Domesticating Human Rights: A Reappraisal of their Cultural-Political Critiques and their Imperialistic Use

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DOMESTICATING HUMAN RIGHTS

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A Doctoral Dissertation

By

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ABSTRACT

Following the idea that human rights are anchored in many cultures and find their support in many traditions, the contemporary human rights corpus is a fruit of a long history whose roots can be traced back to different societies in addressing the universal questions of injustice. If one adopts such a historical evolution of human rights, their universality might be affirmed on the assumption that they are coexistent to every human society. This view is, however, challenged by scholars who claim that the current human rights regime does not owe anything to other cultures, since they are essentially Western.

The consequence of such an understanding touches the heart of the human rights' perennial question concerning their universality, and it is the source of the Third World's critiques. Indeed, if conceptually, culturally and historically, human rights are Western, how do

they become universal? This question was first raised by the American Anthropological Association in its now well-known 1947 statement, even before the existing human rights instruments were framed. Today, it has been taken up by some Third World critics. For them, human right movement is an imperialistic swirl of Western liberalism upon other societies under the banner of United States of America that has replaced the former European imperialistic powers such as France and United Kingdom. According to these critics, there is no other area where human rights are imperialistically used by the West than in the so-called humanitarian intervention. Usually evoked as an urgent need to protect human rights, humanitarian intervention is seen as another name for the neo-colonialism in the Third World, as it is carried out by Western Powers against states in the Third World.

Two challenges arise from these views. On the one hand, because of their Western origin, human rights are decried as Western and, therefore, they should not be imposed on other cultures. On the other hand, their imperialistic use by the West is an acute difficulty stemming from the global political context after the fall of Communism as a competing ideology with liberalism in 1990s. These challenges affect the theoretical justification as well as the implementation of human rights. For, according to the critics, human rights are purposely framed in liberal terms because they have to pursue and advance the Western project of conquering the whole world. Therefore, they claim, the actual spread of Western liberalism under human rights label is neither incidental nor accidental; it is a continuation of the Western imperialism which started long ago with economic exploitation, slavery and colonization of the rest of the world. Human rights is only a neutral term to translate the same reality. To those who reply that the contemporary human rights regime, starting with Universal Declaration of Human Rights, is a fruit of an international group with a diverse background, the critics respond that all of them

were trained in the Western culture. And if one presents the role of the local human rights activists in the non-Western world, the critics consider them as Western mercenaries in local colors. That is why, while it springs from the cultural critique, the imperialistic challenge to human rights is a serious one because it attacks the human rights regime in its purpose and in its practice. It does not reject human rights only because they are extrinsic to the non-Western culture –cultural relativism—; rather, human rights are rejected because they are channels of oppression and exploitation as was and has always been the Western imperialism.

The question now is: what do human rights become in this case? Is it possible to rescue them from both the cultural critics and imperialistic crusaders? Such a project would aim at maintaining and affirming their historicity as Western, yet showing that they are open to the possibility of being practiced in other cultures and other contexts. That it is the goal of this dissertation whose thesis is that, by domesticating human rights we retrieve the purpose of human rights of protecting and enhancing human dignity and, at the same time, it becomes possible to satisfactorily address the cultural and imperialistic challenges. Indeed, instead of thinking that people adopt and use human rights discourse because they like their individualistic side, the domestication of human rights pays attention to the process through which human rights as moral norms are incorporated in local cultures. Relying on the anthropological works that focus on the way human rights norms are integrated in different cultural contexts, this project endeavors to build a normative account of human rights based on these local practices. Philosophically speaking, domestication of human rights takes up Beitz's insight of human rights as an emerging practice, and brings it to the beneficiaries of human rights purpose, instead of remaining at the legal level where only states are accepted as credible interlocutors, while they are the most suspected violators of human rights.

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0. Introduction

I

The idea of human rights seems to be anchored in many cultures and to find its support in many traditions. For instance, Paul Gordon Lauren notes that "thoughtful and insightful visionaries in many different times and diverse locations have seen in their mind's eye a world in which all people might enjoy certain basic and inherent rights simply by virtue of being human."[1] According to him, there is a "historical evolution of international human rights that continues to this day [that] started centuries ago with efforts attempting to address … difficult and universal questions."[2] He goes even further to ascertain that human rights are inherent to the social life of human beings, since this historical evolution "began as soon as men and women abandoned nomadic existence and settled in organized societies, long before anyone had ever heard the more recent expression, 'human rights,' or before nation-states negotiated specific international treaties."[3] Following this understanding, human rights as they are framed today in different UN instruments, are a fruit of a history whose roots can be traced back to different societies, since they respond to the need of addressing universal questions of injustice. In this regard, human rights are seen as cross-cultural in Abdullahi Ahmed An-Na'im's sense, where these norms find legitimacy in different cultures.[4]

