysing the place the doctrine of the responsibility to protect holds in the framework of international law concerning the use of force.

2. From humanitarian intervention to the responsibility to protect

The changing face of conflict

The importance and actuality of the problem revolving around humanitarian intervention is a direct result of the changes the international community has been through since the San Francisco Conference and the creation of the United Nations. A first and more obvious change is the enormous growth in the number of states in the world. For instance, while in 1945 the United Nations counted 51 member States, that number has changed to 192 as of 2006⁵ - more than thrice the number of member States 60 years ago. Not only has the number of states grown, but there has also been a proliferation of non-state actors on the international scene.

Most significantly, the changing face of conflict has exposed the international community to new challenges, as intrastate conflicts, terrorism and the menace of failed states have proven to affect the entire world community whereas some decades ago they were treated as national or regional problems. In fact, war between states has dramatically declined (they represent now less than 5 percent of all conflicts); since the early 1990s there has been a general decrease in the number of armed conflicts; on the other hand, there was also an impressive increase in the number of conflicts resolved by active peacemaking, diplomatic negotiations and international mediation⁶.

Nonetheless, terrorism has become a growing threat to international peace and security, as the number of high-casualty terrorist attacks has increasingly risen in the last ten years⁷. At the same time, with the end of the era of colonialism and the end of the Cold War, intrastate conflicts have emerged throughout the world and have become a problem of crucial importance to international law and politics.

Since the end of the Cold War it has become clearer each day that international peace depends upon the well-being of every human being in the world. What used to be regarded as purely internal matters of states, such as the way a government treats its nationals, has become an issue of international interest and concern. The developments in international human rights law and international criminal law prove that we are finally starting to build a new *droit des gens*, the international law of humanity. Proof this is already happening can be found in the works of Human Rights Tribunals such as the Inter-American Court of Human Rights and the European Court of Human Rights, in the creation of international courts such as the ICTY and the ICTR, of mixed tribunals like the Extraordinary Chambers for Cambodia (ECC), the Special Court for Sierra Leone (SCSL) and the International Tribunal for Timor Leste (ITTL), and finally in the establishment of the International Criminal Court (ICC).

The changing face of conflict is therefore defining new developments in the way the international community deals with threats to the maintenance of world peace. Throughout the 1990s the Security Council went on to extend the notion of a "threat to international peace

⁵ Growth in United Nations Membership, 1945-present, available at <http://www.un.org/members/growth.shtml>

⁶ EVANS (2005)

⁷ According to the MIPT (Memorial Institute for the Prevention of Terrorism), available at <http://www.mipt.org>

and security” to include internal conflicts and humanitarian concerns. During that period, the Security Council passed many more resolutions than it had done in all the previous decades. Ironic though it may seem, just when collective security was beginning to take form as the Security Council assumed a more active role than ever before, stronger vindications for an independent right of humanitarian intervention appeared all through the 1990s.

Looking back at the last decade of the twentieth century, the logical explanation for this urge to claiming a right of humanitarian intervention is that the quintessential problem of the decade was that of intrastate conflicts, civil war and internal atrocities perpetrated on a massive scale. The proclaimed arrival of an era of internationalism and multilateral actions was obscured by the heterogeneous actions and the many failures in face of the major conflicts of that time.

The intervention in Somalia in 1993 was a complete disaster. Somalia remains as of today one of the most evident examples of failed states, the scandalous actions of pirates in the gulf of Aden happening at this moment being a patent result of the international community’s failure to prevent conflict and restore order in that territory. The debacle of the intervention in Somalia was also crucial to the outrageous negligence the world community reacted with during the Rwandan genocide in 1994. The ethnic cleansing that occurred in the Balkans, especially in Srebrenica in 1995, is another shameful reminder that security actions during the 1990s were anything but successful. At last, the NATO bombing of Yugoslavia in 1999, in response to the situation in Kosovo, was an example where intervention was effectively carried out, even though there was no authorization from the Security Council and the end result is far from being unanimously accepted as a triumph.

As the new millennium arrived the international community still faced the continuing threats of intrastate conflicts and internal widespread violations of human rights, while having no particular plan or successful precedent to guide its future actions. What has been called a slow-motion genocide⁸ in the Darfur region of Sudan and the imminent threat of yet another civil war in the Democratic Republic of the Congo are examples that show how grave the problem still remains. There is a clear tension between the traditional concept of sovereignty and the progressing demand for respect to human rights. That is why it has been argued that “the vital debate on the foundations and frontiers of humanitarian intervention is perhaps the greatest political question of our time”⁹.

