Using the case of Sudan to understand how countries are still able, through the concept of State Sovereignty, to protect themselves from their human rights obligations.

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Dissertação com vista à obtenção do grau de Mestre em Direito, na especialidade de Direito Internacional e Europeu.

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Declaro por minha honra que o trabalho que apresento é original e que todas as minhas citações estão correctamente identificadas. Tenho consciência de que a utilização de elementos alheios não identificados constitui uma grave falta ética e disciplinar.

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O corpo desta dissertação, incluindo espaços e notas de rodapé, ocupa um total de 199 709 caracteres.

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Abbreviations

AD – *anno domini*

AMIS - African Union Mission in Sudan

AU – African Union

BC – Before Christ

CPA – Comprehensive Peace Agreement

DPA – Darfur Peace Agreement

ECCC – Extraordinary Chambers in the Courts of Cambodia

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICISS - International Commission on Intervention and State Sovereignty

ICJ – International Court of Justice

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

IHL – International Humanitarian Law

JEM – Justice and Equality Movement

LJM – Liberation and Justice Movement

NIF – National Islamic Front

OCHA – United Nations Office for the Co-ordination of Humanitarian Affairs

R2P – Responsibility to Protect

SLM/A – Sudan Liberation Movement/Army

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SPLA - Sudanese People's Liberation Army

UN – United Nations

UNMIS - United Nations Mission in Sudan

UNSC – United Nations Security Council

U.K. – United Kingdom of Great Britain and Northern Ireland

VCLT - Vienna Convention on the Law of Treaties

VRS – Vojska Republike Srpske (Army of Republika Srpska)

WWI – World War I

WWII – World War II

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Abstract

The continuous changes suffered by the concept of State Sovereignty in line with the growth of interdependence, lead to a greater concern on the part of States - as global actors - in the internal affairs of third parties, especially with regard to cases in which human rights are violated. However, the case of the Darfur humanitarian crisis, exposes, in addition to the wickedness of the State of Sudan – the main responsible for the events - the weakness of an international system focused on an anarchic organization, in which sovereignty is still the ultimate factor in deciding on intervention, even in cases of extreme atrocity.

This dissertation proposes to make a critical analysis to the concept of State Sovereignty, trying to conclude why there are still countries that protect themselves behind this notion, exposing, more concretely, the consequences that its authoritarian application, by the government of Sudan, spawned in the region. For this reason, a theoretical concept, but with an executive approach, the R2P, is proposed as a resource for impunity that has persisted globally in the defense against human rights violations.

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Resumo

As contínuas alterações sofridas pelo conceito de Soberania de Estado em sintonia com o crescimento da interdependência, levam a uma maior preocupação por parte dos Estados - como atores globais - nos assuntos internos de terceiros, sobretudo no que diz respeito a casos em que são violados os direitos humanos dos seus cidadãos. No entanto, o caso da crise humanitária do Darfur, expõe, para além da impiedade do Estado do Sudão – responsável máximo pelos acontecimentos -, a fragilidade de um sistema internacional focado numa organização anárquica, em que a soberania é ainda fator derradeiro de decisão sobre intervenção, mesmo em casos de atrocidade extrema.

Esta dissertação propõe-se fazer uma análise crítica ao conceito de Soberania de Estado, tentando concluir porque é que existem ainda países que se protegem por detrás desta noção, expondo, mais concretamente, as consequências que a sua aplicação autoritária, por parte do governo do Sudão, gerou na região. Por esta razão, é proposto um conceito teórico, mas de abordagem executiva, o R2P, como recurso à impunidade que vem persistindo globalmente na defesa contra violações de direitos humanos.

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1. Introduction

In the last 70 years, rules and norms protecting people from the violation of their basic human rights have increased internationally to a point where the pressure generated on the actions of States, has changed the way they behave towards their citizens.[1] Compliance with international general principles of law, subscribing to all sorts of treaties and agreements, has compelled States to sacrifice their sovereignty at the hands of the international community, in what concerns the respect for universal human rights.[2]

But while most States have followed this path, some remain skeptic about their compromise with the international legal system. The mechanism that has allowed States to avoid their international responsibilities throughout centuries has been the concept of State Sovereignty. It has given state actors the power and authority to decide on any national issue, while avoiding any external interference, without practical consequences. Despite this, sovereignty has gone through immense change along the years, shifting into something much more flexible today, allowing international actors to enforce on States commitment and responsibility in averting violations of human rights, not only inside their borders, but also where intervention is deemed necessary.

This change can be understood through two historical movements displayed in both political institutions and political thought. The first was the development of a system of sovereign States that culminated at the Treaty of Westphalia in 1648, while the second movement the restrictions set to the sovereign State, which began in practice after World War II, continuing since through the increase of

[1] "All states are subject to some degree of international human rights pressure, or demands that they comply with international norms (…), all states confront normative pressures for human rights compliance." (Cardenas, 2007, pp.102)

[2] The universal human rights are a set of inalienable rights of people established in the Universal Declaration of Human Rights proclaimed by the United Nations General Assembly on December 10th 1948. It recognizes "all human beings as born free and equal in dignity and rights" and with the "right to life, liberty and security of person". (UN General Assembly, 1948)

interdependence, regional integration and the strengthening of laws and practices protecting human rights. The changes inflicted on sovereignty after this second movement have generated space for other mechanisms of international law to emerge, founded on a principle of compliance. Thus, for the purpose of this thesis, the starting question is: *why have States become so attached to the concept of State Sovereignty?*

To answer this, this work has been divided into two parts: a theoretical part and a practical case. The first part will address the more philosophical questions, concerning both sovereignty and compliance with international law, throughout their existence. Also, after analyzing the theoretical approach to sovereignty, a simple challenge, created with the data retrieved for this investigation, will correlate the attachment to sovereignty and the actions of autocratic regimes, aiming to demonstrate what type of States today are the most devoted to defending their sovereignty. Lastly, a mechanism of compliance - Responsibility to Protect - will be examined, so as to understand why sovereignty can no longer be a justification for States' actions, when they violate human rights. The second part will analyze the case of the Sudan, as an example of a State, notorious for its continuous violations of human rights, exempt of repercussions, with the objective of trying to determine why hasn't the international community been able to act, despite possessing sufficient mechanisms to.

By attempting to understand a country's "grip" to the concept of State Sovereignty, analyzing both the theoretical framework and the practical case, we consider that sovereignty has been responsible for numerous human rights violations, by not allowing, in many circumstances, the intervention of the international community to avert these crimes.

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2. The Concept of State Sovereignty in International Law

International Law is centered on the concept of the State. In its turn, the State lies upon the foundation of Sovereignty, which expresses internally the supremacy of governmental institutions and externally the supremacy of the State as a legal person.[3] Until recently, Sovereignty was regarded as an element of a particular individual in a State and not as an abstract manifestation of the existence and power of the State. The sovereign was considered to be the one "who decides on the exception"[4], "a definable person, to whom allegiance was due."[5] However, the concept of State Sovereignty has become in many aspects an archaic idea in what is considered to be modern international law[6], existing various elements that support its continuous decay, being the growing cooperation between states and their interdependence, the most relevant.

Although a key principle of international law[7], State Sovereignty is not universally defined by the international community, though some potential definitions have been provided: sovereignty "is a set of practices that are historically contingent – a mix of both international and intra-national processes, including self-determination, international law, and ideas about natural right"[8]. Camilleri defines it as "a conception of a world divided into separate, independent communities, delineated clearly in time and space, governed by their own sovereign authority and system of law". [9] It "implies control of an identifiable geographical space by

[3] Shaw, 2003
[4] Schmitt, 2005, pp.5
[5] Shaw 2003, pp. 622
[6] "Practical sovereignty is challenged by the problems facing human society at the dawn of the twenty-first century, problems so great, so complex, that the sovereign state is to small a unit, the concept of sovereignty too archaic, to be of much practical use in solving them. (Harrison and Boyd, 2003, pp.28).
[7] "The principle of sovereignty, i.e. of supreme authority within a territory, is a pivotal principle of modern international law. What counts as sovereignty depends on the nature and structure of the international legal order and vice-versa." (Besson, 2011)
[8] Howland and White, 2009, pp.1
[9] Camilleri, 1992, pp. 172

the state, as the supreme legal and political authority over a physical environment and its inhabitants"[10].

Krasner determines that there are four distinct ways in which the concept of Sovereignty is generally used:

1) International legal sovereignty, which regards the establishment of each state's political entity, as mutually recognized, in the international system;
2) Westphalian sovereignty understood as an institutional method of organizing the political life on the principle of exclusion of external interference from the domestic structures responsible for applying authority;
3) Domestic sovereignty, which refers to the organization of political authority within the state and the degree of control given to the state, and;
4) Interdependence Sovereignty, which respects the state's ability to control specific issues, such as capital and people across its borders. [11]

In addition to the fact that there has not been a unanimous agreement regarding the definition of State Sovereignty, the political and international systems have transformed so dramatically over the past centuries, that the concept itself could not remain untouched, shifting from time to time and adopting new approaches. As Grimm states, "it [sovereignty] was forced to adapt more than once to the great changes in the development of political rule. As a result, more than a few characteristics of the concept of sovereignty have changed their meaning over time, so that the continuing use of the term does not necessarily imply its content

[10] Litfin, 1998, pp.79

[11] The term sovereignty has been used in four different ways – international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty. "International legal sovereignty refers to the practices associated with mutual recognition, usually between territorial entities that have formal judicial independence. Westphalian sovereignty refers to political organization based on the exclusion of external actors from authority structures within a given territory. Domestic sovereignty refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity. Finally, interdependence sovereignty refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of the state." (Krasner, 1999)

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remains the same".[12] But despite this necessary change, Fassbender recognizes that the concept of State Sovereignty has proved itself highly "adaptable" to the changes that have taken place in the international system, to ensure the preservation of mankind. [13]

Although sovereignty is shaped to be a tool used by state actors to safeguard the interests of the nation, Cassese argues that "[s]tate Sovereignty is not unfettered. Many international rules restrict it. In addition to treaty rules, which of course vary from State to State, limitations are imposed upon State sovereignty by customary rules. They are the natural legal consequence of the obligation to respect the sovereignty of other States". [14] According to the author, one state cannot use its powers to interfere with any other state's legal business, inside its territory, respecting the ideal of conformity with the independence of any foreign state[15]. More broadly, according to Cassese, a State may not:

1) Impose its will on, or interfere with, or coerce a foreign State official;
2) Interfere with foreign armed forces lawfully stationed on its territory;
3) Perform coercive acts onboard a foreign military or public ship or aircraft.
4) Submit to the jurisdiction of its courts' foreign States for acts performed in their sovereign capacity;
5) Submit to the jurisdiction of its courts' foreign State agents for acts performed in their official capacity. [16]

The concept of State Sovereignty is amongst the most ancient of international law, following the rise of the modern nation-state. It has witnessed a great transformation and with it, it has adapted to the necessary requirements, evolving

[12] Grimm, 2015, pp.19
[13] "Throughout its long history, the concept of sovereignty has proved highly adaptable. It has survived many premature obituaries, and the charge that it stands in the way of a system of international governance adequate to ensure the future existence of humanity." (Fassbender, 2003, pp.115)
[14] Cassese, 2005
[15] "A State may not exercise its sovereign powers over, or otherwise interfere with, actions legally performed by foreign States on its territory. This legal inability stems from the general principle imposing respect for the independence and dignity of foreign States" (Cassese, 2005)
[16] Cassese, 2005

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into one of the most important instruments a state actor can have at its disposal to defend the interests of the sovereign.

In the following sub-chapters, a theoretical groundwork will be addressed, offering a broad, but direct, analysis of the historical development of the concept of State Sovereignty, with the purpose of understanding: *how it has evolved over the years*; and *the different levels of attachment States have had to it*. Following this, a correlation between State Sovereignty and the behavior of authoritarian regimes will be investigated, as a starter for the practical case ahead, in order to demonstrate a determining factor in the dependence of States to the concept, that will lead to the succeeding chapters.

2.1. From Ancient Times to the Treaty of Westphalia[17]

The concept of State Sovereignty has been present as an integral principle of both national and international political order since early antiquity, though much has changed since then. During the classical period of international law, the question of why nations obey was similar to why nations should obey, and usually answered with reference to a higher law – the law of nature. Before the dominion of the Roman empire, religion served as the dominant source of the law between nations[18], developing a direct connection between Church and State. As stated by Dixon[19], "[s]overeignty in the empire of Egypt, Rome, Greece, Persia and Babylon were clearly vested in the image of the ruler. It was his face that projected the political legitimacy and power of the empires".

[17] The Treaty of Westphalia "is a collective name given to the settlements which the Imperial-Habsburg delegates drew up with France, at Munster, and with Sweden, at Osnabruck", and that ended the Thirty Years' War and the religious wars in Europe for centuries. "[A]llowed rulers to maintain the state religion of their choice and to direct the institutions of that religion but, at the same time, urged them to acknowledge the right of their subjects to practice minority religions in private." (Lee, 1994, pp.91). It called for the recognition of sovereign states of territorial entities that could not be externally interfered with, a recognized population and a legitimate government.

[18] Koh, 1997

[19] Dixon, 2011, pp.13

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The traditional understanding of the concept of State Sovereignty, before Westphalia, is credited to Jean Bodin's 16th century definition of sovereignty, the absolute and lasting power of the state. According to the author, the concept of sovereignty encompasses the state's absolute and exclusive ability to determine laws inside its territory, not recognizing another's authority to do so as well.[20] Sovereignty, "he [Bodin] observed, was crucial to understanding many obscure and difficult questions about the *république*". According to Bodin, sovereignty is composed of five distinct functions[21]:

1) The establishment of magistrates and civil offices;
2) The constitution of laws;
3) Decision whether or not to go or to end armed conflict;
4) Establishes the sovereign as the arbitrator of appeals;
5) Institutes the sovereign with the power to award clemency when legal processes of justice are exhausted.

The notion of customary practice of nations was introduced by Francisco Suárez, as an important supplementary source of rules in international law. The author is considered to be the first to establish a definite separation of international law from theology and ethics, considering it as an area of jurisprudence.[22]

Lastly, Hugo Grotius was the first to define *jus gentium*[23] not just as natural law, derived from right reason, but as a consequence of voluntary action, generated by independent operation of the human will. Grotius theorized the notion of

[20] Bartelson (1995)

[21] "Sovereignty, he urged, consisted in five functions. First and especially important was creating magistrates and defining each one's office (*una est ac praecipua in magistratibus creandis & officio cuiusque definiendo*); secondly, making and annulling laws; thirdly, declaring and terminating war. Fourthly, the sovereign was the final adjudicator of appeals (*prouocatione*), and, finally, the ultimate arbiter of clemency in capital cases where possibilities of remission through the ordinary processes of law were exhausted." (Lloyd, 2017, pp.83)

22 Koh, 1997

23 In Roman law jus gentium referred to the laws common to the various nations and people under the Roman Empire, used in cases between non-Roman citizens or between a Roman and a non-Roman citizen. In https://www.merriam-webster.com/dictionary/jus%20gentium

international society, as a community of those who participate in the international legal system, whose basic composition was international law.[24]

Long before the Treaty of Westphalia, basic aspects of the international system, with regard to questions of sovereignty, were much different, whether we speak in terms of national or international perspectives. Much of the world was organized into city-states, particularly in the region of the East Mediterranean, where the concept of nation-state is born[25]. The power of the sovereign – monarch or emperor – was absolute, defined by a political authority of medieval hierarchy. Religion – more specifically the Catholic Church - played a big part in ruling most of the European powers for centuries, becoming the unifying element in Europe's medieval society[26]. Later, the birth of the Protestant Reformation "activated many of the existing vulnerabilities in early modern European rule"[27], leading to religious wars that lasted years and that only ended with the Treaty of Westphalia.

But despite the never-ending conflicts in Europe before 1648, they became essential to understand why compromising on a close acknowledgment[28] of the concept of State Sovereignty was essential to establish a new international order in Europe, at least until the beginning of World War I, in 1914. As Philpott argues, "[i]t is indeed in the political history of the century prior to Westphalia that we best discern the tremendous historical significance of state sovereignty. State' invasions of other states to alter their religious practices, the empire's military assertions of religious uniformity – this religious war and its attendant abridgments of sovereignty were the chief sources of contention in European politics for over a

[24] Koh, 1997

[25] "Many consider the Greeks as the originators of the nation-state with the formation of the Greek city states." (Dixon,2011, pp.14)

[26] "This is a system that in the pre-Westphalia phase was dominated by a central religious and legal authority and was composed of a number of entities of differing status in the system" (Simpson,2004, pp. 35).

[27] Nexon, 2009, pp.4

[28] Despite the fact that we are able to recognize the existence of a close understanding of what the concept of State Sovereignty means, specially between Western societies, the international community until this day has never issued a decisive and unanimous definition for it.

century (…) and [the Thirty Years' War] proved the most destructive and protracted European war prior to the twentieth century"[29].

Traditional State Sovereignty has thus, been denoted as "the highest, final decision-making authority, which lent its holder power over others"[30] – the supreme power of the state. But it is evident that the concept, prior to 1648, was perceived as subject of higher norms of hierarchical structures, rather than after Westphalia – where a concept vested with absolute and unlimited power emerged.

