

Mimicking Just War? How the R2P Uses and Misuses the Just War Tradition

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Abstract

In the *Responsibility to Protect* (R2P) normative perspective if a state is not capable or is unwilling to be responsible toward its citizens the responsibility to protect them should be borne by the international community which, under certain conditions, can carry out a military intervention in its domestic jurisdiction to address gross violations of human rights. The R2P principles for military intervention (*right intention, last resort, proportionality etc.*) are deliberately inspired by the Just War Theory.

The paper problematizes the way the R2P uses just war theory. In the first place, it claims that the establishment of modern international relations around the principle of sovereignty matched with the rejection of the Just War doctrine. It argues that such a rejection cannot be reduced to a pure normative evolution – that a current normative change can overtake – but the incongruity between sovereignty and Just War was more substantial and still persists today. In this view, the stark dichotomy between *responsibility* and *control* (assumed by the R2P) should be questioned, since it neglects a more ambiguous relationship in which sovereignty has always implied a political responsibility. In the second place, the paper challenges the notion of *individual* sovereignty – on which the R2P is based on – to emphasise the pluralistic character at the origins of sovereignties. The pluralist character of sovereignty collides with the inescapable universalistic stance of the just war theory. Finally, building on these insights, the paper sheds some light on current limits and paradoxes of the R2P: the problematic reference to the just war theory concerning the problem of the ‘right authority’ principle and ‘who should intervene’.

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The *Responsibility to Protect* (R2P) represents the most influential doctrine of humanitarian intervention emerged in the post-Cold War international scenario. It stems from the practices of humanitarian interventions of the '90s, in particular from NATO's missions in the Balkans (in Bosnia and especially in Kosovo). In 2001 the report issued by the *International Commission on Intervention and State Sovereignty* (ICISS 2001), titled "The Responsibility to Protect", presented a new doctrine that later on was officially upheld by the United Nations in the *Outcome Document* of the World Summit in 2005. The rationale behind the new doctrine is essentially that a state is meant to be sovereign as long as it is responsible toward its citizens. When a state is unable or unwilling to protect its citizens from systematic abuses of human rights the responsibility to protect moves to the international community that, in particular circumstances, can forcibly intervene in its domestic jurisdiction to stop the abuses.

While reframing state sovereignty in terms of responsibility stands for the novelty introduced by the new doctrine, the R2P is built upon previous normative reflections on humanitarian intervention and particularly on the tradition of Just War Theory. In part, this is due to the necessity of anchoring the doctrine to a long, influential and authoritative tradition. And, in part, it comes from the idea of justifying the use of force in normative terms. In this case, the Just War tradition offered the best starting point to set the criteria for assessing the *justness* of forcible intervention for humanitarian purposes. However, although the R2P's reference to the just war theory is reasonable and probably inevitable, it is not devoid of difficulties and incongruities.

The main argument presented in the paper is that the R2P's reliance on the Just War tradition is contradictory and that the main source of the contradiction is the hybrid nature of the current international system. The Westphalian component, still present in contemporary international politics, remains a prominent part in a system that has increasingly departed from the traditional, modern international politics (particularly starting from the late 20th century). In other words, currently the nature of international politics is no longer reducible to the traditional model of the Westphalian system but, on

the other hand, it has not conclusively reached a post-Westphalian order. Such a hybrid nature hinders an easy renewal of the just war theory. More precisely, the persistence of Westphalian aspects in contemporary international politics makes that renewal problematic.

In order to present in detail the line of reasoning behind this argument, the paper proceeds as follows. The first section presents the way the R2P's doctrine is built on the just war theory and stresses both the reasons behind the necessity to frame the humanitarian intervention in terms of just war and the reasons to conceal an explicit reference to the just war tradition. The second section delves into the frictions and incongruities between the Westphalian model and the just war theory. The aim is to shed light on the limitations concerning the use of the just war theory by the R2P coming from the Westphalian dimension still present in the current international system. The third section focuses on the way the R2P's doctrine and literature overlook the implications stemming from the incongruities between the Westphalian model and the just war theory discussed in the previous sections. In particular it questions the way the R2P's literature refers to the notions of sovereignty, non-intervention and responsibility resulting from a partial interpretation of the Westphalian order. The fourth section aims at understanding the current problems concerning the R2P's implementation in the light of the incongruities underlined in sections 3 and 4. It focuses on the controversial issue of the right authority principle drawn from the just war theory.

1. R2P and Just War theory: the case of an ambivalent reference

The ICISS's report in 2001 was both a point of departure and a point of arrival. In the first sense it sought to establish a *new* doctrine of humanitarian intervention going beyond the contentious debates about the issue of the preceding years (Paris 2015). The intent to mark a discontinuity is revealed (even though more symbolically than substantially) by the intentional choice to abandon the traditional terminology of "humanitarian intervention" and "right to intervene" in favour of a less divisive notion of "responsibility to protect" (ICISS 2001: 11). Indeed, the report was understood as a starting point to develop a new global consensus on how to move from debates (or paralysis) toward action when intolerable violations of human rights occur (*Ibidem*: 2).

At the same time, the R2P report was also a point of arrival at the end of the '90s, the decade of humanitarian interventions (Holzegrefe – Keohane 2003; Weiss 2001). In particular, NATO's mission in Kosovo came to represent a turning point: its perceived *legitimacy* (for the intervention's humanitarian credentials) against the unlawfulness

denoted a normative and operative change in the practice of humanitarian intervention (Chandler 2002; Independent International Commission on Kosovo 2000).