The ICISS’s report on “The Responsibility to Protect”

The ICISS’s report named “The Responsibility to Protect” attempted to give solutions to the dilemmas inherited from the 1990s. Its main accomplishment was to re-conceptualize sovereignty as implying responsibility. Sovereignty was re-characterized from *sovereignty as control* to *sovereignty as responsibility* in both internal and external duties¹⁰. As a consequence, sovereignty implies that state authorities have the primary responsibility to protect the safety and lives of citizens and to promote their wellbeing. Secondly, sovereignty implies that government officials are responsible internally to their citizens and externally to the international community through the United Nations.

An important feature of the Commission’s report is the effort to change the terms of the debate: the traditional language referring to a “right to intervene” (*droit d’ingérence*) should be replaced by a focus on the “responsibility to protect”. The intention of this change of terms is to foster a change in perspective, avoiding privileging claims of the potentially intervening states over focusing on the point of view of those seeking support. It also escapes the traditional focus on the act of intervention, providing a good support for the need of

⁸ WEISS (2006, p.747)

⁹ BURGESS (2002, p.263)

¹⁰ ICISS (2001, p.13)

preventive effort or subsequent follow-up assistance. In fact, the Responsibility to Protect encompasses not only the responsibility to react, but most importantly the responsibility to prevent and the responsibility to rebuild. Finally, the R2P language acknowledges that the primary responsibility towards the welfare of citizens lies with the state concerned, and “that it is only if the state is unable or unwilling to fulfil this responsibility, or is itself the perpetrator, that it becomes the responsibility of the international community to act in its place”¹¹.

The point of central interest to this paper refers to the controversies arising precisely when the state concerned is unable or unwilling to stop a population from suffering serious harm. According to the responsibility to protect, in this case the responsibility to intervene and stop human suffering will fall upon the “international community”. The difficulties that arise in this situation are as following: if military intervention becomes inevitable, who has the right to authorize it? Furthermore, who can legitimately act in the name of a responsibility to protect? In answer to these questions, the ICISS came up with six criteria for military intervention, those being *right authority, just cause, right intention, last resort, proportional means* and *reasonable prospects*¹².

The just cause criterion states that military intervention can only be justified in order to halt or avert large scale loss of life or large scale ethnic cleansing, actual or apprehended. Right intention means that the primary objective of the intervention must be to halt or avert human suffering. The last resort principle compels governments to pursue all reasonable peaceful means available before considering military intervention¹³. Proportional means refers to the scale, duration and intensity of the force to be used, which should be the minimum necessary to secure the humanitarian objective in question¹⁴. Lastly, reasonable prospects intends to avoid interventions that do not have a reasonable chance of success, or that might cause worse consequences than if there was no intervention at all.

The only criterion left is perhaps the most important and controversial one: *right authority*. The Commission’s report clearly favours action taken by the UN Security Council, concluding that “the task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work much better than it has”¹⁵. But what if the Security Council fails to act? Should it be the only and last resort of authority for humanitarian intervention?

The ICISS suggests some alternative courses when the Security Council is blocked by disagreement between its permanent members or when its decisions are clearly ineffective. The first choice is the “Uniting for Peace” procedure under General Assembly Resolution 377 (V) of 1950, according to which the General Assembly may recommend enforcement action in the event of a deadlock in the Security Council. According to the ICISS, “although the General Assembly lacks the power to direct that action be taken, a decision by the General Assembly in favour of action, if supported by an overwhelming majority of member states, would provide a high degree of legitimacy for an intervention which subsequently took place, and encourage the Security Council to rethink its position”¹⁶.

Another recommended option would be recourse to regional organizations acting under Chapter VIII of the U.N. Charter. In this case, prior authorization from the Security Council would still be needed. However, the Responsibility to Protect Report notes that “there are recent cases when approval has been sought *ex post facto*, or after the event (Liberia and Sierra Leone), and there may be certain leeway for future action in this regard”¹⁷.