2.2. The Treaty of Westphalia until the 20th Century

The Treaty of Westphalia defined an important moment for international politics, especially for the powers in Central Europe. Some consider these settlements agreed to be the birth of modern State Sovereignty[31]. What Krasner describes as "an institutional arrangement for organizing political life that is based on two principles: territoriality and the exclusion of external actors from domestic authority structures. (…) Westphalian sovereignty is violated when external actors influence or determine domestic authority structures." [32]

The treaty introduces an essential transformation in the relations between States, making all sovereignties equal[33] "upon the eyes" of the international community, regardless of their religious faith – Catholic or Protestant - or form of government – republican or monarchical, thus ending the medieval structures of political authority hierarchically organized and based on inequality. This shift erases centuries of stratified ruling, turning into a no-ruler, all equal type of State Sovereignty.

[29] Philpott, 2001, pp.96
[30] Grimm, 2015, pp.14
[31] "The international state system and the modern state as we know it today, is rather young. The treaty of Westphalia of 1648 is said to be the beginning of the system of sovereign states." (Pant,2011, pp.1)
[32] Krasner, 1999, pp.20
[33] Besson argues that "the establishment of a secular and territorial authority was secured thanks to the development of the principle of the sovereignty of States of equal power." (Besson, 2011, pp.3)

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Like argued by Simpson, "[t]he trajectory traced, in all this, describes a system developing out of the highly centralized and unequal relations that were the mark of the pre-Westphalian stage in international affairs to a Westphalian order in which the sovereign equality becomes a defining quality of the system. The transformation here is one from Empire to anarchy or from centralized hierarchy to sovereign equality"[34]. According to Larkins, "Westphalia symbolized a transformation from a system of political rule based in the hierarchical structures of medieval Christianity to one ordered in terms of independent sovereign territorial states: a transition from hierarchy to anarchy"[35]. In addition to marking "the origins of the modern, sovereign-territorial state system"[36], Westphalia brought an "end to inter-state religious conflict in Europe"[37], even uniting, in some cases, both religious factions to the same side, as allies[38].

Westphalia determines that domestic – and only domestic – authority is to dictate the policy of the state. As Krasner argues, "The fundamental norm of Westphalia sovereignty is that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior"[39]. The introduction of an anarchical system, essential to the respect of a state's national political authority inside its territory, was fundamental to stopping the conflicts that were consistent to that period, in Europe.

Despite this, the anarchical system introduced, brought constant struggles for power in the European continent for centuries to come, with states fighting for their hegemony in the region, shifting the balance of power, leading to what were inevitable great conflicts in the 19th[40] and the 20th[41] centuries. The "fragmentation

[34] Simpson, 2004, pp.35
[35] Larkins, 2010, pp.3
[36] Nexon, 2009, pp.2
[37] Nexon, 2009, pp.2
[38] Nexon (2009, pp.3) argues that "Westphalia allowed Catholic and Protestant powers to become allies, leading to a number of major secular geopolitical realignments"[38].
[39] Krasner, 1999, pp.20
[40] The Napoleonic Wars (1803-1815)
[41] World War I (1914-1918) and World War II (1939-1949)

of political authority among a group of states[42]" was key to this new international system, representing "a rejection of government in the form of a common, supreme authority"[43]. Another key aspect to it, was the principle of non-intervention, where "a state is free to determine its own political, economic, religious, and cultural systems"[44] without consideration from another state, and together, both the principle of sovereignty and of non-intervention where fundamental to enhance the anarchical behavior of states.[45]

With regard to what was previously established, one can question how can international law have a role in the interaction of states, if such domestic political authority, inspired by self-preservation, exists. According to Fidler, "[i]nternational law is a Westphalian governance process through which the states create, and consent to be bound by, certain rules of behavior in connection with their anarchical interactions"[46]. This means that, to some extent, states will cooperate in order to abide by a specific group of rules, internationally recognized, as long as one country doesn't interfere in the business of a second country, without the latter's permission.

The international system, as established by the Treaty of Westphalia, has proven to be very complex. There is no higher authority, no universal actor capable of solving disputes and, at times, that has shown to be an imperfection of the system itself. The most threatening[47] aspect to Westphalia's concept of State Sovereignty, is actually related to one of its most appealing features – the absence of an authority through a hierarchical system. This means that, even though the international system no longer works through hierarchies, less powerful countries won't stop

[42] Fidler, 2004, pp.23
[43] Fidler, 2004, pp.23
[44] Fidler, 2004, pp.23
[45] Fildler states that "With governance within states rendered off limits by the sovereignty and non-intervention principles, Westphalian governance involved managing state interaction in anarchy" (Fidler, 2004, pp.23)
[46] Fidler, 2004, pp.23
[47] The expression "threatening" cannot be interpreted as having a bad effect on the states that have their sovereignty influenced by others, meaning that it is only threatening to the concept itself and not, in all cases, to the country which isn't free of external influence.

being exposed to the influence and determination of stronger states.[48] In fact, Krasner argues that "Westphalian sovereignty has been violated through intervention; more powerful states have coerced their weaker counterparts into altering the domestic institutional arrangements of their polities"[49], for their own benefit.

The concept of State Sovereignty established in the Treaty of Westphalia was essential to what came after for the European powers. For the next three centuries they fought in defense of their own sovereignty, in order to safeguard their presence in the region. As Yafei argues, "[f]rom the Peace Treaty of Westphalia to the end of WWI, there was no limitation on the use of force or the threat to use it by international law. Only after WWI and in particular after WWII did this […] come into question."[50]

As the international conflicts of the 21st century would later show, the traditional sovereign system of States is an insufficient institutional structure because "it does not offer adequate guarantees that citizens' physical safety and liberties can be secured by government institutions alone"[51]. The second half of the 20th century would thus, bring great transformation to the international system concerning state's respect for international law, while the concept of State Sovereignty would prove to be vulnerable to states' new interdependence approach.

2.3. The End of World War II, Interdependence and a new approach to the concept of State Sovereignty

The Westphalian concept of State Sovereignty entails an attitude of non-intervention with a State's authority in its domestic policies, by another State. However, as the tragic events of WWI and WWII occurred in the first half of the

[48] Krasner (1999, pp.23) states that "Violations of Westphalian sovereignty can arise in a sovereign state system because the absence of a formal hierarchical system of authority, the defining characteristic of any international system, does not mean that the authority structures in any given political entity will be free of external influence".
[49] Krasner, 1999, pp.25
[50] Yafei, 2018
[51] Pavel, 2014, pp.22

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20th century, the international community started doubting the range of the concept, "not only as a result of the growing emergence of international human rights but, more significantly, the need for a more coordinated international response to various humanitarian crisis"[52]. As Magnuson argues, "[f]or the first time, the idea that international law should protect the rights of individuals started to gain traction in legal circles, leading to a proliferation of international human rights treaties in the postwar era."[53]

Jacobsen states that "[t]he internationalisation of the legal status of the human being became one of the most prominent features of the post-World War II period after the Nazi and fascist violations of elementary human rights. The post-World War II era was a period in which the freedom and independence of the state in law-making was subjected to limitations by international law in respect of certain international interests."[54]

In some cases, sovereigns sacrificed some of their political authority, in order to introduce legislation preventing them from committing actions identified as human rights violations[55] - an effective way of legitimizing their governance[56]. This sudden shift in the behavior of states and state actors is well explained by Krasner, as he argues that "[i]n some instances rulers endorsed human rights conventions not because they had the intention or even ability to implement their precepts, but because such agreements were part of a cognitive script that defined appropriate behavior for a modern state in the late twentieth century"[57].

[52] McMahon, 2013, pp.1
[53] Magnuson, 2010, pp. 257
[54] Jacobsen, 2008, pp. 218
[55] As Krasner (1999, pp.24) argues, "After the Second World War it was preferable for the rulers of western Europe to sign the European Human Rights Convention, which compromised their Westphalian sovereignty, than to insist that the domestic autonomy of their polities be unconstrained."
[56] "Human rights are important not only for input-oriented legitimacy of democratic decision-making processes (…) but also for output-oriented effectiveness of economic resources (…) which are essential preconditions for protection and enjoyment of most human rights." (Walker,2003)
[57] Krasner, 1999, pp.106)

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Due to this, after World War II, the number of treaties and conventions "dealing with political rights and with social and economic rights, as well as accords on more specific issues such as slavery, women, children, refugees, stateless persons, genocide, and torture"[58] grew. In fact, even though that before World War II human rights agreements between states and international organizations were almost inexistent, after the conflict, their number increased immensely becoming of great importance to the international community[59] - even greater than minority rights[60], ensuring "the premise that sovereign states are not free to abuse their own citizens with impunity"[61].

This proved to have a tremendous effect on the international system, demonstrating a radical attitude change from states, as human rights progress became one of the most important issues of the last century, specifically after World War II[62]. Probably the biggest shift in the behavior of international actors that resulted from the tragic effects of World War II, concerning State Sovereignty, was a defensive stance, from these – whether States, organizations or other political actors – regarding that "international human rights operate to check the exercise of internal sovereign power […] whether one understands human rights from a moral, political, or legal perspective"[63].

From this moment forward - and once again -, the concept of State Sovereignty was forced to adapt to the new international system, becoming exposed to the

[58] Krasner (1999, pp.31)
[59] "Until the conclusion of the Second World War, human rights, which stipulated the rights of human beings in their status as individuals or as part of class that was not a source of basic identity (such as refugees), were less salient than minority rights. Before this time only the abolition of slavery and the slave trade in the nineteenth century and some International Labour Organization agreements in the interwar period emphasized human, as opposed to, minority rights. There are now, however, more than twenty United Nations human rights agreements as well as accords associated with specialized international organizations and with regional groups." (Krasner, 1999, pp.105)
[60] "After the Second World War the focus on minority rights was supplanted by an emphasis on human rights, a reflection both of the failure of the interwar minorities regime and of the preferences of the leaders of the United States, the most powerful state in the postwar world and of western Europe as well." (Krasner, 1999, pp.105)
[61] Jacobsen, 2008, pp. 2018
[62] "The focus on individual rights is a phenomenon of the twentieth century. International human rights agreements have proliferated since the Second World War." (Krasner,1999, pp.109)
[63] Macklem, 2015, pp. 33

intentions of the international community, with the objective of preventing further violations of human rights, even if committed by a political authority inside the borders of a sovereign state.

The face of this change was the United Nations Charter (UN Charter) that despite much criticism[64], was according to Hegarty, fundamental for two distinct reasons. "First, it recognized, formally, that human rights have an international dimension and are no longer solely a matter falling within the exclusive jurisdiction of a State; and, secondly, it granted the United Nations (UN) the legal authority to embark upon a codification of human rights which led to the drafting of what was the world's first international human rights document, the Universal Declaration of Human Rights[65]"[66].

The principle of absolute sovereignty had thus shifted to a more relative concept of sovereignty, where States recognize the need to embrace an international community, increasingly interdependent, organized in similar social and political conducts, while acknowledging "that the individual states are included in a pattern of relationships which necessarily imposes certain limitations upon their will to be autonomous"[67]. Intrinsic to the concept of relative sovereignty, interdependence "requires the existence of rules concerning inter-State relations. These rules cannot be those made by a single State. If every State claimed to make such rules, their inevitable non-acceptance by other States would lead to anarchy." [68]

[64] "The fact that the United Nations Charter's provisions are so lacking in detail, and that the States which drafted the Charter probably never intended it to be legally binding, in view of their own vested interests…" (Hegarty,1999, pp.5)

[65] The United Nations Declaration of Human Rights was adopted on December 1oth 1948 in the form of a resolution passed by the United Nations General Assembly. It consists of 30 Articles regarding civil, political, social, economic and cultural rights, universally.

[66] Hegarty, 1999, pp.5

[67] De Visscher,1968, pp.30

[68] Seidl-Hohenveldern (1989, pp. 44) The author further adds that "rules on inter-State relations can only be rules recognized by all States participating in these relations, that is, in view of the present-day world-wide interdependence, by all States of the globe. If a State was to be allowed to disregard these rules of international law, in view of its claim to be maser of its own destiny, there would no longer be ay reliable basis for the inter-State relations required by fact of the interdependence of the several sovereign States."

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As a result of the changes suffered by the concept of State Sovereignty, most States have abdicated the absolute power attributed to them by the traditional concept, encouraging a more analogous and relative one, reflected in the reciprocal respect and equality between states' in the international stage, leading to the idea that States are now sovereign, not because they impose their own rules, but those of international law.[69]

2.4. The changes to the concept of State Sovereignty entering the 21st century

Reflecting on the changes to the concept of State Sovereignty, after World War II, the creation of international institutions such as the UN, in 1948, was fundamental to develop an interdependent space, where States abide, in principle, to the same basic laws. But despite this, to convince every State of being a part of an international organization founded on the premise that every member would have to comply with its laws, a few compromises had to be made in order to convince some more reluctant States to agree on entering this interdependent space.

A considerable concession granted in order to unanimously create the UN was maintaining the Westphalian principle of non-interference in the domestic affairs of a State by another State or States. We can find this in Article 2(7) of the UN Charter which provides that "(n)othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdictions of any state or shall require the Members to submit to such matters to settlement under the present Charter". Associated to this provision is Article 2(4) of the Charter stating that "(m)embers 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 purposes of the United Nations"[70]. Taking this into account, it was apparent that

[69] Seidl-Hohenveldern, 1989, pp.44

[70] United Nations - Charter of the United Nations, 1945. See also the Preamble to the 1970 Declaration of Principles of International Law (Friendly Relations and Cooperation among States in accordance with the

the concern with the concept of State Sovereignty manifested in these provisions was vital to the international community in the second half of the 20th century.

Entering into the 21st century, due to the constant rise of international human rights issues, doubts concerning the broadness of the concept of State Sovereignty became larger, especially after the humanitarian crisis that occurred in the 1990's in Srebrenica and Rwanda. After the internationally agreed compromise over the preservation of the principle of non-intervention in the past century, the atrocities occurred brought a dire need to change the perception of sovereignty by state actors, reminding them that despite the existence of such principle, the international community would still be responsible for intervening, for the sake of "international peace", "security", "prevention and removal of threats to that peace"[71]. As McMahon states, "[t]he twentieth century focus on sovereignty had not prevented the UN from engaging in humanitarian intervention but what was different for the twenty-first century was the perceived need to establish a series of principles that would guide such intervention to ensure consistency in UN action"[72].

The 21st century, with regards to human rights obligations, became synonymous with challenging the authority of states, being that the growing importance of the concept of universal jurisdiction[73] was fundamental to this issue. Under the principle of universal jurisdiction a State is entitled or even required to bring accounts in respect of specific serious crimes, regardless of the location of the crime, and irrespective of the nationality of the perpetrator or the victim[74], allowing

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Charter of the UN) which states: …the duty of States to refrain in their international relations from military, political, economic or any other form of coercing aimed against the political independence or territorial integrity of any State. GA Resolution 2625 (XXV)

[71] United Nations - Charter of the United Nations, 1945. (Article 1)

[72] McMahon, 2013, pp.2

[73] "The doctrine of universal jurisdiction is used to authorize domestic courts to exercise jurisdiction over serious international crimes, like piracy, genocide, war crimes, slave trade and other crimes against humanity. Universal jurisdiction means a State, without any jurisdictional bond, exercising jurisdiction over a crime on behalf of global community." (Ramdhass, 2018, pp.2)

[74] Kamminga, 2001

for the trial of international crimes, committed by any person in any part of the world. Regarding this concept, the most notable cases were those brought against Ariel Sharon in Belgium and Augusto Pinochet in Spain, using universal jurisdiction has a tool to "seek to obtain custody of a defendant for crimes committed far from the nation and court seeking to try him or her"[75].

According to Sriram, "[t]he exercise of universal jurisdiction may constitute a significant challenge to national sovereignty and may constitute a deviation from the principle, enshrined in Article 2(7) of the UN Charter, of non-interference in the internal affairs of states"[76], but despite this, Ramdhass argues that universal jurisdiction has evolved for two reasons: "first to punish the crimes that are grave and harmful to the entire international community; and second, to ensure that no safe haven is available to those who have committed serious crimes"[77].

States differ in opinion regarding the use of the doctrine of universal jurisdiction, as countries from the developing world have different assessments comparing to the one's of the developed countries, though both believe strongly in the proper application of universal jurisdiction against any actor - or actors - responsible for violations of national or international laws.[78] This might come because of the lack of unanimous definition as to the circumstances in which the concept can be applied, leading to more conflictive relationships inside the international community. Subsequently, the legality and legitimacy of the doctrine of universal jurisdiction is still a doubt in international law.

The concept of universal jurisdiction will be portrayed later in Chapter 5, where its features will be analyzed exclusively for the particular case of Sudan.

A parallel doctrine to the one of universal jurisdiction in challenging the sovereignty of states is the political commitment of Responsibility to Protect

[75] Sriram, 2006, pp. 13
[76] Sriram, 2006, pp. 13
[77] Ramdhass, 2018, pp.2
[78] Ramdhass, 2018, pp.4

(R2P)[79], "the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states"[80]. A starting point to the principles previously argued by McMahon was the 2001 Report of International Commission on Intervention and State Sovereignty (ICISS), the initiative responsible for the introduction of R2P.

Following the lead of the international community, concerning human rights obligations and its implications on the concept of State Sovereignty, the ICISS report states that "[i]t is acknowledged that sovereignty implies a dual responsibility: externally – to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state"[81]. By focusing the debate on the political commitment of the R2P, the ICISS fixates the debate on "the security of people against threats to life, health, livelihood, personal safety and human dignity" safeguarding anyone against "the omnipresent enemies of good health and other real threats to human security on a daily basis"[82].