In fact, it was the unresolved tension between illegality and legitimacy regarding the intervention in Kosovo in 1999 that activated the process through which the *International Commission on Intervention and State Sovereignty* was established and eventually resulted in the R2P report in 2001. In his annual report to the UN General Assembly, in 1999, the then UN Secretary General Kofi Annan implicitly accused the inadequacy of the organization rather than charging NATO for infringement of international law¹. More precisely, Kofi Annan presented the problem in terms of a stark dilemma between the case of an *unlawful* military action undertaken without a UN mandate and the *legitimacy* of halting human rights abuses (Chesterman 2003). In that occasion he called for an international debate to square the circle between the recognition of state sovereignty as a fundamental principle of international relations and the possibility of forcible intervention in the domestic affairs of a state to stop gross violations of human rights. That call motivated the establishment in 2000 of the ICISS, an initiative sponsored by the government of Canada that the following year issued the R2P report.

But the doctrine of R2P is not just the result of a decade of humanitarian interventions. It embodied a more pervasive and long-lasting normative change concerning the issue of humanitarian intervention. In this perspective, the just war thinking emerged as a sort of normative backbone of the doctrine. More precisely, the normative dimension of the R2P has been built upon more than two decades of just war thinking, from the Micheal Walzer book *Just and unjust wars* in 1977 on (see among others Martin 2007, Nardin 2003, Wheeler 2000; Walzer 1977).

The R2P report shows no explicit reference to the just war theory, however the subject is touched upon (even though not at length) in the supplementary volume devoted to the intellectual background of the doctrine (ICISS 2001a: 129-143). More important, the R2P reference to the just war theory is somewhat explicit in the section of the report stating the “principles for military intervention” (ICISS 2001: xii). In this case the criteria related to the *jus ad bellum* (the “just cause threshold” in the document) and to the *jus in bello* are plainly drawn from the just war framework. Even the terminology reveals an overt allusion to the just war vocabulary in presenting those principles: the R2P designates the *just cause, right intention, last resort, proportional means, reasonable prospects* and *right authority* as fundamental criteria to be respected.

¹ See the UN document “The Secretary General Presents His Annual Report to the General Assembly”, 20 September 1999 (<http://www.un.org/press/en/1999/19990920.sgsm7136.html>)

The ambiguity regarding the way the R2P refers to the just war theory is revealing. On the one hand, the R2P's lexicon is apparently drawn from the just war thinking. Likewise, the normative framework of the doctrine and the just war theory is analogous. On the other hand, an explicit reference is deliberately concealed. Even though the criteria set for a *just* intervention are essentially those concerning the just war theory, the latter is not openly mentioned in the main report. This is particularly indicative for a document extremely attentive to the terminology used: the abovementioned rejection of expressions like "humanitarian intervention" and "right to intervene" reveals the ICISS meticulous approach on that.

The ambiguity stems from the necessity for any doctrine of humanitarian intervention to rely on a moral basis and, at the same time, from the difficulty to craft a workable doctrine in a world still organized around the principle of state sovereignty. Beyond the fact that state sovereignty may be surpassed, or significantly changed, the ICISS's overall objective was that of reconciling sovereignty and forcible action against *irresponsible* sovereign states. In this case, admitting the persistence of a Westphalian dimension in international politics – as the R2P does – compels the doctrine to introduce considerations of *justness*. In this view, the reference to the just war thinking is inescapable. Precisely because the principle of non-intervention is a constitutive norm in a Westphalian model, and in the UN system, the permissibility of humanitarian intervention needs to be grounded on extra-judicial reasoning. Examining the Westphalian model in its purest form, Carl Schmitt stated that intervention, unlike the *inter-state* warfare, is the point in which war turns into a *just war* (Schmitt 1974). The essential point is that intervention, representing a forcible interference in the domestic affairs of a state (the most critical violation of sovereignty), inevitably requires exceptional, extra-judicial and ethical justifications.

However, while the reference to an extra-judicial moral argument is unavoidable the R2P eludes it. The ICISS confined the allusion to the just war theory. The rationale of such a restraint derived from the enduring recognition of state sovereignty. That, in turn, came from the mandate of the commission (namely, squaring the circle between intervention and sovereignty) and the UN's assignment that limited the reflections going beyond the interstate nature of the organization. But, the motivation of circumventing a strong and explicit reference to the just war theory is more essential: in order to craft a *workable* doctrine, a feasible solution to the problem of humanitarian intervention, the R2P avoided a radical departure from the existing international order. The just war theory, likewise the expression "right to intervene", from the ICISS perspective, was probably considered too much challenging and controversial.

Thus, the contradictory relationship between the R2P and the just war theory is witnessed by the dilemma regarding two conflicting necessities: on the one hand, the inevitable

reference to the just war thinking as the most authoritative extra-judicial and normative argument for humanitarian intervention; on the other hand, the restraint coming from the concern that a too explicit mention of the just war theory would have been excessively contentious and at odds with the aim of building a broad consensus around the doctrine. The origins of that dilemma comes from the hybrid nature of the current international system and, more precisely, from the Westphalian component still present in it.