¹¹ ICISS (2001, p.17)

¹² ICISS (2001, p.32)

¹³ JOYNER (2007)

¹⁴ ICISS (2001, p.37)

¹⁵ ICISS (2001, p.49)

¹⁶ ICISS (2001, p.53)

¹⁷ ICISS (2001, p.54)

Nonetheless, the big dilemma still remains. As the ICISS described it, “it is a real question in these circumstances where lies the most harm: in the damage to the 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”¹⁸. The Responsibility to Protect Report does not give a clear and definitive answer to this question; it simply argues that concerned states are unlikely to rule out other means and forms of action to respond to critical and urgent situations. Finally, it warns us of the hazards to the international community that could follow from either unauthorized intervention or from inaction.

The Responsibility to Protect: from document to doctrine

The years that followed the Report on The Responsibility to Protect proved that the document had gained widespread attention. Whether in form of strong support or clear rejection, as we reach the final years of this decade one thing is certain: even if the responsibility to protect has not yet been successfully put in practice, it certainly has influenced and contributed to the debate over humanitarian intervention.

The invasion of Iraq in 2003 by a coalition of States led by the USA and the UK had an enormously negative impact on the recently born doctrine. As Gareth Evans puts it, the new norm was practically “choked at birth”¹⁹. For many critics of humanitarian intervention, the war in Iraq was a conversation stopper when discussing setting aside the principle of non-intervention²⁰. In fact, the invasion of Iraq brought to light the problem of false friends of R2P or that of Trojan horses. These consist in doctrines and arguments which use R2P and its concepts in a distorted manner with the aim of legitimating completely different and contested purposes. In this sense, George W. Bush’s and Tony Blair’s spurious and *ex post facto* “humanitarian” justifications for the war in Iraq were a clear sign of the dangers of contamination to the idea of humanitarian intervention²¹. Another good example of false friends of R2P are academics who, like Lee Feinstein and Anne-Marie Slaughter, extend R2P to prevention, arguing for a “duty to prevent”²².

Besides the problem of false friends, the invasion of Iraq seriously undermined the potential R2P had to foster action when it was truly needed. In other words, “to the extent the Iraq war is perceived to indicate the potential for misuse of the R2P doctrine, it will be more difficult next time for us to call on military action when we need it to save potentially hundreds of thousands of lives”²³. This is precisely what happened in the humanitarian crisis in Darfur, where the international community’s slow and ineffective response is evidence that R2P still has a long way to becoming an operational principle. The situation in Darfur revealed that the war in Iraq undermined the standing of the USA and the UK as the R2P norm carriers²⁴. The states most associated with the new norm lost credibility due to abuse of the doctrine or use of it in self-serving purposes. In addition, as those countries, chiefly the USA, are at the same time the ones who have the potential and the military muscle to carry out humanitarian interventions in places like Sudan or the Democratic Republic of the Congo, where larger and long-term deployments are required, the prospects for transforming R2P from doctrine to deeds are bleak due to a “distracted *hyper-puissance*”²⁵.

The crisis in Darfur also demonstrated that changing the language from humanitarian intervention to responsibility to protect did not really affect the underlying political dynamics.

¹⁸ ICISS (2001, p.55)

¹⁹ EVANS (2004)

²⁰ WEISS (2006, p.749)

²¹ WEISS (2006, p.749)

²² FEINSTEIN, SLAUGHTER (2004)

²³ HAMILTON (2006, p.293)

²⁴ BELLAMY (2005, p.32)

²⁵ WEISS (2006, p.753)

According to Thomas G. Weiss, “military overstretch and the prioritization of strategic concerns to the virtual exclusion of humanitarian ones is the sad reality of a post 9/11 world”²⁶. Likewise, the responsibility to protect language was not able to forge consensus or overcome the struggle between sovereignty and human rights²⁷. The R2P language was adopted by both those who defended or opposed humanitarian intervention: “it allowed traditional opponents of intervention to replace largely discredited ‘sovereignty-as-absolute’-type arguments against intervention in supreme humanitarian emergencies with arguments about who had the primary responsibility to protect Darfur’s civilians”²⁸.

