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Law is discourse. Discourse is rhetoric. Therefore, Law is rhetoric. A rhetorical analysis of the responsibility to protect

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A Thesis Submitted to the

Department of Law

in partial fulfillment of the requirements for the degree of Master of Arts in International Human Rights Law

By

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DEDICATION

For Mahfouz Ifrene and Soumaya Abdel Alim for their generosity that knows no bounds and for their support, love and companionship.

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First and foremost, I would like to thank my family and friends for supporting all of my endeavors, especially to pursue this Master's degree, and most importantly, for always believing in my ability to succeed. I must thank my father for providing an example of the professionalism and intellectual I seek to live up to. His journey to his success has served as a reminder that I too can and should embody his drive, determination and focus. I am forever grateful for his readiness to be a coach and a friend, always providing the voice of reason when it is needed. My mother represents strength and focus, never wavering from her purpose; she set the bar high for me. I thank her for her always reminding me that a task is only complete if done to the best of my ability. I would also like to thank my mentors Abeer Etefa and Muhannad Hadi for their encouragement and for supporting my personal, educational and professional ambitions alike. They have both been exceptional role models for me. Finally, Dr. Hani Sayed for guiding me through this project and providing the space to explore and learn along the journey; it has been fruitful thanks to his insight and support.

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ABSTRACT

It is estimated that the yearly cost of containing and responding to conflict worldwide is nearly US$10 trillion. Meanwhile, the level of global peace and security is on the steady decline and gross violations of human rights and massive loss of human life are not yet an issue of the past. As such, contemporary international legal doctrines like The Responsibility to Protect (R2P) have emerged in an effort to prevent and react to global conflict. This thesis performs an atypical study of R2P by performing a rhetorical analysis of the doctrine through the lens of Orientalism and post-colonial theory. In doing so, this thesis reveals the ways in which the discourse of R2P functions as a mode of reproducing and exercising power over the 'Other' of international law, the Orient. It also shows that the rhetorical persuasiveness of the R2P narrative is itself an Orientalist discourse that recreates and reinforces colonial binaries between the Occident and the Orient, making the Orient susceptible and subject to contemporary forms of control and domination in the name of humanitarianism. By confronting the continuing implications of colonial history on contemporary international law, this thesis has recognized and deconstructed through rational analysis the lasting psychological and legal effects of the colonial enterprise into the twenty-first century.

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Introduction

A. Context: An Overview of Conflict and Reaction

Almost every country on the planet is currently involved in some form of armed violence, either on its own territory or abroad.[1] Only 11 countries are considered conflict-free at the moment, but nearly all of them are conflict prone.[2] With levels of international peace and security on the steady decline, 500 million people are living in countries that are currently at risk of instability and conflict.[3] Accordingly, the cost of containing and responding to the consequences of violence is nearly US$10 trillion per year.[4] Categorically, the most common type of violent conflict is internal conflict, particularly civil war.[5] More than 800 people died during the 18-day Egyptian revolution of 25 January 2011.[6] Up to 50,000 people were killed during the uprisings in Libya in 2012,[7] and the death toll from the civil war in Syria has exceeded 191,000 individuals to date.[8] These figures are not simply staggering numbers; they represent the loss of human lives, the loss of boys and girls, sisters and brothers, mothers and fathers. These numbers represent shattered lives, devastated futures and tarnished histories. Nonetheless, conflicts

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[1] INSTITUTE FOR ECONOMICS & PEACE, GLOBAL PEACE INDEX 2014; MEASURING PEACE AND ASSESSING COUNTRY RISK 3 (2014), http://www.visionofhumanity.org/sites/default/files/2014%20Global%20Peace%20Index%20REPORT.pdf

[2] *Id.*

[3] *Id.*

[4] *Id*, at 2.

[5] WILLIAM J. LAHNEMAN, MILITARY INTERVENTION: CASES IN CONTEXT FOR THE TWENTY-FIRST CENTURY xiii (Rowman & Littlefield Publishers 2004).

[6] Lateef Mungin, *Amnesty: Egypt far from justice over unrest that killed more than 800,* CNN, (May 19, 2011), *available at* http://edition.cnn.com/2011/WORLD/africa/05/19/egypt.revolution.report/.

[7] Seumad Milne, *If the Libyan war was about saving lives, it was a catastrophic failure,* THE GUARDIAN, (October 26, 2011), *available at* http://www.theguardian.com/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure.

[8] JOHN Heilprin, *UN: Death toll from Syrian civil war tops 191,000*, ASSOCIATED PRESS, (August 22, 2014), *available at* http://www.usatoday.com/story/news/world/2014/08/22/united-nations-syria-death-toll/14429549/.

of their nature continue to rise and fall with trillions of dollars being channeled toward containing their consequences.[9] If human rights are indeed inviolable, it is reasonable to conclude that 'somebody must do something' to put an end once and for all to the circumstances that continue to have such horrific consequences on human life. Humanity simply cannot afford more Syrias and Libyas. Indeed these suggestions are not original, nor are the situations that have tarnished human history with gross violations of human rights and the consequent loss of human life. As such, in 1999, former Secretary-General Kofi Annan asked the United Nations (UN) General Assembly, "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to Srebrenica—to gross and systematic violations of human rights that offend every precept of our common humanity?"[10]

By the 1990s, individual states or coalitions of states increasingly resorted to 'humanitarian intervention': intervention in the internal affairs of other nations in the name of conflict resolution. A single legal definition of humanitarian intervention does not exist, but mainstream international politics and law generally regard it as the *right* of one state to exercise coercive control or action in the territory of another state where the laws of humanity are being violated.[11] As demonstrated below, intervention usually involves the use of armed force and the broad consensus is that it should only be exercised with exceptional UN Security Council authorization strictly "for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law."[12] Within less than a decade, many world leaders and members of civil societies around the world began to question the legitimacy, integrity and intentions of so-called 'humanitarian intervention,' criticizing it as a means to evade state sovereignty or as an excuse for powerful states to realize their economic and political objectives in the decolonized world. Others were more concerned with the international legality of coercive intervention and whether it was possible to establish

[9] *supra* note 1, at 2.
[10] ICISS, THE RESPONSIBILITY TO PROTECT VII (2001), *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf [hereinafter *ICISS*]; Secretary-General Kofi Annan asked this question first at the 1999 United Nations General Assembly, and again in his Millennium report to the General Assembly in 2000.
[11] ANNE RYNIKER, THE ICRC'S POSITION ON "HUMANITARIAN INTERVENTION" 528 (June 2001), https://www.icrc.org/eng/assets/files/other/527-532_ryniker-ang.pdf.
[12] *Id.*

standardized rules of engagement or a reliable international precedent on which to base future interventions.[13]

Initially, humanitarian interventions took the form of diplomatic or economic mediation, but more and more frequently interventions have become military in nature with the alleged goal of ending hostilities.[14] Contemporary interventions share a common feature in both their proclaimed purpose and their pretext: obligation and responsibility. For example, intervention was said to be necessary, an obligation, of the UN and later of the United States, in Somalia in the early 1990s. NATO was commissioned to create a secure environment that would allow for the smooth roll out of humanitarian operations due to a hunger epidemic clutching the nation and a growing and dangerous state of lawlessness that put the lives of hundreds of thousands of civilians at risk.[15] However, in the absence of established rules of engagement or a clear plan of action, the US and NATO forces with their poor understanding of Somali politics and historical grievances failed to address the underlying sources of conflict.[16] As a result, they became involved in violent clashes with militias on the ground, which quickly led the forces to withdraw in 1994, leaving Somalia to be engulfed by a violent civil war that has continued to this day.[17] Soon after, a gruesome civil war raged on in Rwanda; as the Hutu majority terrorized the Tutsi minority, the world stood idly by. Public criticism of humanitarian intervention mounted as the Somalia intervention was condemned as a failure and as a waste of Western resources. Possibly in an effort to divert attention from the political blowout that followed the Somalia fiasco, the UN Security Council finally authorized a peacekeeping mission for Rwanda, a conflict it showed little concern toward beforehand.[18] Too little, too late, an ill-prepared, ill-equipped UN peacekeeping force landed in

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[13] Jon Western and Joshua S. Goldstein, *Humanitarian Intervention Comes of Age*, FOREIGN AFFAIRS, (November/December 2011), *available at* http://www.foreignaffairs.com/articles/136502/jon-western-and-joshua-s-goldstein/humanitarian-intervention-comes-of-age.

[14] *supra* note 5, at xiii; 'Humanitarian Intervention' was formerly called 'military intervention,' but the term 'military' proved to be very contentious and was later replaced with 'humanitarian,' a strategic political and rhetorical move.

[15] JOHN TERENCE O'NEIL & NICHOLAS REES, UNITED NATIONS PEACEKEEPING IN THE POST-COLD WAR ERA 107 (Routledge 2006) (2005).

[16] *supra* note 13.

[17] *Id.*

[18] *Id.*

Rwanda in 1993, only to be attacked by Hutu extremists shortly after its arrival.[19] With the death of ten Belgian peacekeepers, the forces swiftly withdrew, again leaving "more than half a million civilians [to be] killed in a matter of months [;] the international community failed to act."[20] In contrast, when the Bosnia War broke out in 1992, NATO swiftly intervened, ironically through airstrikes, in order to fulfill its 'responsibility' to establish peace and to put an end to the ethnic cleansing of the Muslims.[21] Keeping with the theme of obligation and responsibility, the international community also claimed that intervention was necessary to halt human rights abuses in East Timor and then to reinstate a democratically elected government in Haiti.[22] The United Nations Mission to Sierra Leone was established in 1999 to work with the Government and international organizations to implement a peace agreement and to assist with disarmament, demobilization and reintegration.[23] And most notably, after war broke out in Kosovo in 1998, intervention there became one of the most contentious examples in history. NATO forces deployed without UN Security Council authorization, constituting a clear violation of Article 2(4) of the UN Charter that governs the international use of force.[24] Most recently, again through NATO, the international community supposedly fulfilled its responsibility to intervene in Libya in 2012 in an effort to restore peace between warring factions and to rid the country of a violent dictator.[25] Nonetheless, since NATO's withdrawal, Libya has undergone sustained turmoil with increased intrastate conflict, terrorism and political division.[26] The fate of the Libyan conflict and the impact of humanitarian intervention there will be telling in the future. Now, the American-Arab airstrikes in Syria have purportedly been deployed to contain the spread of the dangerous and radical Islamic State (ISIS and ISIL) throughout Syria, Iraq and the rest of the

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[19] *supra* note 13.

[20] *supra* note 13.

[21] Peace support operations in Bosnia and Herzegovina (Nov. 2014), *available at* http://www.nato.int/cps/en/natolive/topics_52122.htm.

[22] *ICISS*, *supra* note 10, at xiv.

[23] *supra* note 15, at 183.

[24] *supra* note 13.

[25] AIDAN HEHIR ET, AL., LIBYA, THE RESPONSIBILITY TO PROTECT AND THE FUTURE OF HUMANITARIAN INTERVENTION (Palgrave MacMillan 2013).

[26] *supra* note 1.

region.[27] The notions of obligation and responsibility in the context of coercive military intervention are questionable, especially considering that many of these examples of intervention failed to achieve their supposed objectives and most of them have actually exacerbated the harm and suffering that they apparently set out to contain.

The turbulent track record of humanitarian intervention together with Secretary General Annan's 1999 General Assembly appeal fuelled the 2001 development of The Responsibility to Protect (R2P), an international legal doctrine established by the Canadian-led International Commission on Intervention and State Sovereignty (ICISS). The aim of R2P was to establish a legal and moral framework to justify military intervention for human protection purposes. Some legal and political theorists regard R2P as a breakthrough, a substantial improvement, in the discourse endorsing humanitarian intervention and promoting human rights.[28] Others view R2P as essentially the same and just as controversial as the military humanitarian intervention doctrine,[29] making R2P and humanitarian intervention two sides of the same coin.

B. Context: The Author Vis-à-vis the Topic

As a former student of literature, I approach the study of international law from a linguistic and literary perspective, seeing international law primarily as a system of discourse and rhetoric, which eventually manifests as a system of rights and order in the "Occident" and as a system of interests and control in the "Orient."[30] Studying emerging legal doctrines like R2P and understanding how the principle of non-intervention and the norm of state sovereignty have evolved since the Cold-War era raised for me a series of

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[27] Nick Paton Walsh & Laura Smith-Spark, *Airstrikes target another Islamist group in Syria,* CNN (November 6, 2014), *available at http://edition.cnn.com/2014/11/06/world/meast/syria-crisis/index.html?hpt=hp_t2.*

[28] *See* GARETH EVANS, THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL (The Brookings Institution, 2008) (2008).
See Lee Feinstein and Anne-Marie Slaughter, *A Duty to Protect,* FOREIGN AFFAIRS, (January/February 2004), *available at http://www.foreignaffairs.com/articles/59540/lee-feinstein-and-anne-marie-slaughter/a-duty-to-prevent.*

[29] Noam Chomsky, *The Responsibility to Protect: Text of Lecture Given at UN General Assembly* (Jul. 2009), *available at* http://www.chomsky.info/talks/20090723.htm (*see* author's note at *supra* note 14).

[30] Edward Said coined these terms. In this thesis, "Orient" represents the non-western, non-European nations, or the 'Other' of international law and will be used to represent the subaltern former colonies, developing states, the Middle East and parts of Asia. The "Occident" represents the powerful western nations, the 'Self' of international law and will be used to represent geopolitically powerful states including former colonizers, Europe, the United States and its coalition partners.

suspicions about the political and legal intentions that fueled their development. These suspicions became especially apparent when I found myself implicitly invoking intervention in the face of massive human rights abuses and to humanitarian crises in the region of my origin, the Middle East. When frantic media headlines announced death after death in Egypt in 2011, I was frustrated by the silence of the UN and appealed for international condemnation of the Egyptian government. Shortly afterward, when frenzied reports announced that women and girls were being raped in Libya and entire villages in Benghazi and Misrata had been attacked by government forces because of their residents' political views, I voiced my desire for the international community to 'do something' to put an end to the injustice. Finally, I have expressed my dismay at chemical weapons attacks in Syria, the massive loss of life and the relentless destruction of infrastructure, historical sites and agricultural lands. I have also been an advocate for international condemnation of the warring parties' illegal actions and for the facilitation of humanitarian aid deliveries inside Syria. The more I engaged with R2P discourse, the more I felt suspicious of what I, myself was actually appealing for in Egypt, Libya and Syria, but I was unable to properly articulate my conclusions. It is this unexplained discomfort that led me to delve further into the relevant international legal discourse to unveil the root of my unease. In doing so, I discovered that directly and indirectly appealing for intervention invariably translated to suggesting the evasion of state sovereignty. While I see sovereignty as the only remaining defense that could potentially protect countries in the Middle East and developing nations around the world from contemporary Western imperialism, I was caught in a moral paradox between supporting human protection on the one hand and regional and state sovereignty on the other hand.