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[1] Paul Gordon Lauren, *The Evolution of International Human Rights: Vision Seen*. (Philadelphia: University of Pennsylvania Press, 1998), p. 1.
[2] Ibid., p. 5.
[3] Ibid.
[4] Abdullahi Ahmed An-Na'im, "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment" in Abdullahi Ahmed An-Na'im, Ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. (Philadelphia: University of Pennsylvania Press, 1992), p. 20. According to An-Na'im, "cultural legitimacy may be defined as the quality or state of being in conformity with recognized principles or accepted rules and standards of a given culture." Abdullahi Ahmed An-Na'im, "Problems of Universal Cultural Legitimacy for Human Rights" in Abdullahi Ahmed An-Na'im

Michelle Ishay espouses this view when she says that "human rights are seen as a result of a cumulative historical process that takes on a life of its own, sui generis, beyond the speeches and writings of progressive thinkers, beyond the documents and main events that compose a particular epoch."[5] She, however, recognizes that "our modern conceptions of rights, wherever in the world it may be voiced is predominantly European in origin," although she warns that "to say that our current views of universal rights originated in the West…should not imply that Western rights are reducible to free-market liberalism."[6]

If one adopts such a historical evolution of human rights, their universality might be affirmed on the assumption that they are coexistent to every human society. This view is not, however, welcomed by all scholars versed in the human rights debate. Jack Donnelly is one of the outspoken scholars who claim that the current human rights regime does not owe anything to other cultures. To authors like Adamantia Polis and Peter Shwab who argue that "all societies have human rights notions"[7] and that "all societies cross-culturally and historically manifest conceptions of human dignity and human rights,"[8] Donnelly responds that, "to the contrary… most non-Western cultural and political traditions lack not only the practice of human rights but the very concept." He adds, "as a matter of historical fact, the concept of human rights is an artifact of modern Western civilization."[9] Hence for instance, in his sketchy article that appears to survey all non-Western traditions, Donnelly "wonders how the Chinese managed to claim

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and Francis M. Deng, Eds., *Human Rights in Africa: Cross-Cultural Perspectives*. (Washington: The Brookings Institutions, 1990), p. 336.

[5] Michel Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era.* (Berkeley: University of California Press, 2004), p. 2.

[6] Ibid., 5.

[7] Adamantia Polis and Peter Schwab, "Introduction" in Adamantia Polis and Peter Schwab, Eds., *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1980), p. xiv.

[8] Pollis and Schwab, "Human Rights: A Western Construct with Limited Applicability" in Pollis and Schwab, eds., *Human Rights: Cultural and Ideological Perspectives*, p. 15.

[9] Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" in *The American Political Science Review*, Vol. 76, No. 2, 1982, p. 303.

rights without the language to make such claims" since, apparently, "Chinese language lacked even a term for rights until one was coined in the late nineteenth century to translate the Western concept."[10] Some years later, he softened his position by asserting that "the idea that all human beings, simple because they are human, have inalienable political rights was foreign to all major premodern societies."[11] Accordingly, "human rights were as foreign to traditional Asian societies as they were to their Western counterparts."[12] It might be important to note that Donnelly's definition of human right is part of what Charles Beitz,[13] calls naturalistic theories, since for Donnelly, "the term **human rights** indicates both their nature and their source: they are the rights that one has simply because one is *human*. They are held by all human beings, irrespective of any rights or duties they may (or may not) have as citizens, members of families, workers, or parts of any public or private organization or association." And because they are held because of the fact of being human, "human rights are also inalienable."[14]

Donnelly's understanding of human rights is taken up by Rhoda E. Howard whose work has focused on Africa. According to her, "most known human societies did not and do not have conceptions of human rights. Human rights are a moral good that one can accept–on an ethical basis—and that everyone ought to have in the modern state-centric world."[15] For her–as for Donnelly—human rights is a modern concept developed in the West, based on the evolution of a society from its traditional structures to the modern state-centered organization. For that reason, the An-Na'im's project of searching for cultural legitimacy through internal and cross-cultural

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[10] Ibid., p. 308.
[11] Jack Donnelly, "Human Rights and Asian Values: A Defense of 'Western' Universalism" in Joanne R. Bauer and Daniel A. Bell, Eds., *The East Asian Challenge for Human Rights*. (Cambridge: Cambridge University Press, 1999), p. 62.
[12] Ibid., p. 66.
[13] Charles Beitz, *The idea of Human Rights*. (Oxford: Oxford University Press, 2009), pp. 48-72.
[14] Jack Donnelly, *International Human Rights*, 4th ed. (Boulder: Westview Press, 2013), p. 19.
[15] Rhoda E. Howard, "Dignity, Community and Human Rights" in A. A. An-Na'im, *Human Rights in Cross-Cultural Perspectives,* p. 81.

dialogues is a futile effort, because "to seek an anthropologically based consensus on rights by surveying all known human cultures…is to confuse the concepts of rights, dignity, and justice." Indeed, "the concept of human rights springs from modern human thought about the nature of justice; it does not spring from an anthropologically based consensus about values, needs, or desires of human beings."[16] In other words, as they might be interpreted, there is no need to look for a human rights concept outside the Western world, because it simply does not exist.