2. Just War Theory and the Westphalian order: Limitations for the R2P's renewal of the Just War?

While the reasons for a reference to the just war theory for a doctrine of humanitarian intervention are understandable, why the just war thinking is in conflict with the Westphalian model of international politics is less evident. The literature on humanitarian intervention, and particularly the one dealing with the R2P, has repeatedly stressed how two cornerstones of the Westphalian order – namely sovereignty and non-intervention – are inconsistent with the acceptability (or the legitimacy) of a forcible interference in the domestic jurisdiction of a sovereign state (Holzegref – Keohane 2003, Lyons – Mastanduno 1995; Lang 2003). But the essential rejection of just war theory in the modern system of states in Europe is less explored. However, understanding that refusal can shed some light on the current difficulties of the R2P concerning its relationship with the just war tradition. In other words, exploring the foundational marginalization of just war theory in the Westphalian system can help to understand two relevant points: in the first place, the reasons why the ICISS was reluctant to openly mention the just war in the R2P; in the second place, the limited understanding of the *myth* of Westphalia by the R2P literature. This section delves into the former while the latter will be explored in the next one.

The Westphalian system and its defining features are well-known in international relations theory. Its essential norms are: (a) *sovereignty*, understood as the most fundamental rule of the international society, sovereign states are conceived as territorial polities whose central authority is undisputed domestically and does not recognize any superior internationally; (b) *legal equality*, meaning that states, independently from their capabilities and size, are legally equal, (c) *non-intervention*, neither international organizations nor states have the right to interfere in domestic jurisdiction of a sovereign state; (d) *balance of power*, sovereign states are deemed to be committed to prevent a single great power from achieving an imperialistic dominance over the others, the imperial order is seen as a denial of the Westphalian arrangement, which is pluralistic and based on the 'liberties' and independence of states (see among others Brown 2002: 19-37; Bull 1977, Dehio 1948).

It is pretty obvious that humanitarian intervention does not match the Westphalian norms. Sovereignty and non-intervention are inconsistent with the idea of interfering in the domestic affairs of an independent state. But, what about the issue of just war? The Westphalian order essentially rejected the mediaeval notion of just war. A number of causes defines such a rejection. First, the Peace of Westphalia (1648) put an end to the religious wars of the sixteenth century. More generally the process started with the Peace of Augsburg (1555), introducing the principle of *cujus regio, ejus religio*. The notion of just war was associated to the tragedy of religious conflicts and the new order aimed at preserving international relations from disruptive theological disputes.

Second, and consequential to the first point, the rise of the Westphalian order established a new canon according to which only each individual state can determine the justice of its action (Turner Johnson 2014: chapter 4). The fundamental rationale here is that the self-understanding of state sovereignty was that of bringing peace in the internal jurisdiction and in order to achieve that goal it was necessary to remove any confessional or moral foundation from the legitimacy of state's authority. The essence of modern sovereignty was the separation between politics and morality and, then, the subordination of the latter to the former (Koselleck 1959; Schnur 1963). It was the fictional solution – or the hypocrisy as Krasner called it (Krasner 1999) – of the separation of politics from morality that contributed to the rejection of the just war thinking from the emerging Westphalian order. Through the prism of absolute sovereignty any individual state was entitled of resolving religious (and more generally moral) disputes on its own, in this way the domestic jurisdiction of every state was rigorously sealed from one another (Koselleck 1959).

Third, and most important, from the partition of politics and morality emerged a new sort of warfare: the *inter-state* war. The only legitimate war in the Westphalian system was that waged among sovereign states. Its *justness* was depending on the interstate nature of the conflict, framing it as a relation between states. As long as organized violence preserved sovereignty – in the sense that during military operations the principle of sovereignty was not infringed – the war was deemed legitimate. In this view, the justness transmigrated from the reasons of the use of force (*just cause*) to the manner a war was fought (Schmitt 1974). The *jus ad bellum* was recognized as an undisputable right of a sovereign state (precisely because it was sovereign), independently from the reasons why it resorted to the use of force, and the *jus in bello* turned to be the heart of the legitimacy of war. In other words, in the Westphalian system a war was estimated as just if it was appropriately waged rather than for the rightness of its motivations.

In this way the mediaeval just war tradition was abandoned. It was too much intertwined with the tragic experience of religious wars; the separation of politics and morality

discredited and confined moral considerations in the conduct of international politics; and the only form of war judged legitimate was the interstate warfare. As a consequence, just war theory and intervention came to be assumed as incompatible with the Westphalian order. The former for its alleged reinstatement of morality, understood as disruptive of international stability. The latter for its stark inconsistency with the principle of sovereignty.

The point to be stressed is that the rebuff of just war thinking was not an occasional normative change. Rather, it was a constitutive and deliberate political development consistent with the emerging Westphalian norms. It was not only a minor consequence, or an unintentional side-effect, of the rise of absolute sovereignty. Nor it was a contingent political decision taken by a group of well-organized monarchs at the dawn of Modern age. Instead, the rejection of the just war theory was a crucial aspect of the new international order.

Nowadays international politics is pretty different from a traditional Westphalian order (that in its purest form probably never existed even in the Modern age). Nevertheless, its norms still play a significant role in international relations. Both the self-representation and the practices of sovereignty are rather resilient today. It is exactly the persisting Westphalian dimension of international relations today that troubles the emergence of a doctrine of humanitarian intervention like the R2P.

The idea to craft a workable doctrine of humanitarian intervention moving from the just war theory and, at the same time, without departing from state sovereignty – but, conversely, pretending to recognize it as a central tenet of international politics – is a tricky task. The normative effort seems to start from a debatable premise: the idea that the incongruity between just war and the Westphalian system has been more or less accidental and that the constitutive norms of that system can be radically changed without abandoning the system altogether².