Nonetheless, R2P did in fact achieve some success in the years that followed the ICISS’s report. When lessons from Iraq were sinking in, the concept of R2P resurfaced and achieved widespread recognition in the 2005 World Summit, where world leaders endorsed the responsibility to protect in a unanimous statement. This was a crucial step for R2P, as just when it had finally attained worldwide recognition it was transformed in what has been called “R2P-lite”²⁹. This new version of the responsibility to protect did not specify the criteria governing the use of force and insisted upon Security Council authorization for humanitarian interventions. It is worthwhile to quote here the full extract referring to the responsibility to protect in the outcome document of the 2005 World Summit:

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

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.³⁰

This clearly shows that the responsibility to protect, as adopted by the international community, is different than the concept proposed by the ICISS³¹. R2P no longer contains criteria to guide the decision about when to intervene and it does not open any possibilities other than actions approved by the Security Council. The scope of application of R2P is clearly defined: it applies to genocide, war crimes, ethnic cleansing and crimes against humanity, all of which have reasonably precise meanings under international law. Finally, R2P affirms that states have a primary responsibility towards their own citizens. In case they fail to fulfil this

²⁶ WEISS (2006, p.758)

²⁷ BELLAMY (2005, p.33)

²⁸ BELLAMY (2005, p.52)

²⁹ WEISS (2007, p.117)

³⁰ United Nations General Assembly. *2005 World Summit outcome*, A/60/L.1, paragraphs 138-139.

³¹ BELLAMY (2008, p.622)

primary responsibility, the Security Council, in partnership with the relevant regional organizations, has a responsibility to take appropriate action to address the situation.

Although some authors criticized the outcome of the 2005 World Summit as a step backward for R2P³², mainly because the criteria on the use of force were left out and unilateral humanitarian intervention was completely ruled off, we should not underestimate the value of the consensus achieved in the Summit. The endorsement of the principle by the General Assembly and subsequently by the Security Council (Resolutions 1674 and 1706, both in 2006) expresses a broad commitment of the international community towards protecting populations from grave harm. As Gareth Evans asserts, the evolution in just five years of the responsibility to protect from a gleam in a commission's eye to what now might be described as a broadly accepted international norm is an extremely encouraging story.

On the other hand, the criteria that were left out of the R2P concept had a very limited prospect of application as they were "unlikely to foster consensus on how to act, deter the use of vetoes, provide anything other than a self-serving pathway to the legitimization of intervention not authorized by the Security Council, or add anything to the Council's mechanism for preventing abuse"³³.

Before moving on to analysing the influence of the responsibility to protect on the affirmation of a so-called "right" of humanitarian intervention, it is of fundamental importance to distinguish what R2P is and what it is not. Accordingly, it is indispensable to bear in mind that the responsibility to protect present in international law (even if it exists only as "soft-law") is the one adopted by world leaders in 2005 and not ideas, concepts and recommendations put forth by the ICISS, governments or individuals. This elucidation is essential to avoid confusion and distortions over the principle of the responsibility to protect.

3. Humanitarian intervention and the use of force in international law

The primacy of international law over force

Any person capable of good observation and possessing a minimum of ethical awareness will agree that our world is going through a major crisis. This crisis can be described as an ever increasing dissociation between a rich minority and a deprived majority in the world's population. One has stated that humanity as a whole is undergoing a strong and contradictory process of technological unification and social disaggregation³⁴. Never before have we seen such progress in science and technology accompanied by so much cruelty and suffering. There is, in fact, a clear crisis of values³⁵ in the dawn of this new millennium as we watch the ruin of the great ideals over which the international community erected the United Nations after the nazi barbarities during the Second World War.

The ongoing financial crisis that has shaken the world over the last months is just the latest event in this major crisis, whose fundamental causes remain widely ignored. It contributes to demonstrate the danger of the times we are living, when there is a systematic attempt to eliminate institutions that limit political and economical power worldwide. A diagnosis of the actual crisis indicates a sort of entropy or universal disorder, caused by lack of governance on both the domestic and international levels³⁶. In times like these, it is utterly necessary to preserve the fundamental principles and the true values that sustain the international community, reaffirming the primacy of international law over force³⁷.

Since its modern foundations, international law has been immensely concerned with

³² WEISS (2007, p.117)

³³ BELLAMY (2008, p.630)

³⁴ COMPARATO (2007, p.529)

³⁵ TRINDADE (2006, p.vii)

³⁶ COMPARATO (2007, p.535)

³⁷ TRINDADE (2006, p.viii)

the legitimacy of the use of force by States, also referred to as the *ius ad bellum*. One of the greatest achievements of the last century consisted in the definitive prohibition on the use of force in international law, a result of a long history tracing back to the 19th century and the development of international humanitarian law, going through the interwar period and the Kellogg-Briand Pact, and finally achieving crystallization in the U.N. Charter. That great achievement and the international system conceived after the Second World War are now “threatened with rupture by unwarranted use of force, outside the framework of the U.N. Charter”³⁸.