The principle of responsibility has thus become an important tool to protect people from internationally recognized crimes, such as those that constitute as human rights violations. As Ramdhass argues, we can determine the existence of at least four different types of responsibility: State responsibility, individual responsibility, collective responsibility, and command or superior responsibility. They are put into action if the rights of a person, or collective group of people is affected, or if it violates the legal commitments one has towards others. As the

[79] The Responsibility to Protect doctrine is a set of principles based on the idea that "States sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself." Also, "[w]here a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect." (International Commission on Intervention and State Sovereignty (ICISS), 2001)
[80] ICISS, 2001, pp.9
[81] ICISS, 2001, pp. 8
[82] ICISS, 2001, pp.15

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author argues, "[s]tate has the primary responsibility to protect human values to the citizens of foreign as well as domestic"[83], thus demonstrating that the principle of responsibility bolsters the strength that the concept of universal jurisdiction has over both domestic and international courts and tribunals.[84]

The topic of the R2P will be developed more extensively in the subsequent chapters, when we analyze, in depth, its influence on the growth of States' compliance with international law, in what concerns their human rights obligations.

2.5. The Correlation between State Sovereignty and the actions of autocratic regimes

After all the research completed, as well as the information collected on Sovereignty, this sub-chapter will help answer the starting question of *why do countries get attached do the concept of sovereignty?* This study has assisted in determining that there is a political element directly connected not only to the concept of State Sovereignty, but also to its continuous safeguard and perception of indispensability – autocratic regimes. Therefore, this sub-chapter intends to display a correlation between the concept of State Sovereignty and countries led by autocratic regimes.

My research on the subject of State Sovereignty and States' Compliance, with regard to international human rights, has led me to conclude that autocratic regimes tend to actually use the concept of State Sovereignty as a form of protection from both international intervention and prosecution, for various human rights violations. In other words, autocratic regimes are susceptible to judge the costs of losing their sovereignty as too great to adopt international human rights procedures.[85]

[83] Ramdhass, 2018, pp.4
[84] Ramdhass, 2018, pp. 4
[85] Hafner-Burton, Mansfield, Pevehouse, 2011

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As stated by Hafner-Burton, Mansfield and Pevehouse, "[o]f all regimes, autocracies (and autocratizing countries) have the weakest incentives to join high cost human rights institutions". Defending the implementation of these institutions is grounding for the establishment of a democratic regime. By allowing the admission of human rights institutions, compromising high levels of sovereignty, it improves the levels of legitimacy and credibility of the State's responsibility towards the development of democracy.

Diverging from this, according to the authors, both established democracies and dictatorial regimes have fewer motives to embrace such high cost institutions, since the impact these same costs have, are far to damaging to their sovereignty, entailing costs that these States are not willing to bare.[86]

Although democracies are included in this claim, the theoretical reason for this addition is entirely different than the one regarding dictatorships, standing important to separate the two.

Democracies - not including emerging democracies[87]-, in some cases, are likely to resist binding commitments because as established democracies they have already proven their commitment towards the respect for human rights, becoming unwilling to stand even greater costs on their sovereignty stemming from contributing for the development of human rights institutions.[88] Autocracies, as well, are likely to stay away from contributing to "high-sovereignty-cost institutions", but for completely different reasons. For these dictatorial regimes, first, there is no motivation in protecting human rights, by entrusting their political

[86] "[m]ature democracies and dictatorships have less reason to join such high cost institutions because membership infringes on their sovereignty and requires them to commit resources, with few corresponding benefits." (Hafner-Burton, Mansfield, Pevehouse, 2011, pp. 2)

[87] Emerging Democracies are best defined by three specific characteristics: "First, the level of inequality in emerging democracies is higher than that in advanced democracies. Second, the variance of inequality among emerging democracies is high. Finally, the independent variables that we deal with seem to correlated with the level of inequality". (Kawanaka and Hazama, 2016)

[88] "Because established democracies have already demonstrated a respect for human rights, they are generally reluctant to bear the sovereignty costs stemming from participation in human rights institutions." (Hafner-Burton, Mansfield, Pevehouse, 2011, pp. 3)

authority to an international institution that could jeopardize their position, by means of sentencing for their violations.

In certain situations, leaders of autocratic regimes may join these institutions, not because of their actual interest in the protection of human rights, but because benefits associated with this cooperation may be enough to counterbalance the costs of membership.[89]

In some cases, the precision with which we can perceive a country's support for human rights is debilitated if countries join "lower-cost institutions"[90]. Generally, "such institutions lack strong enforcement mechanisms, contain imprecise or low levels of obligation, participation sends a less credible signal about a government's intentions to treat citizens humanely than membership in a higher cost institution"[91].

As Moravcski argues, "international human rights institutions are not designed primarily to regulate policy externalities arising from societal interactions across borders, but to hold governments accountable for purely internal activities"[92]. That's probably why state leaders pursue binding commitments to human rights institutions, such as the ECHR or the ICCPR, when the uncertainty of the effectiveness of future human rights policies is greater than the sovereignty costs[93] of membership.[94]

In sum, in what concerns human rights obligations, authoritarian regimes are less likely to relinquish their State Sovereignty. In most cases, the simple idea of sharing their political authority, whether with a national or international body, is

[89] Hafner-Burton, Mansfield, Pevehouse, 2011.
[90] "Autocracies should also enter less frequently, preferring lower-cost institutions that facilitate cheap talk." (Hafner-Burton, Mansfield, Pevehouse, 2011
[91] Hafner-Burton, Mansfield, Pevehouse, 2011
[92] Moravcski, 2003, pp.217
[93] "Various studies refer to the costs that states bear when they surrender discretion over national policies in order to adhere to the standards set by an international institution as sovereignty costs". (Hafner-Burton, Mansfield, Pevehouse:2011)
[94] Moravcski, 2003

deterrent enough to withdraw from any sort of human rights agreement. This absence of power sharing and opening to the international community only brings great difficulty to the cause of those fighting for universal and inalienable rights in their country.

Provisions to adjudicate human rights on an international level, thus, poses a vital test not just to the traditional concept of Westphalian sovereignty that motivates the classical approach to international law, but also to liberal principles of democratic legitimacy and self-rule.[95] The difference between democracies and autocratic regimes rests in the "empowerment of individual citizens to bring suit to challenge the domestic activities of their own government"[96].

2.6. Chapter Conclusion

This first chapter of the thesis aimed to introduce the concept of State Sovereignty, through a chronological analysis. In this conclusion, I would like to provide a concise answer to the previously stated questions. On *how it has evolved over the years*, we determined that until the Treaty of Westphalia in 1648, the relation between States was much different, having an impact on how sovereignty was perceived – still an absolute power of the ruler, but within a system of hierarchical structures where stronger States didn't have to respect the individual authority of others. From Westphalia, sovereignty became based on exclusive authority inside a State's territory and on a policy of non-intervention in domestic issues, transitioning from a hierarchical to an anarchical system and ending the religious wars in Europe. For some scholars, this was the birth of the subject of International Relations.[97] Then, came the tragic events of WWI and WWII and the international community recognized that interdependence was a solution to avert conflicts and protect humanity. Finally, entering the 21st century, after the mass atrocities of the

[95] Moravcski, 2003
[96] Moravcsik, 2003, pp. 217
[97] "It [Westphalia] is the Beginning. The Beginning of international politics. Before that, we were told, there was no sovereignty, there were no states, and there certainly was no international system". Gofas, Hamati-Ataya, Onuf, 2018, pp. 225)

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1990's - as result of divisions laid by an extent number of independencies - measures to protect the rights of citizens, threaten by conflict gained a reinforced influence, forever altering the "inviolability" of sovereignty, if such rights are abused.

The second question, on the *understanding of the different levels of attachment States have had to sovereignty*, the Treaty of Westphalia was fundamental because from it, States gained a new kind of power, which was something they had all along – their domestic authority without external interference. This increased drastically the importance States gave to the concept. This lasted until the end of WWII, when the international community, concerned with the effects domestic issues had on the perception of other States, decreasing gradually and until today, the dependence of States towards the concept of State Sovereignty.

This chapter was not an attempt to answer the question of what sovereignty is; rather it tries to understand how the concept has evolved through history, how States have been affected by it and how States have transformed it. By doing this, the overall objective of this thesis becomes clearer, providing an opening for human rights obligation to have a greater and more effective impact on the shaping of State Sovereignty, in the future.

3. State Compliance with International Law

This chapter will briefly examine the concept of State Compliance within international law, serving as an introduction to the following chapter on the concept of Responsibility to Protect, central to the transformation inflicted to State Sovereignty in the beginning of the 21st century. This chapter will present a brief historical context of compliance from the classical era of international law to the period right after the Treaty of Westphalia, two distinct periods with great influence on the foundations of the concept. Also, the chapter will explore what is

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compliance and what it means to comply with international law, as well as investigating how compliance with these same laws as affected the perception on State Sovereignty. Ultimately, this chapter will explore the question of *why do States obey international law?*[98], as a bridge towards the succeeding chapter.

3.1. Historical Background on compliance

As mentioned in the previous chapter, a partially religious answer was given to the question of why nations should comply with international law – the law of nature -, of which international law was a component. Then, the establishment of *jus gentium* in Roman law by emperor Gaius was fundamental to ascertain a "law common to all men", as a system of equity between Romans and foreigners.[99]

After the establishment of the Treaty of Westphalia, the concern shifted from "why should nations comply" to "what national rulers should do", viewing the subject of compliance as ethical and philosophical, rather than scientific or empirical. Within this new system, the notion of legal obligation emerged as bedrock for distinguishing customary international law from voluntary acts that States might conform but are able to neglect.[100] The concept of obligatory custom "assumed that nations, by virtue of their sovereign statehood, had de facto consented to compliance with customary practices out of a sense of legal obligation."[101]

Immanuel Kant, with regard to compliance, recommended State actors to follow international law as a route to "perpetual peace". Kant interpreted international law as a system toward securing peace, justice and democracy, focused on the significance of human rights. The philosopher argued, not for a world government, but for "a law-governed international society among sovereign states, in which the

[98] It is understood that not all States obey, respect or even recognize some or most international sources of law, whether treaties, resolutions, or even peremptory norms of international law (*jus cogens)*. After all, this thesis concerns one of those States. However, for the purpose of this study, a broad overview will be constructed due to the large difference that exists between countries that do, and countries that do not obey international law.

[99] Koh, 1997, pp.2604

[100] Koh, 1997, pp. 2607

[101] Koh, 1997, pp.2608

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strong ties existing among individuals create mutual interests that cut across national lines".[102] Kant believed that "the existing transnational ties would create a moral interdependence, and lead to greater possibilities for peace through international agreement".[103]

Today, State Compliance, though not unanimously consented as a concept inside international law, has become a parallel notion to State Sovereignty[104]- in what concerns the respect for human rights obligations - providing a framework capable of averting serious violations to these rights. The subject of States' compliance with international law has most recently become one of the key subjects of academic investigation in the field[105]. Complying with internationally adopted laws concerning the rights of every citizen, as brought many alterations to the behavior of most States. Human rights are, today, universal rights which every State has an obligation to guarantee to its people, along with many other civil and social liberties, rewarding them with legitimacy and acceptability in the eyes of the international community.

As the influence of international law on States is generally debated with regard to "compliance with international law"[106], we can question, what is compliance?

3.2. Defining what is State Compliance

Compliance refers to the conformity of behavior of States with a specified legal rule of international scope. It does not necessarily require a cause-effect relationship between a specific rule and a standard behavior of a State. Compliance doesn't imply any aspect of implementation or enforcement towards a State. These

[102] Koh, 1997, pp.2610
[103] Koh, 1997, pp.2610
[104] This argument has no intention of making a comparison between the concepts of State Compliance and State Sovereignty. It's recognized that one is not the opposite of the other and that Sovereignty is a right of every State. Despite this, it is argued – as stated in the previous chapter - that countries that compromise their political authority for the commitment to international laws regarding human rights, are more likely to respect these rights, contrasting to those who don't commit on compromising their national sovereignty.
[105] Alkoby, 2008
[106] Guzman, 2008, pp.22

refer to a process of putting obligations into practice, whether nationally or internationally, denoting a more coercive meaning.[107] It can also be defined as "a state of conformity or identity between an actor's behavior and a specified rule"[108], distinguished from what Mitchell[109] considers to be "treaty-induced compliance", which describes a behavior that occurs because of a specific treaty's compliance system. Franck stresses that compliance with international law is "a function of the normative acceptance of international rules"[110], reflecting their uniformity with domestic standards.[111] It "refers to the degree to which states adjust their behavior to the provisions contained in the international agreements they have entered into"[112].

Despite the fact that the concept of State Compliance has not always been a central subject of great research by the international community, conjectures about what it means to comply with international rules and norms or about why States increasingly abide by international laws, have always been around the academic world, whether in social sciences disciplines or in the field of law.[113] These assumptions are generally related to what Keohane defines as "the puzzle of compliance", the reason "why governments, seeking to promote their own interests, ever comply with rules that are not in their immediate self-interest"[114].

So far, experts regarding international law and international relations' studies have not been able to present a suitable model capable of explaining why States comply with international law in some situations and violate it in others. Though we know that State Compliance exists because political actors are concerned with reputational implications and direct sanctions, associated with violating

[107] Nollkaemper, 2012
[108] Raustiala and Slaughter, 2002, pp.539
[109] Mitchell, 1993, pp. 328
[110] Moravcsik, 2003, pp.224
[111] Franck, 1988
[112] Lutmar and Carneiro, 2018, pp. 2
[113] Goodman and Pegram, 2012, pp.31
[114] Keohane,1984, pp.99

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international law, failing to understand the reasons behind why some comply while others don't, has delayed the progress of the international legal system[115].

The following sub-chapters will focus on how can States demonstrate their compliance with international law and on the reasons behind why countries obey with international law.

3.3. Determining how and why do States comply with International Law

In the modern international system, every State is, to some extent, obligated to justify their actions – in what concerns human rights - according to the rules and norms agreed by the international community[116]. This sub-chapter will analyze the scope to which most States have become – and rightly so - progressively compliant towards international law.

As seen in the previous chapter, the establishment of the Treaty of Westphalia and of the UN Charter - though in completely different periods - have established the traditional principles of international law, based on territoriality and State's political authority. Entering in the 21st century, after the terrible events of the previous century and as a result of the evolving processes of globalization[117] – technology, communication and others – international rules and norms have themselves become more global. Significant transformations had taken place with regard to the international legal landscape, underlined by the continuous increase of: the number of international institutions and regimes; of States ever more concerned with incidences outside their own borders; of non-state actors and of the interconnective relation between domestic and international legal systems. All unveiling a period of rapidly growing transnational relations.

[115] Guzman, 2001

[116] "[T]he State in exercising its right to establish laws and administrative regulations must comply with its legal obligations under international law". (Butler,1987, pp.91)

[117] "Globalization is a widely and somewhat loosely used term, intended to describe the recent and rapid process of intercontinental economic, social, and political integration. This worldwide integration allows people to communicate, travel and invest internationally, and helps companies marker their produces widely, acquire capital and human and material resources more efficiently, share advanced technology, and enjoy economics of scale." (Wells, Shuey, Jiely, 2001)

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A recognizable outcome in the behavior of States, towards complying with their human rights obligations, was the adaptation of their national laws to those internationally recognized, for the protection of these same rights. A nation with international ambitions generates moral obligations to conform with international norms, that subsequently become internally binding legal responsibilities once these transnational standards have been adopted into its domestic legal system. Global actors are thus, more likely to comply with international law when they consent to its legitimacy through an internal process of approving said legislation[118].

Sources of international law, which comprise of treaty law, international customary law and general principles of law are fundamental to the process of compliance with international law, as they bind States either through signed and ratified documents (treaties, conventions…) or through peremptory norms (*jus cogens*). Article 38 of the Statute of the International Court of Justice (ICJ) establishes, under its jurisdiction, that the court, whose function is to decide in accordance with international law, shall apply:[119]

a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting state;
b) International custom, as evidence of a general practice accepted as law;
c) The general principles of law recognized by civilized nations;
d) […] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Thus, participating in any form of international agreement with respect to values such as international peace, security and protection of human rights, as well as

[118] Koh, 1997
[119] United Nations - Statute of the International Court of Justice. 18 April 1946 (Article 38)

abiding by its dictums is the most effective way of complying with international law, leaving the doubt of why a State should do it.

So, as Young questioned: "[w]hy is it that an actor acquires and feels some sense of obligation to conform its behavior to the dictates or requirements of a regime or an institution?"[120] In other words, why do nations comply with international law?[121]

3.4. Why do countries comply with international law?

In the modern era, the debate around why States comply with international law directly relates to Austin's statement that international law cannot be considered actual law because, unlike domestic rules, international legal regulations are not yet imposed by a coercive political authority – a sovereign[122]. Nonetheless, the number of international human rights institutions and countries contributing to the development of humanitarian laws has increased considerably since the end of WWII[123].

This progress has generated discussion over why States willingly choose to take part on these international commitments, as they're intended to monitor compliance with human rights standards.[124] Moreover, contributing to the protection of human rights and the development of human rights institutions – sources of obligation, precision, and delegation – establish significant restraints on the sovereignty of their members[125].