This incongruity behind the R2P normative framework inevitably results in a contradictory use of the just war theory. As long as the intention of the doctrine is respecting the principle of state sovereignty (although changing its meaning) the reference to the just war tradition is necessarily ambiguous. That is why it alludes to the just war terminology to support its normative stance but it conceals an open reference – implicitly conceding that the just war theory still does not match with the persisting Westphalian norms.

² On the incompatibility between the Westphalian order and a doctrine of intervention see Bull (1984), Byers – Chesterman (2003).

3. Misreading Westphalia: R2P and the changing notion of Sovereignty

The purpose of finding a place for humanitarian intervention (and the tentative rediscovery of the just war theory), but still recognizing the principle of sovereignty, leads the doctrine and the following literature on R2P to misjudge the key tenets of the Westphalian order. The necessary step in that direction is reinterpreting the notion of sovereignty as a changeable one. Obviously the notion of sovereignty has changed since it emerged in its modern sense (in association with the modern territorial state) but it cannot be supposed to be changing to the point of contradicting its core meaning – namely the negation of superior external authority and the resulting preservation of the domestic jurisdiction.

The R2P, to be credible, needs to mark a discontinuity with previous conceptions of sovereignty and ought to argue that there exists sufficient room for changing its meaning toward a reinterpretation in terms of responsibility. In this view, the R2P doctrine and its advocacy offered a flawed depiction of the *old* Westphalian norms. In particular, it insistently presents a stark dichotomy between sovereignty as *control* and sovereignty as *responsibility* that is helpful for the doctrine's normative intent but fairly wrong for the analysis. Faking the Westphalian notion of sovereignty is the other side of the coin of neglecting the divergence between the just war theory and the Westphalian order. Thus it is worth considering what is wrong in such a deceiving dichotomy.

Putting forward the notion of sovereignty as responsibility the ICISS was building on previous reflections upon the changing connotation of sovereignty. From the 90s several scholars stressed the shift from an old notion of absolute sovereignty – distinctive of the Westphalian system – to a conditional principle in which the normative balance moved from the state central authority to the people. From this perspective, the unitary conception of absolute sovereignty – an *agency-based sovereignty* – gave place to a *rule-based sovereignty* (Keohane 2003: 283). Other authors framed the same transformation in terms of a path from a *state-centred sovereignty* to a *people-centred sovereignty* (Griffin 2000: 424). Similarly, Kofi Annan introduced the formula of 'two concepts of sovereignty' that recurred in the R2P's literature, meaning an old narrow conception based on the idea that the exclusive source of legitimacy and authority is the state against an emerging broader notion which encompasses both rights and responsibilities of states (Weiss 2012: 106).

Accordingly, the ICISS's report pointed out that no abdication of sovereignty is underway but its meaning is considerably changing:

“there is no transfer or dilution of state sovereignty. But there is a necessary re-characterization involved: from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties.

Thinking of sovereignty as responsibility [...] has a threefold significance. First, it implies that state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And, thirdly, it means the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission.” (ICISS 2001: 13)

Even though it is undeniable that the self-representation and the normative meaning of sovereignty is changing – as it has continuously happened in history (Turner Johnson 2014) – the dichotomy presented by the R2P’s report and supporters is misleading. None of the three significances specified raise a real innovation.

First of all, sovereignty has always meant some sort of responsibility and political responsibility entails some sort of control. A number of scholars have recently pointed up how responsibility has been part of the Modern notion of sovereignty from the outset (Glanville 2010, Orford 2011, Turner Johnson 2014). We could concede that the *type* of responsibilities attached to sovereignty is changing but the evolution of the concept was not one from a mere ‘irresponsible’ control toward responsibility. Furthermore, political responsibility and control are not mutually exclusive but responsibility necessarily requires control. Such a relationship is particularly relevant in the modern system of states.

In fact, in the Westphalian order a state is recognized as sovereign *precisely* because it was responsible – meaning capable to halt religious conflicts, bringing peace within its jurisdiction and to establish reliable relations with other sovereign states. Even in stark Hobbesian terms, a sovereign who was not capable of protecting its citizens was not deemed legitimate (Orford 2011, Moses 2014). Internal peace is the foundational purpose of sovereignty. As Luke Glanville pointed out “the safety of the people [...] becomes for Hobbes a responsibility of the state which cannot be revoked by civil law; it is the end for which the sovereign is trusted” (Glanville 2010: 238). In Hobbes, absolute sovereignty is not even understood as unconditional, it is reversible: “the obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them” (Hobbes quoted in Glanville 2010: 238)³. Several modern thinkers – like Grotius, Vattel and Wolff – share a similar interpretation on state sovereignty (Turner Johnson 2014).

³ See also Moses 2014, Orford 2011.

In this view, neglecting the intimate and constitutive relationship between sovereignty and political responsibility is one of the major flaws of the R2P. The result is to exaggerate a shift from absolute (meaning unaccountable and irresponsible) sovereignty to responsibility that does not match the reality of international relations. Consequently, overstating the absoluteness and irresponsibility of old sovereign states let the R2P miss the compelling and still captivating nature of state sovereignty and the correlated resistance to the just war resurgence.