The principle of the non-use of force was sculpted in article 2(4) of the U.N. Charter. This provision is certainly one of the most elementary rules of international law, being recognized as having a primacy over other norms due to its *ius cogens* status. In fact, it has truly transformed the traditional and surpassed *ius ad bellum* into the *ius contra bellum* of our days, this being one of the most significant transformations of the contemporary international legal order³⁹.

It is therefore a duty of every concerned jurist to constantly reaffirm and defend the international order and its prohibition on the use of force, reiterating that military action must be strictly limited to self-defence (article 51 of the U.N. Charter) or collective action with Security Council authorization (Chapter VII of the U.N. Charter). Recent cries for extending the right of self-defence to preventive actions, as well as claims of legitimate use of force outside the framework of the U.N. Charter, besides forgetting the sufferings and lessons of past generations, can only foster chaos and disorder in a world already falling apart. It is time we step up to reality and assume a simple fact, acknowledged for thousands of years in some of the major religions and philosophical traditions in the world: that force only generates force, and that achieving anything close to a “perpetual peace” means renouncing once and for all to the use of force.

To summarise the ideas put forward in the last paragraphs, it is worth to quote an extract from an article written by the recently elected future judge of the ICJ Antônio Augusto Cançado Trindade:

In a historical moment like the present one, in which it regrettably appears again trivial to speak of war, there is pressing need to face the new threats to international peace and security *within the framework of the U.N. Charter*, and to insist on the realization of justice at international level as the best guarantee for peace. The principle of the juridical equality of States, just as that of the equality before the Law, are antithetical to any schemes – ineluctably anarchical – of unilateralism or self-help, which aggravate factual inequalities inevitably privileging the great powers. Only with the strengthening of the United Nations and other international organizations of universal character, with strict adherence of the general principles of international law, can one contain and control the frenzy of unilateralism and self-help, based usually on force rather than Law, and perpetuating inequalities and privileges rather than fostering equality and justice.⁴⁰

Humanitarian intervention and the prohibition of the use of force in international law

The U.N. Charter contains a latent tension between sovereignty and human rights. While war is proscribed as an instrument of national policy, human rights are to be respected. This eventually leads to a problem when the use of force is needed to ensure the respect for human rights – e.g. in cases of humanitarian intervention. Nevertheless, the substantive legal provisions of the Charter manifestly privilege peace over human rights: while the threat or use

³⁸ TRINDADE (2006, p.177)

³⁹ CARRASCO (1998, p.263) in: TRINDADE (2006, p.191)

⁴⁰ TRINDADE (2006, p.182)

of force is prohibited by article 2(4), the protection of human rights is restricted to the more or less hortatory rules of articles 55 and 56⁴¹.

Justifications for a supposed “right” of humanitarian intervention normally come from two different arguments. According to the first one, military intervention for humanitarian purposes is not incompatible with article 2(4) of the U.N. Charter, as the use of force for humanitarian purposes is not directed “against the territorial integrity or political independence” of the target State. The second argument asserts that there is a customary rule of humanitarian intervention resulting from the practice of States. None of these arguments are convincing and the disjunction between the positions of publicists and the practice of states regarding these issues is worthy of note⁴².

Interpretation of article 2(4) of the U.N. Charter has been generally divided in two groups: the restrictive school and the permissive school. The latter defends that the expression “against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations” qualifies the prohibition of the threat or use of force, in the sense that actions which do not fall into one of these categories could be considered outside the scope of article 2(4) and therefore be regarded as legitimate. The restrictive school argues that article 2(4) entails an absolute prohibition of the threat or use of force and that the expression “against the territorial integrity or political independence of any state” was used to give more specific guarantees to small States and cannot be given a qualifying effect.

As we see it, the restrictive school certainly has a stronger argument than the permissive school, if not because of the primacy of law over force as mentioned earlier in this article, certainly because an interpretation according to the rules set on the Vienna Convention on the Law of Treaties leads to the same conclusion. It follows from article 31 of the referred Convention that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Additionally, article 32 of the same document grants that “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable”. Hence, it is necessary to go back to the context of the drafting of article 2(4) to discover its purpose, noting that recourse may be had to the *travaux préparatoires*, as a way of clarifying the meaning of the norm.