[120] International Law and International Relations Theory: Building Bridges (remarks by Oran R. Young), 1992
[121] Koh (1997)
[122] "The duties which [international law] imposes," Austin wrote, "are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected." (Austin, 2009, pp.171)
[123] Annex 1- Human Rights Institutions and Democratization
[124] Hafner-Burton, Mansfield, Pevehouse (2011)
[125] Abbott and Snidal (2000)

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As the study on theories of compliance is extent, this thesis will not focus too much on the subject, but just enough to concisely analyze the work of a few scholars that tackle some explanations for complying with international law.[126] Chayes & Chayes determine that States comply with international law simply based on the treaty regimes[127] they are part of, what they define as the "managerial model".[128] According to the authors, States obey not because they feel threatened or any other reason, but because they believe it is in their interest to remain committed to the treaty regimes to which they belong. Through this model, domestic actors pursue the promotion of compliance, not through coercion or institutionalization, but through a cooperative model of compliance, which tries to encourage compliance patterns through justification, discourse and persuasion[129]. Ultimately, if the aim is for better implementation of international rules, voluntarily complying, instead of forced compliance, is the more desirable mechanism to guarantee the greater number of obedience towards international law. If States establish internally, international ruling to be reasonable, their more likely to comply with it because, as argued by Chayes & Chayes, "if nations must regularly justify their actions to treaty partners in terms of treaty norms (…) it is more likely that those nations will voluntarily comply with those norms"[130].

Alternatively, Franck claims that the reason States comply with international law is not as the "managerial model" describes, but about the elements of fairness and justice in the international legal system that compel States to obey. States are consequently more inclined to "obey powerless rules" because legitimacy plays a big part in compliance issues.[131] The notion of legitimacy is fundamental for the

[126] For a more comprehensive study on the issue, see Chayes & Chayes (1995), Franck (1990) and Koh (1997)
[127] Chayes & Chayes (1995, pp.2) state that "treaties are at the center of the cooperative regimes by which states and their citizens seek to regulate major common problems", thus concluding that the expression "treaty regime" is a collective system centered around a set of treaties – the main structure of the authors' "managerial model".
[128] Chayes & Chayes, 1995, pp.3
[129] Koh (1997)
[130] Koh, 1997, pp. 2645
[131] Franck, 1990

improvement of interdependence and cooperation between nations, aimed at both States and international laws. In an international community, established through rules and norms, compliance is secured through the perception of rules as being legitimate by those to whom they're addressed[132]. As to States - particularly concerning customary international law – legitimacy has a direct impact on the way States behave, for the reason that every State relies on the fact that all others shall commit to honoring a mutual agreement. Failing to respect such responsibility will damage a State's legitimacy, indicating its unwillingness to comply with its obligations.

According to Koh, the Chayes' managerial model and Franck's fairness approach have historically defended the discipline against two divergent claims: "on the one hand, the realist charge that international law is not really law, because it cannot be enforced; on the other hand, the rationalistic claim that nations "obey" international law only to the extent that it serves national self-interest."[133] Thus, both sides, though distinct, present a valuable case for the reason why States comply with international law.

3.5. Chapter Conclusion

To its own question, quoted at the end of sub-chapter 3.3., on why nations obey international law? Young answers that "there are differences in being obligated to do something because of a moral reason, a normative reason and a legal reason".[134] About Young's remarks, Koh argues "that these moral, normative, and legal reasons are in fact conjoined in the concept of obedience. A transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system."[135]

[132] Franck, 1988
[133] Koh, 1997, pp. 2602
[134] Young, 1992 in Koh, 1997, pp. 2659
[135] Koh, 1997

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Recognized has anything but novel, domestic compliance to internalized global law has respected historical roots. Interpreting global norms and internalizing them into domestic law, leads to the rebuilding of national interests and national identities.[136] With centuries of content to investigate on this issue, motives on why States comply with international law have changed – some have become extinct, while others emerged -, but the it's an irrefutable fact that the number of nations that have become compliant, regarding most international norms, has consistently risen. Thus, furthering the development of transnational legal processes can supplement the understanding on why nations have, throughout history, become more and more compliant to international law.[137]

A crucial part to that development has been the concept that will be presented in the next Chapter.

4. The Responsibility to Protect (R2P)

Just before entering the 21st century, the 1990's witnessed levels of violence and brutality only comparable to those seen during World War II. Throughout this long period of time, States have largely failed to act consistently with their responsibilities as signatories of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), evidencing the international community's "contentious history when it comes to preventing and halting mass atrocities"[138].

In international law, doctrine has still an important role despite the closing gap between international legal theory and that of practical legal life. The inexistence of a central legislator – a supra organization responsible for establishing the rules

[136] Koh, 1997
[137] Koh, 1997
[138] Stark, 2011, pp. 4

of the international legal system –, adding to the fact that state actions are often contradictory and inconsequential, doctrine can fill an important gap by developing central structures in what is seen as a chaotic legal reality.[139] This can justify, or at least partly explain, why the introduction of new concepts and approaches became so popular in the more recent times. As Hipold so accurately states, "new ideas can change the way international law is seen and, in the end, on a practical level, the very substance of the law"[140].

The following chapter will focus on the analysis of a concept that is part of this new wave of legal practices, responsible for focusing on matters of accountability and commitment to the respect of human rights obligations – Responsibility to Protect (R2P). Before focusing on the concept, a quick approach will be made to the notion of humanitarian intervention, identifying its main dilemma, in order to understand the indispensability of new mechanisms such as R2P. This will be followed by an analysis on the concept, through the understanding of its upbringing, its structure, and at last trying to understand under which circumstances can the concept of R2P be executed by the international community.

4.1. Questioning humanitarian intervention

By observing the legal mechanisms responsible for coping with humanitarian intervention, its easily identifiable in the UN Charter, that Articles 2(4) and 2(7), establish a prohibition on "the use of force against the territorial integrity or political independence of any state"[141], or "to intervene in matters which are essentially within the domestic jurisdiction of any state"[142], clearly establishing a principle of non-intervention. This is built around the idea, as mentioned in Chapter 1, that sovereign States have an individual responsibility to exercise law,

[139] Hipold, 2014
[140] Hipold, 2014, pp. 2
[141] United Nations- Charter of the United Nations. 1945, Article 2(4)
[142] United Nations- Charter of the United Nations. 1945, Article 2(7)

promote human rights and prevent human rights violations, as an obligation imposed by the human rights treaties, they are a part of.

Unfortunately, some States are, sometimes, not able or willing to satisfy their responsibilities, and even though the UN Security Council (UNSC) has the ability to approve a military intervention on any State, as established in Article 39 of the UN Charter[143], it is often unable to take quick and effective measures. In past circumstances of gross human rights violations, a third party – a State or group of States – as taken the initiative to stop these violations through force – sanctioned or not by the UNSC – and without the permission of the State that has committed or allowed human rights violations in its territory. This has mistrusted, not only the legality, but also the legitimacy of these interventions, because, even though the moral and political justifications might be correct, many consider humanitarian intervention has having a negative implication when we speak of coercive measure, as it "can be invoked as a cover for military operations of different nature [and] the position of international law may be […] undermined if it does not provide for intervention in cases of […] violations of universally accepted human rights".[144] Essentially, this morally accepted concept of humanitarian intervention with barely any legal foundations faces both the principle of non-intervention and the recognition of territorial sovereignty.

4.2. R2P: a new alternative to humanitarian intervention

With the beginning of the 21st century, UN Secretary-General Kofi Annan stated that: "[…] if humanitarian intervention is, indeed, an unacceptable assault in sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violation of human rights that affect every precept of our common humanity?"[145]

[143] United Nations- Charter of the United Nations. 1945, Article 39
[144] AIV; CAVV - Advisory Report 13: Humanitarian Intervention. Advisory Committee on Issues of Public International Law, 2000.
[145] ICISS, 2001, pp. VII

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It was only in the early 2000's when the international community, embarrassed by its failure to act in the face of the genocides in Rwanda and Srebrenica, as well as by the problems humanitarian intervention was facing, introduced a broad framework of policies aimed at preventing the continuance of mass atrocities and human rights violations.

Emerging from a Report drafted by the International Commission on Intervention and State Sovereignty (ICISS), established in 2000 as an initiative of the Canadian Government and adopted at the UN's World Summit Outcome in 2005, the Responsibility to Protect (R2P) refers to the obligations of States regarding the protection of their population from crimes of genocide, war crimes, ethnic cleansing and crimes against humanity[146], entailing the prevention of such crimes, including their incitement, through appropriate and necessary means[147]. As a result, a state that neglects to take its responsibility cannot claim the violation of its sovereignty if the international community acts on behalf of said state, therefore pressuring States to comply with their human rights obligations.

4.3. The three pillars of R2P

The ICISS attributed three main pillars to R2P – "not just the responsibility to react to an actual or apprehended human catastrophe, but the responsibility to prevent it, and the responsibility to rebuild after the event"[148].

4.3.1. Responsibility to Prevent

The first pillar of the R2P is the responsibility to prevent. This means that the "[p]revention of deadly conflict and other forms of man-made catastrophe is, as with all other aspects of the responsibility to protect, first and foremost the responsibility of sovereign states, and the communities and institutions within

[146] UN Generally Assembly - World Summit Outcome Resolution, 2005, pp. 30
[147] Moon, 2009
[148] ICISS, 2001, pp. 17

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them."[149] The commitment displayed by a State is assessed through its efforts "to ensure accountability and good governance, protect human rights, promote social and economic development and ensure a fair distribution of resources point toward the necessary means".[150]

In spite of this, avoiding conflict is not just a task on the national level, as it is within the benefit of the international community to prevent national calamities, in order to maintain international peace and security. Strengthening the rule of law as well as human rights, providing economic and development assistance, or supporting initiatives to increase good governance are, largely speaking, ways in which the international community can demonstrate its commitment in providing support to States in internal conflict and, in return, gain credibility from said State. This is fundamental in cases where prevention has been unsuccessful, and the use of armed forces is required.

Responsibility to prevent is essential to the well-functioning of R2P, as its primary importance is duly emphasized[151]. Preventing a conflict or an atrocity from occurring is crucial - "to be ready to act […] and not just in the aftermath of disaster".[152]

4.3.2. Responsibility to React

This pillar is essential, not only to the concept of R2P, but to provide this paper with a more concrete response on one of its central points – understanding how the international community can overlap a State's sovereignty, if it violates its international commitments, particularly its human rights obligations.

The second pillar of responsibility to react suggests from the start, that there is a a situation where preventive measures have failed to stop a disaster responsible for

[149] ICISS, 2001, pp. 19
[150] ICISS, 2001, pp. 19
[151] "Prevention" is the single most important dimension of the responsibility to protect". (ICISS, 2001, pp. XI)
[152] ICISS, 2001, p. 27

mass atrocities, and where military intervention is seen as a last resort in situations where the human rights violations are severe. In the exceptional circumstances in which a threat to human security cannot be prevented, the R2P determines that the response of the international community should shift from less intrusive action to coercive measures and only in the more radical cases, "which shock the conscience of mankind"[153], would there be military intervention.[154]

The unsuccess of the first pillar of preventive measures to avoid or contain a humanitarian crisis or conflict does not indicate military action as the only effective measure. Apart from armed reactions, other coercive methods may be related to judicial, economic or political sanctions.[155] Previous to pondering coercive measures, every other possibility towards resolving the conflict has to be discarded, through the use of these sanctions. In cases where there is a need for military intervention, the situation has to be severe and the verdict to take military action has to be considered besides other methods of intervention. In matters of military intervention, the international community is split into States that pursue more intervention and States that favor minimal intervention, but in order to avoid lack of an understanding – that only tends to delay critical decisions and increase human suffering – it is fundamental to find common ground for both preventing and reacting to mass human rights violations.[156]

Carrying out a military intervention "directly interferes with the capacity of a domestic authority to operate on its own territory"[157]. To understand the impact of such an extreme measure, it is important to identify what comprises a case so severe that the employment of military action is justified, starting by the principle of non-intervention. As mentioned previously on Chapter 1, the principle of non-interference is that no sovereign State shall interfere in each other's internal affairs,

[153] ICISS, 2001, pp. 31
[154] McMahon, 2013
[155] ICISS, 2001
[156] ICISS, 2001
[157] ICISS, 2001, pp. 29

comprising a mutual respect for the sovereignty of States and territorial integration, which we can conclude to be the States' concern in preserving order and peace in the regions that surround them. Under exceptional situations, and within the welfare of the international community it is justified to react if a State does not respect its obligations of maintaining peace and order, as it has been acknowledged that "even in states where there was the strongest opposition to infringements on sovereignty, there was general acceptance that there must be limited exceptions to the non-intervention rule for certain kind of emergencies".[158]

Despite the Commission recognizing, through its Report, that "there is no universally accepted single list", six criteria were highlighted for such action to be authorized: "right authority, just cause, right intention, last resort, proportional means and reasonable prospects"[159]. From this list, significant notice is given to the "just cause" criteria, having the Report considered that "military intervention for human protection purposes is justified in two based sets of circumstances, namely in order to halt or avert:

- large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or
- large scale "ethnic cleansing", actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape."[160]

The carrying out of such military intervention can only be authorized by the UNSC, with an understanding between the permanent members not to exercise their veto power, however, in the event of a disagreement amongst members, it was proposed that the General Assembly could act through the 1950 Uniting for

[158] ICISS, 2001, pp. 31
[159] ICISS, 2001, pp. 32
[160] ICISS, 2001, pp. 32

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Peace Resolution (Resolution 377 A (V))[161] [162], allowing it to accelerate the process of decision-making and consequent intervention, so as to minimize any further threats to human security.

Despite the fact that the terms *large scale loss of life* and *large scale ethnic cleansing* are fundamental in the establishment of the *just cause threshold* in the Principles for Military Intervention, it is difficult to quantify a minimum required to be contained in those groups, as the ICISS report doesn't specify. Military intervention can be perceived as a measure of anticipation to large scale killings because if not, the international community would be forced to wait until serious violations, such as the crime of genocide occur, in order to act. Concerning this, it is indifferent whether an international reaction is needed in a undemocratic or collapsed State, or in a democratically represented State. According to the UN Charter, the UNSC can authorize any intervention if there is a threat to international peace and security.[163] The report and its *just cause* criterion exclude other situations that fall "short of outright killing or ethnic cleansing", such as systematic racial discrimination, systematic imprisonment or other repression of political opponents, that "do not in the Commission's view justify military action for human protection purposes".[164] In cases where there is a clear expression for a democratic regime, where democratic values are rejected by a military take-over, or in the case of democratic government being overthrown, the report recognizes that the UNSC "is prepared to authorize military intervention (including by a

[161] The Resolution establishes that, "if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security." United Nations General Assembly - Uniting for peace, 3 November 1950, pp. 10

[162] McMahon, 2013

[163] "This reflects our confidence that, in extreme conscience-shocking cases of the kind with which we are concerned, the element of threat to international peace and security, required under Chapter VII of the Charter as a precondition for Security Council authorization of military intervention, will be usually found to exist." (ICISS, 2001, pp 33)

[164] ICISS, 2001, pp. 34

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regional organization) on traditional international peace and security grounds".[165] There can also arise circumstances where the overthrown government expressly requests military support, which can clearly be given within the scope of the self-defense provision in Article 51 of the UN Charter[166], however the report states that military intervention for human protection purposes should be limited to situations "where large scale loss of civilian life or ethnic cleansing is threatened or taking place".[167]

The responsibility to react is of the three pillars of R2P the most debated. It is difficult to build a consensus within the international community as to establish one singular structure for coercive military intervention, when human rights violations are committed. But it is also important to understand that every reaction by the international community, that holds either sanctions or military intervention, will be a unique case so even though the guidelines should be the same, every case should be treated differently, so as to better identify and respect the different aspects of each situation.

4.3.3. Responsibility to Rebuild

The third and final pillar of R2P is responsibility to rebuild. This means that responsibility to protect implies not only prevention and reaction but also a responsibility to see through and rebuild. If a military intervention is taken, for any of the reasons stated in the previous sub-chapter, in the aftermath, there should be an equal important commitment in "helping to build a durable peace, and promoting good governance and sustainable development".[168]

[165] ICISS, 2001, pp. 34
[166] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security". (UN Charter, 1945, Art.51)
[167] ICISS, 2001, pp. 34
[168] ICISS, 2001. Pp. 39

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An essential priority after any military intervention is to guarantee that sufficient funds for reconstruction and rebuilding are provided, so as to guarantee an effective process of rebuilding. Also, working closely with local authorities in order to ensure public safety and security with the goal of establishing stability in the region. That is why, after a military intervention is succeeded, it is fundamental to have a "post-intervention strategy".[169] The main objective of this strategy, no matter the distinctiveness of every case, should be to make sure that the circumstances that lead to a military intervention do not repeat themselves.

As the report recognizes, the most fruitful reconciliation processes do not necessarily occur through high level political dialogue or through judicial processes. The most accurate reconciliation "is best generated by ground level reconstruction efforts, […] occurs with sustained daily efforts at repairing infrastructure, at rebuilding housing, at planting and harvesting, and cooperating in other productive activities."[170] That is why both the process and the responsibility for rebuilding does not rest on the shoulders of leaders, state actors or truth and reconciliation commissions, but anyone involved with, dedicated to, and that benefits from the process of rebuilding.[171]

In 1998 the UN Secretary-General introduced a structure for post-conflict peacebuilding missions, in his report on *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*[172], after identifying "the need for a concerted international effort to promote peace and security in Africa".[173] This report introduces the foundations for following interventions that succeed any military action. It highlights the need for consolidation of peace and preventing a recurrence of armed confrontation; the creation or strengthening of national institutions, monitoring elections, promoting human rights, providing for

[169] ICISS 5.3
[170] ICISS, 2001, pp. 39
[171] Sarkin, 2015
[172] UN Secretary General, 1998
[173] UN Secretary General, 1998, pp. 3

reintegration and rehabilitation programs, as well as creating conditions for resumed development.

