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The “Discourse” of International Law and Humanitarian Intervention*

GUSTAVO GOZZI

Abstract. This essay analyzes the doctrine of “humanitarian intervention” in the frame of international law in the second half of 19th century and identifies the ground of legitimation of this intervention in the violation of presumed universal laws of humanity. The analysis emphasizes the transformation of the paradigm of “humanitarian intervention” into the current doctrine of the “responsibility to protect,” which under the rubric of “responsibility” legitimizes limitations on a state’s sovereignty in cases where the state fails to guarantee the protection of its own population. This reconstruction of the genealogy of “humanitarian intervention” illustrates the continual exceptions to the principle of nonintervention, which means that the Westphalian principle of sovereignty has always been violated. Both doctrines—humanitarian intervention and the responsibility to protect—can be considered “hegemonic techniques” that use so-called universal concepts in order to legitimize unilateral power interests.

1. Methodological Premises

This essay focuses on the theory of international law that in the 19th century legitimated the Western states’ so-called humanitarian intervention, on the pretense that this would bring civilization to other states and peoples regarded as inhuman. The objective of this essay, on the ground of the perspective introduced by Martti Koskenniemi, will be to identify the legitimization discourse underpinning the international law of humanitarian intervention.

In the preface to *The Gentle Civilizer of Nations*, Martti Koskenniemi comments that the book can be regarded as a history of international law considered as “a sensibility that connotes both ideas and practices”¹ of the liberal and cosmopolitan movements of the 19th century. Many objects of the international lawyers of this period have been realized: the rule of law and the general suffrage for instance. But in the colonies the presence of Western powers had opposite effects.

Koskenniemi clearly sets out his methodological perspective: he is taking a Foucaultian approach² in an effort to spy in the normative structure of

* The essay has been discussed at the international conference “‘Il mite civilizzatore delle nazioni’ - Investigating International Law’s Past. Philosophical, Methodological and Theoretical Issues” - Ravenna-Bologna 26-27 March 2013.

¹ Cfr. Koskenniemi 2001, 2.

² A Foucaultian perspective means that “law is not the vis-à-vis of power, speaking absolute truth or universal justice to power, but ...a form of power itself that produces a truth regime through legal knowledge claims”. In this approach law is “invested in the production and regulations of objects...within the realm of the legal”, in Aalberts and Golder 2012, 608.

international law the elements of the discourse in which is grounded the idea of European superiority over other civilizations and cultures.

We can see, then, that *The Gentle Civilizer of Nations* has all the makings of a deeply innovative work, for the approach it introduces is neither essentially biographical nor a timeline for making out different epochs. The development and transformations of international law are instead investigated by Koskenniemi by tracing out a history of the social, legal, and political ideas of the 19th and 20th centuries, and this enables him to bring two relations into focus: that between “power” and “discourse,” on the one hand, and that between “history” and “narration,” on the other.

The period he investigates starts from a watershed moment, the one that marks the beginning of modern international law, a mid-19th-century development owed to the work of certain liberal jurists. Koskenniemi points out in particular the jurists affiliated with Institut de Droit International established in Gand in 1873: they rejected the idea of European society as a society of kings and diplomats and in its place put forward the conception of international law as both *consciousness* and *conscience*, that is, as expressing on the one hand an organic relation between law and society and on the other the moral sentiments (and prejudices) of European societies.

This original approach enables Koskenniemi to outline what became the standard view or paradigm of international law in the 19th century: international law was the expression of a humanitarian liberalism that conceived it as a universal construct, and so as amenable to being extended to other civilizations, with a view to enabling all peoples to attain the same levels of civilization reached by the European peoples.

In this way Koskenniemi laid bare the “discourse” embedded in the paradigm of international law, by which is meant an unmistakable Eurocentric design aspiring to become universally binding by carrying a colonial project to completion. And so his investigation brings out the Janus-faced aspect of 19th-century liberalism, for on the one hand it styled itself as the “legal conscience of the civilized world,” but on the other it set in motion a history of hubris and cruelty legitimized by a presumption of superiority on the part of the West. An important part of this story was the idea of “humanitarian” intervention forming the subject matter of this essay.

2. The Theory of “Humanitarian” Intervention: Barbaric Humanity and the European Peoples’ Civilization

According to the French jurist Antoine Rougier, an explicit reference to the “laws of humanity” appeared in the second half of the 19th century³ in the sources of European international law, where these laws were set in contrast to the logic governing the “barbaric” peoples and the “partially civilized” states.⁴ From the

³ Rougier 1910, 473. This essay of Rougier is a wide and deep reconstruction of the complex theory of humanitarian intervention in the 19th century.

⁴ The distinction just mentioned is by James Lorimer, a Scottish international lawyer of the second half of the 19th century who claimed that international law offered a different basis for a state’s political recognition. Savage peoples would be granted mere human recognition, and

standpoint of the Western powers, states trapped in a state of barbaric humanity could exercise power only coercively through the use of arms. And so in the need to counter this barbarism lay the justification for the positions taken by the European governments. This was precisely the line of argument that France used in taking a stand at the end of the 19th century against an African sovereign who wanted to institutionalize human sacrifices. These customs appeared unacceptable to the conscience of the European peoples, who had “grown to maturity nurturing the cult of morality and law.” These are the words of A. Rougier, who went on to posit a right and a duty to prevent such manifestations of barbarism, since the European peoples had taken up a “noble cause,” a mission to “bring a germ of civilization to the barbarian lands.”⁵ These words reveal the paradigm of humanitarian intervention.

A state that acted contrary to the laws of humanity would fall subject to international control, and its actions would give rise to the right of one or more other states to intervene. Along with this paradigm came a conception of international society built on the basis of a hierarchical power entrusted with seeing to it that justice was respected.