Admitting that Modern state sovereignty has been deeply intertwined with political responsibility from the outset means that what is changing is the *type* of responsibilities attached to sovereign states. But in this case the ICISS's report is more silent than revealing. Respect of human rights should be the actual novelty of the new notion of state's responsibility. The unspoken purpose is probably that of fostering a more democratic understanding of political responsibility. However, the R2P doctrine does not dare to delve into this crucial aspect. On the one hand, relying on the narrative of the shift from absolute sovereignty to responsibility, R2P presents the responsibility as the new course and evades the more important question about the changing nature of responsibilities attributed to states. On the other hand, the document is pretty conservative and respectful of state sovereignty to the point that the type of political regime is not questioned. It could have not been otherwise since one of the key aims of the R2P is to build a *broad* international consensus on the doctrine.

Thus, the originality of the R2P is not to be found in the unprecedented responsibility of states. The possible novelty could rest instead on the *international* responsibility of states. In the above quotation the report suggests that "the national political authorities are responsible to the citizens internally and to the international community through the UN" (ICISS 2001: 13). In my view, the second part of the sentence is more compelling because it adds to the traditional duty of a state to provide the internal peace a responsibility toward the international community. In other words, a state should protect its citizens not only because it is responsible to them but because it is *also* responsible to the international community. However, even in this case the risk is to overstate the normative change promoted by the doctrine and its supporters.

Although the R2P tends to amend the balance between the freedom of states and international community as a whole in favour of the latter, it tends to rely on a flawed narrative, based on the idea that in the past absolute sovereignty was not affected or constrained by the system of states. While the R2P's effort pretending that states should come to terms with a changing international environment and new challenges that call for new responsibilities and common action is worth considering (ICISS 2001: 4-7), the idea that in the past sovereign states were not responsible to the international society is

incorrect. Beyond the fact that even realists have frequently underlined the international responsibilities of great (or super) powers (Bull 1977; Wight 1979; Waltz 1979), there are two aspects neglected by the R2P's literature which are instead particularly relevant in this matter: the plurality of sovereignties and non-intervention as a limit of external sovereignty.

The implicit interpretation of the absolute sovereignty in the R2P's literature is that of a sort of individual sovereignty, in which the power of the sovereign (or more generally of the central authority) is not limited neither in the domestic jurisdiction nor by any external political actor. But both practice and self-understanding of the modern state sovereignty has been rather different. Hedley Bull and Martin Wight and other European scholars have, quite convincingly, argued that the modern international system was something more than just a group of egoistic, self-interested states (Bull 1977; Morgenthau 1985; Schmitt 1974; Wight 1979). Conversely, the European system of states in the Modern age was also a *society*, meaning that those states shared some common values and interests, and even common norms because they form a society founded upon a common culture and civilization: "a common language, a common epistemology and understanding of the universe, a common religion, a common ethical code, a common aesthetic or artistic tradition" (Bull 1977: 15). The point to be stressed is that the modern notion of state sovereignty was conceived as a *plurality* of sovereignties. In the Westphalian order (and it is significant that that system took the name from a general treaty of peace) sovereignty in isolation was a nonsense. Historically, monopolizing the agency of international politics, states developed a *common* interest in defending sovereignty as the constitutive institution of international relations (*Ibidem*: 16-17, 62-64). In this sense, even though states did not recognize any authority above them, they mutually admit the presence of other states – similarly organized domestically – as legitimate actors. As Nicholas Onuf pointed out, states "[b]y dealing with each other at all they give as they get: *to act like sovereigns they give up sovereignty*" (Onuf 1995: 48, emphasis added).

Whether the society of states has been capable of developing compelling international norms remains debatable, nonetheless it is noticeable that the modern notion of sovereignty emerged in the context of a plurality of political units. Each state was internationally recognized as sovereign as long as it was recognizing the others. For every state (in Europe), the political space beyond borders was not a political vacuum, an anarchical and uncivilized environment but, conversely, the territory of another state organized in the same manner, with the same institutions and with the same legitimacy (Schmitt 1974). Thus, both substantially and ideationally, the presence of similar sovereign states has represented for the state a limitation to its own international sovereignty. In

this way, state sovereignty was understood as a *shared* norm and preserving it was a *common* purpose.

For the very same reason, non-intervention cannot be merely regarded as the other side of the coin of sovereignty. The principle of non-intervention has not been only a norm safeguarding the right of sovereignty but it has also represented a restriction to that right (Vincent 1974: 333). It is precisely a limit to external sovereignty: the modern state does not acknowledge any restriction to its own *jus ad bellum* except that of interfering in the domestic jurisdiction of another sovereign state (Ramsbotham 1997: 446-47). In this sense, non-intervention came to represent an international norm founded upon a common intent of the international society – not just an individual claim to protect its own jurisdiction, but a joint effort. Indeed, the rise of non-intervention did not come from a *single* state but it can be understood only as a shared commitment.

In conclusion, the R2P doctrine and its supporters tend to represent the Westphalian order as a myth of absolute sovereignty and non-intervention. On the one hand, they overemphasize the normative change from sovereignty as control to sovereignty as responsibility, from the individual claim to non-intervention to a responsibility toward the international community. On the other hand, the deceiving understanding of the old Westphalian institutions disregards the still compelling nature of those same institutions: how sovereignty is still a constitutive part of the self-representation of states because it has always been associated to political responsibility, how decision-makers conceive *control* over their own domestic jurisdiction as a necessary part of sovereignty and a non-negotiable one, how they are inclined (even when a humanitarian intervention occurs or gross violations of human rights are perpetrated) to *share* a common interest in mutually preserving their domestic jurisdictions. Neglecting the ‘plural’ dimension of sovereignty and the shared commitment to non-intervention the R2P ends up underestimating the constitutive nature of those institutions and their resistance to both doctrines of humanitarian intervention and resummptions of just war.