Professor Ian Brownlie explains that during the drafting of the U.N. Charter, “several delegates referred to the necessity of incorporating in Chapter II an express undertaking that the world Organization should insure the territorial integrity and the political independence of Member States”⁴³ and that “there is no indication in the records that the phrase was intended to have a restrictive effect”⁴⁴. Moreover, Brownlie affirms that the *travaux préparatoires* prove that “the phrase under discussion was not intended to be restrictive, but, on the contrary, to give more specific guarantees to small States and that it cannot be interpreted as having a qualifying effect”⁴⁵. In fact, the phrase “against the territorial integrity or political independence of any state” was added to the original proposal by an Australian amendment in response to the wish of several smaller States to emphasize the protection of territorial integrity and political independence⁴⁶. Finally, as Simon Chesterman declares, the permissive interpretation of article 2(4) “runs contrary to numerous statements by the General Assembly

⁴¹ CHESTERMAN (2001, p.45)

⁴² CHESTERMAN (2001, p.47)

⁴³ BROWNLIE, APPERLEY (2000, p.884-886) in: DIXON, McCORQUODALE (2003, p.523)

⁴⁴ BROWNLIE, APPERLEY (2000, p.884-886) in: DIXON, McCORQUODALE (2003, p.523)

⁴⁵ BROWNLIE, APPERLEY (2000, p.884-886) in: DIXON, McCORQUODALE (2003, p.523)

⁴⁶ CHESTERMAN (2001, p.49)

and the ICJ concerning the meaning of non-intervention, and is inconsistent with the practice of the Security Council, which has on numerous occasions condemned and declared illegal the unauthorized use of force notwithstanding its temporary nature⁴⁷.

The other legal justification for humanitarian intervention is based on the supposed existence of a customary rule that allows intervention for humanitarian purposes. The concept of international custom is found on article 38(1)(b) of the Statute of the ICJ, where it is defined as “evidence of a general practice accepted as law”. International custom is generally acknowledged as being composed of two necessary elements: a general practice and the *opinio juris*, the latter meaning that the practice is regarded to be legally binding or, in other words, it is accepted as law. Of all the events usually referred to as amounting to a “general practice”, three cases of interventions may be considered as the most successful in regards to the international community’s response: East Pakistan (1971), Uganda (1978-9) and Cambodia (1978-9). Nevertheless, in all these interventions humanitarian concerns were far from being the primary concern of the interveners and, furthermore, humanitarian purposes were not invoked as a justification for the use of military force⁴⁸.

As far as state practice is concerned, history has proven that interventions are seldom purely humanitarian and that state practice is considerably different than theory when it comes to justifying the use of force in such situations. In fact, Simon Chesterman comments that “no state has ever justified an intervention in terms corresponding to the doctrine as articulated by its most enthusiastic academic proponents⁴⁹”. Most interventions that are frequently cited as a practice of military action with humanitarian purposes were heavily criticized and condemned by a large number of states, thus making it difficult to sustain an *opinio juris* concerning a supposed right of unilateral intervention for humanitarian purposes. Some examples that prove this point include the following interventions: Belgium in the Congo (1960), India in East-Pakistan (1971), Vietnam in Cambodia (1978-9), US in Grenada (1983) and US in Panama (1989-90). On the other hand, there are a few number of occasions where the relatively good intentions and positive consequences of an intervention meant that it was tolerated by the international community. This may have been the case of Tanzania’s intervention in Uganda (1978-9). This subtle toleration of intervention in a few cases may lead to the conclusion that humanitarian intervention is not entirely and absolutely illegal under any circumstance. At most, it remains in a legal penumbra – often regarded as illegal, sometimes legitimized by the Security Council or merely tolerated by the international community⁵⁰.

Concluding this section on the (in)compatibility of a right of unilateral intervention with international law, it is worth remembering that if the prohibition of the use of force really is a peremptory norm of international law (*ius cogens*), as it is widely recognized, than only a norm of the same character could modify it (according to article 53 of the Vienna Convention on the Law of Treaties). That would mean that the rule of unilateral intervention for humanitarian purposes would have to achieve the status of *ius cogens*, what is highly unlikely to happen, as its mere existence is already disputed.