The idea was that any one or more states acting on behalf of the international society could assert a right to interfere in another state’s sovereign sphere if that state violated its own people’s human rights: the intervening state could request the infringing state to desist, but it could also act to prevent those violations from being repeated in the future, and if the infringing state failed to act, the intervening state could even take urgent precautionary measures enabling it to substitute temporarily its sovereignty to that one of the controlled state⁶.

Humanitarian intervention such as it was beginning to take shape in the second half of the 19th century differed from the kind envisioned by jurists like Vitoria and Grotius, where one state could resort to armed intervention to put an end to another state’s tyranny, for these classic theorizers of the *jus gentium* rested their doctrines on a moral foundation, whereas the new paradigm was conceived within an essentially legal framework. In this turning point lies the watershed that for Koskenniemi marks the origin of modern international law.

The idea of humanitarian intervention was developed in large part in dealing with the so-called Eastern question, for it was in reaction to the Ottoman Empire’s actions that international diplomacy first mobilized to put this doctrine into practice. And indeed it was after the French deployment in Syria in 1860 that an explicit appeal was made to the “reason of humanity” (*raison d’humanité*) as a basis on which to justify the intervention.

so “human treatment,” whereas partially civilized peoples (examples being Turkey, Persia, China, Siam, and Japan) would only be granted partial political recognition, which became the basis on which to legitimize unequal treaties. See Lorimer 1883, 102. In Lorimer’s worldview, humanity could hierarchically be mapped out onto three concentric spheres: in the first of these was civilized humanity, which of course included Europe and its colonies; in the second was “barbaric humanity,” which included Turkey and the other countries just mentioned; and in the third was a savage humanity. (*ibid*, p. 101).

⁵ Rougier 1910, 469ff.

⁶ *Ibidem*, 472.

The French intervention was followed up by diplomatic action and resulted in France controlling the Sublime Porte's acts of internal sovereignty and forcing the government to reform its administrative apparatus⁷. This intervention gave rise to a sort of special public law governing relations between Europe and the Ottoman Empire, and it became a subject of analysis underscoring what was peculiar about this new way of limiting sovereignty.

Indeed, under a conventional theory of intervention, states were recognized as having the right to intervene for the purpose of ensuring their own survival and welfare by containing the threat posed by a foreign power. This meant that a state could intervene to protect its own citizens abroad, or to protect its own financial interests, or again to enforce a treaty. So-called humanitarian intervention, by contrast, was billed as a disinterested act, for it was made to rest on a different foundation: on the "laws of humanity" (*les lois de l'humanité*).

In the mid-19th century, Rolin-Jaequemyns, jurist and chief editor of the review *Revue de Droit International et de Législation Comparée*, turned to the problem of the right of intervention in an enlightening essay highlighting all the inaccuracies and ambiguities of the contemporary theory of international law. He published a letter that had been sent to him from Brussels by Prof. Arntz, a distinguished Belgian jurist and a noninterventionist who nonetheless argued for two exceptions to that principle.

But the concepts he used in making that case readily lent themselves to instrumentalization.

Indeed, under the first exception, Arntz took the view that a right of intervention had to be recognized whenever (a) a state would infringe or threaten to infringe the rights of another state and (b) such infringement would make it impossible for the two states to coexist under normal relations.⁸ The rights in question were those which make a state sovereign, and they entitled that state to act for its own preservation. But the notion that a simple threat could justify foreign intervention too easily invited a logic of power, for any state could intervene on that basis just to curb another state's power.

Even more problematic were the circumstances that Arntz understood to legitimize intervention under the second exception: he claimed that a state could legitimately intervene, asserting its sovereign rights, whenever another state violated the rights of humanity through an injustice and cruelty so egregious as to offend our own customs and Western civilization⁹.

The case laid out by Arntz was that of a conflict between two sorts of rights: sovereign rights, on the one hand, and the rights of humanity or of human society, on the other. But rights grounded in concepts so broad and vague as that of humanity or in entities so patently fictitious as that of the human community were rights that could be invoked by just about *any* state in pursuing its own interests

⁷ *Ibidem*, 474.

⁸ Letter by Egide R.N. Arntz, reproduced in Rolin-Jaequemyns 1876 (A), 675. About the discussion between Arntz and Rolin-Jaequemyns cf. Heraclides 2014, 33 and 41 ff. The essay is a complete and systematic analysis of the concept of humanitarian intervention since the first half of the 19th century till 1939.

⁹ *Ibidem*, 675.

or affirming its own power, just as their violation could be ignored if it did threaten to undermine those interests.

This conception becomes even more problematic and inadequate if considered against the background of the improper analogy that Arntz struck between individual freedom, which could only be limited by reference to the laws and customs of society, and what he called the “individual freedom of the states,” which instead could only be limited by reference to the rights of human society.

And, finally, the paradigm developed by Arntz showed itself to be Eurocentric in his claim that the right of intervention could be exercised not by a single state but by the greatest number of civil states, for this was to be understood as a right of collective intervention in the name of humanity. Arntz’s conception is even more significant if we consider, as he explicitly stated, that it was elaborated in view of the situation involving the Ottoman Empire.

In responding to Arntz, Rolin said he certainly accepted the first ground on which to justify a right of intervention, for it could be construed as a case of legitimate defense. In short, in cases where a state’s sovereign rights would be violated, intervention would give rise to legitimate defense, simply construed as the effect whose cause lies in the violation of sovereignty¹⁰.

But the critical problem when it came to the right of intervention lay in what Arntz had identified as the *second* ground of intervention, when a state was to blame for inflicting grave injustices on its people.

Rolin engaged with the classic theorizers of the *jus gentium*, accurately reconstructing their thought to see if he could discover in their work the kinds of criteria that might justify intervention. He believed an especially strong foundation on which to make the case for intervention was to be found in Grotius’s *De jure belli ac pacis*, where it is argued that when justice is violated, it is legitimate to intervene on the basis of a *jus humanae societatis* grounded in natural law.¹¹

Grotius’s view was criticized from a utilitarian perspective by E. de Vattel, who argued that a sovereign was not within his rights to punish violations of natural law when these violations did not amount to direct infringements of the sovereign’s own rights and did not pose a threat to his security.¹² As we can see, Vattel’s conception was much more pragmatic: intervention was justified neither on moral grounds nor by invoking principles of justice but simply in view of a state’s need to guarantee its own security.