Post-colonial theory and the study of rhetoric have helped me come to terms with my own qualms about the evolving international legal atmosphere and discourses that found their way into my own consciousness and vocabulary. In doing so, I found that Edward Said's theory of Orientalism provides a useful and productive framework through which to engage in an introspective study of how humanitarian discourse functions, and where I, as a hybrid subject of both the Occident and the Orient, fit into

this discourse and into my troubling moral paradox.[31] Thus, the purpose of this thesis is to empower myself to "use [my] mind historically and rationally for the purposes of reflective understanding and genuine disclosure."[32]

C. Context: Scope of Research and Thesis Map

Through the lens of Orientalism, this thesis examines the discourse of R2P as presented primarily in the ICISS report and endeavors to reveal how the Orientalist undertones of the R2P narrative function as a mode of reproducing and exercising power over the 'Other' of international law, the Orient.[33] The rhetorical persuasiveness of R2P's humanitarian narrative is itself an Orientalist discourse, which promotes Orientalist binaries between lawful and unlawful, responsible and irresponsible, capable and incapable, to name a few. The impact of R2P's implicit Orientalist discourse is that it can result in an unintentional 'self-orientalization' when people of the Orient invoke intervention in the face of gross violations of human rights. At the same time, when people of the Occident invoke intervention, they subconsciously reinforce the Orientalist discourse, thereby empowering Oriental subordination and subservience to the Occident. This reveals one of the most ingenious built-in mechanisms of power exercised through R2P, which on the surface appears to be altruistic, humanitarian and desirable to both the Orient and the Occident. "Genuine disclosure" of this conundrum is the locus of my moral paradox with regards to R2P.[34]

This project is important because, as explained by Alpana Roy, "the scholarship of critical legal studies has challenged the static monolithic categories constructed by liberal positivist law, and in doing so have insisted upon the necessity of recognizing partial realities, subjugated knowledges, and subaltern positions." [35] Furthermore, Orientalism provides a helpful framework through which to analyze R2P because, "a postcolonial view not only queries the base from which liberal positivist law unthinkingly

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[31] *See* HOMI K. BHABHA, THE LOCATION OF CULTURE (Routledge 1994) [hereinafter *Bhabha*] for more information on hybrid theory.
[32] EDWARD W. SAID, ORIENTALISM xxiii (Vintage Books 1979) (1978) [hereinafter *Orientalism*].
[33] *See supra* note 19 for definitions of Orient and Occident.
[34] *Orientalism, supra* note 32.
[35] ALPANA ROY, POSTCOLONIAL THEORY AND LAW: A CRITICAL INTRODUCTION 320 (2008), http://www.austlii.edu.au/au/journals/AdelLawRw/2008/10.pdf [hereinafter *Roy]*.

functions; it also provides a *different* forum in which the law's taxonomic structures and ontological foundations may be understood from the Other's perspective."[36]

Chapter I of this thesis presents post-colonialism as a field of study and outlines the theoretical framework provided by post-colonial discourse theory generally, and by Edward Said's Orientalism specifically. Chapter I also illustrates the intersections between post-colonial discourse theory and its application to law and rhetoric and surveys insightful examples of post-colonial legal analysis through a literature review that focuses primarily on the scholarship of international legal historian Nathaniel Berman and his engagements with ambivalence as a form of power, orientalism as a form of discourse and other disciplines like art, literature, and media as sources of insight. Chapter II introduces the doctrine of R2P as it is presented in the ICISS report and relevant supporting UN documents where the doctrine has been endorsed. Chapter II also explains how R2P evolved from its predecessor, humanitarian intervention, and takes an in-depth look at the language and rhetoric of the doctrine. This rhetorical analysis will examine how R2P attempts to recharacterize the concept of state sovereignty and why the logic of 'responsibility' in the context of intervention law is flawed. Chapter III will apply post-colonial theory and Orientalism to the rhetorical analysis conducted in the previous chapter to reveal the mechanisms of power established by the R2P discourse. This chapter will also apply Orientalism to R2P to explain how international law is itself predicated on a powerful system of othering. Finally, this thesis will be concluded with suggestions for future research.

[36] *Id*, at 321.

I. Post-Colonialism, Discourse and Law

A. The Post-Colonial in Space and Time

As the term implies, that which falls under the realm of the post-colonial is that which succeeds colonialism. It also implies that colonialism itself was a contained enterprise with a start and an end date.[37] To view the era of colonialism with its power, domination and history as finite is limiting. Undoubtedly, the colonial enterprise, its structures and its effects continue to impact the present day. Post-colonialism is the field of study that engages with the legacy and enduring effects of colonialism following the dismantling of the colonial empires, when previously dominated countries and peoples gained their independence.[38] In this way, post-colonialism is not confined to a specific temporal period in history, but rather transcends the colonial era and encompasses the period leading up to colonization, colonization itself, and the period following decolonization, which brings us to the present.

Debate among post-colonial theorists about the space and time that post-colonialism occupies are plentiful. Stephen Selmon provides a useful proposal to understand the scope of post-colonial residue and influence, which this thesis has adopted as its definition of 'post-colonial'

> Definitions of the 'post-colonial' of course vary widely…the concept proves most useful not when it is used synonymously with a post-independence historical period in once-colonized nations, but rather when it locates a specifically anti- or *post*-colonial *discursive* purchase in culture, one which begins in the moment that colonial power inscribes itself onto the body and space of its Others and which continues as an often occulted tradition into the modern theatre of neo-colonialist international relations.[39]

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[37] PETER CHILDS & R.J. PATRICK WILLIAMS, AN INTRODUCTION TO POST-COLONIAL THEORY 1, http://www19.homepage.villanova.edu/silvia.nagyzekmi/teoria/childs%20postcolonial.pdf.
[38] *Id.*
[39] STEPHEN SELMON, '*Modernism's Last Post,'* PAST THE LAST POST: THEORIZING POST-COLONIALISM AND POST-MODERNISM 3 (Ian Adam and Helen Tiffin eds., Hemel Hempstead: Harvester Wheatsheaf, 1991); originally cited in *Roy, supra* note 35 at 3.

It is important to note that post-colonial theory does not entail a strict methodology or criteria. Rather, post-colonial theory is versatile and malleable in its cross-disciplinary nature as it provides the means to critically examine the ongoing effects of colonial power, oppression and reproduction across disciplines in the humanities and social sciences ranging from literature, anthropology and culture to politics, media and law; post-colonial theory could even arguably be used to analyze the historical and cultural foundations on which biological and mechanical sciences are built as well. Therefore, post-colonial theory provides an introspective foundation and toolkit to reveal the intricacies of contemporary world order.

Because post-colonial theory is not constrictive or specific, it includes an expansive range of theories and theorists; this extends to discourse theory and legal theory.[40] In conjunction, Michael Foucault, the father of discourse theory, and Edward Said, the father of Orientalism, provide the theoretical framework that will be employed in this thesis to unveil the Orientalist underpinnings of the "modern theatre of neo-colonialist international relations" as manifested by R2P, a twenty-first century emerging legal doctrine.[41] It is through Said's elaboration on Foucault's scholarship that his theories become particularly useful in the analysis of legal discourse through a post-colonial lens, making it pertinent to understanding the current context in which international legal norms operate.

B. Foucault: Discourse as Power

> "[P]ower is tolerable only on the condition that it masks a substantial part of itself. Its success is proportional to an ability to hide its own mechanisms."[42]
> - Michael Foucault, *The History of Sexuality 1: An Introduction*

According to Michael Foucault, discourse is "both an instrument and an effect of power…[it] transmits and produces power; it reinforces it, but also undermines and exposes it, it renders it fragile and makes it possible to thwart."[43] Thus, discourse analysis is a useful method to understand the ways in which power is produced and how it is

[40] *Roy*, *supra* note 35, at 315.
[41] *supra* note 39.
[42] MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL 1: AN INTRODUCTION 86 (Robert Hurley trans., Vintage Books 1990) (1976) [hereinafter *Foucault Intro]*.
[43] *Id*, at 101.

transmitted both to those upon whom it is exercised and to those who exercise it. Through understanding systems of discourse, the mechanisms of power that organize political and international relations can be understood with more clarity. As explained by Foucault, discourse is the system by which dominant groups establish truths by imposing specific elements of knowledge, perspectives and values upon dominated groups. As a social formation, discourse functions to establish realities not only for the objects it appears to represent, but also for the subjects who form the community on which it depends.

The same is true of discourse as a legal formation. Legal discourse establishes the realities or the assumptions within and upon which rules control interpersonal and international relations, actions and interactions. The creation of these realities has its basis in assumptions, perspectives and subject positions that are presented as "just the way things are" and consequently "taken for granted" as truth and reality.[44, 45] Ultimately, obtaining a sound and thorough understanding of a discourse reveals the underpinnings of its power on society, and understanding the hidden mechanisms within a discourse reveals how it succeeds to make systems of power seem acceptable and desired.[46]

C. Said: Orientalism as Colonial Discourse

Elaborating on Foucault's definition of discourse, Edward Said coined the term "Orientalism" as a field of study and method of understanding colonial discourse, a system within which colonial practices and power came into being and have remained active and influential until the post-colonial present. In *Orientalism*, Said provides a productive set of conclusions and a framework through which to understand how colonial and post-colonial discourses operate as instruments of power. From this point onward, this thesis will employ the term 'Orientalist discourse' and 'colonial discourse'

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[44] John Langan, SJ, *Ethics and the International Politics of Rescue: Getting Beyond an American Solution for An International Problem*, RIGHTEOUS VIOLENCE: THE ETHICS AND POLITICS OF MILITARY INTERVENTION *4 (*Tony Coady & Michael O'Keefe Eds., Melbourne University Press 2005).
[45] Noam Chomsky, *Liberating the Mind from Orthodoxies: Interview with David Barsamian, available at* http://faculty.mu.edu.sa/public/uploads/1333600745.2666Noam%20Chomsky%20-%20Liberating%20the%20Mind%20from%20Orthodoxies.pdf [hereinafter *Chomsky Orthodoxies*].
[46] It is useful to note that our ability to understand discourse is complicated and restricted by the fact that we cannot necessarily escape discourse; we are constituted by it even when we are trying to understand it.

interchangeably to encompass a variety of important implications that are specific to Orientalism as explained below.[47]

Orientalism is a discourse or a "style of thought based upon an ontological and epistemological distinction made between 'the Orient' [, the East,] and…'the Occident'," the West.[48] This distinction can be expanded beyond an exclusive east-west, north-south divide; the distinction between the Orient and the Occident can also be used to compare binary oppositions such as just and unjust, legal and illegal, civilized and uncivilized, responsible and irresponsible. In essence, Orientalist discourse is centered upon binary oppositions that define the Occident as the "contrasting image, idea, personality, [and] experience" of the Orient, and vice versa.[49] Such stark distinctions between the characterization of the Occidental self and the Oriental Other are reminiscent of the archetypal intellectual and political hegemonic discourses of the colonial era. Likewise, Said describes the "relationship between [the] Occident and Orient [as] a relationship of power, of domination, of varying degrees of a complex hegemony."[50] He seeks to investigate the "sorts of intellectual, aesthetic, scholarly, and cultural energies" that contribute to the development of the Orientalist discourses and asks, "[h]ow does Orientalism transmit or reproduce itself from one epoch to another?"[51]

Through Said's theory, this thesis asserts that R2P is itself a reproduction of Orientalism in the twenty-first century, that R2P is an Orientalist discourse and that the rhetoric of this discourse makes possible the transmission, reinforcement and reproduction of colonial power between international law's Western/Occidental 'Self' and non-Western/Oriental 'Other'.

[47] It is also worthwhile to note that colonial discourse has broader implications such as the colonialism of the Americas for example. For the purposes of this thesis, the focus is on how colonial discourse corresponds with or manifests as Orientalist discourse.
[48] *Orientalism, supra* note 32, at 2.
[49] *Orientalism, supra* note 32, at 2.
[50] *Orientalism, supra* note 32, at 5.
[51] *Orientalism, supra* note 32, at 15.

D. Theoretical Intersections: Post-Colonialism, Orientalism, Law & Rhetoric

"[A] post-colonial analysis of law provokes a *different* reading of it, and this in turn instigates a more contextual and expanded understanding of the concept of law. This is important, as the law has in many ways essentially remained a 'Eurocentric enterprise'."[52]
-Alpana Roy, *Post Colonial Theory and Law: A Critical Introduction*

As mentioned above, post-colonial theory is cross-disciplinary, lending itself to the establishment of intersections between various fields and modes of analysis. Roy explains that although "conversations between law and post-colonialism have been infrequent," postcolonial theory "is increasingly being recognized by legal scholars as a methodological tool with which to scrutinize the nature of legal discourse."[53] As such, Orientalism, a post-colonial discourse theory, is a microscope through which to conduct "a *different* reading" of law in an effort to effectively reveal the "nature" and effects of its discourse.[54]

The colonial system was built upon stark distinctions between "the colonizers and the colonized, [while] post-colonialism refers to a more discursive condition, where the culture of the former imperial power has left an undeniable scar of the psyche of the colonized."[55] Orientalist discourse analysis can reveal the assumptions that allow for the survival and advancement of colonial relationships of power and domination through Orientalist representations of history, language, art, society, values and law. Orientalist discourses can therefore be understood as a series of narratives and descriptions about the Orient and the Occident and about their mutual relationship and duties toward one another. It is predominantly the Occident that creates and disseminates the assumptions, narratives and constructions of Oriental discourse.[56] Nonetheless, a consequence of its power is that it eventually forms elements of the discourse within which the Orient can also come to see and describe itself. For subjects of both the Orient and the Occident

[52] *Roy, supra* note 35, at 316; 'Eurocentric enterprise' is in quotations in the text because Roy cites Kenneth B. Nunn from 'Law as a Eurocentric Enterprise' (1997) 15 *Law and Inequality* 323.
[53] *Id*, at 315.
[54] *Id*, at 315.
[55] *Id*, at 318.
[56] It is worthy to note that the Orient also creates assumptions about the Occident. However, it is the Occident that holds the power that allows for its narratives about the Orient to form the primary hegemonic discourse.

alike (particularly those who are politically disinterested), this irony creates a dilemma whereby individuals who do not necessarily seek to promote the narratives of Orientalist discourse or its binary subject formations perpetuate it unknowingly because of the linguistic constraints imposed on them by the hegemonic Orientalist discourse, which will be discussed at length throughout this thesis.