4. R2P, just war and the principle of ‘Right Authority’

There are many aspects in the current narrative and practice of the R2P that reveal the controversial use of the just war theory and the flawed representation of the Westphalian institutions underlined in the previous sections. The reluctance of states to fully endorse the doctrine is one of them. It is particularly worth noting how the great powers (those that fear the less the possibility of a forcible interference in their domestic affairs) and even the Western countries are very cautious in officially embracing the doctrine. A telling example are the official justifications of NATO’s intervention in Libya in 2011 by the

countries that took part to the mission and the nearly absence of a plain reference to the R2P (Heir 2014). Indeed, there is a gap between the narrative of the 'triumph of the R2P' in Libya by the R2P supporters and the modest (if not absent) reference to the doctrine by the governments that wanted and undertook the military intervention.

Another aspect concerns the fact that since 2001 R2P has not seemed to really affect the practices of intervention. Many scholars pointed out how the decision to resort to military intervention in situation of large-scale violation of human rights appears to be still based on a case-by-case assessment by great powers (Bellamy 2006; Chesterman 2003). More generally, policies of intervention or non-intervention in cases like Darfur, Syria, Iraq in 2003 and even Libya (considering the half-hearted commitment, especially in the post-conflict phase) look like policies affected by traditional geopolitical calculations rather than being inspired by a ground-breaking doctrine of humanitarian intervention. From a doctrine we should expect patterns of behaviour both declared and, in a significant part, practiced but there is a large consensus about the fact that we are not witnessing the emergence of an international customary law (Heir 2014; Welsh 2010). Perhaps that is a too much demanding test for an emerging doctrine – in particular if we bear in mind that the overall aim of the R2P is to build a consensus around the notion of sovereignty as responsibility. In addition, it is a normative doctrine that as sense in itself and the goal of affecting the international law is probably only one of its possible final purposes. However, the fifteen years after the launch of the ICISS's report, the international life appears to confirm the resistance of the 'old' Westphalian institutions.

But regarding the relationship between the R2P and the just war theory one of the most controversial issues is that concerning the principle of 'right authority'. Such a principle is exceptionally demanding for an anarchical system. Besides the realist refrain (and exaggeration) according to which anarchy shatters any credibility of promises and norms, the very point is that today there is no agreement upon to role of the UN Security Council in playing the part of the 'right authority' even among R2P supporters. First of all, the possibility of unilateral humanitarian intervention – meaning without a UN's mandate – is increasingly perceived as a legitimate action as long as it complies with the other criteria of just war theory – *just cause, right intention, last resort, proportional means, reasonable prospects of success* (Pattison 2010; Nardin 2003). Even though the UN's mandate remains the preferable way, that is not valued as a necessary requisite for the legitimacy of humanitarian intervention. Second, even if we admit that a *just* intervention needs the UN's authorization the duty to protect people in case of human rights abuses remains an 'unassigned responsibility' (Pattison 2010). Indeed, the problem is that the international community, when entrusted of the responsibility to protect, offers no clear agency to enforce the R2P provisions.

The aim here is not enquiring into the controversies concerning the principle of right authority, nor that of suggesting a reasonable solution to the lack of international authority enforcing the R2P. Instead, it is to shed some light on the contradictory relationship between the R2P and right authority principle drawn from the just war theory. Moving from the considerations suggested in the three previous sections this concluding part focuses on three aspects of that relationship: (a) the ambiguity in the way the R2P report embraces the principle of right authority; (b) the reluctance of states to justify their interventions in the R2P terms, with reference to the intervention in Libya; (c) the attitude of states to dilute the R2P provisions, precisely using the principle of right authority, with reference to the *Outcome Document* of the World Summit in 2005.

(a) The reference to the principle of right authority – clearly stemming from the just war theory – is probably the most incongruous element in the R2P report. It is immediately presented in the section titled ‘principles for military intervention’ and it is articulated in six points, named by letters from A to F (ICISS 2001: xii-xiii). From the point A to F the report starts in one position and changes to almost the opposite. In the former the report states that “[t]here is no better or more appropriate body than the United Nations Security Council to authorize military intervention for humanitarian protection purposes” (*Ibidem*: xii). In the latter the doctrine alludes to the possible legitimacy of intervention without a mandate from the Security Council:

F. The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby (*Ibidem*: xiii)

In other terms, while the doctrine locates the agency of the ‘right authority’ in the UN Security Council, rather ambiguously it does not rule out interventions devoid of the UN authorization. The contradiction in the report tends to be resolved – shifty I would say - with the idea that the Security Council should work better insomuch that it will not fail to find the necessary consensus to authorize military action⁴. The inconsistency however persists – at least until the Security Council will not work like that.

This incongruous use of the right authority principle reflects the contradictory reference to the just war theory exposed in the first section. On the one hand there is a respectful attitude toward extant Westphalian institutions, on the other hand there is an allusion to

⁴ See point C and D of the same section: “[t]he Security Council should deal promptly with any request for authority to intervene where there are allegations of large scale loss of human life...” and “[t]he Permanent Five members [...] should not apply their veto power [...] to obstruct the passage of resolutions authorizing military intervention for humanitarian protection purposes” (ICISS 2001: xii-xiii).

the latest just war thinking. The Security Council is invested as the agency for the right authority and that is the most conservative option for a doctrine of humanitarian intervention. The Security Council is a guarantee for great powers, particularly those with veto powers – the others tend to trust on one of the Permanent Five. The role conferred to the Security Council in the hidden frame of the just war theory reveals something more than the mere commitment to the UN. There is another reason, probably the most significant, that is the inexpressible belief that in the way to build a consensus around a doctrine like the R2P a departure from the UN Security Council (namely the role of great powers) could have hindered the project from the start. To put it differently, the Westphalian institutions, or what remains of them, mitigated the R2P ambitions.