Rolin looked at the two positions next to each other and concluded that Vattel’s was overly restrictive, for it reduced the right of intervention to just one ground, namely, a state’s right to provide for its own security. Grotius, by contrast, at least in Rolin’s judgment, proved to be a thinker ahead of his time, having

¹⁰ *Ibidem*, 677.

¹¹ Grotius 1625, Lib. II, Caput 25, § 8: “At non etiam, si manifesta sit injuria, si quis Busiris, Phalaris, Trax Diomedes ea in subditos exercent, quae aequo nulli probentur, ideo praecclusum erit ius humanae societatis”.

¹² Vattel 1758, L. II, Chap. I, § 8: “Il [Grotius] est tombé dans cette erreur, parce qu’il attribue à tout homme indépendant, et par là même à tout souverain, je ne sais quel droit de punir les fautes qui renferment une violation énorme du droit de la nature, même celles qui n’intéressent ni ses droits ni sa sûreté.”

foreseen the direction that modern legal science would take, for he correctly identified a right of human society, his only limitation being that he conceived this right as something each state would exercise individually on its own and not yet collectively with the other states in the family of nations.

3. Natural Law and Human Law: The Western Principle of Human Solidarity

In the 17th and 18th centuries, Grotius and Vattel looked to natural law in framing their theories. But in the 19th century, natural law came under criticism as being more of a moral conception than a legal one, and so as “an insufficient basis on which to determine with any sense of accuracy the sorts of actions this supreme norm might permit or prohibit.”¹³

The 19th century, it is known, was the century of legal positivism, which rejected natural law precisely on that basis, by bringing front and center the need for legal certainty. And so natural law yielded to human law, as it came to be known, a more juristic conception propounded, as we have seen, by authors like Arntz and Rolin-Jaequemyns, and also by Pillet. It was Pillet’s view that the peoples of the world are organized on three levels: on the first level we have the national societies, where we find the sphere of relations among individuals within the same territory; on the second level we have the international society, the sphere of relations among states; and on the third level we have the human society, the sphere of relations among humans above and beyond the political entities they belong to. Corresponding to each form of society, according to Pillet, was a distinctive form of law: national law, international law, and human law, respectively.¹⁴ Human law—the form of law specific to human society—consisted of “a set of obligatory principles applying to humans solely by virtue of their being human” (ibid.).

Rougier felt that this was still too vague a definition of human law and thus sought to bring it into sharper focus. That he did by explaining that this was the highest form of law, for it answered “the deepest and most abiding needs inherent in human nature.” As such, human law had to “necessarily seep into and inform national and international law,” its purpose being to attend to the human rights (*les droits humains*) of the national and international society (ibid., 492).

To appreciate as much, one just had to look at the path of human law as evidenced, on a national level, in the establishment of political freedoms and, on an international level, in the protection of prisoners of war, the abolition of the slave trade, the institution of international arbitration, and other like developments. And so it was that in the 19th century a consensus emerged on the foundation of human law: it lay in the principle of solidarity. Rougier looked in

¹³ Rougier 1910, 490.

¹⁴ In Pillet’s own words: “We thus reach the third and final level in our progression. To the most general of the three forms of society must correspond the most general of all duties; to the human community, human law.” Pillet, 1894, 13; my translation. The French original: “Nous arrivons ainsi au troisième et dernier échelon de notre progression. A la plus générale des trois formes de société doit correspondre le plus général des tous les droits; à la communauté humaine, un droit humain.”

particular to Léon Duguit,¹⁵ who in social or human solidarity saw the basic principle of law, and no positive enactment that failed to embody that principle could claim legitimacy as law. In short: “Human law is none other than the expression of human solidarity.”¹⁶ In a passage approvingly quoted by Koskenniemi, however, E. H. Carr observes that “pleas for international solidarity and world union come from those dominant nations which may hope to exercise control over a unified world.”¹⁷

But what content did this human law need to take in order to serve as the foundation of positive law? Because human solidarity was understood to protect all activities essential to the human being, human law had to encompass the right to life and liberty, as well as the right to legality, that is, the right to a legal system under which these rights of the human being are recognized and protected.

In the Western debate of the 19th century human law and the rights it comprised were found to encapsulate the essential aim recognized by all “civil states.” And thus was sealed the idea framing the paradigm for humanitarian intervention: this intervention was made to rest on this Western conceit of a community of states committed to the principle of human solidarity, a principle that in human law found its legal embodiment. It was thus a specifically Western construct that provided the criterion on which to judge other states and peoples as *rouge* or nonhuman. This much can be appreciated by looking at Rougier’s conclusions:

When acts contrary to human solidarity are [...] the work of a barbaric state [*État barbare*] or one that is semicivilized [*demi-civilisé*] [...], the civil powers are compelled to resort to a more vigorous mode of control through which to *prevent* evil before it comes to the point where it needs to be repressed or redressed. Plain intervention is thus replaced by a permanent right of intervention: a right to protection. That is the right the Western powers have claimed for themselves against the Porte [meaning the Ottoman Empire].¹⁸

It was deemed legitimate for the European states to exercise their right to protection even more robustly by setting up a protectorate, or they could assert against the “more backward” tribes of Africa what came to be known as the “right to civilize” (*droit de la civilisation*).¹⁹ But this was of course a way to dissemble the true nature of the Western powers’ interest, which was to annex territories.²⁰

¹⁵ Duguit 1901.

¹⁶ Rougier 1910, 493.

¹⁷ Carr 1981, 201, quoted in Koskenniemi 2004, 201.

¹⁸ Rougier 1910, 497.