Post-colonial theorists have "endeavored to show that the ideological effects of colonial laws continue to have contemporary relevance as they *continue* to be used as an instrument of control in this postcolonial world."[57] At the heart of colonial discourse was a deliberate system of disguising the imperial, political, economic and social benefits of control; the same is true in post-colonial, Orientalist discourse. Ultimately, Orientalist discourse portrays Occidental altruism as the motivation behind humanitarian interventions; salvation of the Orient from its inferior, primitive, depraved status is portrayed as the duty and responsibility of the inherently superior, civilized and privileged Occident.

Each discourse comes with its own set of terms, attitudes, and implications, none of which is used or chosen arbitrarily. Rhetoric is what makes Orientalist discourses and Orientalist legal discourse persuasive: law is discourse;[58] discourse is rhetoric; therefore, law is rhetoric. Moreover, Gerald B. Wetlaufer claims that law is "the very profession of rhetoric."[59] A discipline that relies so heavily on the minute intricacies of semantics and syntax, a discipline in which the very order of a given group of words could lead to opposite outcomes that are both legally plausible, a discipline that prides itself and finds its identity in a specific, exclusive discourse, "law can never escape the intricacies and imprecisions, as well as the promise and power, of language itself."[60] As a 'profession of rhetoric,' a profession that hinges on the tactful compilation and selection of words, law

[57] *Roy*, *supra* note 35, at 319.,
[58] *See* Jürgen Habermas, *Law as Discourse: Bridging the Gap between Democracy and Rights; Between Facts and Norms: Contributions to Discourse Theory of Law and Democracy,* 108 HARVARD LAW ASSOCIATION 1163, 1163-1189 (1995).
[59] GERALD B. WETFLAUFER, RHETORIC AND ITS DENIAL IN LEGAL DISCOURSE, http://www.law.uiowa.edu/documents/wetlaufer/rhetoric.pdf.
[60] THE RHETORIC OF LAW 1-2 (University of Michigan Press, Austin Sarat & Thomas R. Kearns eds ., 994) [hereinafter *Rhetoric of Law*].

is "a stage for…linguistic virtuosity, and persuasive argument," a stage on which rhetoric is literally a matter of life or death.[61]

E. Post-Colonialism, Orientalism and Law: A Literature Review

The claim that the history of colonialism has shaped the development of international law is not novel.[62] The legacy of colonialism and its history of occupation and exploitation of land, resources and peoples undeniably have lasting psychological, political and legal consequences to the present day. However, much legal scholarship fails to explicitly acknowledge the ways that this history can provide insight into the power structures that have contributed to contemporary international legal development. As explained, post-colonial theory is not restricted to any specific discipline. The cross-disciplinary quality of post-colonial legal analysis is demonstrated by the scholarship of international legal historian and theorist Nathaniel Berman who has extensively explored non-legal colonial discourses, such as literature, art and media, to shed light on the parallel development of international law and the ways in which the colonial legacy is etched into the foundations of the international legal system. His focus on ambivalence as a technology of power and the appeals of the Orient are of particular relevance to this thesis, which undertakes a similar modus operandi to analyze the mechanisms of power exhibited by R2P as a post-colonial, Orientalist legal discourse.

E.1 Ambivalence As a Technology of Power[63]

> **"**[T]ry as it might, international law seems unable, even decades after decolonization, to shed [its] past – a past that continues to haunt it, often in the shape of the puzzling persistence of reminders of the colonial legacy in even the most idealistic exercises of contemporary internationalism."[64]
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> -Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law*

[61] *Supra, note* 59.
[62] *See* Anne Orford, *A Jurisprudence of the Limit,* in INTERNATIONAL LAW AND ITS OTHERS 3 (Anne Orford ed., Cambridge University Press 2006) [hereinafter *Orford Jurisprudence]*.
See ROBERT JACKSON, SOVEREIGNTY 72 (Polity Press 2007).
[63] NATHANIEL BERMAN, IMPERIAL AMBIVALENCES: SCENES FROM A CRITICAL HISTORY OF INTERNATIONALSM, at 411 [hereinafter *Berman Imperial Ambivalences]*.
[64] *Id*, at 412-413.

One recurring theme in post-colonial studies is ambivalence. The concept of 'ambivalence' in international legal discourse is most closely associated with Berman, who focuses on the destabilizing philosophical and practical impact of ambivalence about the foundations of international law. Meanwhile, postcolonial theory centered on the theme of ambivalence is usually credited to Homi Bhabha. The main divergence between their engagements with the concept is that Berman is principally concerned with the ambivalence to European colonialists and the evolution of international legal thought, while Bhabha focuses largely on the ambivalence of colonized people themselves in navigating their own postcolonial identities.[65] As it can be difficult to rationalize and identify ambivalences, some individuals dismiss or bypass them rather than confront the anxieties they provoke, particularly in the context of contemporary liberal internationalism. [66] However, disregarding ambivalence precludes the space for comprehensive "reflective understanding and genuine disclosure."[67] This thesis attempts in part to confront and recognize the psychological and political effects of post-colonial ambivalence to the foundation, history, and power of contemporary international law.

Berman relies on the notion of ambivalence to illustrate how international legal thought and development is wrought with paradoxes that emanate from a colonial history that can neither be denied nor purged. Through acknowledging the infusion of imperial and colonial history into the development of contemporary international law, one can appreciate how the colonial legacy continues to create and recreate mechanisms of power and control, particularly over international law's non-Western 'Others'.[68] The absence of this introspection is what Berman calls 'imperial ambivalence,' which is essentially "the inability of an individual, a group, or a culture to rid themselves of ideas, passions, or relationships that they nevertheless also claim to condemn or deny."[69] Berman's primary concern regarding the convergence of colonial history and international law is "the way in which ambivalence toward colonialism marks the interpretation of legal concepts and the establishment of legal structures – indeed, the way in which ambivalence can itself

[65] *See Id; Bhabha, supra note 31*; Bhabha's concept of ambivalence will discussed further in the conclusion of this thesis.
[66] NATHANIEL BERMAN, THE APPEALS OF THE ORIENT at 200-201 [hereinafter *Berman Appeals*] and *Berman Imperial Ambivalences, supra* note 63, at 413.
[67] *Orientalism, supra* note 32, at xxiii.
[68] *Berman Imperial Ambivalences, supra* note 63, at 413.
[69] *Id,* at 414.

become a kind of technology of power and thus define a whole strand of colonial discourse and practice."[70] His analysis reveals that international legal regimes that are celebrated as neutral and progressive in fact reinforce and institutionalize colonial oppressive power structures and "their own set of assumptions and techniques by means of which powerful outside forces deploy power on those less powerful."[71] His exploration of 'imperial ambivalence' reveals that it is impossible to mark a moment in history where international law detached itself from imperial power structures and shifted toward a model of egalitarian international legal order.[72]

E.2 Interdisciplinary Approaches

Berman suggests that traditional linear approaches to the study of international legal history are too superficial and thus tend to neglect "legal history's fundamental breaks and controversies."[73] Similarly, critical legal theorist Anne Orford notes that international law alone cannot holistically provide the answers to the fundamental questions that continue to arise along the trajectory of international law's lifetime; turning to other disciplines can help fill this knowledge gap.[74] By focusing too heavily on international law's "successes and failures," for its "causes and effects" and for "better solutions," historical legal inquiry runs the risk of overlooking the significant cultural developments that provide "insight into the deeper meaning of legal change."[75] As an alternative, Berman asserts that interdisciplinary engagement with pivotal developments in cultural, literary, artistic, and intellectual thought and expression can provide "useful insight on current legal and cultural debates…which ha[ve]…shaped our…intellectual condition" and the state of international affairs today.[76] As he says, "understanding the relationship of colonialism to international legal history often requires that we move

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[70] *Berman Imperial Ambivalences, supra* note 63, at 416.
[71] *Berman Imperial Ambivalences, supra* note 63, at 418;
See also Frédéric Mégret, *From 'Savages' to 'Unlawful Combatants': a Postcolonial Look at International Humanitarian Law's 'Other', in* INTERNATIONAL LAW AND ITS OTHERS 267 (Anne Orford ed., Cambridge University Press 2006) [hereinafter *Mégret*].
[72] *Orford Jurisprudence, supra* note 62, at 7.
[73] NATHANIEL BERMAN, MODERNISM, NATIONALISM AND THE RHETORIC OF RECONSTRUCTION, at 353 [hereinafter *Berman Modernism].*
[74] *Orford Jurisprudence, supra* note 62, at 7.
[75] *Berman Modernism, supra* note 73, at 353.
[76] *Id*, at 352.

beyond law's disciplinary boundaries."[77] For this reason, a substantial part of this thesis is devoted to analyzing law as a system of rhetoric from a linguistic and literary point of view.

In *Modernism, Nationalism, and the Rhetoric of Reconstruction*, Berman juxtaposes elements of Modernist art with significant changes in international legal thought.[78] This type of inquiry "suggests that transformations in legal thought can be productively viewed as participating in, and, indeed, partly creating deep shifts in Western cultural history."[79] One useful feature of Berman's analysis of Modernist art is his explanation of how Modernist painters used "primitive sources of cultural energy," derived from the Orient, to animate new forms of artistic expression.[80] This example shows a shift in cultural and political thought marked by appropriating Orient that was once repudiated by the colonialists to invigorate and exoticize modern art. In this way, the Orient becomes the inspiration, the purpose and the subject of the art. Similarly, in *The Appeal of the Orient*, Berman draws on public discourse that emerged from the 1925 War of the Riff between France and the Moroccan Riffan rebels.[81] He examines French newspapers and magazines that described "the relationships among a variety of French images of the colonized world…notions of international legal order associated with those images, and…anticolonial struggles claimed and evoked by Abd el-Krim," the leader of the Riffan rebels.[82] The public discourse revealed how the French perceived themselves as the legal, moral and physical contrasting image of the colonized world and also how the anticolonial struggles of Abd el-Krim were seen as exceptional, unlike the colonial notion of passive colonial subjects. Berman's examples rely on other disciplines to

[77] *Berman Appeals, supra* note 66 at 197.
[78] *Berman Modernism, supra* note 73, at 353.
[79] *Id,* at 352.
[80] *Id,* at 353; It is important to acknowledge that neither Berman nor this thesis regard the sources of cultural energy used by Modernist painters as "primitive." Berman's use of this term demonstrates a purely Modernist point of view.
[81] *Berman Appeals, supra* note 66, at 196; The Riffan Rebels were a Moroccan rebel group that resisted European colonial advancement on a small piece of territory that fell outside of the control of the Moroccan central government and the colonial forces, making it especially susceptible to colonial advancement. The Riff region was located along the border between regions of Morocco that were under French and Spanish colonial control. Up until their defeat in 1926 to the French, the Riffan rebels successfully resisted Spanish encroachment on their territory.
[82] *Id*.

demonstrate how changes in art and cultural corresponded to changes in international legal thought and development and vice versa.

Berman also discusses the disciplinary boundaries that limit our understandings of international legal history and essentially claims that to comprehend the legal landscape, one must turn to cultural and political writers for insight. The lack of legal commentary on colonial and interwar historical developments can function to erase key developments from international legal history. However, turning to other disciplines can fill these gaps in the history. Indeed, the "turn to cultural and political writers…is…not some arbitrary interdisciplinary move;" instead, "this boundary between law and non-law was an artifact of the discipline's interwar relationship to colonialism."[83] Berman's "turn to writings of non-lawyers, therefore, is not an engagement in interdisciplinarity for the sake of 'enriching' or 'renewing' legal history but, rather, is both required and forbidden by the historical materials themselves."[84] As such, this thesis makes reference to post-colonial literary and cultural theorists like Edward Said and Homi K. Bhabha, to contemporary political critics like Noam Chomsky, to politicians like Anne-Marie Slaughter, and to colonial poets like Rudyard Kipling, who have each shaped theoretical, political and conceptual developments that offer significant insight to this analysis of R2P.[85]

Similarly, James Boyd White suggests that law should be imagined as a "rhetorical and literary process," one that is fluid and changes constantly to suit the needs of its author or user and to appeal to the preferences of its audience.[86] In this way, he explains that law exists and operates in "interaction with…other systems of discourse that make up our world."[87] So, law acts as a thread that weaves in between and connects all other systems that govern our world and human interaction including "scientific and technical talk, psychological and sociological language, the speech habits of the parties and the witnesses," and, I would add, our opinions and memories of history and politics.[88] He also asserts that law is a rhetorical and literary process, an art of persuasion. In this

[83] *Berman Appeals, supra* note 66, at 201.
[84] *Berman Appeals, supra* note 66, at 204.
[85] *See* Chapter III, Section A of this thesis for discussion of Anne-Marie Slaughter's political theory, proposing a 'New World Order,' which is one of the most influential arguments in favor of new sovereignty.
[86] *Rhetoric of Law, supra* note 60.
[87] *supra* note 86, at 38.
[88] *supra* note 86, at 38.

way, one of the most important goals of law is to present itself as appealing, tangible, and useful; law must always give itself an *ethos* of reason, purpose and dedication to justice. In addition, a good lawyer or practitioner of legal rhetoric is one who can link legal objectives to those of civil society and present itself as benevolent and just. Historical narratives, which conjure emotions, nostalgias and repentances, provide an extremely useful set of persuasive tools to the legal rhetorician to achieve this *ethos*.[89] In the same way, the narrative of R2P tries to establish this *ethos* through its heavy reliance on positive recollections of humanitarian intervention in Kosovo and clear repentances about the failure of intervention in Rwanda. Meanwhile, a legal rhetorician can craft historical narratives in a way that strategically excludes details that would undermine this *ethos*.

E.3 The Appeals of the Other

The Appeal of the Orient is another compelling piece by Berman that provides relevant insight into the role of the Orient in cultural, historical and international legal discourse. In this piece, Berman reveals the ways in which Occidental sexualization of the Orient informed historical and thereby legal attitudes toward the Orient. He uses "the language of desire and language of law as two interpretive frames to understand" colonial discourse.[90] It is the sexualized, desire-driven characterizations of the Orient that reveal the cultural and historical developments that implicitly impacted the historical international legal developments that last until the present day. His focus links the discourse and illustration of libinal (sexual or erotic) desires and corresponding characterizations of the Orient as indicative of "legal, cultural, and political positions."[91]

In an inventory of passages by French writers in the inter-war period, Berman notes various examples of ambivalence in engaging with the Other.[92] He explains that

> The 'appeals' of the Orient [that] the French intelligentsia experienced in 1925 combined [the] senses of attraction *to* an Other and challenged *by* an Other. On the one hand, these writers expressed a European desire for an alternative to the culture that had brought about World War I, a desire that led to the *active projection* of such an alternative in the exotic

[89] As Rwanda and Srebrenica serve to evoke emotions in support of R2P.
[90] *Berman Appeals, supra* note 66, at 197.
[91] *Id.*
[92] *Berman Appeals, supra* note 66, at 196.