Issues like security and justice in the region are crucial in a post-intervention mission. Successfully disarming, demobilizing and reintegrating local military and security forces is an important element of this process of rebuilding. Also, an operational judicial system has to be applied in order to deliver justice to the region, which can be a difficult job, since it is imperative that the intervening actor prevents any human rights violations from happening. Chapter XII of the UN Charter states that the UN "shall establish under its authority an international trusteeship system for the administration and supervision of such territories"[174], providing the guiding principles for intervening States behavior in military interventions and peacebuilding missions through the promotion of "political, economic, social and educational advancement […] and their progressive development towards self-government or independence"; the encouragement for the "respect for human rights and for fundamental freedoms for all without distinction"; ensuring "equal treatment in social, economic, and commercial matters […] and also equal treatment […] in the administration of justice".[175]

Rebuilding is much a responsibility as preventing or reacting and, as it was stated previously in the sub-chapter of responsibility to react, rebuilding is also a very unique process and though guidelines have been developed, peacebuilding and reconciliation in rebuilding States deserve each process to be specific to a country's condition.[176]

The three pillars of R2P demonstrate how the notion of humanitarian intervention has become dated, even though its purpose is still of tremendous importance. The concept of R2P presents a new and more direct approach, attributing

[174] UN Charter, 1945 (Article 75)
[175] UN Charter, 1945 (Article 76)
[176] Sarkin (2015, pp.97) states that "Countries embarking on reconciliation processes can learn from each other but need to understand that each process has to be specific to that country's situation."

responsibilities to the international community and making it accountable for any inaction in cases of human rights violations.

4.3.4. The Element of *Right Authority*

The element of *right authority* – one of the six criteria for military intervention mentioned in the sub-chapter on responsibility to react – is a vital part since it deals with the party – or parties – who make the decision to intervene with military action and infringe another State's sovereign right to territorial integrity. So, who has the right to determine whether a military intervention for human protection purposes should be conducted?[177]

As stated previously in the chapter on State Sovereignty, the UN Charter states in Articles 2(4) and 2(7), that the UN or any State is prohibited to interfere in any other State's domestic jurisdiction, recalling the principle of non-intervention. But opposite to this, Article 24(1) provides that "[i]n order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security"[178], meaning that the SC has as obligation to use its powers to their full extent, in order to preserve an environment of peace and security. Furthermore, Article 39 specifies that the SC "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, or decide what measures shall be taken […], to maintain or restore international peace and security".[179] The ability granted by Article 39 to the SC does not include the use of force, like Article 41, which mentions that "measures not involving the use of armed forces are to be employed"[180], however if the SC finds the measures provided for in Article 41 inadequate, "it may take such action by air, sea or land forces as may be necessary

[177] ICISS, 2001, pp. 47
[178] UN Charter, 1945 (Article 24(1))
[179] UN Charter, 1945 (Article 39)
[180] UN Charter, 1945 (Article 41)

to maintain or restore international peace and security".[181] As observed by the ICISS report, the general provisions of Chapter VII, the specific approval of self-defense in Article 51 and the provisions of Chapter VIII, collectively establish a formidable source of authority to deal with security threats of all types.[182]

The UN is regarded as the main authority of the international community, as the UN Charter provides the legal foundations concerning military interventions.[183] But, the UN must not be recognized as a source of coercive power, but by its role as the *applicator of legitimacy*.[184] As legitimacy links the exercise of authority and the resort to power, the UN can be identified as an universally recognized system responsible for enforcing international law. In addition, a few facts working in favor of increasing the UN's legitimacy: the fact that the UN cannot enforce a military intervention, as an independent UN military does not exist and, therefore, it is reliant on the resources of its member, as well as their will to approve its decisions.

When analyzing the *right authority*, the UNSC's role is decisive. As the report states, the UNSC is the suitable organization for deciding on the overriding of a State's Sovereignty. However, the veto power of its members can prove a difficult challenge, as one veto can override the others on matters of grave humanitarian concern.[185] As a political organization, the UNSC has limited effectiveness, since its authority remains on implementing the provisions of the Charter, however, if the UNSC fails to respond to gross human rights violations, the General Assembly has, in very exceptional cases, with a two-thirds majority, the legitimacy to decide on military interventions.[186] Additionally, regional collective intervention from organizations from surrounding States is also an option, since their interest in the

[181] UN Charter, 1945 (Article 42) Also, Article 51 describes the right for self-defense against a UN member state.
[182] ICISS, 2001, pp. 48. It is not only the SC which deals with peace and security maintenance. Articles 10 and 11 of the UN Charter give the General Assembly of the UN the ability to make non-binding recommendations for the preservation of peace and security.
[183] ICISS, 2001, pp. 48
[184] ICISS, 2001, pp. 48
[185] ICISS, 2001, pp. 51
[186] ICISS, 2001, pp. 53

situation might be increased if a current of refugees or rebel groups arises and such neighboring States will thus have a strong collective interest in dealing with the catastrophe.[187] The UN Charter provides legal credentials for such regional organizations in Article 52, where is stated that nothing "precludes the existence of regional arrangements or agencies for dealing with such matters relating to maintenance of international peace and security".[188] Some exceptions, such as interventions led by individual states or a group of states, not grounded on any decision taken by the UN, have happened in the past, but only as exceptional cases, as actions led with the authority of the UN would be preferable. This issue raises the main problem of decision-making inside the UN, specially in the UNSC. In many cases, the difficulty in finding unanimously consensus, triggers an international crying towards the necessity of those same exceptions, if conducted for the right reasons.[189]

The concept of R2P has been developing itself into an international legal norm, representing "progress towards the replacement of sovereign impunity with a culture of national and international responsibility and accountability".[190] Its source in international law is treaty and custom centered, and can be employed to international crimes such as war crimes, crimes against humanity, genocide and ethnic cleansing[191] – recognized as peremptory norms of *jus cogens*. Therefore, "preventing these crimes is an obligation under international law that is binding on all states whether or not they have signed or ratified any treaty."[192]

4.4. Crimes invoking R2P

[187] ICISS, 2001, pp. 53
[188] UN Charter, 1945 (Article 52)
[189] ICISS, 2001, pp. 54
[190] Barbour and Gorlick, 2008, pp.541
[191] Barbour and Gorlick, 2008, pp.541
[192]With the exception of "ethnic cleansing", which is not defined in international law, all crimes referred to in the R2P documents are codified in various conventions and statutes in international law (Barbour and Gorlick, 2008, pp.54)

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The 2005 World Summit Outcome report, adopted at an unparalleled assembly of Member States of the UN, demonstrated broad acceptance to the application of this new concept, R2P. The participants of this event agreed, at a minimum, that R2P "is an emerging international legal norm that recognizes an obligation on states and the international community to protect potential victims from genocide, war crimes, ethnic cleansing and crimes against humanity"[193], thus determining which crimes invoke R2P. Beyond this crimes, R2P cannot be applied as it could become destructive to the concept itself.[194] It was therefore limited to the context of these four terrible crimes as there is a comprehensive agreement and acknowledgement of the need to prevent and address them.[195]

4.4.1. Genocide

The UN General Assembly unanimously passed, on December 11th 1946, the Resolution 96(I) that condemned genocide as "the denial of the right of existence of entire human groups".[196] On December 9th, 1948, the same Assembly unanimously passed Genocide Convention. In its Article II, the Convention determines that genocide means any act "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[197]

As an advisory opinion on the Genocide Convention, the International Court of Justice (ICJ) understood that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on states, even without any conventional obligation", further agreeing the universal nature of both

[193] Barbour and Gorlick, 2008, pp.535

[194] "It is important to recognize that R2P is uniquely intended for cases of threatened or actual mass atrocity: genocide, large scale ethnic cleansing, war crimes and crimes against humanity. R2P itself cannot be applied beyond that limited context. To do so would be plainly wrong and damaging to R2P itself." (Axworthy and Rock, 2008, pp. 64)

[195] "R2P was limited to the context of these four egregious crimes as there is broad agreement and recognition of the need to prevent and address them." (Barbour and Gorlick, 2008, pp 541)

[196] United Nations- General Assembly, The Crime of Genocide. 11 December 1946, A/RES/96.

[197] United Nations- General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide. 9 December 1948 (Article 2).

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the condemnation of genocide and of the cooperation required, so as to free humanity from such an horrendous crime.[198] Consequently, according to the ICJ, the Convention mainly confirms pre-existing legal obligations that amount to international *jus cogens*[199], meaning that States are "obliged to take all measures within their power to prevent the crime of genocide".[200] The ICJ has even specified that a State can be held responsible in situations where it fails to employ all measures within its control which might contribute to preventing acts of genocide before it really materializes.[201] The purpose of the Convention includes specific action on both prevention and punishment of crimes of genocide, with Article VIII allowing any contracting party to call upon the competent organs of the UN to take such action under the UN Charter, as they consider appropriate for the prevention and suppression of acts of genocide, attempts to commit genocide, incitement, complicity in genocide, or conspiracy to commit genocide.[202]

4.4.2. War Crimes

Laws on war have existed for centuries. But eventually, international humanitarian law (IHL) was codified in the four 1949 Geneva Conventions[203] and in the 1977 Additional Protocols[204], each containing a list of grave breaches that can be committed in both international and non-international armed conflicts.[205] Preceding the Geneva Conventions, the Hague Conventions of 1907 established

[198] International Court of Justice, 1951.
[199] Méndez, 2007
[200] Barbour and Gorlick, 2008, pp. 542
[201] Barbour and Gorlick, 2008, pp. 542
[202] United Nations- General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide. 9 December 1948 (Article 3 and 8).
[203] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949.
[204] Protocol Additional (No. I) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts; Protocol Additional (No. II) to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977,
[205] Barbour and Gorlick, 2008

the pre-existing laws and customs of war, identified by the Nuremberg Tribunal as "recognized by all civilized nations, […] regarded as being declaratory of the laws and customs of war…".[206] But, it is the Charter of the Nuremberg Tribunal that defined war crimes as:

"[…] violations of the laws or customs of war […] including, but not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons of the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."[207]

More recently, the Rome Statute has established the most current definition of war crimes. In Article, the Statute determined that war crimes include "[g]rave breaches of the Geneva Conventions of 12 August 1949, namely, […] acts against persons or property protected under the provisions of the relevant Convention", which include willful killing; torture or inhuman treatment; willfully causing great suffering, as among several other enumerated crimes.[208]

Until today, numerous international criminal tribunals have been established with jurisdiction over grave breaches of the Geneva Conventions. From time-limited tribunals established by resolutions of the UNSC such as the ICTY and the ICTR; to hybrid tribunals established by bi-lateral treaties between the host State and the UN such as the ECCC[209] in Cambodia, the Special Court of Sierra Leone, and the Special Tribunal for Lebanon; and to special panels set up by an interim UN civil administration and peacekeeping mission such as those established as part of the

[206] Barbour and Gorlick, 2008, pp. 543

[207] United Nations - Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"),1945.

[208] UN General Assembly - Rome Statute of the International Criminal Court (last amended 2010). 17 July 1998. (Article 8)

[209] The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (ECCC).

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UN Transitional Administration Mission in East Timor (UNTAET), the UN Interim Administration Mission in Kosovo (UNMIK); and finally, the permanent court established by the Rome Statute, the International Criminal Court (ICC).[210]

Both the responsibility and the precedent set by these international criminal courts is a strong sign of progress in the development of international law.[211] Despite the questionable effectiveness of these international criminal institutions, whether regarding the limited number of convictions to date or its still fragile ability in preventing future crimes, despite significant financial cost, it is unquestionable that these tribunals "serve an important and necessary function [as they will] continue to play a key role in the promotion of international criminal, humanitarian and human rights law".[212]

4.4.3. Ethnic Cleansing

As previously stated, the term *ethnic cleansing* is not defined in international law. However, the concept is well incorporated within the definition of *crimes against humanity* in Article 7 of the Rome Statute of the ICC,[213] and in Article 5 of the Statute of the ICTY.[214] It is evident that this concept and the other three core international crimes of the R2P end up overlapping each other, with *ethnic cleansing* often falling under the definitions for genocide, crimes against humanity, or fit into specific war crimes.[215]

[210] Barbour and Gorlick, 2008
[211] Barbour and Gorlick, 2008, pp.545
[212] Barbour and Gorlick, 2008, pp. 545
[213] "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court" UN General Assembly - Rome Statute of the International Criminal Court (last amended 2010). 17 July 1998. (Article 7).
[214] "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: […] (h) persecutions on political, racial and religious grounds" UN Security Council - Statute of the International Criminal Tribunal for the Former Yugoslavia,1993. (Article 5(h)).
[215] Barbour and Gorlick, 2008

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Following the conflict in the former Yugoslavia, the term *ethnic cleansing* was established within the terminology of IHL.[216] The UN General Assembly, through resolution 46/242, recognized and condemned the practice of *ethnic cleansing*, which it constituted as "a grave and serious violation of international humanitarian law".[217] It further states that what was occurring in the region was a "concerted effort by the Serbs of Bosnia and Herzegovina, with the acquiescence of, and at least support from, the Yugoslav People's Army, to create "ethnically pure" regions".[218] In resolution 47/80, the General Assembly "reiterates its conviction that those who commit or order the commission of acts of *ethnic cleansing* are individually responsible and should be brought to justice.[219]

4.4.4. Crimes against humanity

The undertaking of crimes against humanity entails the execution or commission of mass atrocities, aimed at any civilian population. Even though no specific source of international law as specialized in crimes against humanity, this core international crime has been included in the Charter of the Nuremberg Tribunal[220], the Statute of the ICTY[221], the Statute of the ICTR[222], and more recently in the Rome Statute of the ICC[223], among other sources.[224]

[216] Barbour and Gorlick, 2008

[217] UN General Assembly The situation in Bosnia and Herzegovina: resolution / adopted by the General Assembly. 25 August 1992. A/RES/46/242.

[218] UN General Assembly The situation in Bosnia and Herzegovina: resolution, 1992.

[219] UN General Assembly - Resolution Adopted by the General Assembly, Ethnic cleansing and racial hatred, 1992.

[220] "The Tribunal […] shall have the power to try and punish persons who, […] committed any of the following crimes […] (c) Crimes against humanity" in United Nations - Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement"),1945. Article 6 (c)

[221] UN Security Council - Statute of the International Criminal Tribunal for the Former Yugoslavia,1993. (Article 5).

[222] UN Security Council, 1994.

[223] Rome Statute of the International Criminal Court, 1998. (Article 7)

[224] Barbour and Gorlick, 2008

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Its first definition in Article 6 of the Charter of the Nuremberg Tribunal defines crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated".[225] This definition required that the crime be perpetrated be connected with war and with another crime within the jurisdiction of the Tribunal.[226]

The definition provided by the ICTY included "the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political; racial and religious grounds; other inhumane acts."[227] Just like the Charter of the Nuremberg Tribunal, it is required a connection to armed conflict, though no connection to any other crime is required.[228]

The ICTR definition establishes that the following crimes are considered as crimes against humanity "when committed as a part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial and religious grounds; other inhumane acts."[229] In cases ruled by the ICTR, what is required in a connection to widespread or systematic attack against the civilian population, while it is not required a connection with an armed conflict.[230]

At last, the Rome Statute definition was drafted to include:

[225] United Nations- Charter of the International Military Tribunal, 1945. (Article 6 (c))
[226] Barbour and Gorlick, 2008
[227] UN Security Council - Statute of the International Criminal Tribunal for the Former Yugoslavia,1993. (Article 5).
[228] Barbour and Gorlick, 2008
[229] UN Security Council, 1994
[230] Barbour and Gorlick, 2008

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"[T]he following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecutions against any identifiable group or collectivity on political, national ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[231]

This definition attempts to cover an extensive selection of potential mass atrocities, while not requiring any connection with armed conflict. The evolution that is visible in the prevention of this specific crime, through these sources of international law, gradually converts it into an even more unique and identifiable case. Crimes against humanity are part of *jus cogens* and thus, all States share a responsibility in prosecuting and assisting in securing the evidence needed to prosecute such crimes.[232]

4.5. R2P: Chapter Conclusion

This chapter on R2P was designed to, after the analysis on State Sovereignty, present a modern mechanism, at the hands of the international community, that determines State Sovereignty not only as an exclusive right of the sovereign, the ultimate authority over the territory of the State, but also as a responsibility for the

[231]Rome Statute of the International Criminal Court, 1998. (Article 7))
[232] Barbour and Gorlick, 2008

protection of its people. Thus, where a population is suffering serious harm, inflicted by the State, or the State is unwilling or unable to stop it, its sovereign entitlement to the non-intervention of external actors yields to the international community's responsibility to protect.

It has been identified that only under what specific circumstances can the international community invoke R2P. Those are the core international crimes of genocide, war crimes, crimes against humanity and ethnic cleansing. Through its second pillar – responsibility to react – R2P establishes a list of six criteria to the non-intervention principle, under which R2P can be executed. The criterium of *Right Authority* has been emphasized so as to understand who in the international community has the authority to decide on a military intervention. As we determined, the UNSC has the sole responsibility in that matter, requiring a unanimous decision to determine any action.

The concept of R2P is still a very young mechanism in an international system that has existed for centuries and that is becoming more complex every day. However, R2P should be recognized for the progress it expresses, towards developing international legal standards which focus on international protection, accountability, as well as the prevention of future occurrences of mass atrocities and serious human rights violations.[233] It is astonishing how exceptionally fast the doctrine of R2P has grown and the signs it shows of how much further it can develop. Because of this, it is essential to demand that its application be swift, effective and recurrence-free. The international community – especially power organizations such as the UN - must be very consistent in its references to the doctrine. It's the only way to build a general acceptance of R2P among its member States.