¹⁹ Bluntschli 1895.

²⁰ Rougier 1910, 497.

4. The Eastern Question

The so-called Eastern question emerged in the second half of the 19th century as the paradigmatic expression of the problem of humanitarian intervention. The crisis of the Ottoman Empire provided the occasion to justify the European powers' need to intervene. And it fell to the international lawyers to work out the legal concepts and principles on which basis to justify a common European initiative.

In 1876 the *Revue de Droit International et de Législation Comparée* featured a long article on the Eastern question by Rolin-Jaequemyns, recognizing the need for a sense of responsibility on Europe's part, along with a duty to collectively intervene.

On the basis of racist stereotypes, coupled with the assertion of a fundamental incompatibility between civilization and religion, the Turks were painted as "Shiites or Tartars, whose blood is mixed with that of the slaves and renegades of all nations,"²¹ and whose character, rugged and proud, was inimical to any progressive spirit.

In Rolin's view, the Christian states of the European continent formed a natural and historical group that in certain circumstances became a subject of rights and duties to be collectively exercised or discharged. This is what happened at the time of the Crusades, when the European peoples rallied around the common cause of the Christian civilization, setting all rivalries aside and deferring to this single idea, an idea in itself neither theocratic nor military—it was simply "human"—but which could have been enacted either peacefully or belligerently, depending on the means available (*ibid.*, 300–301).

In the second half of the 19th century, the Ottoman Empire still led the way as the vanguard of Islam, but since it was only a shadow of its former self as a military power, it could only express itself through repressive action in dealing with its subjects (*ibid.*, 302). It is against this background that in Europe a sentiment gained momentum which turned away from a policy of balance and toward a policy based on an international law capable of rising above self-interest and promoting instead the permanent interests of humanity (*ibid.*, 301). We are looking here at what Koskenniemi has called the *hegemonic technique*,²² meaning the ability to present as universal what is actually a partial perspective (here, Europe's conception of international law). Universalistic approaches, in other words, were fashioned so as to conceal imperialistic designs.²³

The Ottoman Empire in its heyday had conquered half of Hungary (1526) and encamped just outside the gates of Vienna (1529), but by the second half of the 19th century it no longer struck any fear in the European powers. Quite the contrary, its weakness made it an easy prey, with the European states setting out to take it apart. And the high concepts of justice, humanity, and history (*ibid.*, 303) were deployed to complete the enterprise!

²¹ Rolin-Jaequemyns 1876 (B), 298.

²² Koskenniemi 2004 (A), 199.

²³ Jouannet 2007, 396. The same considerations one can read in E. Laclau: "particularities which without ceasing to be particularities, assume a function of universal representation. This is what is at the root of hegemonic relations", in Laclau 2000, 56.

Rolin traced out a history in which the treaties through which the empire was broken up piece by piece were interpreted as landmarks marking the stages in the gradual rise of the maxims of law (*maximes de droit*; *ibid.*, 304): there was the treaty of July 6, 1827, through which Great Britain, France, and Russia jointly acted to free Greece from Turkish rule, followed by the famous Treaty of Paris, of March 30, 1856, through which the European powers set up a tutelage of sorts over the empire.

At this point, all the elements were in place—the legal instruments as well as the material circumstances on the ground—that would make it possible to legitimize the European plan to collectively intervene in the Ottoman Empire. International law proscribed intrusions into a foreign state’s internal affairs, but as Rolin commented, it was necessary for a state to be worthy of that name,²⁴ that is, a state would qualify as such only if it could secure the existence of its peoples, uniting them into a harmonious whole, but there was no statehood to be found in the simple fact of a nation’s dominion over other nations.

This latter situation, Rolin thought, was precisely the one that described the Ottoman Empire, the outcome of the “historical superimposition of a Muslim people over numerous Christians peoples” (*ibid.*, 369), in that the Turks accounted for no more than one-fourth of Turkey’s entire population in Europe (the figure was about 2,210,000 Turks out of 8,396,000 inhabitants overall), and Muslims “of all races” did not even amount to half of the population (*ibid.*, 370).

It was further necessary for a state to be vital or thriving rather than be falling apart. As Bluntschli put it: “The law of peoples only protects living states. [...] ‘Only the living have rights.’”²⁵ The Ottoman Empire, by contrast, was by now being judged as a “political cadaver in decomposition” (*ibid.* 369), on account of its moral and financial failures. It is in this context that a singular idea took hold, that of the “rights” of the “European concert” (*concert européen*).

The European concert was described by Rolin as the complex of the great powers that had earned “the right to interpose through mediation or intervention so as to reestablish peace across Europe, act in the interests of humanity, and, more to the point, [...] represent the whole of Europe in its relations with the Eastern peoples.”²⁶ Rolin, clear-sightedly zooming in on the problem, laboriously set about constructing the foundation that would legitimize European intervention.

That this would indeed be a formidably effortful undertaking can be appreciated by observing, with Rolin, that if the international society had reached a satisfactory level of organization, it would have been guided by “a duly instituted deliberative authority capable of making decisions on a permanent basis in accordance with specifically framed principles.” But since the organization then available was still imperfect at best, affording no more than the ability to hold congresses and conventions, the international society could only entrust its decision-making to the driving force of the great powers. So the predicament of the second half of the 19th century is still the predicament we are in today:

²⁴ Rolin-Jaequemyns 1876 (B), 369.

²⁵ Bluntschli 1868, § 61: “Das Völkerrecht schützt nur lebensfähige Staten. [...] ‘Nur der Lebende hat Recht.’”

²⁶ Rolin-Jaequemyns 1876 (B), 368.

international relations do not appear to have made much headway since Rolin's time!

Indeed, we cannot say that the basic elements of the universalist humanitarian paradigm have gone away: they may be couched in a different language and set in a different internationalist scenario, but they also turn up the contemporary doctrine of the responsibility to protect. In fact, an argument can be made that the strategy or "discourse" devised in the second half of the 19th century—invoking the "laws of humanity" as a way to dress up Western values with a veneer of universality—has persisted into the present day in a variety of forms that all seem to share the same common denominator, casting in a universal light what continue to be Western values.