> Orient. On the other hand, they expressed an *anxious reaction* to challenges to European rule coming from the colonized world, challenges posed by growing political and cultural contestation from [the Occident]. The range of interwar variations on the European fantasy of the life-giving, yet threatening, Orient emerged out of this combination of appeals.[93]

His study draws a number of poignant conclusions, primarily "that the grand dichotomies that have long structured discussions of the relationship of Europe to the colonized and formerly colonized world such as those between good and bad colonialism, good and bad nationalism, real and illusory Orients are both persistent and indeterminate."[94] He also asserts that "fears and fantasies about others, marked by shifting and ambivalent configurations of gender and sexuality, are an irreducible element of human experience."[95] Ultimately, he shows that even anticolonial, anti-orientalist, progressive Western discourse relies on Orientalizing the Orient through the appeals of: sexualized, seductive desire, marked by a reliance on grand dichotomies; "the desire to conscript" by which Occidental discourse seeks to "press the energy of the Orient, imagined as exorbitant but irrational, into the service of a European project of revolution, imagined as rational but fatigued"; the desire to explore, which relies on the revolutionary eccentricities of the Orient; and the desire to disorient, as practiced by the Oriental Other. Ultimately he rejects "ahistorical and rationalist critiques of Orientalism" and asserts "we can and should look for variety, instability, and ambivalence – uncovering the complex impulses that make change possible."[96]

[93] *Berman Appeals, supra* note 66, at 200-201.
[94] *Berman Appeals, supra* note 66, at 229-230.
[95] *Berman Appeals, supra* note 66, at 229.
[96] *Berman Appeals, supra* note 66, at 230.

II. R2P: Language and Rhetoric

A. R2P Background

Criticized for contradicting the principle of non-intervention codified under Article 2(4) of the UN Charter, humanitarian intervention has been heavily contested in legal and political debates throughout the past few decades.[97] 'Humanitarian intervention' has become the political and legal term used to denote the use of military force by a state or group of states in the sovereign territory of another state with the alleged goal of ending human rights violations. Following humanitarian intervention in Kosovo, which was contentious as it was performed without Security Council authorization, and the failure of the international community to respond effectively to gross human rights violations in Rwanda, the credibility of the doctrine including the ability to justify it as being adequately 'humanitarian,' suffered greatly. Its proponents promoted humanitarian intervention as the international solution to mass atrocities and the way to restore peace and security in conflict zones. However, this notion was undermined by a track record where interventions coincided with the political and economic interests of powerful states. R2P emerged from efforts to establish a legal and moral basis for humanitarian military intervention and to shift and correct negative perceptions associated with this contentious historical track record. The R2P doctrine was designed to provide "new and constructive ways to tackle the long-standing policy dilemmas associated with intervention for human protection purposes" and essentially posits that sovereignty is a conditional right based on *responsibility*; according to R2P, if a given state is found to be "unable or unwilling to fulfill its responsibilities," the international community absorbs

[97] Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945; Article 2(4) of the Charter reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
Also, US National Security Adviser Brent Scowcroft said the following at a high level UN panel in 2004; "Article 51 needs neither extension nor restriction of its long-understood scope...In a world full of perceived potential threats, the risk to the global order and the norm of nonintervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all." Citation: Noam Chomsky, *A Just War? Hardly, available* at http://www.chomsky.info/articles/20060509.htm (May 2006) [hereinafter *Chomsky Just War*].

the responsibility to intervene and acts in the place of the state.[98,99] While contemporary liberal internationalism regards R2P as a breakthrough in the discourse endorsing humanitarian military intervention, this thesis argues that the doctrine too closely resembles that of the colonial civilizing mission and is exercised based on state interests, rather than for human security purposes, as claimed in the ICISS report.

A.1 R2P Documents Considered

The terms and conditions of the R2P doctrine are comprehensively documented in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS).[100] After the ICISS report was published, the R2P doctrine was discussed at length at the 2004 High-Level UN Panel on Threats, Challenges and Change, and preliminary endorsement of the doctrine was articulated in paragraphs 29 and 30 of the outcome report, *A more secure world: Our shared responsibility.*[101] One year later, UN member states officially endorsed R2P at the UN World Summit in paragraphs 138 and 139 of the General Assembly resolution A/RES/60/1.[102] Since then, the majority of member states have accepted the doctrine, regarding it as a progressive step forward toward safeguarding human rights. A few months after it was endorsed by the General Assembly, an important reference to R2P was made in the Secretary General's report, *In Larger Freedom: Towards Development, Security and Human Rights for All.*[103] Reference to these documents will be made throughout the following chapters of this thesis.

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[98] *ICISS*, *supra* note 10, at ix.
[99] Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit*, Ethics & International Affairs 20 (2006) at 143, *available at* http://www.cerium.ca/IMG/pdf/BELLAMY-_ALEX-Whither_the_Responsibility_to_Protect-2.pdf.
[100] *ICISS*, *supra* note 10.
[101] UNITED NATIONS, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY – REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE 17 (2004), http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf (Paragraphs 29 and 30) [hereinafter *UN A More Secure World]*.
[102] UNITED NATIONS, UN WORLD SUMMIT GENERAL ASSEMBLY OUTCOME DOCUMENT 30 (2005), http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf (Paragraphs 138 and 139) [hereinafter *UN GA Outcome Document*].
[103] UN SECRETARY GENERAL, IN LARGER FREEDOM: TOWARDS DEVELOPMENT, SECURITY AND HUMAN RIGHTS FOR ALL, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/59/2005 [hereinafter *UN SG In Larger Freedom]*.

A.2 From 'Humanitarian Intervention' to 'The Responsibility to Protect'

The ICISS report explains that the pivotal cases of "Rwanda, Kosovo, Bosnia and Somalia" "occurred at a time when there were heightened expectations for effective collective action following the end of the Cold War."[104] The report elaborates that these examples "have had a profound effect on how the problem of intervention is viewed, analyzed and characterized."[105] More than a decade has passed since the R2P doctrine was born, and it has been invoked in the pretexts to several interventions including those in Afghanistan in 2001, Iraq in 2003, Libya in 2012 and most recently in Syria in 2014; each example uniquely complicates how intervention is "viewed, analyzed…characterized," justified and practiced.[106]

It is important to acknowledge that the ICISS report and the UN documents where R2P is endorsed form the basis of the R2P discourse, though reference to R2P can be found in an array of other arenas including for example media, political speeches and government policy documents. This thesis has deliberately limited its references to the documents listed above because the ICISS report most comprehensively articulates the most contemporary version of humanitarian intervention and the subsequent UN reports are among the most official of its endorsements. The analysis of R2P conducted in the following chapters of this thesis will help to reveal the mechanisms of power produced by the rhetoric, discourse and logic of the doctrine, and how its vocabulary has been adopted by a wide spectrum of people, including the beneficiaries and perpetrators of R2P, who engage with it actively or passively.

As discussed, R2P is often criticized for being too similar to its predecessor, humanitarian intervention. To differentiate itself from the contentious doctrine of humanitarian intervention, R2P is based on three "integral and essential components"[107]: the responsibility to prevent,[108] the responsibility to react,[109] and the responsibility to rebuild.[110] Though the ICISS report attempts to explain the scope and limits of each

[104] *ICISS*, *supra* note 10, at IX.
[105] *ICISS*, *supra* note 10, at IX.
[106] *ICISS*, *supra* note 10, at IX; also refer back to overview in Introduction of this thesis.
[107] *ICISS*, *supra* note 10, at 17.
[108] *ICISS*, *supra* note 10, at 19.
[109] *ICISS*, *supra* note 10, at 29.
[110] *ICISS*, *supra* note 10, at 39.

component at length, a disproportional amount of the report is dedicated to defensively explaining how and why R2P is unlike humanitarian intervention and to defining the criteria and parameters of military action, the core of the responsibility to react. While the responsibilities to prevent and rebuild are presented as central to the R2P doctrine, they actually function as accessories to distract from the military intervention element of the responsibility to react.[111] For these reasons, this thesis engages primarily with the responsibility to react and regards the doctrines of 'humanitarian intervention' and 'R2P' as two branches from the same tree and will use the terms interchangeably.

B. Shifting the Terms of the Debate[112]

The first step to conducting a post-colonial analysis of R2P is to deconstruct the language of the discourse to understand how it has been instrumental in the creation and exercise of power.[113] Examining the vocabulary will illuminate the attempt to distance the relationship between R2P and humanitarian intervention and why these terms can actually be used interchangeably. In particular, the words 'humanitarian,' 'responsibility' and 'protect' are used extensively and strategically in the R2P discourse. It is therefore important to investigate the connotations that each word carries to understand their wider rhetorical and persuasive value. As explained by Orford, through their strategic vocabularies, "the stories that explain and justify the new interventionism," like the 'responsibility' to 'protect' have permeated "everyday language through media reports and political sound bites," making interventionist discourse tangible and practical not only for legal technocrats who are engaged in the study or practice of international law

[111] Since the birth of doctrine, R2P has primarily been invoked in government speeches and statements to legitimize military intervention. R2P is rarely alluded to in policy discussions about international risks or post-conflict reconstruction. Discussions about the responsibility to prevent have largely been intended to justify military interventions, as seen in the pretext to intervention in Libya in 2012.
See Nicole Deller, *Challenges and Controversies* in THE RESPONSIBILITY TO PROTECT 64 (Jared Genser et al. Eds, Oxford University Press, 2011) [hereinafter *Deller]*.

[112] This title is adopted verbatim from the title of a sub-section in the ICISS report that discusses the need to adopt a new vocabulary to discuss R2P because the "traditional language of the sovereignty-intervention debate …is unhelpful." *See ICISS*, *supra* note 10, at 16.

[113] Said conducts a similar rhetorical analysis in *Orientalism* through tracing the writings of Homer, Nerval and Flaubert, whose depictions of the Oriental 'Other' contributed to the West's romantic and exotic construction of Orient as a subject of thought and action.

but also for civil society, politicians and even artists.[114] As the language of 'humanitarianism' becomes increasingly colloquial, it is also adopted into the vocabularies of the people who are on both the receiving and the performing ends of intervention. In this way, the vocabulary of humanitarian protection allows for "strategic accounts of a world of sovereign states and of authorized uses of high-tech violence [to] become more and more part of 'the stories we are all inside, that we live daily'," and consequently the enterprise of military intervention becomes more widely accepted.[115]

According to White, language is not neutral and it cannot be innocent; it is instead used in deliberate ways and actively shapes and contributes to legal discourse. White explains that particular words are the building blocks used by lawyers to create powerful legal narratives and persuasive nuance. In analyzing legal narratives from a rhetorical perspective, one is able to view the law "from the inside" in order to identify the basic persuasive mechanics of the discourse and the way that language operates as a mechanism of power. "The discourse created by the dialectic between law and language," White argues, "in turn serves to constitute a specific vision of 'community', a particular normative view of the social world."[116] White defines this process as "constitutive rhetoric," whereby the rhetoric of law creates visions of involved actors and creates a place of belonging for its subjects and its objects. It is through constitutive rhetoric and "appeals to the need to protect human rights, democracy and humanitarianism [that] international lawyers [are able to] paint a picture of a world in which increased intervention…is desirable and in the interest of those in the states targeted for intervention."[117] The language of R2P constitutes an attractive identity of a peaceful, righteous community that is internationally, politically and socially *responsible*.

C. New and Improved Vocabularies

At its outset, the ICISS report declares that in proposing a new and improved version of humanitarian intervention, "[i]t is important that language – and the concepts

[114] ANNE ORFORD, READING HUMANITARIAN INTERVENTION HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW 77 (Cambridge University Press, 2003) [hereinafter *Orford Reading Humanitarian Intervention]*.
[115] *Id.*
[116] *Rhetoric of Law*, *supra* note 60, at 226.
[117] *Orford Reading Humanitarian Intervention*, *supra* note 114.

which lie behind particular choices of words - do not become a barrier to dealing with the real issues involved."[118] This is an acknowledgment that the "traditional language" of humanitarian intervention had become inconvenient and laden with contentious connotations that needed to be replaced with an alternative, progressive vocabulary that would escape the "barriers" posed by problematic collective memories of failed and ineffective interventions.[119] The claim that it is important to avoid the use of contentious language early on in the ICISS report is intended to acquit the doctrine from criticism of its new vocabulary. Acknowledgment of potential criticism of the language functions to absolve R2P of accusations that it could use language deviously, which in turn serves to characterize the report and R2P itself as honest, transparent and trustworthy. However, upon closer inspection, it appears that this claim is merely rhetorical.

The fact that the report invests so much effort to pardon itself for any reproach for rebranding already contentious issues and legal norms in the discourse of humanitarian intervention warrants a closer look. While "changing the language of the debate...does not…change the substantive issues which have to be addressed," it does function to veil those issues in order to displace them from the center of the debate and it helps to distance the problematic history and collective memory that is associated with those issues.[120] Changing the language simply offers a more attractive and more persuasive vocabulary with which to address the substantive issue of humanitarian intervention. Indeed, the new vocabulary provided by R2P is merely a "change in perspective, reversing the perceptions inherent in the traditional language and adding some additional ones."[121]

Furthermore, in its explanation as to why the vocabulary of R2P needed to replace that of humanitarian intervention, the ICISS report acknowledges that the "traditional language" of the discourse is "unhelpful" and inconvenient. Its concerns with the pre-existing language are primarily: the apparent lack of attention to the "potential beneficiaries of the action," the failure to consider the "need for either prior preventative effort or subsequent follow up assistance," and lastly that the existing language of

[118] *ICISS*, *supra* note 10, at 11.
[119] *ICISS*, *supra* note 10, at 16.
[120] *ICISS*, *supra* note 10, at 12.
[121] *ICISS*, *supra* note 10, at 17.

intervention "label[ed] and delegitimize[d] dissent as anti-humanitarian." [122] These concerns are shared by most critics of humanitarian intervention; however they are criticisms of the doctrine itself, and less so about the language. By associating these concerns with the language, the ICISS report gives the illusion of changing and correcting these issues by simply changing the language used to address the very same substantive issues.