The Responsibility to Protect and the use of force

The adoption of the Responsibility to Protect by the international community has been used as an argument for supporting a right of unilateral intervention when the Security Council fails to respond to grave humanitarian crisis. This reveals the potential misunderstandings or manipulations that the concept of R2P is subject to. Thus, one must clarify the context in which

⁴⁷ CHESTERMAN (2001, p.51-52)

⁴⁸ CHESTERMAN (2001, p.84)

⁴⁹ CHESTERMAN (2001, p.47)

⁵⁰ CHESTERMAN (2001, p.87)

the principle of R2P stands in order to see it as a real advance in international relations and not as a dangerous threat to the international legal order.

Although the paragraphs referring to the responsibility to protect in the outcome of the 2005 World Summit clearly rule out any possibility of action without Security Council authorization, there have been assertions that the same text gives support for unilateral action, for reasons such as: (a) by stating that countries have a responsibility to protect its nationals from massive suffering (meaning that sovereignty implies responsibility), the agreement undermines the objection that unilateral coercive action violates national sovereignty⁵¹; or (b) in the absence of a functioning international institution, one should look at the overriding purpose of the Summit agreement – to prevent another genocide like the one in Rwanda. In this sense, it would be “perverse” to defend that countries cannot act individually to attain the purpose of the agreement⁵².

The arguments presented above are both dangerous and misleading. First of all, we must stress that from the adoption of a concept of sovereignty that implies responsibility it does not necessarily follow that the failure of a government to fulfil its responsibility entitles a foreign state – any foreign state, “though one can guess *which* foreign state”⁵³ – to use military force for alleged humanitarian purposes. If there is a conflict of rights between sovereignty and human rights, the latter certainly has not displaced peace as the principal concern of the U.N. Charter. Peace is protected chiefly through the renunciation of the use of force and the respect for the equality of States. The affirmation of a so-called “right” of unilateral intervention is a much more complex issue than the assertion that sovereignty implies responsibility, and the former does not follow from the latter.

If the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity is a limitation to national sovereignty and a duty of the international community, international law also poses constraints on the forcible means of complying with this responsibility. States may not use force other than in self-defence (within the strict limits of the law governing that principle) or when the Security Council has authorized the use of force. That does not mean we have to stand by and watch while vast human suffering is going on, it simply indicates that the international community’s response must be limited to peaceful means, or that when military action is indispensable collective action through the Security Council provides the only suitable and legal alternative⁵⁴.

At last, we come to a central argument projected by those who claim the existence of a right of unilateral intervention: the alleged moral obligation to intervene in humanitarian crisis, or, as it is usually placed, to avoid another Rwanda or another Srebrenica. By stating that avoiding future genocides is the “overriding purpose” of the responsibility to protect, some authors will go on to affirm that the R2P legitimates unilateral military action in order to achieve that purpose. Implicit in such arguments is the idea that the ends justify the means. However, the relation between ends and means in humanitarian intervention is paradoxical: *humanitarian war requires means that are inherently inadequate to its ends*⁵⁵. As far as state practice is concerned, the methods associated with humanitarian intervention are a long way from being clearly viewed as compatible with the ends sought. The failures of the 1990s and the actual state of affairs in Darfur or in the DR Congo demonstrate how far we have yet to go in order to develop more appropriate means for dealing with critical situations of humanitarian concern. In the history of interventions, the ends are never so clear and the means are seldom closely bound to them⁵⁶.

⁵¹ BANNON (2006, p.1162)

⁵² BANNON (2006, p.1162)

⁵³ CHESTERMAN (2001, p.49)

⁵⁴ CHESTERMAN (2001, p.108-110)

⁵⁵ KRAUTHAMMER (1999, p.6) in: CHESTERMAN (2001, p.219)

⁵⁶ CHESTERMAN (2001, p.236)

4. Conclusion

The conclusion this article comes to is that the responsibility to protect does not support in any way a right of unilateral humanitarian intervention. The danger of allowing such a right is far more pernicious to the international rule of law than asserting the basic principle of the prohibition of the use of force and leaving it up to States to seek a political justification for actions in breach of that norm⁵⁷. In fact, there is not even a need for a right of unilateral intervention, as the current normative order is not preventing interventions that should take place. Simon Chesterman insists on this point: “interventions do not take place because States do not want them to take place. Fear of international condemnation did not prevent any state intervening in Rwanda: televised images of a downed US Ranger being dragged through the streets of Somalia did”⁵⁸.