Briefly: if we can agree with Koskenniemi that the liberal "reformist sensibility written into international law"²⁷ since the Seventies of the 19th century has come to an end in the Sixties of the 20th century owing to processes of increasing deformalization, fragmentation and imperial strategy, nonetheless we have to recognize a continuity in the "discourse" of the "civilizing mission" purported and underpinned by the international law since the 19th century till to the present time, although through different concepts. The doctrine of the responsibility to protect is a significant example of this continuity.

5. Humanitarian Intervention and the Responsibility to Protect

The concept of the responsibility to protect has a well-known genealogy: it can be traced to the founding documents in which it was outlined. The first of these was the report titled "The Responsibility to Protect," issued in 2001 by the International Commission on Intervention and State Sovereignty, set up at the initiative of the Canadian government.²⁸ The concept was subsequently developed by the High Level Panel on Threats, Challenges and Change in a 2004 report titled "A More Secure World: Our Shared Responsibility." The following year, the theses framing this concept made their way into a report by the UN Secretary-General titled "In Larger Freedom: Towards Development, Security and Human Rights for All." And, finally, the concept was used in the 2005 World Summit Outcome resolution of the UN General Assembly.²⁹

The effort in these documents was to provide an answer to the humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo, and Darfur by singling out what were thought to be new forms of legitimacy for humanitarian intervention. The first document, out of Canada, reframed the concept of sovereignty by parting with the Westphalian model, where sovereignty is understood as a state's control over a territory and its people, and embracing in its place a conception framed terms of a state's responsibility, both internal and

²⁷ Koskenniemi 2001, 4.

²⁸ International Commission on Intervention and State Sovereignty, "The Responsibility to Protect," published by the International Development Research Centre (December 2001), online at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

²⁹ For this genealogical reconstruction see Stahn 2007, pp. 99–120.

external, that is, internally toward the people and externally in the face of serious human-rights violations in other geopolitical contexts.³⁰

A fundamental feature of this first document by the International Commission lies in its framing of the responsibility to protect by distinguishing such responsibility from human intervention, all the while highlighting three ways in which these two ideas relate to one another. To begin with, the new concept of responsibility designates forms of intervention designed to answer the needs of those who *request* aid, rather than to promote the interests of those who intervene. In the second place, the International Commission relativizes the centrality of sovereignty by introducing the view that responsibility is shared between each national state and the international community. And, finally, the scope of responsibility is broadened so as to apply not only to emergency situations themselves but also to situations where initiatives can be taken to both prevent an outbreak of hostilities and to deal with the aftermath (reconstruction).³¹

What drives this approach is a need to subject the concept of sovereignty to critical scrutiny. Indeed, in the International Commission's report, sovereignty is analyzed as a twofold conception: on the one hand is internal responsibility—for the life, safety, and welfare of citizens within a state's own territory—and on the other is external responsibility vis-à-vis the international community through the UN. On these premises, the International Commission clearly sets out the conditions under which a state's responsibility must be replaced by the “residual responsibility” borne the international community of states (*ibid.*, 104).

Also relevant is the designation of the institutional entities whose role it is to step in when a state can no longer protect its own people or a state itself commits crimes and atrocities. In the 2001 report by the International Commission, it is not just the UN Security Council that is designated as having the capacity to assume “residual responsibility,” for if the Security Council should be unable to intervene, that role could be assumed by the UN General Assembly or by regional organizations or by coalitions of states. This is explicitly stated in the document put out by the International Commission:

E. If the Security Council rejects a proposal or fails to deal with it in a reasonable time, alternative options are:

I. consideration of the matter by the General Assembly in Emergency Special Session under the “Uniting for Peace” procedure; and

II. action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.³²

³⁰ Focarelli 2008, 320.

³¹ Stahn 2007, 103.

³² International Commission on Intervention and State Sovereignty, “The Responsibility to Protect”, XIII.

Noam Chomsky has wryly commented that this formulation inadvertently takes the skeleton out of the closet, in that the area of jurisdiction can only be established unilaterally by the most powerful organizations, and in particular by NATO. Indeed, NATO has resolved that its own area of jurisdiction includes the Balkans and extends to Afghanistan and beyond. In short, as Chomsky argues, the International Commission has reserved the right of intervention for NATO alone, making it possible to resort to the responsibility to protect as “a weapon of imperial intervention at will.”³³

It behoves us at this point to set out the relation that holds between international law and recourse to force for “humanitarian” purposes.

In an essay that goes deep into the subject, Nathaniel Berman has advanced an important thesis on the role that law plays in the use of force, especially in war: this is not a limiting or counteractive role, it is argued, but rather a *constructive* one, in that law serves to regulate war by creating a separate legal sphere insulating certain forms of organized violence from the use of punishments that would otherwise apply under the law, thereby favouring certain forms of violence over others. And so, instead of *countering* war, the legal construction of war channels violence into certain forms of activity carried out by certain persons and entities, while ruling out other forms of engagement by other actors.³⁴

Berman further observes that these legal constructions of war are entirely contingent, not only in the sense that they change over time in history, but also in the sense that they have been contested in every period. The contents of these constructions have thus been defended, attacked, and transformed through the relationships between the parties in conflict, between colonizers and the colonized, between regular armies and guerilla fighters, and so on. This dynamic was also enacted in the wake of 9/11 with the instrumentalization of the distinction between war and nonwar and that between prisoners of war and criminals. The role of law in the use of force can thus be understood as that of construction, contestation, and instrumentalization³⁵.