D. The Many Faces of 'Humanitarian'

> "Humanitarian intervention is an orthodoxy and it's taken for granted that if we…do it, it's humanitarian. The reason is because our leaders say so. But you can check. For one thing, there's a history of humanitarian intervention. You can look at it. And when you do, you discover that virtually every use of military force is described as humanitarian intervention."[123]
>
> - Noam Chomsky, *Liberating the Mind from Orthodoxies*

The term 'humanitarian' takes on different, often conflicting, meanings depending on whether it is used in political and legal discourse or whether it is considered linguistically. Literally speaking, 'humanitarian' is an adjective that signifies a person who seeks to promote human welfare. Some synonyms of the term include: humane, benevolent, merciful, gentle, philanthropic, altruistic, and charitable. Since the 1990s, the term 'humanitarian' has gained currency in international legal, political and human rights discourse and has taken on an entire gamut of meanings. In a world fraught with natural and economic disasters that lead to widespread hunger, pandemic diseases and poverty, the crises themselves and the assistance that is provided to people affected by them are qualified as 'humanitarian' as they affect human welfare. International organizations and agencies of the UN provide 'humanitarian' aid to relieve individuals who are affected by 'humanitarian' disasters.

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[122] *ICISS*, *supra* note 10, at 16; As demonstrated in the following chapters of the thesis, the new language actually uses the potential beneficiaries to bolster the intervention narrative and to construct the 'Self' of R2P, the Occident, as the contrasting image of the beneficiaries and the states they are in, the Orient. The new language also uses the responsibilities to prevent and reconstruct as rhetorical accessories to the responsibility to react in an effort to dilute the contentious issue of intervention and finally, the new language labels and delegitimizes dissent as irresponsible.

[123] *Chomsky Orthodoxies*, *supra* note 45.

Meanwhile, in political and legal discourse, the term 'humanitarian' becomes misleading and incongruent to its literal definition.[124] International 'humanitarian' law is the law of war, governing and regulating the conduct of armed conflicts, while 'humanitarian' intervention is the use of military force to intervene in the internal affairs of a state where human rights are being violated.[125] Paired with the word 'intervention' or sandwiched between the words 'international' and 'law', 'humanitarian' becomes a euphemism for military action or for war. In theory, 'humanitarian' intervention and international 'humanitarian' law are 'humanitarian' in that they are motivated by the will and intent to protect populations whose lives and human rights are at risk. In that sense, they are benevolent and charitable. That said, the word 'humanitarian' in the context of military intervention or war is paradoxical, as military action by definition, cannot be gentle, merciful or benevolent. Nevertheless, 'humanitarian intervention' has been framed as being the philanthropic, altruistic means through which responsible states protect human rights violations taking place in other states that have forfeited their responsibilities, while international humanitarian law is assumed to be inclusive, providing protection for all people implicated in armed conflicts.[126]

Since the development of R2P, "the United States and its coalition partners [have used and continue to exploit] humanitarian pretexts to pursue otherwise unacceptable geopolitical goals and to evade the non-intervention norm and legal prohibitions on the use of international force."[127] As a result, legal analysts like Peter R. Baehr have rejected the term humanitarian "as a misnomer."[128] Baehr argues that the term humanitarian is used in political and legal discourse because it "has the advantage of sounding nice, while being sufficiently vague so as to leave governments considerable freedom of action."[129]

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[124] Because the term 'humanitarian' in its literal form is used to deal with crises that are often natural and out of human control, the term when used in the context of military intervention, political wars, sanctions etc. gives the impression that the actions that brought about the humanitarian problems are also natural and consequential; i.e. nobody is responsible for them.
[125] The same applies for "intervention for humanitarian protection purposes," a clause that is used frequently in the ICISS report.
[126] *See Mégret, supra* note 71.
[127] Robert Falk, HUMANITARIAN INTERVENTION: ELITE AND CRITICAL PERSPECTIVES, 1-2 GLOBAL DIALOUGE 7 (2005) at 1, http://www.worlddialogue.org/content.php?id=329.
[128] Peter R. Baehr, *Humanitarian Intervention' A Misnomer*, in INTERNATIONAL INTERVENTION IN THE POST-COLD WAR WORLD: MORAL RESPONSIBILITY AND POWER POLITICS 25 (Michael C. David & Wolfgang Dietrich eds, 2004).
[129] *Id*, at 34.

While the word still holds substantial value in R2P rhetoric, Deller claims that R2P itself "was designed precisely to move beyond the discredited notion of humanitarian intervention [as a means in itself to] confron[t] mass atrocities" through "emphasis on prevention [,] peaceful measures," rebuilding and protection.[130]

E. Deconstructing The 'Responsibility' to 'Protect'

> "[T]he **responsibility** to protect acknowledges that the primary **responsibility**…rests with the state concerned, and that it is only if the state is unable to unwilling to fulfill this **responsibility**, or is itself the perpetrator, that it becomes the **responsibility** of the international community to act in its place. In many cases, the state will seek to acquit its **responsibility** in full and active partnership with representatives of the international community. Thus the '**responsibility** to protect' is more of a linking concept that bridges the divide between intervention and sovereignty."[131]
>
> -ICISS, *Shifting the Terms of the Debate*

Similar to the above analysis of the evolution and function of the word 'humanitarian' in this discourse, it is important to take a closer look at the new terminologies that have been adopted to replace and displace the negative connotations carried by 'humanitarian intervention'. Like 'humanitarian', the words 'responsibility' and 'protect' are instrumental in garnering support for intervention as well as sympathy for the "potential beneficiaries" of intervention.[132] Closer analysis of these terms reveals that they are reminiscent of the polarizing emancipatory language of the colonizing mission.

The ICISS report declares that the responsibility to protect should be exercised by the international community when sovereign states fail to protect their own citizens from avoidable catastrophe.[133] In its explanation of the term 'responsibility to protect,' the report acknowledges that the "primary responsibility…rests with the state concerned;" however that responsibility is forgone when and if a state is not fulfilling its primary human protection duties toward its own citizens.[134] Within the parameters of the report, failure to fulfill these duties could include being the actual perpetrator of catastrophic

[130] *Deller*, *supra* note, 111, at 64.
[131] *ICISS*, *supra* note 10, at 17.
[132] *ICISS*, *supra* note 10, at 16.
[133] *ICISS*, *supra* note 10, at 5.
[134] *ICISS*, *supra* note 10, at 17.

violations of human rights like genocide, ethnic cleansing, rape or starvation, or by being "unwilling or unable" to end them.[135] However, the report does not stipulate what constitutes will or ability to end such atrocities, leaving excessive room for interpretation. The practical result of this ambiguity is that as long as a threat to human rights can be characterized as imminent and a state can be framed as unwilling or unable to protect its citizens, other states can justify intervention. This is problematic because it leaves the necessity to intervene to be determined on a case-by-case basis rather than through an internationally agreed upon criteria. Once a state in question can be characterized as failing to fulfill its primary responsibility, then responsibility to intervene is automatically borne by other states. While this is rhetorically, persuasively and practically effective, it is also one of the intrinsic flaws of the R2P framework

E.1 Responsibility

Deconstructing the word 'responsibility' reveals that it is by far the most powerful word in the R2P discourse. The term is fully loaded, carrying with it significant legal, historical and linguistic connotations. When placed in the context of intervention, human protection and sovereignty, the word 'responsibility' and its multiple associated definitions strategically create an ambiguous rhetorical space. An examination of the rhetorical genealogy of the term illustrates how the ambiguous space it creates serves as an arena for the legal and political exercise of power.

In international legal discourse, the term 'responsibility' refers specifically to 'state responsibility', the laws that govern when and how states should be held responsible for breaching their international legal obligations. The laws of state responsibility also determine the appropriate legal consequences for internationally wrongful acts, including cessation, non-repetition and reparation.[136] Since the establishment of the UN, the codification of the Law of State Responsibility has been an extremely contentious, lengthy and complicated work in progress, involving five different special rapporteurs over the course of 50 years. Finally, in 2001, the International Law

[135] *ICISS*, *supra* note 10, at 31.
[136] REPORT OF THE INTERNATIONAL LAW COMMISSION FIFTY-THIRD SESSION 216 (23 April-1 June and 2 July-10 August 2001), http://www.un.org/ga/search/view_doc.asp?symbol=A/56/10%28SUPP%29 (Articles 30 and 31).

Commission (ILC) adopted the Draft Articles on the Responsibility of States for Internationally Wrongful Acts and the related commentaries in full.[137] Since 2001, the International Court of Justice (ICJ) has cited the draft articles in international court proceedings, elevating the articles to the realm of customary international law. For the ILC to adopt the draft articles, it was necessary to keep them as general and abstract as possible, leaving substantial space for interpretation. However, the one concrete element of an internationally wrongful act is that it must be attributable to a state and constitute a breach of an international obligation consisting of either an action or an omission. Thus, the concept of 'responsibility' in international legal discourse refers to state crimes and wrongful acts; 'responsibility' is an element in a system of control, governing interstate relations.

Meanwhile, historically, the term 'responsibility' is reminiscent of colonial discourse and the purported 'responsibility' of the colonizers to civilize, emancipate and educate the Other. Colonial discourse gained much of its persuasive power through carefully crafted assumptions that were presented as natural truths to legitimize and promote imperial control and conquest. At the core of these assumptions were the notions that the cultural, religious and legal values of the Occident were inherently better than those of the Orient and that the civilized people of the European, Western Occident were naturally and genetically superior to the people of the Eastern, non-European Orient, who were 'barbaric,' 'savage,' 'dirty,' 'primitive,' and 'wild'.[138] These assumptions about natural superiority served to justify domination and colonization as a 'responsibility' that emerged from the contrasting generous altruism of the Occident. The colonial narrative was promoted not only through political discourse, but also, as Berman and Said suggest, through art and literature as central to the colonial mission was the spread of colonial propaganda. "The White Man's Burden," a poem that was published in the late nineteenth century by British poet Rudyard Kipling provides poignant insight into colonial rhetoric, the binary oppositions it produced and how it constructed and employed

[137] DRAFT ARTICLES ON THE RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS, *Report of the ILC on the Work of its Fifty-third Session, (2001)* *http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf*.
[138] *Orientalism, supra* note 32.

the notion of colonial 'responsibility'. [139] In Kipling's poem, the "White Man's burden" represented the Occidental 'responsibility' "to veil the threat of terror," to "[f]ill the mouth of [f]amine," and to cease the "savage wars of peace."[140] The poem juxtaposes the rational, pious, altruism of the Occident against the "savage," "need[y]" and "sullen" barbarism of the Orient. [141] In doing so, it exhorts the "White Man"/Occident to fulfill its "burden"/responsibility to "serve," feed and emancipate the "[h]alf-devil and half-child"/Orient from its inevitable self demise.[142] A product and instrument of this colonial notion of 'responsibility' was a sense of moral anxiety regarding the possibility of decolonization. This anxiety was promoted far and wide to garner continued support for the colonial enterprise. Significant efforts to implore the Occident's 'responsibility' toward the chaotic, conflict-ridden Orient meant that departure of colonial rule would lead to mayhem in the colonized world, a failure to fulfill the Occident's God-given 'responsibility'.

The homonymy of 'responsibility' extends beyond colonial and legal connotations. Linguistically, the term 'responsibility' is a synonym for duty, obligation or liability, while it can also imply a burden, blame, or guilt. Whereas parents have a 'responsibility' to care for their offspring, thieves can be held 'responsible' for robbery. However, at a subliminal level, 'responsibility' conjures the notion of making someone responsible over someone else. Invoking 'responsibility' also has a psychological consequence in that it creates a distinction between responsible and irresponsible, fit and unfit, or innocent and guilty. In its application to states through R2P, a state that fulfills its responsibility would be characterized as responsible, implying conscientiousness, reliability, and morality. Nonetheless, the ICISS report fails to provide an explanation of principles on which these 'responsible' states gain their responsibility and how it becomes incumbent on them to exercise their inherited duty on the territory of other states. The report only alludes to definitions of irresponsible states, but fails to do the same for 'responsible' states. Regardless, once a state is deemed 'responsible' for

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[139] Rudyard Kipling, *The White Man's Burden*, 1899 at http://www.fordham.edu/halsall/mod/kipling.asp [hereinafter *Kipling]*.
[140] *Id*.
[141] *Kipling, supra* note 139.
[142] *Kipling, supra* note 139 (also see Chapter IV, Section C of this thesis for more on resemblance between Kipling and R2P rhetoric).

protecting civilians in another state, on a semantic level it automatically acquires the associated characteristics of morality, trust, and reliability as listed above and imposes the contrasting characteristics onto the other state. The word 'responsibility' derives its power from its ability to evoke these multiple definitions simultaneously, rendering their connotations interchangeable; the word 'responsibility' implicitly suggests all of the above without saying any of the above.

E.2. Protect

The word 'protect' further illuminates the ideal of responsibility by insinuating the acts of safeguarding, defending and sheltering. As such, states that are deemed 'responsible' to 'protect' other states, must have the means to provide defense and shelter, meaning that such states would need to have the monetary and military resources to fulfill such duties. On the basis of resources, this requirement necessarily excludes developing nations from the list of 'responsible' states, which implicitly suggests that developing nations are irresponsible.[143] Additionally, in order to invoke 'protection', the responsible states rely on a vulnerable subject in need of defense. Therefore, the civilians of the states where protection is to be carried out serve as fuel to justify intervention by responsible states. In other words, to define and characterize themselves, the responsible states automatically require defenseless vulnerable victims in need of protection as their reference point. The R2P narrative therefore defines the potential beneficiaries of intervention in the same way that colonial narrative described colonial subjects as defenseless and in need of emancipation.

The ICISS report also explains that in some cases "states will seek to acquit [their] responsibility in full and active partnership with representatives of the international community."[144] In this way, R2P is cast as a "linking concept that bridges the divide between intervention and sovereignty."[145] As a result, rather than evading the principle of state sovereignty, R2P strategically overcomes the barrier sovereignty poses

[143] Also, states that are, at some point, deemed to be 'responsible', are much less likely to be ever beconsidered as 'irresponsible,' even in the future. For example, no nations would think about invoking R2P in Ferguson, Missouri or in England during the riots. In other words, 'responsible' states become perpetually immune to ever being characterized as 'irresponsible' since it is assumed that they have the power, influence and/or financial means to 'protect'.
[144] *ICISS*, *supra* note 10, at 17.
[145] *Id.*

by diluting the concept and framing sovereignty as a collective enterprise, a "full and active partnership."[146] This notion of collective security is also suggested in the UN reports that endorse R2P.[147] In this way, R2P functions to replace the concept of sovereignty as a right with sovereignty as a responsibility, which inevitably functions to support intervention narratives. This is effective because the notion of sovereignty as responsibility that is proposed by R2P is not rhetorically contentious or controversial. Hence, the simple representation and definitions of responsibility (and implicitly irresponsibility) as provided by R2P offer a malleable alternative to state sovereignty and the principle of non-intervention, and in turn support and justify interventionist objectives.

[146] *Id.*

[147] *See UN GA Outcome Document*, *supra* note 102, at 30.
See UN SG In Larger Freedom, *supra* note 103, at 24-25.