Nonetheless, a reference to the just war thinking is both necessary (in order to frame the justness of intervention) and timidly present in the report. The part quoted concerning the possible legitimacy of unilateral intervention recalls the recent literature on just war and humanitarian intervention. Indeed, from the 90s the principle of right authority has been increasingly regarded as an aspect that could increase the legitimacy of a just intervention but not as a necessary one. In particular, the real and likely possibility of Security Council inaction in cases of gross human rights abuses contributed to depreciate its role in the just war framework. As Fixdal and Smith noted: “[i]f the United Nations is unlikely to sponsor rampant interventionism, the alternative seems to be to accept a narrower basis for multilateral actions (e.g., the North Atlantic Treaty Organization or the European Union) or even endorse unilateral action” (Fixdal – Smith 1998, p. 294). After the intervention in Kosovo, precisely for the lack of the UN authorization and its perceived legitimacy, the requisite of right authority attached to the Security Council lost its normative strength. Thereafter, the acceptance of unilateral humanitarian action or multilateral actions devoid of a collective mandate (i.e. interventions undertaken by NATO) has considerably grown (Martin 2007; Nardin 2003; Pattison 2010; Wheeler 2000, 2003).

This approach regarding the use of just war theory for the issue of humanitarian intervention and the shrinking importance attached to the principle of right authority affected the R2P report. That is why it tentatively suggests the possibility to enforce the responsibility to protect even outside the aegis of the UN. The result is a contradictory reference to the just war theory due to the tension between two conflicting aims: that of using the most recent discourse on the just war theory applied to humanitarian intervention and that of escaping a disruptive departure from the extant Westphalian institutions – which could have exposed the R2P project to an early failure.

(b) Another process revealing the ambiguity surrounding the use of just war theory and the principle of right authority by the R2P is related to the intervention in Libya and the approval of resolution 1973. What is worth noting in this case is the gap between, on the

one hand, how the R2P supporters interpreted the intervention and the role of the UN Security Council and, on the other hand, how the Security Council actually worked.

The R2P account of the intervention in Libya in 2011 has been that of triumph. Gareth Evans, co-chair of the ICISS, affirmed that the intervention was “a textbook case of the R2P norm working exactly as it was supposed to” and similarly the UN Secretary General Ban Ki-Moon that “by now it should be clear to all that the Responsibility to Protect has arrived” (both quoted in Hehir 2013, p. 8). Regarding the right authority principle, the role of the UN Security Council was that expected from the R2P report: quick, responsive and capable to authorize the military action to avert the imminent massacre of civilians. Even though the Resolution 1973 did not explicitly mention the R2P, the responsibility to protect was meant to be present when the resolution authorized “all necessary measures to protect civilians and civilian-populated areas under attack or threat of attack in Libya”⁵. More generally the R2P advocates stressed the idea that doctrine was eventually inspiring and easing a collective deliberation in the UN (and then within NATO) to enforce the responsibility to protect (Weiss 2012: 171-2).

A closer examination of what went on in the Security Council deliberations offers instead a pretty different picture. First of all, the Security Council deliberation did not reveal a wholehearted support for the R2P: five important members abstained (Russia, China, India, Brazil and Germany). Second, the already mentioned reluctance to make an explicit reference to the R2P in the resolution mitigates the picture of the intervention as a textbook case of R2P in action. Third, the abstaining members contested the way NATO undertook the intervention and lately the unspoken goal of regime change. That reveals a gap between the Resolution 1973 and NATO’s air campaign which is often overlooked by the R2P advocates (Chivvis 2014). In this view understanding NATO’s intervention in Libya as a consistent response by the international community enforcing the responsibility to protect – a responsibility that Qaddafi was no longer able to fulfil – is exaggerated. Four, concerns of the abstaining states regarding how NATO (in their view) exceeded the mandate suggest that the resolution 1973 “is unlikely to serve as a precedent for future actions” (Keating: 163). Finally, the eventual development of the crisis in Libya shows the lack of commitment to the third pillar of the R2P: the ‘responsibility to rebuild’ (ICISS 2001: 39-46). More generally, NATO’s intervention in Libya can be interpreted as R2P success looking only at its (short-term) outcome rather than considering the deliberation before it and the post-conflict crisis.

Considering the right authority principle, the role of the UN Security Council in Libya seems to confirm the arguments presented in section two concerning the R2P neglect of

⁵ UN Security Council resolution 1973 (<http://www.un.org/en/sc/documents/resolutions/2011.shtml>).

the deep reasons why the Westphalian order marginalized the just war thinking and moral arguments. While the surviving Westphalian institutions are progressively losing ground, they still have a residual influence in obstructing the use of moral arguments justifying political actions. Although fictional and hypocritical the modern distinction between politics and morality – predominantly in international politics – still affects the decision-making upon humanitarian intervention. The deliberation of the UN Security Council on the Libyan crisis and Resolution 1973 supports the influence both of the distinction between politics and morality and the diffidence in letting the morality entering the political negotiation. Tom Keating, examining the Security Council deliberation behind the Resolution 1973 and the members approaches, conclude that “[m]uch like previous Security Council resolutions, 1973 was less a matter of elaborating and implementing international norms than it was the result of a political compromise among Council members” (Keating 2013: 162-3). Similarly, Robert Murray, stressed how, in the Resolution 1973 the language of the R2P is present throughout the initial paragraphs but “when the Resolution arrives at the section that authorizes action by the Security Council, any mention of *responsibility* curiously disappears” (Murray 2013: 29). More generally, the argument in the Murray’s essay is that, during the deliberation in the Security Council, traditional security concerns and the terminology of international peace and security prevailed over moral considerations.