On these premises, Berman refashions the two concepts involved in the distinction traditionally relied on in setting out the relation between law and war, namely, the distinction between *jus ad bellum* and *jus in bello*. He points out that only once the medieval doctrine of *jus ad bellum* (just war) had been abandoned was it possible for the doctrine of *jus in bello* to gain a foothold and flourish. And more recently, Berman also points out, *jus in bello* has been restyled as “international humanitarian law,” a development that would “appear to reflect a persistent discomfort about the semantic conjunction of law and war”³⁶. But we now seem to have the same discomfort about the adjectival use of *human*, for it appears that coded into the adjective *humanitarian* (its undisclosed meaning) is a sort of immunity from the legal consequences attaching to certain forms of violence: the exempt forms that would qualify as “humanitarian.”

³³ Chomsky 2011, 14.

³⁴ Berman 2004, 5.

³⁵ Berman 2004, 8.

³⁶ *Ibidem*, 3.

The International Commission has set out the criteria that “humanitarian” interventions grounded in the “responsibility to protect” must satisfy in order for the violence to be justified. These are just cause, right intention, last resort, proportionality of means, and a reasonable prospect of success.³⁷

By just cause is essentially meant any extreme human-rights violation, as in mass killing and ethnic cleansing.³⁸ These are the unspeakable violations, bespeaking an utter contempt for human dignity, and carried out on such a scale as to pose a threat to peace, thereby falling within the scope of Chapter VII of the UN Charter, authorizing the UN Security Council to take action so as to reestablish international peace and security (Article 42 of the UN Charter).

However, the legal construction of humanitarian intervention by reason of the responsibility to protect inevitably lends itself to instrumentalization. In the UN General Assembly’s debate on the Secretary-General’s previously mentioned report titled “In Larger Freedom,” many were the states that underscored how the new legitimation of humanitarian intervention grounded in the responsibility to protect was at bottom a pass allowing the great powers to impose their values and interests on the weaker states.³⁹ Many Third World or developing countries, such as Algeria, Egypt, Colombia, Vietnam, Venezuela, Iran, Cuba, Syria, and Tanzania have made the case that the responsibility-to-protect doctrine essentially serves the function of enabling the stronger states to assert their interests against the weaker states.⁴⁰ This is what happened, for example, with the recent military intervention to enforce a no-fly zone in Libya on the basis of Security Council Resolution 1973 of 2011.⁴¹

³⁷ Stahn 2007, 104. Cf. International Commission on Intervention and State Sovereignty, “The Responsibility to Protect,” § 4.23, p. 51.

³⁸ One can clearly appreciate in the previously mentioned World Summit Outcome resolution of the UN General Assembly how the responsibility to protect was unambiguously embraced by the assembly and how the member states were in agreement on the just causes on which basis that responsibility can be invoked (genocide, war crimes, ethnic cleansing, and crimes against humanity). Cf. Focarelli 2008, 337.

³⁹ Focarelli 2008, 331.

⁴⁰ These positions are documented in the verbatim records of the plenary meetings of the 59th session of the UN General Assembly (2005), A/59/PV.86, 87, 89, and 90. By way of example, consider the words spoken by the Syrian representative, Mr. Mekdad: “In earlier statements on the report of the High Level Panel, Arab States have emphasized their rejection of the right to resort to humanitarian or other intervention which has no basis in the Charter or in international law. [...] In accordance with the principle of non-interference in the internal affairs of States, and in order not to undermine the peace, stability or sovereignty of States, which are safeguarded by the Charter, we believe that we should not use the pretext of the needs of the twenty-first century to restrict the concept of state sovereignty so as to allow intervention. Neither should the concept of sovereignty revert to its nineteenth-century definition so as to relax restrictions on the use of force and allow so-called preventive action” (A/59/PV.90, p. 19).

⁴¹ Resolution 1973 (2011): “*The Security Council, [...] Reiterating* the responsibility of the Libyan authorities to protect the Libyan population [...]. *Considering* that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity, [...] *Authorizes* Member States [...] to take all necessary measures [...] to protect civilians and civilian populated areas under threat of attack [...].”

Here international law reveals its nature as a construction that lends itself to instrumentalization by the stronger powers in the complex system of international relations. Indeed, the responsibility-to-protect doctrine can be seen to work here once again as a hegemonic technique, to use Koskenniemi's term, and so as a technique enabling the great powers to legitimize their hegemonic aims by alleging as justification the grave human-rights violations that a regime committed against its own people. As E. Jouannet has framed the point, human rights, understood as an expression of modern legal humanism, can become the foundation to which to instrumentally resort to in encroaching on territorial sovereignty.⁴²

In these transformations one can find the full ambivalence of international law. Indeed, Koskenniemi has accurately observed that when extraordinary circumstances arise, as in the event of serious human-rights violations, the point of the rule of international law—namely, to prevent those violations from happening—outstrips its formal validity. In short, even if the law is formally complied with, such compliance no longer represents a limit on the use of force, nor can it prevent mass killing, genocide, or ethnic cleansing. Koskenniemi pithily summarizes this tension thus: “If the rule does not allow this, so much [the] worse for the rule.”⁴³

In these transformations Koskenniemi sees rightly a delegalization of law giving place to a turn to ethics.⁴⁴ But the appeal to ethics evinces a clear political stance, namely, the view that decision-making in a state of exception should rest with the hegemonic powers, that is, with whoever happens to be in a position to “decide on the exception.”⁴⁵

The device we can rely on in keeping such discretion within bounds, Koskenniemi argues, is the culture of formalism: “In such a situation, insistence on rules, processes, and the whole culture of formalism now turn into a strategy of resistance, and of democratic hope” (ibid. 174).

Formalism, he believes, can set limits for those in prominent positions of power by holding them accountable to the political community. At the same time, the formalist strategy would make it possible for others to lay their concerns on the table, giving rise to a reasonable expectation that these concerns may be taken into account (ibid., 174). In the *Gentle Civilizer of Nations* Koskenniemi declares that the culture of formalism “makes a claim for universality that may be able to resist the pull towards imperialism”⁴⁶. And furthermore: “universality (and universal community) is written into the culture of formalism as an idea (or horizon), unattainable but still necessary”⁴⁷. One can agree with this perspective that can be fundamentally considered a Kantian perspective.