III. Beyond Rhetoric – Recharacterizing Sovereignty

As demonstrated in Chapter II, the vocabulary of R2P is capable of achieving significant transformative reconstruction of humanitarian intervention. R2P rhetoric can also be credited with the recharacterization of state sovereignty, which is at the heart of the doctrine and of neocolonial political rhetoric. Leading up to the establishment of R2P, international law and politics were saturated with "calls for clearer rules to guide interventions whose aim was the protection of people, not national security."[148] The focus on people has been instrumental in the discourse at large and specifically in efforts to redefine sovereignty. As discussed in Chapter II, to further ease anxieties about the evasion of state sovereignty, "[t]he ICISS placed intervention within a framework of prevention, reaction, and rebuilding."[149] In this framework, military means were framed as a measure of last resort after exhausting other means for prevention, reaction and protection of populations at risk. This is a strategy that is meant to divert attention from the possibility for military action. However, it is well known that the "appeal to humanitarian reasons as a basis for military interventions has a long and uneven history."[150] As such, "there was substantial opposition among governments from the global South to criteria that would legitimize humanitarian intervention. The history of colonial interventions left them justifiably skeptical about the intentions of Western powers."[151] To manage this skepticism, Orford suggests that contemporary legal and political strategies like R2P "put historical knowledge to work…to shift the focus on to something else which offers…more options" for the exercise of control.[152]

Shifting the terms of the discourse became increasingly necessary as resistance to reconceptualizing humanitarian intervention was mounting in the period leading up to the proposal of R2P. For example, Algerian President Abdelaziz Bouteflika was extremely vocal about his objections to the concept in his 1999 address to the General Assembly where he asserted, "sovereignty is our last defense against the rules of an unequal

[148] *Id*, at 63.
[149] *Id*, at 64.
[150] *Id*, at 63.
[151] *Id*, at 63-64.
[152] *Orford Jurisprudence*, *supra* note 62, at 9.

world."[153] In addition, UN voting blocks representing the developing world, the Non-Aligned Movement and the Group of 77, "repeatedly rejected the right of humanitarian intervention in their collective statements" before R2P was adopted by the General Assembly.[154] As a result, R2P needed to achieve two substantial tasks: firstly, it needed to adopt a new language to displace negative connotations of 'humanitarian intervention', as discussed in Chapter II, and secondly, it needed to make a rhetorical and logical shift from sovereignty as control to sovereignty as responsibility to serve as the foundation on which to justify intervention.

A. Sovereignty: From Control to Responsibility

> The conception of the unitary state is a fiction, but it has been a useful fiction, allowing analysts to reduce the complexities of the international system to a relatively simple map of political, economic, and military powers interacting with one another both directly and through international organizations. But today, it is a fiction that is no longer good enough for government work. It still holds for some critical activity such as decisions to go to war, to engage in a new round of trade negotiations, or to establish new international institutions to tackle specific global problems. But it hides as much as it helps.[155]
>
> – Anne Marie Slaughter, *A New World Order*[156]

In any discussion about the definition, parameters and scope of state sovereignty in today's twenty-first century context, it is imperative to consider the suggestions set forth by Anne Marie Slaughter in *A New World Order.* Slaughter provides one of the most robust responses to critics of R2P who are concerned with the doctrine's potential to prevaricate the principle of state sovereignty. While critics tend to perceive Slaughter's conclusions as radical, many influential decision makers, particularly in the US, consider her ideas to be progressive, liberal and valuable. *A New World Order* does not address the doctrine of R2P directly, but it does elucidate issues that are pertinent to the debate, uses

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[153] *Deller, supra* note, 111, at 64.
[154] *Id.*
[155] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 32 (Princeton University Press 2004) [hereinafter *Slaughter]*.
[156] Anne-Marie Slaughter is a prominent and vocal politician, legal analyst and author. She is a former Director of Policy Planning in the US State Department and a Professor of Politics and International Affairs at Princeton University; her writings are extremely influential in the debates on reconceptualizing humanitarian intervention and state sovereignty. Slaughter has published many books, essays and articles that grapple with modern-day political and legal issues.

much of the same strategies to redefine sovereignty, and provides an analysis of international relations that seeks to explain the conditions that make modern developments in international law and relations (like that of R2P) a necessary and natural progression from the staunch "outdated and inadequate" Westphalian concept of state sovereignty that has been a foundational international legal principle since the 1940s.[157]

In *A New World Order,* Slaughter describes a seismic shift in international relations during the twenty-first century that, if accepted, could effectively "address the central problems of global governance" that still plague inter-state relations today.[158] She argues that the global context which gave rise to international organizations in the 1940s is so drastically different compared to today's twenty-first century reality that the international organizations that were born in that context are too outdated to "meet contemporary challenges [and] must be reformed or even reinvented [or] new ones must be created."[159] In other words, the UN, which came to life in 1945, is no longer a suitable or effective option for the governance of all international affairs, and modern doctrines like R2P are necessary to maintain international peace and security.

Slaughter illustrates a vision of a 'new world order' composed of disaggregated networks of judges, government officials, parliaments, bankers, nongovernmental organizations, professional experts and more.[160] She asserts that these networks are already a reality and that the role they play in international relations is too significant to ignore. Slaughter suggests that it is no longer sufficient to speak solely of interstate relations between "unitary state[s]" when trying to understand the "complexities of the international system," and interstate relations should be seen as a collective enterprise, a "full and active partnership."[161], [162] Like R2P, Slaughter's solution to address contemporary global challenges is a conceptual shift from sovereignty as control to sovereignty as collective responsibility.[163] Slaughter's model redefines sovereignty as a

[157] *Slaughter, supra* note 155, at 8. The quoted words are actually referring to the UN at large, but her point is that the context that gave birth to the United Nations in the 1940s is vastly different than what we see today and needs to be reformed or replaced.
[158] *Id*, at 1.
[159] *Id*, at 8.
[160] *Id*, at 19 and 20.
[161] ICISS, *supra* note 10, at 17.
[162] *Slaughter, supra* note 155, at 32.
[163] For examples of R2P suggesting collective responsibility, *see*: *UN A More Secure World, supra* note *101*, at 17; *UN GA Outcome Document*, supra note 102, at 30; *ICISS, supra* note 10, at 12

prestigious membership that is earned by individuals and institutions in the networked world. In this model, sovereignty becomes a member status that in and of itself promotes the norms of honesty, integrity and collaboration that are purportedly lacking in international relations and international law today. The problem with the membership concept is that it is in direct contradiction to the Westphalian system of international relations that presents all states as equal, whereas prestigious membership suggests exclusion and exclusivity.

B. Displacing History and Sovereignty in UN Documents

Like Slaughter's 'New World Order,' the UN documents that have endorsed and promoted R2P have largely contributed to efforts to reconceptualize sovereignty as a conditional right and as a collective enterprise. It is important to examine the rhetorical and political strategy used in these documents to distance the notion of state sovereignty from its Westphalian historical origin and how the narrative "put[s] historical knowledge to work…to shift the focus on to" new notions of sovereignty "which offe[r] more options" to manage international relations.[164]

B.1 Dismissing Westphalian Sovereignty

> "Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a state to protect the welfare of its own peoples and meet its obligations to the wider international community."[165]
>
> - Paragraph 29, *A More Secure World: Our Shared Responsibility, Report of the High-Level UN Panel on Threats*

The words 'perceptions', 'clearly' and 'obligation' are all problematic and insightful in this passage. Firstly, relegating understandings of the elements of Westphalian State sovereignty to mere 'perceptions' undermines their historical and legal significance. The notion of state sovereignty has its basis in the peace of Westphalia,

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See also "disaggregated sovereignty" in *Slaughter, supra* note 155, at 34.
[164] *Orford Jurisprudence, supra* note 62, at 9.
[165] *UN A More Secure World, supra* note 101, at 17.

dating back to 1648.[166] The concept of state sovereignty under the Westphalian system declares that part and parcel of statehood is territorial sovereignty and part and parcel of territorial sovereignty is that "supreme authority is vested in the state."[167] Being sovereign, states had no prescribed responsibilities; they had full control over all of their affairs. As such, sovereignty precludes any role for foreign intervention in internal state affairs, regardless of a state's power or wealth. By reducing the essential defining feature of Westphalian sovereignty to basic "*perceptions*," the report belittles the *right* of sovereign states to non-intervention and paves the foundation for a reformulation, a dilution, of this right. Secondly, the word "clearly" closes the space for rational dispute and presents the conclusion that sovereignty "carries with it…obligations" as a fact rather than an opinion. Furthermore, the understanding that sovereign states are responsible for the protection of their people is widely accepted. However, the idea that states have "obligations to the wider humanitarian community" besides non-intervention and non-aggression is not as well defined in international legal treaties.

The rhetorical strategy at work in this paragraph is to present opinions and assumptions about international legal history as facts. In doing so, any state that disputes the claims or the rhetoric presented in the report of the UN High-Level Panel would appear to be disputing the importance of human protection and could consequently be characterized as unwilling to fulfill its 'responsibility' to protect.[168] As such, similar to

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[166] Derek Croxton, THE PEACE OF WESTPHALIA OF 1648 AND THE ORIGINS OF SOVEREIGNTY at 1 http://www.jstor.org/discover/10.2307/40109077?uid=2&uid=4&sid=21104418851381.

[167] *Orford Jurisprudence*, *supra* note 62, at 7.

[168] *See Chomsky Just War*, *supra* note 97; Chomsky explains the current international legal regime that was instituted in the 1940s with its "provisions on laws of war…codified in the UN Charter, the Geneva Conventions, and the Nuremberg principles, adopted by the General Assembly." He explains that the UN Charter forms the basis of the legal regime that protects states from the "threat or use of force unless authorized by the UN Security Council or, under Article 51, in self-defense against armed attack until the Security Council acts." This is significant to note because the concept of R2P as well as the effort to redefine state sovereignty dilutes the role of the Security Council as the international peacekeeper and puts that role into the hands of the international community. R2P and humanitarian intervention have been equated to just war and rationalized through just war theory. Chomsky explains that just war theory relies on the dismissal of facts and the acceptance of myths. The humanitarian propaganda of the just war theory narrative has been used by powerful states to justify armed attacks in the sovereign territory of states, including for example the US invasion in Afghanistan or more recently the NATO intervention in Libya; "[b]y 'just war,' counterterrorism," R2P or humanitarian intervention, powerful nation states "exemp[t themselves] from the fundamental principles of world order that [they] played [a] primary role in formulating and enacting."[168] Chomsky references the accepted definition of aggression from the Nuremberg Tribunal in an effort to assert that the use of force, whether authorized by the Security Council or not, and whether padded with humanitarian rhetoric, is indeed an act of aggression. What is useful from

the ICISS's critique of humanitarian intervention language for "labeling and delegitimizing dissent as anti-humanitarian," the new concept and language of R2P labels and delegitimizes dissent as irresponsible.[169]

B.2 Establishing Collective Sovereignty

> The Charter of the [UN] seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens. These are the values that should be at the heart of any collective security system for the twenty-first century, but too often States have failed to respect and promote them. The collective security we seek to build today asserts a shared responsibility on the part of all States and international institutions, and those who lead them, to do just that.[170]
> -Paragraph 30, *A More Secure World: Our Shared Responsibility, Report of the High-Level UN Panel on Threats*

Building upon the assumptions discussed in section B.1, paragraph 30 of the 2004 UN report states that "[w]hat we seek to protect reflects what we value."[171] This statement limits the opportunity for formerly colonized states to express their anxiety about the possibility that R2P could set a precedent for twenty-first century imperialist undertakings. Paragraph 30 has two primary rhetorical consequences. Firstly, the logic of the first clause automatically positions any claim that calls the statement into question in direct conflict with support of "dignity, justice, worth and safety" for citizens. This has serious consequences in light of colonial history, as it seems rational that formerly colonized states would tend to resist the notion of "collective security" due to its resemblance to the emancipatory civilizing mission that was central to colonialism. However, doing so leads to the second rhetorical consequence, which is that resistance is equated to a failure to "respect and promote" these intrinsic humanitarian values. The rhetoric is effective in that it became too risky for states to question because they would

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Chomsky's interjection is that he makes reference to the basic provisions enshrined in the international laws that R2P and humanitarian intervention seem to evade.

[169] *ICISS, supra* note 10, at 16; As demonstrated in the remainder of the thesis, the new language actually uses the potential beneficiaries to bolster the intervention narrative and to construct the 'Self' of R2P, the Occident, as the contrasting image of the beneficiaries and the states they are in, the Orient. The new language also uses the responsibilities to prevent and reconstruct as rhetorical accessories to the responsibility to react in an effort to dilute the contentious issue of intervention and finally, the new language labels and delegitimizes dissent as irresponsible.

[170] *UN A More Secure World, supra* note 101, at 17.

[171] *Id*.

appear to not value human protection and this could be used against them as evidence that they are unwilling to protect. This would necessarily open the space for other states to absorb their responsibility. By 2005, the ability of states to question notions of collective security was drastically reduced by the rhetorical precedent set by the political policy makers like Slaughter and the logic of the 2004 UN High-Level report. As such, it seems that UN member states were compelled in 2005 to unanimously adopt R2P at the General Assembly.

C. The Logical Fallacy of *'Responsibility'*

> Discourse is "both an instrument and an effect of power…[it] transmits and produces power; it reinforces it, but also undermines and exposes it, it renders it fragile and makes it possible to thwart."[172]
> -Michael Foucault, *The History of Sexuality: The Will to Knowledge*

In the same way that R2P establishes a new vocabulary to distance itself from the contentious connotations attached to 'humanitarian intervention', the ICISS report explains that "the language of past debates arguing for or against a 'right to intervene' by one state on the territory of another state is outdated and unhelpful."[173]As such, R2P discourse functions to displace legal definitions of state sovereignty and suggests a conceptual shift from the contentious *right* to intervene to the novel *responsibility* to protect.

According to Aristotle, the father of rhetoric, "rhetoric is the counterpart of dialectic."[174] Dialectic is the art of logical reasoning and argument and relates to the syllogism, a basic form of reasoning that requires two related premises and a conclusion. So, R2P's persuasive strategy is not merely rhetorical, it is also makes a logical shift that functions "to evoke the mechanism of conditionality from the logic of rights."[175] This logic is simultaneously the power and weakness of R2P.

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[172] MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL 1: THE WILL TO KNOWELDGE, (Penguin, 1998) (1976).
[173] *ICISS supra* note 10, at 11.
[174] ARISTOTLE, RHETORIC 3 (W. D. Ross, ed., W. Rhys Roberts, trans., Cosimo, Inc. 2010) (1910-1931).
[175] David Rodin, *The Responsibility to Protect and the Logic of Rights,* FROM RIGHTS TO RESPONSIBILITIES; RETHINKING INTERVENTIONS FOR HUMANITARIAN PURPOSES 55 (eds.