[233] Barbour and Gorlick, 2008, pp. 565

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5. The Case of Sudan

After the theoretical part of this thesis, this chapter will focus on a practical case in order to understand, in a more distinctive way, some of the answers that might be behind our starting question, *why are countries so attached to the concept of sovereignty?*

This chapter is about Sudan. At the time this thesis was initiated the former government of Sudan was still in power for almost 30 years. But despite a change in power, since the events that highpoint this chapter occurred during the administration of the previous regime, the latter will be presented as if it were the current government. Only the concluding chapter of this work will address the present executive, mentioning it in its closing remarks.

This specific country was chosen for a number of reasons: first, the longevity with which the same head of State has governed Sudan, without interruption; and second, the undisputed violations of human rights that have taken place in the country for several years, while the government proved incapable or unwilling to stop them, without contestation. Both reasons are directly connected to the main subject of this thesis since they demonstrate the level of authority held by the sovereign in such countries. Other reasons are related to the historical construction of the country, that will be presented in the succeeding sub-chapters; the social divisions inside the country due to ethnic and religious differences – essential in understanding the reasons behind the continuous human rights violations; and ultimately, the existence of an enormous economic potential as a result of a vast number of natural resources, such as oil, natural gas, uranium, and copper[234], proving that despite many years of conflict and disorder, the country encompasses the ability to reverse its trajectory and become one of Africa's strongest economies.

[234] Oppong, 2010

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Despite its potential for development, the course taken by Sudan has failed to address the differences among its diverse ethnic communities and the problematic relationship between religion and politics. This has resulted in political instability and the absence of national consensus, leading ultimately to a lengthy civil war[235] between the Arab-dominated North and the Christian and animist South.[236] Since its independence the country as witnessed many internal conflicts, including the longest in all of Africa[237], and until today, stability hasn't yet been achieved.

This chapter provides an analysis of contemporary Sudan, outlining the social and political evolution of the State, emphasizing its post-independence period. Thus, an historical context, starting from its independence to the rise to power of its current government, will precede the focus on its major humanitarian crisis – the Darfur Crisis – its causes and effects, followed by the role of R2P and of the international community in averting this grave situation. Finally, the specific role of the ICC in the case of Sudan will be analyzed, so as to determine how influential an international court has become in obtaining justice, at a time where domestic authority is still the main performer.

5.1. Historical Background

Sudan derives its name from the Arabic *bilad as-Sudan*, meaning "land of the black".[238] Its capital is the city of Khartoum. The country shares borders with seven countries: Lybia, Chad and the Central African Republic to the West; Eritrea and Ethiopia to the East; South Sudan to the South; and Egypt to the North. Through the country passes the longest river in the world, the Nile while its eastern border is partially covered by the Red Sea.[239] The present borders of Sudan, geopolitically speaking, make it a relatively recent nation. However, its parts have experienced different levels of state-building and centralized power. The northern region of the

[235] Sidahmed & Sidahmed, 2005
[236] Udombana, 2005
[237] Udombana, 2005
[238] Moorcraft, 2015
[239] Annex 2: Map of Sudan (2020)

country is well documented, has archaeological excavations and research have taken place in the area for many years. On the other hand, very little is known about the early history of the southern and western region of Sudan. Scholars divide the historical progress of the country into three main stages: ancient, medieval and modern. The ancient period spreads from antiquity until between the fourth or fifth centuries AD; the medieval ranges from the sixth to the eighteenth centuries AD, while the modern history of Sudan extends from the nineteenth century onwards.[240] For the purposes of the scope of this thesis, which focuses primarily on the contemporary era, this investigation will center around the accounts from Sudan's independence forward, particularly as of 1989.

5.1.1. The independence of Sudan

Sudan and Egypt, neighboring territories, have developed a relationship for thousands of years. From about 3000 BC, the northern region of Sudan (then known as Kush) became tangled with Egypt, which began to exercise considerable cultural and political influence on the region, at times ruling it as a province of Egypt. However, Egyptian hegemony over Sudan varied in military might and, at times, Sudan developed its own political structures. This period of Egyptian rule included two significant phases during the modern era.[241] First, the Turko-Egyptian era, from 1820 until 1885, when Egypt, which was at the time a province of the Ottoman Empire, invaded the region of Sudan and in a year had established what came to be known as the Turko-Egyptian regime in Sudan. The motivation behind this occupation was primarily a need for human and economic resources of Sudan, to boost the Egyptian ambitions of building an empire in the region and the city of Khartoum (current capital of Sudan) was established as the central

[240] Sidahmed and Sidahmed, 2005
[241] Sidahmed and Sidahmed, 2005

administration for the region.[242] Second, the Anglo-Egyptian era began due to an increasing European presence in central Africa and in 1884, the Berlin Treaty, between the major European powers defined areas of influence between the various actors, leading Britain to act and reclaim the region.[243] The Anglo-Egyptian Condominium agreement concluded on January 9th, 1899, granted the British ruling over Sudan, however, acknowledging the fact that they could not rule Sudan directly as yet another colony, both nations compromised on a joint British and Egyptian that ruled Sudan until its independence[244] on January 1st, 1956.[245]

Independent Sudan has had numerous changes in government, as consecutive government rulers found it difficult to win the general acceptance and support from the country's largely diverse population.[246] Since 1956, the country has seen three civilian parliamentary regimes (1956-58; 1965-69; 1986-89) and three military ones (1958-64; 1969-85; 1989-present), with each civilian regime being preceded by a transitional period (1953-56; 1964-65; 1985-86) conceived to terminate the previous regime and set up conditions for a new one, during which, mostly fair elections were conducted.[247]

5.1.2. Internal divisions in Sudan

To add to this political instability, before we move on to the next sub-chapter, it is essential for the understanding of the political conjecture of Sudan, to emphasize two distinct circumstances that have affected its history since even before its

[242] Sidahmed and Sidahmed, 2005
[243] The British Empire had unofficially ruled over the regions of Sudan and Egypt.
[244] The Anglo-Egyptian Agreement of 1953 established the steps to be taken towards Sudanese self-rule and self-determination, consequently leading to its independence, in 1956.
[245] Sidahmed and Sidahmed, 2005
[246] Oppong, 2010
[247] Sidahmed and Sidahmed, 2005

independence: the religious/ethnical conflict and the division between the northern and southern territories of Sudan.

5.1.2.1. Ethnical and religious divisions

After the collapse of the Kingdom of Kush in the 4th century AD, the region of Nubia[248], which today encompasses the areas between southern Egypt and central Sudan, was invaded by Ethiopia, resulting in the conversion of Nubia's kingdom monarchs into Christianity. However, this only lasted until the 14th century, when the last Christian king of Nubia was defeated and the first Muslim Nubian King, Abdallah Barshambu, accedes to the throne of Dongola[249], in 1317. Later, under the Funj and Fur Sultanates[250], the northern and western parts of Sudan became Islamized and largely Arabized. This occurred through an extensive process that involved demographic movements, in particular the migration of Arab tribes into various parts of Sudan, as well as preaching and educational efforts of individual Muslim scholars.[251] The Islamization and Arabization processes, which endured for about four centuries, reaching its prime during the eighteenth and nineteenth centuries, developed through three stages:

1) The introduction of Islam through demographic movements and migration, political and commercial contacts, and eventually the conversion of the ruling Sultanates of Funj and Fur;
2) The evolution of a more enthusiastic process of Islamization due to an expanding network of Muslim scholars, and;

[248] Annex 3: Map of the Nubia Region.
[249] Dongola was once a province in the upper Nubia region. Today is a town in northern Sudan.
[250] As the Arabs settled in the northern region, two indigenous kingdoms expanded in the central and western regions of Sudan. The Funj loosely organized domain. At its greatest extent, it reached from the southern part of the Nubian Desert (part of the Sahara, East of the Nile) to modern Khartoum and farther South toward the Ethiopian Highlands. The Funj converted to Islam but retained many traditional African rituals. In Western Sudan, the Fur imposed taxes on caravan goods traveling between western Africa and Egypt, developing a strong central government that dominated, among others, the region of Darfur. Like the Funj, the Fur adopted Islam and the rulers of both kingdoms took the Muslim title of sultans. (Childress, 2010)
[251] Sidahmed and Sidahmed, 2005

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3) The adoption, within the Sudanese region, of Arabic and Islamic culture, especially in the north-central and western areas.[252]

This continuous spread left little room for Christianity to endure. Rapidly, the majority of the population became both of Arabic culture and Islamic religion, with the 19th century marking the integration of Islam into the sphere of national politics, while the native Christian Africans were demoted to a minority with very few influences in the social, religious and political fields.

5.1.2.2. The fracture between northern and southern regions

The second context is the visible crack between northern Sudan and southern Sudan. Not much is known about the past of southern Sudan, though it's clear that the region experienced a very different line of events from the south. Isolated because of natural barriers of mountains and rivers, the region was less exposed to external interference, preserving a unique social and cultural identity. Through the beginning of the nineteenth century, the main cultural identities that describe the Sudanese regions in the present were virtually established: from the Arabic-Islamic alignment in the north-central region to the strong African orientation of the south and, between them, among other, a particular region retained its robust regional identity, Darfur.

A crucial event that expanded this division between north and south was during the independence negotiations. Southern ambitions were not taken into consideration by either the British administration or the northern statesmen, as the negotiations towards self-government did not include a representative from the south. This meant that, since the beginning, Sudan has been ruled merely through northern directives, leading to an increase of isolation and ambition of self-rule in the south. This resulted in the First Sudanese Civil War, from 1955 until 1972, between northern and southern regions of Sudan, which demanded representation and an increase in regional autonomy. A succeeding civil war emerged in 1983 as

[252] Sidahmed & Sidahmed, 2005

a continuation of the preceding conflict between the Sudanese government and the Sudanese People's Liberation Army (SPLA)[253], only ending with a peace agreement signed in 2005, that would forever change the course of Sudanese history.[254]

5.1.3. The rise of Omar Al-Bashir into power

Omar Hassan Ahmad al-Bashir was born on January 7th, 1944 in Hosh Bannaga, 100 miles north of Khartoum, into a peasant family of Arabic origin.[255] His family belongs to the Jaaliyyin, an ethnic group descendent from Arab immigrants who settled in the Nile Valley in the sixteenth century.[256] After studying at the Egyptian Military Academy in Cairo, al-Bashir fought in the Yom Kippur war of 1973, as part of a joint Sudanese-Egyptian special forces group against Israel. In the following years, various military roles were undertaken, such as a military attaché in the UAE in 1975, or a tour duty in 1976 as part of the Arab League peacekeeping force in Lebanon[257]. In the 1980s his military career constantly progressed from garrison commander in 1979 to lieutenant colonel in 1980, full colonel in 1981 and commander of an armed parachute brigade, a post he held until 1987. During this period, he obtained a first master's degree in military science from the Sudanese Command and Staff College in 1981 and a second master's degree in military science in Malaysia, in 1983. As the Second Sudanese Civil War emerged, Al-Bashir gained extensive combat experience fighting in the southern region of Sudan, spending three years posted internally, conducting counterinsurgency operations against the SPLA.[258]

[253] The armed wing of the Sudanese People's Liberation Movement (SPLM).
[254] This peace accord (CPA) lead to a referendum which granted independence to the newly formed South Sudan.
[255] Moorcraft, 2015
[256] Childress, 2010
[257] Moorcraft, 2015
[258] Moorcraft, 2015

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In 1989, the country was in turmoil. The civil war had no ending at sight as southern forces were growing and demanding three things. First was the right to choose their own regional and local government, which was granted by the Sudanese constitution, but abolished during the military regime; second was a plea to end Sharia - a legal system based on the religious writings of Islam, imposed by the same military regime in 1983 - as most southerners were not Muslims but Christians or followers of a traditional African religion. The third demand was a fair distribution of wealth and economic development from Sudan's natural resources.[259]

When Sadiq al-Mahdi, the leader of the Umma Party, was democratically elected in 1986, as the 7th Prime Minister of Sudan, he promised peace and an end to the conflict. However, he did not keep his promise and instead, recruited new militias to fight against the south. In 1988, it was reported that around 250,000 Sudanese died from war, disease or hunger due to the conflict, while two or three million people were forced to flee their homes to avoid the conflict.[260] As the war continued, the division between north and south was becoming greater and the people were becoming tired of the regime.[261] Unsatisfied with the country's leadership, al-Bashir lead a successful coup on the night of June 30th, 1989, announcing over the radio that a fifteen-member Revolutionary Command Council for National Salvation now ruled Sudan and he, "head of state, minister of defense and commander of the armed forces", declared the Constitution suspended and all political parties dissolved.[262] After the coup, the fallen northern politicians, including al-Mahdi were sent to prison and, amid rumors of a counter-coup, al-Bashir locked up other potential opponents from inside the army, thus guaranteeing minimum objection to his rule.[263]

[259] Childress, 2010
[260] Childress, 2010
[261] "The people were fed up with Sadiq al-Mahdi [the Sudanese Prime Minister at the time]" al-Bashir told me straightforwardly." (Moorcraft,2015, chapter 5)
[262] Childress, 2010
[263] Moorcraft, 2015

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An essential element in the implementation of the new regime was a Muslim extremist and leader of the National Islamic Front (NIF), Hassan al-Turabi, "the spiritual mentor of the revolution". Al-Turabi played a crucial rule in the Islamization of the country and as an Islamic scholar, he believed in the Islamization of the south, instead of its separation. As any proposal had to be settled unanimously, his veto power ensured that southerners didn't secure their requirements.[264] Together, al-Bashir and al-Turabi began to Islamize the country, as the government was committed to making all Sudanese proper Arabs and Muslims through a vigorous program of Arabization and Islamization[265] and, in March 1991 Islamic law (Sharia) was introduced[266] further emphasizing the division between the north and the southern regions of Sudan. This process presupposed that Islam and Arabic embodied the foundation of the country's national identity and therefore should outline its legal, political, cultural and economic systems.[267] In October of 1993 when the Revolutionary Council was terminated, al-Bashir was appointed President of Sudan and, as head of the military, thus began a new military rule[268], the third since Sudan's independence in 1956. In the 1996 general elections, the first elections since 1986, al-Bashir was confirmed as President of Sudan.

When the NIF came into power in 1989, the character of the State changed. The party transformed Sudan by seizing the wealth of the country, repressing civil society, enforcing an intolerant Islamist dogmatism on every facet of State and society, alienating Sudan's Arab and African neighbors. The State waged a vicious war against its people, not only in through the mentioned north-south conflict but also across other regions of the country.[269]

[264] Moorcraft, 2015
[265] Moorcraft, 2015
[266] Nagar and Tønnensen, 2017
[267] Nagar and Tønnensen, 2017.
[268] Moorcraft,2015
[269] Bassil, 2015

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Throughout this period, the Second Civil War between the central government and the SPLA endured, resulting in the displacement of millions of Sudanese people. Adding to the unfair application of Sharia law, the centralization of power on the government of Khartoum and the unequal treatment of the southern and western regions of Sudan, the dispute between sides grew fiercer when oil production and exportation started on a large scale, in 1999, specifically in the border area between north and south, thus aggravating the relationship between the government, the SPLA and all the other rebel forces fighting in the war.[270]

Among the multiple consequences that result from an internal conflict such as a civil war, the mistreatment of civilians through the violation of their basic human rights has to be on top as the worst. The importance of understanding this issue lies with the State's ability to act on its citizens, imposing its authority and order, regardless of the costs, because there were no real internal or external consequences to those actions. A military regime ruled by a central authoritarian government, that shares no power, no authority and no resources. Thus, the claim made by those who face it seems ever more legitimate, as the conflict grows.

5.2. The Darfur Crisis and the violation of human rights in Sudan

The incessant escalation of the conflict between the government of Sudan and the rebel factions lead to an event of tremendous proportions affecting the lives of millions of people in the region of Darfur. The NIF's actions to enforce its dominance over the region, reorganizing the provincial political structure and replacing Darfur's local leadership with NIF appointments loyal to President al-Bashir, generated a significant backlash in the region. But this strategy backfired and a powerful challenge to his rule emerged from the region, leading him to employ the most brutal means to subdue the region.[271] A humanitarian crisis struck in the region in 2003, gradually exposing not only the gross violations of human

[270] Moorcraft, 2015
[271] Bassil, 2015

rights and humanitarian law, particularly by militias backed by the government[272] but also the condemnable actions of the government in handling the situation.

The main purpose of this chapter, through the analysis of this humanitarian crisis, is to understand how the government of Sudan was able to behave against international laws on human rights, becoming responsible for the death, injury, and displacement of millions of Sudanese civilians, while avoiding national and international condemnation for its actions, with the international community displaying a posture of apparent neutrality to these atrocities.[273] By using the crisis in Darfur as the practical reference for this thesis, its focus lies on re-conceptualizing the concept of State Sovereignty – "one that views sovereignty not as control but as responsibility"[274] – laying the foundations for establishing appropriate international legal and policy responses, preventing future situations like the one in Darfur.

Thus, this chapter will focus on examining both the causes and the effects that resulted from this humanitarian crisis, emphasizing the role played by the central government of Khartoum in the events of Darfur, in order to identify the demand for international intervention in cases which the government fails to act according to IHL.