⁴² Jouannet 2007, 386.

⁴³ Koskenniemi 2002, 169.

⁴⁴ *Ibidem*, 173. In this turn Jouannet sees an assertion of substantive universalism (Jouannet 2007, 389).

⁴⁵ Koskenniemi 2002, 171.

⁴⁶ Koskenniemi 2001, 500.

⁴⁷ *Ibidem*, 507.

But how can the universality of the culture of formalism fight back the hegemonic tendencies of the great powers? Can formalism prevent violations of sovereignty, such as those committed with the NATO air raids on Serbia in 1999?

In reality we are in front of the clash of two parallel worlds: on the one hand, the formalism that projects the standard of a universal community⁴⁸ and, on the other hand, the perspective of an imperialistic universality that is expressed, for instance, by the doctrine of the responsibility to protect that, as the Nonaligned Movement has underscored, can be used as a tool by which to legitimize coercive unilateral interference in a state's internal affairs.⁴⁹

We do not know which will be the result of this clash, but in order to clarify the conditions of this contrast let us rethink briefly the scope and limits of a central concept in the history of political thought and international law, namely, the concept of sovereignty.

A brief historical reconstruction will make it possible to appreciate how this concept has been a merely formal construction exposed to the incursions of the dominant powers.

6. More on Sovereignty: How to Define It? An Ongoing Hypocrisy?

The international lawyer J. E. Alvarez reflects that the time has come for us to revise such basic documents as the Genocide Convention by adding, in this case, a protocol clarifying what signatory states have a right to do in the face of genocide taking place in other signatory states.⁵⁰ A.-M. Slaughter goes so far as to suggest that UN member states only have conditional sovereignty and that their rights under the Genocide Convention can be exercised only to the extent necessary for these states to meet their human-rights obligations and their obligations to other member states.⁵¹

The responsibility-to-protect principle would seem to offer an answer to the problem of serious crimes against humanity: it does so through a conception of sovereignty as responsibility. However, as Alvarez argues, even if it is undeniable that action may be taken to limit a state's rights in cases where this state perpetrates crimes such as genocide and ethnic cleansing, when the strongest military and economic power seems poised to use preventive force, traditional notions such as those of nonimpeachable sovereignty and nonintervention tend to preserve their traditional import.

⁴⁸ *Ibidem*, 508. This concept of universalism corresponds to a universal that, according to Laclau, "is the symbol of a missing fullness". This "universal emerges out of the particular not as some principle underlying and explaining the particular, but as an incomplete horizon suturing a dislocated particular identity", in Laclau 1996, 28.

⁴⁹ Cf. Bellamy, Davies, and Glanville 2011, 11.

⁵⁰ At the same time, however, Alvarez has criticized the principle of the responsibility to protect, observing that the concept of sovereignty as responsibility by which this principle is underpinned implies a more "flexible" understanding of the rights of sovereign states (including these states' right to territorial integrity). Alvarez, 2007, 8.

⁵¹ Slaughter 2005, 628.

In reality, as Krasner has accurately observed, the nonintervention principle—the principle at the core of Westphalian sovereignty, designed to exclude encroachment on internal authority by external actors—has been consistently violated.

And to support this thesis, he reconstructs the history of this principle starting out from its statement in Christian Wolff and Emer de Vattel.

Wolff upheld the thesis of the states' natural liberty as a way to rule out any possible violation of that liberty.⁵² But Wolff himself recognized for all the peoples forming the *civitas maxima* the right to coercively intervene against a people that should act contrary to the aims of this international society of states, that is, contrary to its interest in promoting the common good⁵³.

Vattel himself emphatically upheld the nonintervention principle as the basis for the liberty and independence of nations.⁵⁴ At the core of his conception was the idea of a *balance politique*, or political balance, which was supposed to prevent any nation from overpowering any others.⁵⁵ But precisely in virtue of this need to preserve an equilibrium, it might have proved necessary to intervene as a matter of duty against those who threatened to upset that balance.⁵⁶

As can be appreciated from the snapshot just provided, nonintervention theories on the one hand conceive nonintervention in a strong sense as a *principle*, but on the other wind up routinely carving out exceptions to the principle. As Ann Van Wynen Thomas and Aaron Joshua Thomas observe, “if one turns to history and

⁵² Writes Wolff: “To interfere in the government of another, in whatever way indeed that may be done, is opposed to the natural liberty of nations, by virtue of which one nation is altogether independent of the will of other nations in its action.” Wolff 1749, vol. 2, § 256, p. 131. The Latin original: “Sese immiscere regimini alieno, quomodocumquetandem fiat, libertati naturali Gentium adversatur, vi cujus prorsus independens est a voluntate aliarum gentium in agendo.”

⁵³ *Ibidem*, § 13, p. 14.

⁵⁴ Writes Vattel: “It is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another.” Vattel concludes that any interference in another nation's internal affairs amounts to an injustice: “If any intrude into the domestic concerns of another nation, and attempt to put a constraint on its deliberations, they do it an injury”.

The two passages in the French original: “C'est une conséquence manifeste de la liberté & de l'indépendance des nations, que toutes sont en droit de se gouverner comme elles le jugent à propos, & qu'aucune n'a le moindre droit de se mêler du gouvernement d'une autre.” Vattel 1758, L. II, Chap. IV, § 54, p. 297. “Si quelqu'une s'ingère dans les affaires domestiques d'une autre, si elle entend de la contraindre dans ses délibérations, elle lui fait injure”, L. I, Chap. III, § 37, p. 38.

For a reconstruction of the nonintervention principle outlined in this section, see Thomas and Thomas 1956, 5.

⁵⁵ Vattel 1758, L. III, Chap. III, § 47.