Westphalian sovereignty creates a conceptual "barrier" that disturbs the contemporary notions of disaggregated or collective sovereignty discussed above.[176] Therefore, through R2P, enormous efforts have been invested into adopting a new vocabulary and into displacing historical legal definitions of absolute territorial sovereignty. This has been an essential task in promoting R2P because, in light of the international community's newfound *responsibility* to protect, the traditional sovereign *right* of the state to non-intervention and the universal *right* of the citizen to protection would appear to be in direct conflict with one another.[177] On the one hand citizens have the right to have their human rights protected, while on the other hand sovereign states have the right to be free from external intervention. By attaching conditionality to the sovereign right of the state, R2P creates a hierarchy of rights: human rights take precedent over states' sovereign right to non-intervention. This is an extremely subtle logical transition that has very overt practical consequences. As long as a state can be characterized as unwilling or unable to fulfill its responsibility, its right to non-intervention is necessarily revoked. Accordingly, successful adoption of an international consensus that the supreme authority of the state is conditional makes the task of justifying intervention exponentially easier; this is one of the implicit mechanisms of power intrinsic to R2P. As Foucault explains, the success of power is "proportional to an ability to hide its own mechanisms."[178] What is also hidden by this logical shift is the ways in which the language and rhetoric of human rights have become instrumental in the supporting the effort to recharacterize and conceptualize legal foundations of sovereignty.

The logical transition from rights to responsibilities is the crux and power of R2P. Meanwhile, this logic creates a conundrum when applied to the international community that purportedly inherits the responsibility to protect from states that are unable or unwilling to fulfill their duties toward their citizens. While this logic supports the justificatory apparatus in favor of R2P, if one accepts that on the basis of logic and precedent *responsibility* is the signifier that makes sovereignty conditional, then the same

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Oliver Jutersonke and Keith Krause, Programme for Strategic and International Security Studies 2006) [hereinafter *Rodin]*.

[176] *ICISS, supra* note 10, at 16. *See also Slaughter, supra* note 155, at 43 for Slaughter's notion of "disaggregated sovereignty."

[177] *Rodin, Supra* note 175.

[178] *Foucault Intro, supra* note 42.

conclusion must apply in relation to the international community's *responsibility* to protect. As discussed in Chapter II, Section E.1, *responsibility* implies duty, obligation or liability. Because 'responsibility to protect' is used to as rhetorical alternative to 'intervention', then logically and semantically, intervention becomes a duty of the international community.[179] When a state fails to fulfill its responsibility, its duty, to protect its citizens, the rhetorical consequence is that it is characterized as irresponsible and the legal consequence is the loss of its territorial sovereignty. Therefore, if the international community were unable or unwilling to intervene in a state where violations of human rights are taking place, then the same logic would suggest that the international community is 'irresponsible'. Nevertheless, when the international community fails to fulfill its responsibility to intervene, it faces neither rhetorical nor legal consequences. This is the weakness of the R2P logic: the failure of the doctrine to define the duties of responsibility and the consequences that result from failure to act. So, based on logic, "the talk of 'responsibility' to protect on the part of the international agencies and the international community is mere rhetoric."[180] R2P is not a logical fallacy, but it is the institutional and political recipe for a postcolonial international double standard.

[179] *Rodin*, *Supra* note 175, at 57.
[180] *Id.*

IV. The Oriental Other

"What does need to be questioned…is the *mode of representation of otherness."*[181]
-Homi K. Bhabha, The Location of Culture

"[T]he first and last mistake is to judge the Other on one's own terms."[182]
-Kwame Anthony Appiah, Is the Post- in Postmodernism the Post- in Postcolonial?

"Legal texts about intervention create a powerful sense of self for those who identify with the hero of that story. Law's intervention narratives thus operate not only, or even principally, in the field of state systems, rationality and facts, but also in the field of identification, imagination, subjectivity and emotion."[183]
- Anne Orford, *Humanitarian Intervention, Human Rights and the Use of Force in International Law*

A. International Law's 'Self' and its 'Other'

The second step to conducting a post-colonial analysis of R2P is to use insight from post-colonial theory to substantiate and expand the rhetorical analysis conducted in above in order to finally draw cogent conclusions about the R2P discourse itself. This section will reveal how the discourse of R2P functions as a mechanism of power that is exercised over international law's 'Oriental Other.' This power is established by constructing the other as the contrasting image of the self and thereby maintains a theoretical, political and legal gap between the Occident and the Orient. This analysis will also explain the psychological impact that the discourse has on subjects of both the Occident and the Orient and how the discourse establishes Occidental authority that can have a tangible impact on international relations.

Many post-colonial and international legal theorists alike have engaged with the question of the 'Other' and its implications on the exercise, production and distribution of power.[184] Like colonialism, international law is predicated on a powerful system of othering. International law has a distinct 'Self' and a series of abstract 'Others' - Africans, Asians and Arabs; women, children and refugees; failed states and developing

[181] *Bhabha, supra* note 31, at 68.
[182] Kwame Anthony Appiah, *Is the Post- in Postmodernism the Post- in Postcolonial?*, CONTEMPORARY POST COLONIAL THEORY: A READER 57 (Padmini Mongia, ed. Arnold 1997).
[183] *Orford Reading Humanitarian Intervention, supra* note 114.
[184] *Orford Jurisprudence, supra* note 62, at 5.

states.[185] While there are treaties and conventions dedicated to dealing with these 'Others', international law as a whole is a system that was designed to navigate and manage the problem(s) posed by the 'Other'(s).[186] As international law evolves to respond to contemporary challenges presented by real and perceived threats like terrorism, environmental degradation, civil war, and religious extremism, to name a few, it invariably rethinks, resituates and redefines the relationships between its 'Self' and its 'Others' through the establishment of new doctrines, like R2P.[187] Interrogating this process reveals how othering operates as a mechanism of power within the discourse of humanitarian intervention and how colonial relationships and subject positions are reinforced, reproduced and transmitted over time.[188]

As a starting point, it is important to acknowledge that the colonial history from which international law and the concept of sovereignty emerged has undeniably made it a Eurocentric system.[189] Being Euro- or Western-centric, the Occident becomes the reference point, the baseline, from which the system of international law and its ideas and ideals of lawful and unlawful are formulated and transmitted. Accordingly, the Eurocentric Occidental 'Self' of international law becomes a point of comparison from which to constitute the Oriental 'Other'(s); articulating the distinctions and the relations between the two is a perpetual and central task of international law.[190] A preoccupation of postcolonial theory is to expose this process of establishing and promoting difference between the 'Self' and the 'Other.' Meanwhile, liberal positivist international law continues to try to distance itself rhetorically and theoretically from its undeniable colonial history by regarding colonialism as a matter of the past and replacing overt colonial distinctions between the 'civilized' and the 'uncivilized' with discreet distinctions that are just as powerful, but not as noticeable. Said's Orientalism with supporting insight from Antony Anghie's 'dynamic of difference' and Frédéric Mégret's

[185] *Orford Jurisprudence*, *supra* note 62, at 7; *Mégret*, *supra* note 71, at 267.
[186] *See* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 60, Cambridge: Cambridge University Press (2005) [hereinafter *Anghie Making of IL*]; *Mégret*, *supra* note 71.
[187] *See Orientalism*, *supra* note 32, at 3; *Orford Jurisprudence*, *supra* note 62, at 3.
[188] *See* Antony Anghie, *Governance and Globalization, Civilization and Commerce* in *Orford supra*, note *62*, at *266.*
[189] *Roy*, *supra* note 35, at 316; *Anghie Making of IL*, *supra* note 186, at 4; *Orford supra*, note *62*, at 237, 238, 240, 242.
[190] *See* Anghie's 'Dynamic of Difference' in *Anghie Making of IL*, *supra* note 186, at 4.

'constitutive other' provide a helpful framework to scrutinize the mechanisms of othering produced by R2P.

Anghie's 'dynamic of difference' refers to "the endless process of creating a gap between two cultures, demarking one as 'universal' and civilized and the other as 'particular' and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society."[191] This everlasting bridging process sustains the power relations between international law's 'Self' and its 'Other,' despite the proliferation of contemporary international legal doctrines that are apparently inclusive, universal and regard all states equally. International Law's power over the Orient emanates from these continual efforts to bridge the gap between the Occident and the Orient through developing seemingly 'new and improved' doctrines for protecting human rights and for managing international relations that in practice serve as 'new and improved' ways to manage colonial relations. The ICISS report claims that it needed to adopt a new language because the "traditional language" of humanitarian intervention "and the concepts which lie behind particular choices of words" were actually "barrier[s] to dealing with the real issues involved."[192] After analyzing the new language it has become apparent that, following the logic of the 'dynamic of difference,' the concepts that lie behind the new vocabulary actually serve as the bridge to avoid dealing with the real issues involved.

Frederic Mégret in *From 'Savages' to 'Unlawful Combatants'* suggests that International Humanitarian Law, the laws of war, are intentionally designed to exclude the colonial Other. He states, "exclusions from the protection of the laws of war might in fact be very much legitimized by some of the founding ambiguities of the laws of war themselves."[193] The aim of his work is to delve into the ambiguities to bring to light how international humanitarian law "has always had an '[O]ther'…that is both a figure excluded from the various categories of protection, and an elaborate metaphor of what the laws of war do not want to be."[194] Mégret explains that international humanitarian law "has a status for everyone" who could possibly be implicated in a war situation, such that

[191] *Id.*
[192] *ICISS, supra* note 10, at 11.
[193] *Mégret, supra* note 71, at 266.
[194] *Id.*

everyone enjoys some sort of legal protection.[195] However, "every protection under the laws of war, every status, might also be gained by denial of an '[O]ther,' so that the law is both inclusive and exclusive."[196] Following White's theory of 'constitutive rhetoric,' through which legal rhetoric creates and constitutes its subjects and its objects, Mégret's argument is that international humanitarian law creates a 'constitutive other.' [197] He asserts that the 'constitutive other' was "central to the *emergence* of the laws of war."[198] The constitutive other was often the raison d'être driving the creation of international humanitarian law, as the laws sought to "distance themselves" from the "uncivilized, barbarian, savage" other. [199] Focusing on the 'constitutive other' allows for genuine disclosure about the origins of the continuing reliance of international law on patterns of exclusion, beyond the realm of international humanitarian law.

B. The Orientalist Mechanism

This thesis argues that R2P is *itself* an Orientalist discourse that functions as a mode of reproducing and exercising power over the 'Other' of international law through the construction and promotion of colonial binaries. Orientalist discourse is based on the constitution of clear distinctions between the Occident and the Orient that define the Orient as the "contrasting image, idea, personality, [and] experience" of the Occident.[200] R2P's distinction between the responsible 'Self' and the irresponsible, needy 'Other' are reminiscent of the archetypal intellectual and political hegemonic discourses of the colonial era. Said explains, "because of Orientalism [,] the Orient…is not…a free subject of thought or action."[201] The Orient, and subsequently the Oriental, is spoken for and constituted by Occidental cultural, political, and literary and legal works. Therefore, Orientalism renders the 'Other' of R2P as "none other than the colonial '[O]ther'."[202]

As discussed, the ICISS report has made concerted efforts to establish an alternative vocabulary to deviate from the sovereignty-intervention debate that "focuses

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[195] *Id.*
[196] *Id.*
[197] *Id,* at 267.
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Orientalism*, *supra* note 32, at 3.
[202] *Mégret, supra* note 71, at 267.

attention on the claims, rights and prerogatives of the potentially intervening states much more so than on the urgent needs of the potential beneficiaries of the action."[203] Indeed, the rhetorical impact of introducing the concept of an international 'responsibility' to 'protect' is an apparent shift in "emphasis [,] away from the would-be intervening states and their rights under international law" and towards "populations at risk of large-scale loss of life or ethnic cleansing" and the would-be intervening states' obligations.[204] However, closer analysis reveals that in practice, through this shift in focus, R2P discourse actually appropriates the explicit and implicit appeals of the Orient to substantiate the authority of the Occident; the populations at risk and their circumstances serve to fuel the interventionist narrative.[205] This supposed shift in focus effectively constitutes the 'potential beneficiaries' and the circumstances that afflict them, as the contrasting image of the 'potentially intervening states.' In other words, the R2P narrative employs the afflicted Orient to describe everything that the Occident is *not.* It is this supposed shift in focus that reproduces and reinforces colonial binary oppositions between the civilized Occident and the barbaric Orient.

C. The Orientalist Process: "The White Man's Burden" = "The Responsibility to Protect"

Orientalist discourse has a tendency to represent its "subject matter without ever changing its mind about the Orient as always being the same, unchanging, uniform, and [a] radically peculiar object."[206] The Orientalist is seduced by the 'peculiar' and allegedly exotic subject matter that is the Orient and the Oriental and makes it the object and subject, the raison d'être, of his/her practice.[207] Early orientalist texts represented the "peculiar" Orient as a perverse place wrought with conflict and barbarism. Following the modus operandi employed by Berman and Said to analyze Orientalist discourse (modernist art and colonial literature), I will examine the ICISS report as a contemporary

[203] *ICISS*, *supra* note 10, at 16.
[204] *Deller*, *supra* note, 111, at 64.
[205] Like how Berman's Modernist artists and Said's Flaubert embraced the barbaric Oriental to invigorate the exotic energies of the orient, and Said's Flaubert appropriated the Orient to showcase as the subject of his work, R2P uses the perverse orient with its self-destructive delusions to empower its interventionist narrative.
[206] *Id.*, at 98.
[207] *Mégret*, *supra* note 71, at 267.