5.2.1. The Causes of the Darfur Crisis

Located in the western region of Sudan[275], bordering Libya, Chad, the Central African Republic, and South Sudan, Darfur is Sudan's largest region comprising an area of approximately 250,000 square kilometers and an estimated population

[272] Udombana, 2005
[273] Udombana, 2005
[274] Maogoto and Kindiki (2007)
[275] Annex 4: Map of Darfur (2020)

of 6 million people[276]. This western part of the country is home to various ethnic groups, including the Furs[277], Baggaras, Masalits, Zaghawas, and others, with the Fur and Masalit as the dominant ethnic groups.[278] For years, the government of Sudan has favored the Arabic culture in Darfur, leading to suspicions by the leaders of the aforementioned ethnic groups. The distrust intensified when the El Mahdi government (1986-1989) armed Arab Baggara militias from Darfur and Kordofan (a present-day southern region of Sudan) known as "*muraheleen*", using them as counterinsurgency forces against southern rebels.[279] After taking power in the 1989 coup, the NIF continued this policy, even incorporating many members of the militia into the national military as members of the Popular Defense Forces, despite their involvement in attacks against the local communities in Darfur, raiding, looting, enslaving and punishing civilians. [280]

The crisis in Darfur commenced in early 2003, largely as a result of action by rebel forces, particularly the Sudan Liberation Movement/Army (SLM/A), and later the Justice and Equality Movement (JEM), the members of whom come predominantly from the Fur, Zaghawa and Masalit tribes.[281] These organized rebel forces accused the Arab-ruled government of Sudan of years of malign, neglect and oppression of black Africans in favor of Arabs, demanding that the Sudanese government address the political marginalization, the economic underdevelopment of the region and the discrimination towards African Darfurians.[282] In April of 2003, the SLA attacked government military forces at El Fasher, in North Darfur.[283] Within a few months of the attacks, the region had come under assault from military and pro-government militias.[284] As the government apparently did

[276] International Commission of Inquiry on Darfur, 2004
[277] The name Darfur is from "dar fur" which in Arabic means "the land of the Fur".
[278] Udombana, 2005
[279] Human Rights Watch, Darfur in Flames: Atrocities in Western Sudan, Vol. 16, 2004, available at www.hrw.org/reports/2004/sudan0404/.
[280] Udombana, 2005
[281] Udombana, 2005
[282] UN Commission on Human Rights, 2004
[283] Maogoto and Kindiki, 2007
[284] Bassil, 2015

not own sufficient military resources - as many of its forces were still located in the southern region of Sudan – the government supported a militia comprised of Arabic fighters, known as the "*Janjaweed*", to respond to the rebellion.[285] Worryingly, what appears to have been an ethnically based rebellion, has been met with an ethnically based response, building in large part on long-standing tribal rivalries[286]. With the support of the government, the militias attacked villages, targeting civilian communities that share the same ethnicity of the rebel groups, killing, looting, destroying hundreds of villages and polluting water supplies.[287] By the end of 2003, some reports were published confirming that those government-backed militias were slaughtering civilians.[288] A humanitarian disaster had just begun.

So, what can we consider to be the causes responsible for the humanitarian crisis in Darfur?

Darfurians share a lot in common, but most importantly they speak Arabic and they are all Muslims. However, some researchers and policymakers, as well as the media, misinterpret the underlying causes, attributing "ancient hatred" as the main responsible for most conflicts in Africa. In the case of Darfur, it is usually attributed to the ethnic hatred between Arabs and non-Arabs, as affirmed by the government itself, but it is argued here, that Darfur was a State-driven political conflict.[289] Whereas many consider these situations of simple explanation, they are in fact complex cases, as "the most widely discussed explanations of ethnic conflict are, at best, incomplete and, at worst, simply wrong."[290] In most cases, the real causes of conflict and humanitarian crises are connected to political and economical power. In other words, conflict arises when a dispute for authority and control is at play, while the risk of losing that conflict can mean a loss of influence

[285] Maogoto and Kindiki, 2007
[286] UN Commission on Human Rights, 2004
[287] Udombana, 2005
[288] Bassil, 2015
[289] Etefa, 2019
[290] Lake & Rothchild, 1996, pp.41

and decision-making. Therefore politics are at the center of the issue, rather than hatred or competition for natural resources.[291] As Elbadawi and Sambanis state, "deep political and economic failures – not tribalism or ethnic hatred – are the root causes of Africa's problems"[292], as ethnic conflicts are mostly caused by political grievance.

It is possible to determine various causes responsible for each specific case of conflict: ethnic manipulation, chronic neglect, and marginalization, land grabbing, arms smuggling, government relying on militias, underdevelopment or lack of basic infrastructures – all boiling down to political accusations.[293] However, in the case of Darfur, it is the political choices and the policies selected by the Sudanese government that lay the foundation for the rebellious mobilizations, through the lack of access to power, resources, and decision-making, and not an intrinsic ethnic hatred, that justifies the conflict. Thus, this struggle for political might translates into a challenge on the State's ability to decide, a challenge on its sovereignty, leading this analysis to the responsibility of the sovereign, the government of Sudan and its President, Omar al-Bashir.

5.2.2. The Responsibility of the State

Accountability and responsibility must be the hallmark of any government[294], as political goodwill, the institutionalization of inter-governmental relations and cooperation among parties is required to enforce conflict management processes in the country[295]. In the case of Sudan, interpreting the facts under international court jurisprudence – specifically the International Court of Justice (ICJ) -, gives reason to question the potential impact of allegations of responsibility for crimes

[291] Etefa, 2019
[292] Elbadawi and Sambanis, 2000
[293] Etefa, 2019
[294] Etefa, 2019
[295] Etefa, 2019

attributable to its government. Interpretations would differ depending on whether the government of Sudan acted according to these specific proceedings:

1) If the government itself orchestrated attacks on the civilian population of Darfur;
2) If the government negligently permitted individuals to have the appearance of state authority, while committing said attacks, or;
3) If the government recklessly armed and unleashed those likely to attack civilian populations that oppose the government.[296]

Another fundamental aspect is the extent of Sudan's responsibility for its failure to act once the international community alerted the government of its inability or unwillingness to prevent large-scale killings and displacement of populations. This is particularly the case when international peacekeeping units are at the government's disposal but forbids their entry, while the violations committed continue without impunity.[297] Escalating the severity of the crisis rather than executing its primary responsibility to provide security and protection to the people, the government abandoned neutrality in Darfur, supporting the Sudanese and non-Sudanese Arabs[298]. The accountability of the government of Sudan arises from the overwhelming evidence that it is responsible for recruiting, arming and participating in joint attacks with militia forces, that have become the main instrument for the attacks on the civilian population of Darfur.[299]

So, with government-backed militias as main perpetrators of the violence that has erupted this humanitarian crisis, it is important to investigate whether direct government accountability for the actions of said militias, that may or may not serve the interests of the government, is appropriate. International courts such as the ICJ, the ICTY, and others, have reviewed the standards for government

[296] Charity, 2011
[297] Charity, 2011
[298] Etefa, 2019
[299] Maogoto and Kindiki, 2007

responsibility, based on its control over militia groups, in several cases. In 2007, the ICJ reviewed state responsibility for actions taken by militias in breach of humanitarian law. In the case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), Bosnia-Herzegovina accused the former Federal Republic of Yugoslavia of engaging in genocide and failing to prevent or punish genocide in contravention to the Genocide Convention, while claiming that Serbia had financially and strategically supported the Bosnian Serb Army (VRS)[300], which had, among other things, engaged in the killing of people in the UN-protected area of Srebrenica.[301] Despite concluding that Bosnia-Herzegovina's case lacked proof of Serbia's control over the killings at Srebrenica, the ICJ did find that the Serbian government failed to exercise whatever authority it might have applied to prevent the reported atrocities. This omission constituted a failure to prevent and punish the crime of genocide.[302]

Thus, operating the same line of thought, and assuming the truth regarding the actions of the Janjaweed militias against the Sudanese population and those militias' connection to the government of Sudan, the international community has established that the government has failed to disarm these militias and to protect its population in Darfur from crimes against humanity, determining that the people responsible for these actions should be prosecuted, either at a national or an international level of justice.[303]

However, the continuous effort of the government in blocking external humanitarian access to understand the situation has led to an absence of proof of a consolidated effort in which the government is taking part in the violent attacks committed by the militias in Darfur. Consequently, any action taken by the

[300] The Bosnian Serb Army, or Army of Republika Srpska (VRS), was the military force of the self-proclaimed Serb secessionists, a territory within the newly independent Bosnia-Herzegovina (formerly part of Yugoslavia), which it fought against during the Bosnian War (1992-95).
[301] Charity, 2011
[302] Charity, 2011. See *Bosn. & Herz. V. Serb & Mont*., 2007 I.C.J.
[303] Charity, 2011

international community would violate the sovereignty of the State, as States comprehend sovereignty to incorporate unilateral and unchecked control of all matters within the State[304], thus limiting the actions of international courts in prosecuting any individual responsible for this humanitarian crisis, whether a low-ranking member of the militia or a high-ranking member of the Sudanese government.

5.2.3. Responsibility to Protect (R2P) in Sudan: the role of the international community

After considerable advocacy by the UN and members of the ICISS, R2P was formed as a political agreement on the responsibility to protect, in 2005. States agreed that they have a responsibility to protect their population from specific human rights violations – genocide, war crimes, ethnic cleansing and crimes against humanity -, as they have in preventing and responding to these mass atrocities.[305] This sub-chapter will examine the application of R2P in the region of Darfur by the UNSC while acknowledging that in the end, it failed to achieve the most important objective – end the conflict in the region.

When the scale of violence in Darfur became clear, many observers called it a test case for the R2P doctrine[306], citing it as one basis for the necessity of an immediate response by the UNSC[307]. The crimes committed in Darfur are unquestionably defined as crimes against humanity, war crimes and ethnic cleansing, three of the four crimes covered by the R2P agreement[308], as there have been divergent perspectives on the legal applicability of genocide to the case of Darfur[309] (though this thesis defends that there's a case to prove acts of genocide). As an effect, the Resolution 1706 on Darfur was the first and only time, the UNSC referred to R2P

[304] Charity, 2011
[305] Hehir,2012
[306] Lanz, 2019
[307] Charity, 2011
[308] Gifkins, 2016a
[309] Gifkins, 2016b

in a country-specific resolution, before 2011.[310] It reaffirmed R2P and authorized the transition from the African Union Mission in Sudan (AMIS) in Darfur to a UN peacekeeping force in 2006, as AMIS, a contingent of African Union (AU) peacekeepers deployed to monitor a ceasefire in 2004, was struggling to provide protection and security to civilians and its people, making donors unwilling to continue funding the mission[311]. This resolution authorized the expansion of the United Nations Mission in Sudan (UNMIS), which had previously operated in the south of Sudan, into Darfur to replace AMIS.

Throughout the negotiations towards the drafting of Resolution 1706, there were two contentious points: mentioning R2P in the resolution and gaining consent from the Sudanese government. During this period, the Darfur Peace Agreement (DPA) of 2006 had been signed but the government of Sudan still rejected any forces entering the country, hampering the UNSC's position, since UN peacekeepers are premised on consent. The U.S. advocated the idea of authorizing the deployment of peacekeepers first and seeking consent afterward, which was, reluctantly, agreed by the U.K. and France, though there was no real sign that this would work, given the positions of the Sudanese government in rejecting UN peacekeepers, and of the Chinese government demanding that consent was required. An agreement was eventually established, as both R2P[312] and consent appear in the resolution.[313]

The Resolution 1706 was thus the first UNSC resolution to associate the R2P doctrine of the World Summit outcome document to a specific country. After the vote on the resolution, the majority of UNSC members spoke on the international responsibilities towards the situation in Darfur, though stressing the primary responsibility of the Government of Sudan to ensure the security of its citizens. This moment marked the recognition that the international community had

[310] Gifkins, 2015
[311] Gifkins, 2016a
[312] Resolution 1706 recalls "its previous resolutions [including] Resolution 1674 (S/RES/1674) on the protection of civilians in armed conflict, which reaffirms inter alia the provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit outcome document." (UN Security Council, 2006)
[313] Gifkins, 2016b

Using the case of Sudan to understand how countries are still able, through the concept of State Sovereignty, to protect themselves from their human rights obligations.

responsibilities within Darfur and engagement with R2P.[314] So, despite its impact, why did R2P end up failing the people of Darfur?

R2P has not been successful in facilitating effective change when confronting internal conflict. The Darfur crisis provides evidence of R2P's unsuccess, as Darfur's population continues to suffer from mass atrocities, and the international community remains in disagreement over how to implement such an uncertain concept. The international community and its sovereign states initially failed Darfur by not taking action to ease the tension between the government and the rebels, which resulted in the start of the mass atrocities in 2003. Looked upon as a test case for R2P, the Darfur conflict demonstrates the international community's failure to prevent mass atrocities and diffuse a serious situation before it became a conflict. Not only were no prevention measures taken, but international organizations, such as the African Union (AU) and the UN, proved to be indecisive and timid when acting as peacekeepers in Darfur.[315]

In theory, R2P serves to protect individual human rights, which has the potential to shift the current international order, however, R2P lacks a clear legal status in the international system and, therefore, fails to be effectively implemented, as exemplified in the Darfur conflict that erupted in 2003.[316] Nonetheless, it would be wrong to dismiss Sudan's problems as of little relevance because they precede the 2005 World Summit or because Sudan is so complex and inflexible. The international community's failure to implement R2P in Sudan undermines its framework and challenges its efficiency going forward. International support to "capacity building" to avoid genocide, war crimes, ethnic cleansing and crimes against humanity can be crucial. But that aspect of R2P is less significant than acting upon the responsibility to respond decisively and on time, protecting

[314] Gifkins, 2016b
[315] Sitcawich, 2017
[316] Sitcawich, 2017

innocents where national authorities fail to. The ongoing failure in Sudan should be a wakeup call for advocates of R2P.[317]

To support why R2P hasn't had a successful contribution to the Darfur crisis, the next sub-chapter will analyze the aftermath of the humanitarian crisis and its effects on the population of Darfur.

5.2.4. The Effects of the Darfur Crisis

Since it erupted in 1983, the civil war between the central government in the north and the southern rebels has had a significant impact on Sudan. It is the longest conflict in Africa involving serious human rights violations and humanitarian disasters and, before its conclusion via peace agreement in 2005, the conflict registered more than 2 million deaths and 4.5 million people forcibly displaced from their homes.[318]

Regarding the situation in Darfur, it is difficult to know the total mortality during the conflict in the region, partly because the government of Sudan initially blocked teams from the UN and other humanitarian agencies from entering the region and making such an estimate.[319] However, at the five-year mark, in 2008, the Under-Secretary-General for Humanitarian Affairs, John Holmes, stated that as many as 300,000 people had died in Darfur since early 2003, when the conflict began, including deaths from disease, malnutrition, reduced life expectancy, and direct combat.[320] Aside from the death toll, more than 2.7 million Darfurians had been displaced, with around 260,000 refugees fleeing to the east of neighboring Chad.[321] Sudan's U.N Ambassador Abdalmahmoud Abdalhaleem, in response to this

[317] Williamson, 2009

[318] International Commission of Inquiry on Darfur, 2004

[319] Udombana, 2005

[320] Up until 2018, this was the last UN update on mortality in the Darfur crisis. Now Ten Years Since the UN Offered a Mortality Estimate for the Darfur Genocide, at https://sudanreeves.org/2018/04/22/now-ten-years-since-the-un-offered-a-morality-estimate-for-the-darfur-genocide/

[321] At the five-year mark, Darfur crisis is only worsening – UN aid chief, at https://news.un.org/en/story/2008/04/256942-five-year-mark-darfur-crisis-only-worsening-un-aid-chief

report, considered the numbers grossly exaggerated, a reasonable extrapolation instead of a scientific estimate. As an alternative, Abdalhaleem said that the Sudanese government put the death toll at 10,000, only including combat death as they claim there is no famine nor an epidemic disease in Darfur.[322]

In November of 2013, the UN Office for the Co-ordination of Humanitarian Affairs (OCHA) stated that in that year at least 460,000 people had fled their homes in Darfur, as a result of the conflict between government-backed troops and rebel movements.[323] In his original analysis of mortality in August 2010, Eric Reeves[324] argued that the data and reports extant at the time indicated mortality had grown to 500,000 people in Darfur. However, on a more recent update to his previous study, the author argued in November 2016, that additional data and new reports ascertained the total mortality figure to 600,000 dead from direct or indirect effects of the mass atrocities in the region.[325]

The years that followed the Darfur crisis immediately witness an international cry for a ceasefire between both parties and, apart from the crucial role played by the UNSC, the African community had an important part in establishing talks. The first international intervention came from the western neighbor Chad, who, concerned about the effects of conflict-induced displacement into its borders, helped mediate a ceasefire between the government of Sudan and the rebels in September 2003, which unfortunately didn't last long. With AU assistance in 2004, Chad was able to mediate yet another ceasefire agreement to allow humanitarian access in Darfur. A year later, in January 2005, the Comprehensive Peace Agreement (CPA) was signed by the government of Sudan and the SPLM/A,

[322] U.N. says Darfur dead may be 300,000 as Sudan denies, at https://www.reuters.com/article/us-sudan-darfur-un/u-n-says-darfur-dead-may-be-300000-as-sudan-denies-idUSN2230854320080422

[323] UN: 460,000 displaced in Darfur this year, at https://www.aljazeera.com/news/africa/2013/11/un-displaced-violence-darfur-20131114132610566629.html

[324] Eric Reeves has spent the past seven years working full-time as a Sudan researcher and analyst, publishing extensively both in the US and internationally. He has testified several times before the congress, has lectured widely in academic settings, and has served as a consultant to a number of human rights and humanitarian organizations operating in Sudan. Working independently, he has written on all aspects of Sudan's recent history. At https://www.theguardian.com/profile/ericreeves.

[325] Reeves, 2016

ending the long conflict between the North and the South of Sudan, setting an independence referendum[326] in Southern Sudan, which officialized on February 7th of 2011.[327] This agreement, based on political power and oil-revenue sharing, marked the end of the Second Civil War in Sudan.