Fighting for a right of unilateral use of force for humanitarian purposes is misplacing the focus vis-à-vis the genuine problems concerning humanitarian crisis. Unless the aim of such efforts is to justify further unrestricted exertion of force by the Great Powers, what can only lead to the disintegration of the international order, the debate over the existence of such right leads us nowhere. Instead, one should concentrate efforts to respond to problems of much greater importance, such as reinforcing international institutions, strengthening the international rule of law and developing mechanisms to prevent future tragedies by assisting failed and weak States.

Our duty towards the new threats to international peace and security such as terrorism, intrastate conflicts and human rights abuses is not to seek “solutions” through the use of force. This is a distortion of the legal profession⁵⁹. International law must be respected if we are willing to “save succeeding generations from the scourge of war”.

The responsibility to protect is an inspiring concept that contributes to the development of the international community. It cannot, however, be used to subvert the international rule of law.

References:

ARBOUR, Louise. The responsibility to protect as a duty of care in international law. **Review of International Studies**, vol. 34, no. 3, 2008.

BANNON, Alicia L. The Responsibility to Protect: The U.N. World Summit and the Question of Unilateralism. **The Yale Law Journal**. Vol. 115, Issue 5, March 2006.

BELLAMY, Alex J. The Responsibility to Protect and the problem of military intervention. **International Affairs**, vol. 84, no. 4, 2008.

_____. Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq. **Ethics & International Affairs**, vol. 19, no. 2, 2005.

BERMAN, Nathaniel. Intervention in a ‘Divided World’: Axes of Legitimacy. **The European Journal of International Law**, vol. 17, no. 4, 2006.

BJOLA, Corneliu. Legitimacy and the use of force: bridging the analytical – normative divide. **Review of International Studies**, vol. 34, no. 4, October 2008.

BURGESS, J. Peter. Ethics of Humanitarian Intervention: The Circle Closes, **Security Dialogue**, vol. 33, no. 3, September 2002.

⁵⁷ CHESTERMAN (2001, p.231)

⁵⁸ CHESTERMAN (2001, p.231)

⁵⁹ TRINDADE (2006, p.189)

CHESTERMAN, Simon. **Just War or Just Peace? Humanitarian intervention and international law**. Oxford University Press, Oxford, 2001.

COMPARATO, Fábio Konder. **A Afirmação Histórica dos Direitos Humanos**. 5ª Ed. Saraiva, São Paulo, 2007.

DIXON, Martin & McCORQUODALE, Robert. **Cases and Materials on International Law**. 4th Edition, Oxford University Press, 2003.

EVANS, Gareth. **The United Nations and Conflict Prevention**, address by Gareth Evans, President of the International Crisis Group, to the Dag Hammarskjold Centenary Seminar co-hosted by the IFRI and Swedish Embassy, Paris, 17 October 2005.

_____. **When is it right to fight? Legality, legitimacy and the use of force**. Cyril Foster Lecture, Oxford University, 2004. Available at <http://www.crisisgroup.org/home/index.cfm?id=2747&1=1>

_____. From humanitarian intervention to the responsibility to protect. **Winsconsin International Law Journal**, Vol. 24, No. 3, 2006.

FEINSTEIN, Lee & SLAUGHTER, Anne-Marie. A Duty to Prevent, **Foreign Affairs**, January 2004.

HAMILTON, Rebecca J. The Responsibility to Protect: From Document to Doctrine – But What of Implementation? **Harvard Human Rights Journal**, Vol. 19, Spring 2006.

ICISS. International Commission on Intervention and State Sovereignty. **The Responsibility to Protect**, December 2001, available at <http://www.iciss.ca/pdf/Commission-Report.pdf>

JOYNER, Christopher C. The Responsibility to Protect: Humanitarian Concern and the Lawfulness of Armed Intervention. **Virginia Journal of International Law**, Vol. 47, No. 3, Spring 2007.

ROBERTS, Adam. The So-Called “Right” of Humanitarian Intervention, **Trinity Papers** 13, Melbourne: Trinity College, 1999.

TÉSON, Fernando R. The vexing problem of authority in humanitarian intervention: a proposal. **Winsconsin International Law Journal**, Vol. 24, No. 3, 2006.

TRINDADE, Antônio Augusto Cançado. **A Humanização do Direito Internacional**. Del Rey, Belo-Horizonte, 2006.

WEISS, Thomas G. R2P After 9/11 and the World Summit, **Wisconsin International Law Journal**, Vol. 24, No. 3, 2006.

_____. **Humanitarian Intervention: ideas in action**. Cambridge: Polity Press, 2007.