Orientalist discursive specimen to demonstrate how R2P others and appropriates the Orient in the same way that colonial orientalists did. To conduct this analysis, I will compare and contrast the colonial subject in Kipling's *The White Man's Burden* with the 'beneficiaries' of R2P in the ICISS report. This will demonstrate that the colonial subject of Kipling's nineteenth century poem and the "potential beneficiaries" of the twenty-first century's R2P are indeed the "the same, unchanging [and] uniform." [208] More importantly, this analysis will also provide an example of how "Orientalism [is] transmit[ted]…from one epoch to another."[209]

The White Man's Burden is about the colonization of the Philippines by the United States in the nineteenth century.[210] The poem provides a vivid example how the 'other' was orientalized in colonial literature. It is a literary artifact that provides a clear example of how colonial Orientalist rhetoric promoted imperialist aspirations as noble, justified and necessary. [211] Kipling's subject, the Filipino 'Other,' is immediately characterized in the title of the poem as a "burden."[212] This implies that the 'Other' is a liability or a problem that needs to be solved, managed and saved. This notion of burden as liability is analogous to R2P's loaded notion of 'responsibility.'[213] In the first stanza of the poem, Kipling describes the 'Other' as the White Man's "wild" "new-caught" "captiv[e]," suggesting that it is a "radically peculiar object"[214] that needs to be tamed; it is therefore not a "free subject of thought or action."[215] Throughout the poem, the 'Others' are characterized as "fluttered folk," "sullen peoples," "half-devil and half-child" and "sloth[s]" who are "silent" "heathen[s]."[216] While Kipling overtly orientalizes the 'Other', R2P does so implicitly. R2P describes the populations it seeks to assist as 'beneficiaries,' implying that they are passive recipients of the international community's benevolent service and thereby incapable of contributing to or having a say in ending the atrocities they are afflicted by. This is an example of the Orientalist tendency to regard

[208] *Id.,* at 98.
[209] *Id.,* at 15.
[210] *Kipling, supra* note 139.
[211] *Orientalism, supra* note 32, at 226.
[212] *Kipling, supra* note 139.
[213] *See* Chapter II, Section E.1 of this thesis for analysis of historical connotations of the word 'Responsibility' with reference to Kipling.
[214] *Orientalism, supra* note 32, at 98.
[215] *Id*, at 3.
[216] *Kipling, supra* note 139.

the Orient as "non-active, non-autonomous [and] non-sovereign with regard to itself."[217] While the ICISS report claims that R2P refocuses attention on the potential beneficiaries of intervention, it merely refers to its beneficiaries in passing, at best as "victims who suffer and die."[218] In lieu of explicitly characterizing the other as Kipling does, the ICISS report claims to refocus attention onto the 'potential beneficiaries' of intervention, the other, but instead it actually strategically focuses on the crimes that give rise to the international community's "duty to protect" such as "mass killing…systematic rape and…starvation."[219] This tactic positions the responsible international community in opposition to the irresponsible states who are themselves "the actual perpetrator[s] of crimes or atrocities" or are "unwilling or unable to fulfill [their] responsibility."[220]

Kipling's poem urges the colonialists to fulfill their duty to emancipate the Orient by warning about the consequences of inaction against "the threat of terror," "[f]amine," "sickness," and "savage wars."[221] It urges the White Man to "serve [the] captive's need" and to "work another's gain."[222] Similarly, the ICISS report describes intervention and R2P as "a promise to people in need: a promise cruelly betrayed."[223] It appeals to the collective guilt of the international community that has left "conscious-shocking situations crying out for action" to "languish in indifference and neglect."[224] And it warns that if the international community "stays disengaged, there is a risk of becoming complicit bystanders in massacre, ethnic cleansing, genocide" and "acts of terror or rape."[225] The report describes inaction as a "risk to people everywhere."[226] In essence, the Occidental Euro-Western international community described by R2P is rhetorically analogous to the Occidental Euro-Western White Man in Kipling's poem. Both the ICISS report and *The White Man's Burden* create binary oppositions that characterize the Occident as the civilized and responsible contrast to the uncivilized, dangerous and irresponsible Orient.

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[217] *Orientalism*, *supra* note 32, at 97.
[218] *ICISS*, *supra* note 10, at 2.
[219] *Id*, at 17.
[220] *Id*, at 17.
[221] *Kipling*, *supra* note 139.
[222] *Id*.
[223] *ICISS*, *supra* note 10, at 1.
[224] *Id*, at 5.
[225] *Id*, at 5 and xii.
[226] *Id*.

D. The Orientalist Authority

> "The community-sanctioning authority to settle issues of international peace and security has been transferred from the great powers in concert to the UN. The UN, with the Security Council at the heart of the international-law enforcement system, is the only organization with universally accepted authority to validate such operations."[227]
> -ICISS Report, *The Question of Authority*

Authority is not an innocent rhetorical tool because it "is formed" and "disseminated," and because it is "instrumental" and "persuasive."[228] The purpose of R2P is to establish authority for the international community to intervene in the internal affairs of sovereign states under the umbrella of international law. Said explains that authority becomes "indistinguishable from certain ideas it dignifies as true, and from [the] traditions, perceptions, and judgments it forms, transmits [and] reproduces."[229] The tools that Said uses to study authority in Orientalist works include

> *Strategic location*, which is a way of describing the author's position in a text with regard to the Oriental material he writes about, and *strategic formation*, which is a way of analyzing…the way in which…types of texts, even textual genres, acquire mass, density, and referential power among themselves and thereafter in the culture at large.[230]

As demonstrated throughout this thesis, R2P discourse strategically and rhetorically locates the Occident in opposition to the Orient. The dichotomies between the potential interveners and beneficiaries of 'protection' establish a 'dynamic of difference' that apparently bridges the sovereignty-intervention divide, but functionally maintains the gap between the Occident and its 'Other.'[231] This gap also provides a buffer space from which justified military action emerges and through which Occidental authority materializes. R2P's ironically selfless, humanitarian rhetoric apparently serves to normalize the eccentric Orient and to sustain strategic power relations under the guise of international justice. Strategically, R2P discourse locates the Orient several steps

[227] *ICISS, supra* note 10, at 49.
[228] *Orientalism, supra* note 32, at19-20.
[229] *Id.*
[230] *Orientalism, supra* note 32, at 20.
[231] *ICISS, supra* note 10, at 17.

behind the Occident in terms of political, cultural, economic and legal advancement, exonerating and exhorting Occidental authority to intervene to emancipate the Orient. It is the Orientalist binary oppositions between responsible and irresponsible, safe and dangerous, and civilized and uncivilized that establish the strategic moral high ground from which the Occident can deploy its political and legal mechanisms of power. The focus on the 'constitutive other' of R2P strategically locates the 'international community' on the positive end of binary oppositions and characterizes its political actions and legal decisions as ethical.

Like colonialist rhetoric, the R2P narrative gains much of its persuasive value through appeals to emotion and compassion that are accomplished by appropriating Oriental hardship to exhort Occidental philanthropy. But it also gains much of its credibility and appeal through strategic formation. The seemingly basic responsible/irresponsible dichotomy produced by the new vocabulary of R2P is impressively capable of evoking legal, historical and psychological connotations to qualify the Orient without actually mentioning any of them explicitly. This strategic formation gives the dichotomy referential power to simultaneously suggest the positive image of duty, benevolence and altruism, the negative connotations of guilt and crime, and a slew of strategic colonial binaries. Furthermore, the very notions of 'international law' and 'international community' are themselves rhetorically strategic formations that implicitly represent the Occident without explicitly saying so. International law as a structure of order, control, justice and equity is strategically and rhetorically located in a metaphysical space outside and above states and international relations.[232] There is thus a tendency to turn to international law as an impartial formula for the restoration of international peace and security, to restrain the abuse of power and to establish economic, diplomatic and political justice and cooperation. The 'international community' also enjoys this strategic 'outside and above' formation of the 'international' abstract space. Capitalizing on the referential power of the impartial, disinterested, disengaged 'international,' it is taken for granted that the actions of the 'international community' are just. Moreover, the word 'community' itself suggests inclusivity, collaboration, and collectivity, all concepts emphatically supported by contemporary liberal

[232] *Orford Jurisprudence*, *supra* note 62, at 1.

internationalism. The strategic formation and location of *law* and *states* into the metaphysical '*international'* space gives them immense power. And by placing R2P under the umbrella of liberal *international law* it benefits from the referential power of international law as a trustworthy and universal enterprise.

E. The Orientalist Effect: Ambiguity, Ambivalence and Power

There is nothing 'post' about the post-colonial present we are experiencing today; the effects of the colonial enterprise continue to manage and control the Orient in contemporary international relations.[233] The ideological and political inequalities of the colonial era have been etched into the foundation of the international legal system that also gave rise to the notion of state sovereignty. Despite the emergence of contemporary egalitarian international legal doctrines, each legal development that stems from this foundation invariably recycles its colonial history and reuses its instruments of power and control. In the absence of an honest and explicit acknowledgment of its colonial past, all efforts to veil or purge the colonial residue from the international legal system will be done in vain. R2P is not an exception. The doctrine is effective because it is couched in seemingly progressive liberal humanitarian rhetoric, resulting in a powerful state of ambivalence that achieves the illusion of the 'post'-colonial.

The power of R2P's humanitarian narrative emanates from its ability to veil its colonial resemblance. This is achieved by establishing rhetorical ambiguities that can be exploited for the justification and the exercise of power. The logical, legal and linguistic conclusions made possible by the words 'responsibility' and 'protect' establish an ambiguous rhetorical space where multiple and seemingly unrelated powerful connotations become interchangeable. These connotations are strategically kept in suspense, with only their impact made apparent: the evasion of state sovereignty and the justification of intervention. The rhetoric that operates in this ambiguous space infantilizes the Orient and allocates political and legal power to the Occident. This ambiguous space is itself the locus of our 'imperial ambivalence:' ambivalence to the lasting psychological, social and political influence of colonialism on contemporary

[233] *Supra* note 39.

international relations and law and to our resounding support for new doctrines that (re)institutionalize that legacy and system.[234]

Through R2P, the Occident creates assumptions it exalts as truths. It then disseminates them far and wide. Due to our ambivalence to the root and purpose of these assumptions, they are perceived to be realities. These realities are then imposed on the Occident and the Orient alike in the form of international legal discourse. This is how progressive liberal international legal doctrines like R2P reinforce and (re)institutionalize colonial oppressive power structures today. As Foucault explains, the success of power is proportional to its ability to hide its own mechanisms. [235] Certainly, this 'imperial ambivalence' is the most effective and ingenious hidden mechanism of power created by R2P.

The twenty-first century imperial ambivalence can also be explained as follows: The Orient simultaneously serves the interests of the Occident while it challenges the interests of the Occident. The Occident condemns oppression and violence in the Orient, but it needs oppression and violence to occur in the Orient to have something to condemn. When there is something to condemn, there is something to change. The Occident therefore promotes the ideals of equality, liberalism and democracy and seeks to share/impose them with/on the Orient. Meanwhile, when the Orient understands equality internationally, it challenges the Occident's political, legal and economic supremacy and it resists what the Occident is seeking to impose. This in turn evokes anxiety amongst the very same Occident that advocates for equality, liberalism and democracy, so it strategically characterizes the Orient as 'irresponsible' in order to justify intervention. However, intervention itself is oppressive and violent, the very issues that the Occident condemned in the first place. Imperial ambivalence today takes the form of a mutual desire to liberate, control, protect and oppress the Orient.

[234] *Berman Imperial Ambivalences, supra* note 63, at 411.
[235] *Foucault Intro, supra* note 42.

F. Normalizing Orientalism

> "To the extent that the Euro-American self-image was shaped by the experience of colonizing the world…the ["]end["] of colonialism presents the colonizer as much as the colonized with a problem of identity."[236]
> - Arif Derlik, *The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism*

The effect of the ambivalence created by R2P is not limited to politics and law; it also has a psychological impact on its subjects in both the Orient and the Occident. Anyone who is not readily aware of the implications international law has on contemporary world order are ambivalent to its power, whether they are subjects of the Orient or the Occident. The psychological impact therefore is that the strategic, Orientalist rhetoric of R2P discourse has been normalized. As the rhetoric of humanitarianism becomes increasingly colloquial, it is proliferated and adopted by people around the world who oppose human rights abuses. [237] Calling for the 'international community' to 'do something' to put an end to heinous violations of human rights and to live up to its international 'duties,' results in a subconscious reinforcement of the range of Orientalist implications discussed in this thesis thus far. Meanwhile, critics of intervention who are mindful of its potential for misuse use the same lexicon to condemn it. Each time critics of intervention express horror at catastrophic situations where human rights are being violated, they are implicitly and subconsciously invoking intervention. By engaging in the discourse, whether through support or criticism, individuals inadvertently bolster the Orientalist narrative that reinforces assumptions about the Orient that it dignifies as true. This preserves the strategic rhetorical, political, legal and economic gap between the Orient and the Occident that makes the Orient susceptible the geopolitical ambitions of the powerful global West.

Moreover, one of the most powerful mechanisms of oppression is the ability to make its legitimacy internalized. [238] This is another powerful feature of R2P's ambivalence mechanism. The strategic humanitarian rhetoric of R2P is assumed by not only the proponents of intervention in the Occident, but also by opponents of imperialism

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[236] Arif Derlik, *The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism*, CONTEMPORARY POST COLONIAL THEORY: A READER 300 (Padmini Mongia, ed. Arnold 1997).
[237] *Orford Reading Humanitarian Intervention, supra* note 114.
[238] *Roy, supra* note 35.

in the Orient who are ambivalent to its implicit colonial and oriental foundation. As such, it is becoming more and more common for subjects in the Orient to appeal to the 'international community' for political support. In doing so, subjects of the Orient, ambivalent to the scope of implications, unconsciously 'self-orientalize.' As a subject of the Orient, invoking R2P in the face of wide-scale human rights violations results in 'self-orientalization.' At the same time, when people of the Occident invoke intervention, they unconsciously reinforce the Orientalist discourse, thereby empowering Oriental subordination and subservience to the Occident.

Conclusion

The purpose of this thesis has been to engage critically, historically and rationally with the R2P discourse to obtain a "reflective understanding and genuine disclosure" about the source of my discomfort with regards to the notion of intervention for human protection purposes.[239] To do so, this thesis attempted to confront the continuing implications of colonial history on contemporary international law and to recognize its real psychological and legal effects. Through the lens of Orientalism and post-colonial theory, this thesis has exposed the strategic paradoxes, the ambiguities, the incongruities and the ambivalences created by the R2P discourse and how together they operate as mechanisms of international legal power. I argue that the rhetorical persuasiveness of the R2P narrative is itself an Orientalist discourse that recreates and reinforces colonial binaries between the Occident and the Orient, making the Orient susceptible and subject to contemporary forms of control and domination in the name of humanitarianism. This project has been important because genuine disclosure requires one to challenge the foundation "from which liberal positivist law unthinkingly functions."[240] Through its engagement with R2P, this thesis has merely scratched surface of this type of historical legal inquiry. This thesis will therefore serve as an intellectual launching pad from which I intent to delve further into the question of the international legal language and how it produces powerful and oppressive ambivalences that are intellectually and legally normalized and internalized by the 'Other.' I am particularly interested in investigating how the 'Other' served as an instrument of power in the pretext to intervention in Libya and Syria and would like to expand my research to examine the ways in which the 'Other' was appropriated and constructed in the humanitarian narrative leading to these specific interventions.

[239] *Orientalism*, *supra* note 32, at xxiii.
[240] *Roy*, *supra* note 35, at 321.