Even though this peace process showed little impact on the conflict in Darfur, under pressure from the international community, the DPA, established with the intent of ending the conflict in Darfur, was signed by the government of Sudan and the SLM/A in Abuja, Nigeria, on May of 2006, however the agreement was rejected by the JEM. In 2007, a second Darfur Peace Conference is held in Libya, but ends with no agreement. Finally, in 2011, the Doha Document for Peace in Darfur, considered the Second Darfur Peace Agreement, is signed by the government of Sudan and the Liberation and Justice Movement (LJM), a Darfur rebel movement. This agreement guaranteed that the people affected by the conflict would be compensated adequately for the losses or damages sustained during the period of deprivation.[328]

The numbers that represent the effect of the humanitarian crisis in the region of Darfur, translate an environment where government accountability and responsibility seem to scarce. In addition to its purposeful inaction, the humanitarian consequences of the conflict have been aggravated particularly by the refusal of the Sudanese government to allow unrestricted access to Darfur by humanitarian agencies.[329] The figures presented above are the reflection of a military regime that has for years acted regardless of international laws on the protection of human rights. A regime that, due to a principle of non-intervention

[326] Southern Sudanese people vote 98.6 percent in favor of the South becoming an independent state in a referendum deemed free and fair by the international community. (Natsios, 2012)

[327] **The Darfur Peace Agreement: Expectations unfulfilled, at http://www.c-r.org/accord/sudan/darfur-peace-agreement-expectations-unfulfilled.**

[328] National Legislative Bodies/ National - Sudan: Doha Document for Peace in Darfur (DDPD), 2012.

[329] Udombana, 2005

in the so-called internal affairs of States, has been responsible for hundreds of thousands of killings, displacements, and misery, on a region that has, for decades, been treated as expendable.

5.4. The ICC in Darfur

The creation of the International Criminal Court (ICC) has been a groundbreaking step in the field of international criminal law towards ending impunity. It is the first criminal court with a potential universal jurisdiction, its grounds in the direct consent of States, independence from all other international organizations and the assistance of national criminal justice systems of all States parties to its founding treaty, the Rome Statute.[330] Upon the inception of the ICC in 2002, the first case to be referred to it by the UNSC is the humanitarian and political crisis in Darfur[331], as the indictment and issuance of arrest warrants of President Omar al-Bashir on March 3rd, 2009, by the Court, was a milestone for international criminal justice.

As Sudan is not a party of the Rome Statute, the ICC was only able to investigate the situation in Darfur after, as mentioned above, the UNSC referred it to the Court, making this the first case taking place in a State that is not party to the Rome Statute, as well as the first case where charges were brought against an incumbent head of State. This sub-chapter seeks to provide a general overview of the ICC's role in attempting to prosecute the main responsible for the mass atrocities committed in Darfur since 2003.

The Pre-Trial Chamber of the ICC announced the issuance of an arrest warrant against Sudanese President Omar Al-Bashir in relation to genocide, crimes against humanity and war crimes committed in Darfur, as a response to the UNSC's Resolution 1593, acting under Chapter VII of the UN Charter, submitting the

[330] Jyrkkio, 2012
[331] UN Security Council, 2005

situation in Darfur to the Prosecutor of the ICC, following Article 13(b) of the Rome Statute.[332] [333]

However, the government of Sudan and President al-Bashir have denied taking part in the conflict, arguing that the violence in Darfur is due to a local ethnic conflict and that the numbers of victims estimated by international organizations are greatly inflated. In return, the government has used the arrest warrants has an excuse to expel several humanitarian organizations, claiming they were cooperating with the ICC. To add to this, the decision to indict al-Bashir has received criticism from African actors such as the AU and most African States, while the Arab League has also rejected the Court's actions, calling for its members not to cooperate with it,[334] on the basis that it would jeopardize the prospects of peace.[335]

So, does the ICC have the legal basis to prosecute President al-Bashir?

The Rome Statute attributes the Court with the power to exercise its jurisdiction over people responsible for the most serious crimes of concern to the international community. Article 5(1) of the Rome Statute provides "that the Court has jurisdiction to try most serious crimes, including the crimes of genocide, crimes against humanity, war crimes and the crime of aggression".[336] In doing this, however, the Court has to exercise its functions and jurisdiction as laid down in its Statute, particularly on the territory of States Parties or under a special agreement with the Court as established in Article 4 of the ICC Statute.[337]

[332] The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if […] A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. Rome Statute of the International Criminal Court, 1998 (article 13).
[333] Nkusi, 2013
[334] Jyrkkio, 2012
[335] Mohochi, 2010
[336] Rome Statute of the International Criminal Court, 1998 (article 5(1))
[337] Rome Statute of the International Criminal Court, 1998 (article 4(2))

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Concerning high ranking State officials, the Court expresses its prime focus to eliminate impunity through Article 27, which provides: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."[338] As a result, the Rome Statute removes immunities of State officials, uncluding heads of State, eliminating both immunity *ratione personae* and immunity *ratione materiae*, attached to State officials, regardless of their part with international crimes.[339]

However, it is fundamental to understand whether under the legal framework of the ICC, a particular State, irrespective of being a non-party of the Statute, is bound by the removal of immunity determined by Article 27. Considering this, it must be acknowledged that the establishment of the Court by the Rome Statute was built through a treaty-based obligation, as, under Article 27(2), "states parties have agreed […] to waive their right to procedural immunities under customary international law."[340] Although ratifying a treaty creates an obligation, according to international law, the same obligations cannot be extended to non-State parties in the absence of their express consent, as established by Article 34 of the Vienna Convention on the Law of Treaties (VCLT), which provides that "A treaty does not create either obligations or rights for a third State without its consent."[341] As a non-State party is not bound by treaty-based obligations, the jurisdiction of the

[338] Rome Statute of the International Criminal Court, 1998 (article 27)
[339] Nkusi, 2013
[340] Williams and Sherif, 2009
[341] United Nations, 1969

Using the case of Sudan to understand how countries are still able, through the concept of State Sovereignty, to protect themselves from their human rights obligations.

ICC can only be extended to individuals of State parties and within those territories.[342]

State-parties have an obligation to cooperate with the Court, since it does not have mechanisms to enforce its decision, depending mainly on the cooperation of States to arrest and surrender the suspected official to the custody of the ICC. By the principle of *pact sunt servanda,* states parties to the Rome Statute are obliged to comply with the ICC pursuant to Article 26 of the VCLT, which provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". However, the obligation to cooperate in respect of the ICC's request to arrest and surrender President al-Bashir, protected by immunity, would be violating international law on immunities of officials from non-party States to the ICC Statute.[343] Even though it is an obligation to cooperate with the ICC, arresting President al-Bashir would breach customary international law on immunities possessed by sitting head of State.[344] Assuming the complexity on the issue of breaking immunity, entitled to an incumbent head of State, hasn't allowed the ICC to exercise its jurisdiction extraterritorially, at least as long as al-Bashir remains President.[345]

So, in the particular case of Sudan, if the international nature of the ICC is incapable of breaking the immunity of a non-State party nor it effectively enforces cooperation of State-parties due to international customary laws, can the UNSC and its Resolution 1593 actually be effective in achieving the ICC's objective of capturing President al-Bashir?

According to Article 24 of the UN Charter, the UNSC has "primary responsibility for the maintenance of international peace and security"[346], while Article 25 states that "[t]he Members of the United Nations agree to accept and carry out the

[342] Nkusi, 2013
[343] Nkusi, 2013
[344] Williams & Sherif, 2009 6
[345] Nkusi, 2013
[346] UN Charter, 1945 (Article 24)

decisions of the Security Council"[347], explaining that the UNSC relied on the obligation derived on the above articles to adopt the binding Resolution 1593 under Chapter VII, obliging Sudan to comply with the ICC request, since it is a Member State of the UN, irrespective of being a non-party State of the Rome Statute.[348] However, irrespective of whether Sudan is bound by the UN Charter via Article 25, the resolution does not make Sudan totally lose its sovereign powers to decide otherwise about the arrest warrant by the ICC. In any case, Sudan is a non-party State, not bound by the Rome Statute and, if the international community, particularly the UNSC, demands Sudan to cooperate with the ICC, it would implicitly subject Sudan to the Statute and making Statute binding on it.[349]

As long as President al-Bashir remains as head of State, Sudan will continue to oppose the obligation to cooperate, because as non-party State to the Rome Statute, the Court lacks jurisdiction over crimes committed in Darfur, while al-Bashir benefits from immunities under international customary law. A major instrument at the favor of this military regime, allowing him to escape justice for the violations committed in Darfur, is sovereignty. The concept enables not only immunity from international persecution, but also hinders external interference in the internal affairs of the State, even if that means not acting towards the protection of civilians and their human rights. The jurisdiction attributed to the ICC showcases why so many State actors have clung so thoroughly to the concept of State Sovereignty and continue to do so.

6. Conclusion

Throughout this thesis, we examined how the concept of State Sovereignty has changed, allowing States and State actors to escape justice and prosecution for

[347] UN Charter, 1945 (Article 25)
[348] Nkusi, 2013
[349] Nkusi, 2013

violations of human rights. Because of this, greater and more effective intervention by the international community is crucial.

Using the particular case of Sudan and its continuous humanitarian crisis in Darfur, we were able to conclude that despite the growing interdependence and compliance with international standards, the international legal system is still, in some cases, unable to overlap the sovereignty of States, towards the pursuit of peace and security in the most affected regions of the world.

For this reason, this work focuses highly on understanding why some States still justify their actions in the name of sovereignty - even if it means violating basic human rights -, stressing the importance of sovereignty as a responsibility to protect, rather than a mechanism of power and authority. It emphasizes the continuous rise of the number of killings and displacements in Darfur as a prime effect of the Sudanese government's actions, as the international community is unable to intervene and stop the conflict. As an answer to this, this thesis analyzes the norm of R2P as an example to follow in the struggle against the damaging traits of sovereignty, not only making States responsible for any situation involving human rights violations within their jurisdiction but also giving the international community the authority and responsibility to act, when States can't or won't.

Today, 17 years after the events in Darfur officially began, action on Sudan is being taken; first with the ousting of former-President al-Bashir, his sentence to prison, and a possible trial before the ICC coming soon. However, a lot has still to be done for the people that have suffered from this grave humanitarian catastrophe as the international community must now focus their efforts on "breaking" sovereignty, through compliance with accountability mechanisms such as the R2P and judicial means such as the ICC.

Hopefully this thesis might work as a beacon of light over the countless situations that involve human rights violations in the world, promoting a reflection on the matter and inspiring future investigations.

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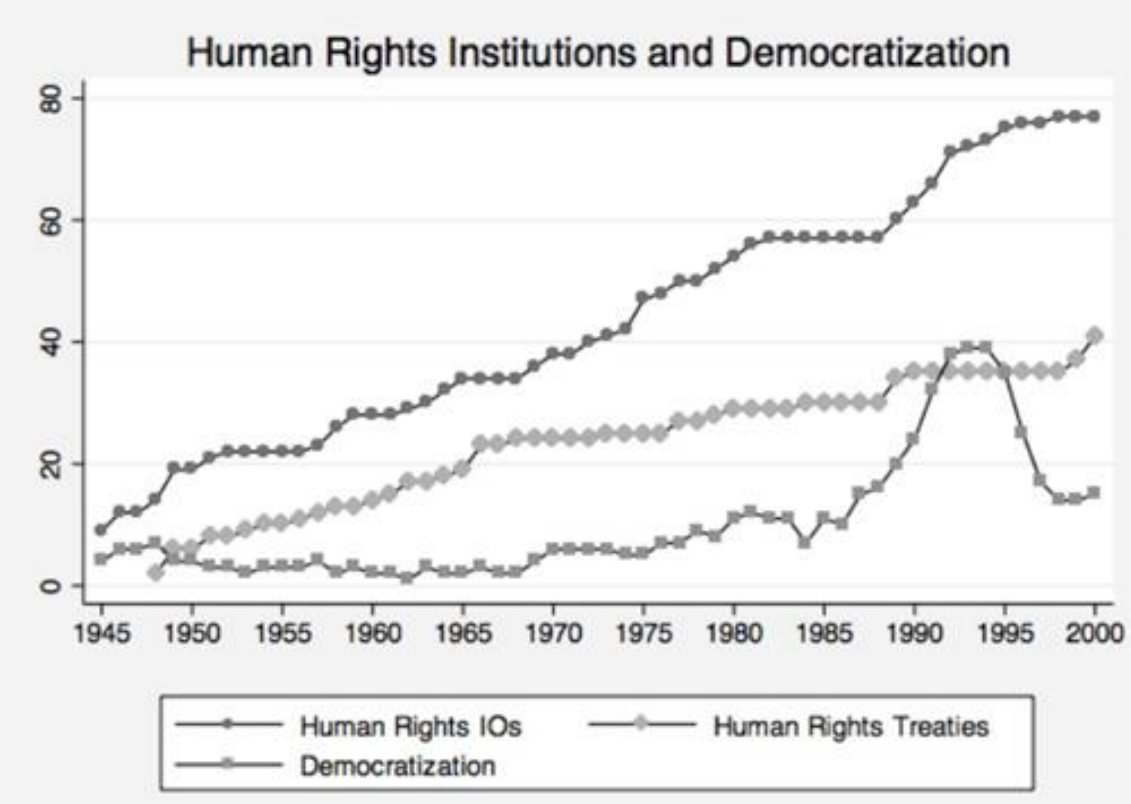
Annex

Annex 1. HAFNER-BURTON; MANSFIELD; PEVEHOUSE, Human Rights Organizations in the World, 1945-2000, 2011



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Annex 2. Map of Sudan, Map nº 4458, Rev. 2, United Nations Geospatial Information Section, 2020

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Annex 3. Map of the Nubia Region, Encyclopædia Britannica, Inc., at https://www.britannica.com/place/Nubia

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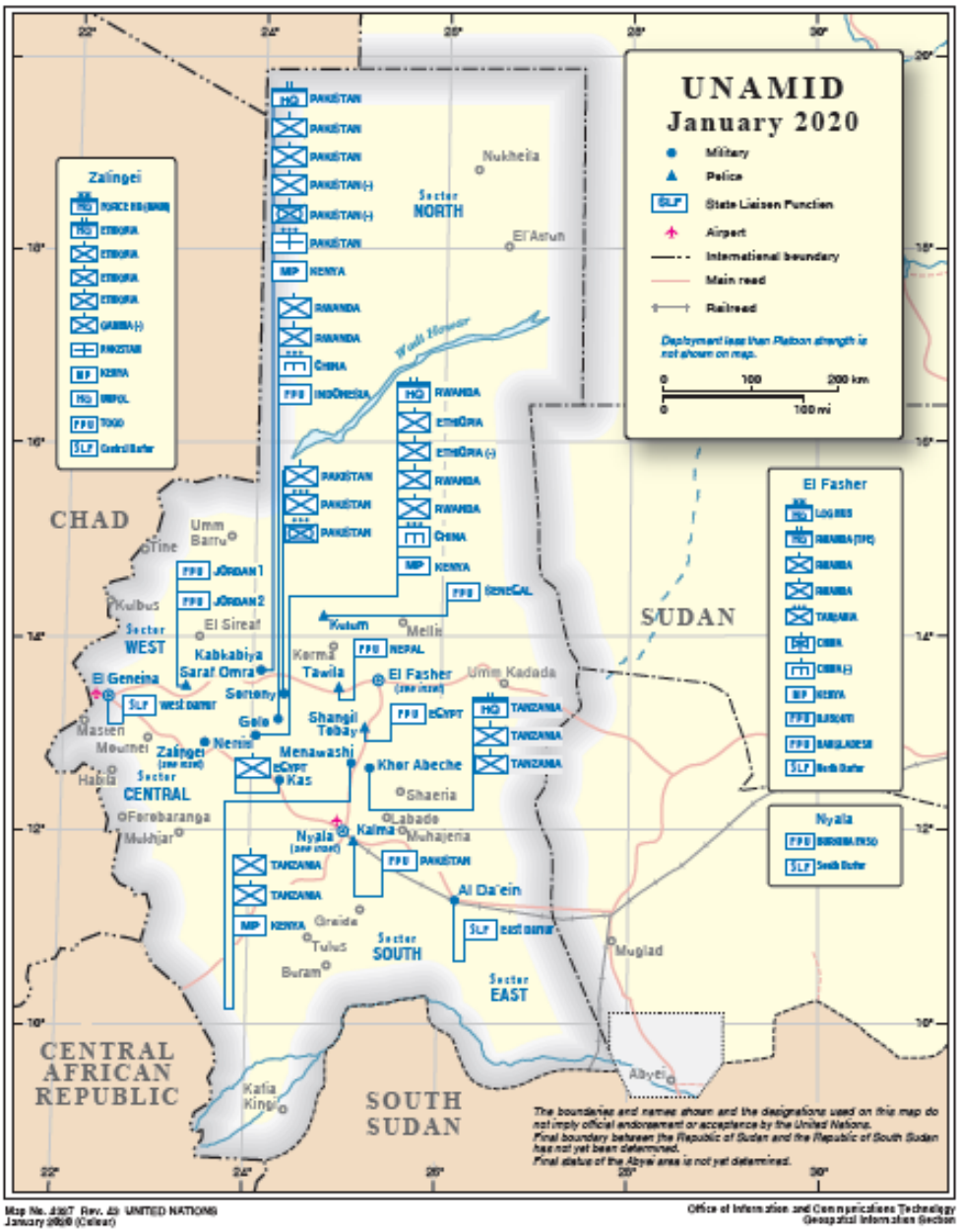
Annex 4. Map of the Darfur Region, Map nº 4327, Rev 43, United Nations (2020)



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