(c) Finally, another sign of controversies concerning the principle of right authority appeared during the UN World Summit in 2005. R2P entered in the Summit’s *Outcome Document* (paras 138-140)⁶. That was welcomed as an undeniable success of the doctrine and as a first step to find its way in the international law. At the same time though, even the supporters of the doctrine admitted that the R2P cited in the *Outcome Document* in 2005 is different from the original version addressed by the ICISS’s report in 2001. Thomas Weiss, one of the most outstanding supporter of the R2P, referred to the doctrine quoted in the 2005 document as ‘R2P lite’ (Weiss 2012: 127). Cristina Badescu and Linnea Bergholm have similarly wrote that “the 2005 endorsement was a watered-down version of the ICISS version of R2P” (Badescu – Bergholm 2009: 291). Alex Bellamy contended that “the outcome document has done little to increase the likelihood of preventing future Rwandas and Kosovos” (Bellamy 2006: 145-6).

What is controversial is in particular Paragraph 139 of the *Outcome Document* that reveals two steps back from the 2001 version of the R2P. Both are contained in the following signatories statement: “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter

⁶ http://www.un.org/en/events/pastevents/worldsummit_2005.shtml.

VII, on a case-by-case basis”⁷. First, the Security Council appears here as the necessary agency through which the responsibility to protect must be enforced and, second, the decision is meant to be grounded on a case-by-case basis. The latter point as to do with the crucial issue concerning the nature of a doctrine and to what extent a doctrine can be based on a case-by-case analysis, for it is pretty evident that admitting discretionary decisions in particular situations dilutes the normative power of general prescriptions. But it is the former point, concerning the role of the Security Council, that is particularly interesting for the right authority principle that the R2P borrows from the just war tradition.

The *Outcome Document* removes the above-mentioned ambiguity of the right authority principle as it was presented in the ICISS’s report. The UN document designates the Security Council as *the* right authority through which any decision of taking action must be deliberated. Unlike the 2001 report, it does not hint to any possibility of interventions devoid of the UN authorization. Although it is not surprising for a UN document, it is revealing in the light of the reflections presented in section three of the present paper. A shared interest in non-intervention and the practice of sovereignty as a plurality of sovereignties are the deep reasons behind the resistance against a comprehensive doctrine for humanitarian intervention and the World Summit document seems to confirm such a resistance. Coming back to the centrality of the UN and the Security Council (and the case-by-case analysis) means to maintain in the hands of states and great powers the decision-making on military intervention. In other words, a close examination of the *Outcome Document* supports the argument that the idea to change the notion of sovereignty fostered by the R2P is based on an underestimation of the roots of non-intervention. Once again, the extant Westphalian dimension in the current international system impairs the emergence of a doctrine that ultimately leans toward the overturn of its core institutions.

Conclusion

The R2P is the most considerable doctrine of humanitarian intervention elaborated in the contemporary international system. Since it implies, in particular circumstances, the violation of sovereignty it necessarily ought to tackle the issue of the *just cause* because intervention for humanitarian purposes implies extra-judicial justifications. Therefore, its reference to the just war theory is almost inescapable. The paper explored such a reference revealing its ambiguities and advancing the argument that those ambiguities are due to the persistence of a Westphalian dimension in the current international system.

⁷ *Ibidem*.

In turn, it pointed out: the contradictory reference to the just war theory in the ICISS's report, the origins of the marginalization of just war thinking in the Westphalian order, and the flawed interpretation of the Westphalian institutions characterizing both the R2P doctrine and the literature in its support. Finally, focusing on the principle of the right authority the paper explored how those ambiguities and the unsatisfactory understanding of the Westphalian institutions affected the emergence of the R2P in practice – looking at the R2P report touching upon that principle, at the intervention in Libya and at the *Outcome Document* of the UN World Summit in 2005.

In conclusion, the ambitious normative goal of the R2P – namely to change the very notion of sovereignty – is exceptionally challenging in the current international environment. It is inevitably accompanied by incongruities, controversial interpretations of international politics and difficulties in the implementation. Nevertheless, precisely those problems are one of the best litmus tests to assess, on the one hand, the impact that just war theory may have on the issue of humanitarian intervention and, on the other hand, the possibility to change both the notions of sovereignty and non-intervention without abandoning the system altogether. Whether the R2P necessarily requires a post-Westphalian order to achieve its normative goal remains open to debate. Yet, the partial conclusion suggested in the paper is that a closer examination of the Westphalian rejection of just war theory and intervention, hindering the development and general acceptance of the R2P, reveals elements of critical incompatibility. Thus, probably it is less likely to square the circle between sovereignty and humanitarian intervention *within* a Westphalian system (notwithstanding its frailty) than to realize the responsibility to protect in a post-Westphalian order.

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