⁵⁶ “The safest plan, therefore, is to seize the first favourable opportunity, when we can, consistently with justice, weaken the potentate who destroys the equilibrium—or to employ every honourable means to prevent his acquiring too formidable a degree of power”.

The French original: “Le plus sûr est donc d'affaiblir celui qui rompt l'équilibre, aussi-tôt qu'on en trouve l'occasion favorable, & qu'on peut le faire avec justice [...]; ou d'empêcher par toute forte de moyens honnêtes, qu'il ne s'élève à un degré de puissance trop formidable”, Vattel 1758, L. III, Chap. III, § 49, p. 41.

views the practices of states, it becomes difficult to escape the conclusion that intervention is the rule and non-intervention is the exception.”⁵⁷

The evidence is overwhelming that the intervention principle has historically been geared to the interests of the stronger states, and that, conversely, as Krasner realistically observes, the nonintervention principle has consistently been upheld by the weaker states against the stronger ones.

Thus, for example, in the debate that blossomed in the second half of the 19th century in Latin America once colonialism there came to an end, the international lawyer Carlos Calvo strenuously defended the sovereignty of the states that had achieved full independence. And he further commented that the Latin American peoples were making headway in the manner of the European peoples, “along the path of civilization and enlightenment.”⁵⁸

Calvo appropriated the fundamental concepts of European international law,⁵⁹ using them to assert the sovereignty of the new states, all the while rejecting foreign encroachment on internal affairs.

Calvo investigates the reasons behind the European interventions in the New World countries—as in the example of the Anglo-French interventions in the Río de la Plata (1843–1850) or the Anglo-Franco-Spanish intervention in Mexico (1861–1868)—and finds that these reasons can be traced to the colonial system’s superannuated traditions (*les traditions surannées*): these traditions were outworn and unacceptable, to be sure, and yet they lingered on as a result of the European powers failing to appreciate that the march of time and of civilization could no longer be guided by a nostalgic longing for a time gone by.⁶⁰ In short, the European interference in the affairs of the New World states no longer had any legitimate basis but only amounted to the most deplorable “abuse of power” (*ibid.*, 350).

The foregoing considerations provide yet more evidence that this circumstance alone—that is, the *de facto* reality of power—is what inevitably forms the basis of interference in another state’s internal affairs. The nonintervention principle in essence works as a device through which to maintain an equilibrium among powers, but even in this role it provides a *contingent* basis of equilibrium, since each power is ready to violate the principle the moment it gets in the way of the national interest; and at best the principle can be configured, from the weaker states’ perspective, as the device they will turn to in the attempt to defend their tenuous sovereignty.

It can thus be concluded, with Krasner, that Westphalian sovereignty has *always* been violated, considering that the central point of that model of sovereignty is to prevent foreign interference in a state’s internal affairs.

⁵⁷ Thomas and Thomas 1956, 3.

⁵⁸ Calvo 1887, VII.

⁵⁹ The premise here is that European international law was not *imposed* on the formerly colonized states but rather was *appropriated* or coopted by them. The argument for this thesis is set out in Becker Lorca 2010, 475-552. For a discussion of the issues presented in that article, I would refer the reader to my own Gozzi 2010, 73-86.

⁶⁰ Calvo 1887, 349–50.

So-called “humanitarian” intervention and the companion idea of the responsibility to protect turn out to be no more than the contemporary development of forms of encroachment on sovereignty, and their only role is to drive Westphalian sovereignty deeper into crisis, once more revealing their nature as an embodiment of “organized hypocrisy.”⁶¹

Certainly, no one can deny the ambivalence packed into the principle of the responsibility to protect, and as Chomsky has realistically argued, the ambivalence is such as to warrant the claim that this principle simply works out to the benefit of those in the “favored list of the powerful.”⁶² Even so, as has been the case with the Universal Declaration of Human Rights, the responsibility to protect could itself serve as a guiding ideal for activists in those popular movements whose initiatives can contribute to progressively soften the power politics that currently drive international relations.⁶³

In conclusion, I believe there is a strong case to be made for the thesis that the responsibility to protect essentially amounts to a hegemonic technique. But it’s equally fair to say, in agreement with Koskenniemi, that “although international law [...] is a hegemonic politics,”⁶⁴ the language of international law and the constitutional vocabulary it has acquired—the ideas of “‘self-determination,’ ‘fundamental rights,’ ‘division and accountability of power’ and so forth—may be used to contest the structural biases of present institutions and politicize what otherwise appears as routine administration.”⁶⁵ Indeed, the concepts of international law belonging to the constitutional tradition can be put to use in criticizing current power relations from the ground up (*ibid.*, 35). For there is inherent in the law a normative force capable of inspiring in public opinion a critical sense and an expectation of change through which to rearrange the organization of political power, as happened during the revolutionary period of the late 18th century.

In short, the language of international law can defy the governance of hegemonic powers, for it is the form through which people, groups, and social movements can form themselves into legally recognized entities.⁶⁶ In this way, as Koskenniemi argues (*ibid.*, 254), the pure form of law opens a public space for a legal community (*Rechtsgemeinschaft*) capable of challenging the governance criteria built on the Schmittian distinction between enemy and friend (*ibid.*, 254).

Against this background, then, there emerges the two-sided nature of contemporary international law, caught between the Kantian outlook and the realist frame of reference, such that on the one hand contemporary international law undoubtedly serves as a tool by which to assert power and exploit the powerless, but on the other hand it opens the possibility of creating a space within which to foster cooperation, solidarity, and emancipation.⁶⁷

⁶¹ Krasner 1999, 25.

⁶² Chomsky 2011, 16.

⁶³ Chomsky speaks in this regard of the “civilizing effect of popular movements”, *ibidem*.

⁶⁴ Koskenniemi 2004 (A), 214.

⁶⁵ Koskenniemi 2007, 34.

⁶⁶ Koskenniemi 2004 (B), 253.

⁶⁷ Jouannet 2007, 406–7.

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