The consequence of such an understanding touches the heart of human rights' perennial question concerning their universality, and it is the source of Third World's critiques. Indeed, if conceptually, culturally and historically, human rights are Western, how do they become universal? If there is no need for an anthropologically based consensus that might generate a "cultural legitimacy," how can they be introduced in other cultures without being a vehicle of Western cultural and economic imperialism?

This caution was first raised by the American Anthropological Association (AAA hereafter) even before the existing set of human rights instruments were framed. In its now well-known 1947 statement, AAA asked: "how can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of values prevalent in the countries of Western Europe and America?"[17] Based on the anthropological work and the experience of Western colonialism over the rest of the world, AAA was wary that the projected

[16] Ibid. See also her "Group versus Individual Identity in the African Debate on Human Rights" in A. A. An-Na'im and F. M. Deng, eds., *Human Rights in Africa*. Both authors hold that most of traditional societies had the concept of dignity which founded their idea of justice, without the connection to the idea of right. However, the Universal Declaration of Human Rights (henceforth, UDHR) articulates the link between human rights and dignity when, in its Preamble, it recognizes that "the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom," while in its first article it states that "All human beings are born free and equal in dignity and rights." Isn't it the same dignity underlying this document that the authors acknowledge in all societies?

[17] American Anthropological Association, "Statement on Human Rights" in *American Anthropologist*, Vol. 49; No. 4, 1947, p. 539.

Declaration would carry forward "the doctrines of the 'white man's burden' [which] have been employed to implement economic exploitation and to deny the right to control their own affairs to millions of peoples over the world, where the expansion of Europe and America has not meant the literal extermination of whole populations."[18] Although the legacy of this statement is rather negative because it is taken as having ushered in a cultural relativism about human rights,[19] its worries were founded on living and lived experiences, to the point that it begs the question even today whether human rights are not being used by the West for its imperialistic goals.

The latter is the conviction of Makau Mutua[20] who sees the human rights movement as an imperialistic swirl of Western liberalism upon other societies. Under the banner of the United States of America that has replaced the former European imperialistic powers such as France and United Kingdom, the Western imperialism is spreading over other cultures under the cloak of human rights. The situation has been exacerbated by the fall of the Berlin Wall which signed the definitive end of communism, leaving liberalism as the sole dominant ideology leading the course of world's history. As Mutua states it, "the European powers of yesterday have, as it were, passed the torch to the United States. The United States has renewed and revitalized the Age of Europe. The domination of the globe exercised by European powers for the last several centuries has been assumed by the United States."[21] This new world's responsibility of the

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[18] Ibid., p. 540.

[19] See Arvind Sharma, *Are Human Rights Western? A Contribution to the Dialogue of Civilizations*. (New Delhi: Oxford University Press, 2006); Fidèle Ingiyimbere, "Spreading from the West: Rethinking the Universality of Human Rights" in *Hekima Review*, no. 43, Dec. 2010, pp. 153-165. From anthropological perspective, references to this statement in the literature abound. See for instance, Ellen Messer, "Anthropology and Human Rights" in *Annual Review of Anthropology*, Vol. 22, 1993 where she calls the Statement "the 'burden of cultural relativism," p., 224; Sally Engle Merry, "Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)" in *PoLAR*, Vol. 26, No. 1, 2003, where she responds to Karen Engle's article "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999" in *Human Rights Quarterly*, Vol. 23, No. 3, 2001.

[20] See Makua Mutua, *Human Rights: A Political and Cultural Critique*. (Philadelphia: University of Pennsylvania Press, 2002).

[21] Ibid., p. 6.

United States relies on human rights discourse to justify its imperialistic motives, especially when addressing the non-Western world. This was –and is—also the case with European countries especially vis-à-vis African nations. Since the 90s, after the so-called La Baule's speech by the then French President François Mitterrand, any economic aid to Africa was conditioned by the adoption of human rights and initiation of democratic processes. Once more, human rights discourse was used as a way of "imposing" economic rules and political changes through economic pressure.

According to critics, there is no other area where human rights are imperialistically used by the West than in the so-called humanitarian intervention. Usually evoked as an urgent need to protect human rights, humanitarian intervention is taken as another name for the neo-colonialism in the Third World, since it is carried out by Western Powers against states in the Third World. For authors like Mahmood Mamdani, there is no doubt that the humanitarian order "draws on the history of modern Western colonialism."[22] Moreover, since the humanitarian intervention brings in the so-called Responsibility to Protect (R2P), one needs "to ask: *Who* has the responsibility to protect *whom* under *what* conditions and *toward* what end?"[23] Jean Bricmont captures the issue at stake here and answers Mamdani's question when he calls humanitarian intervention a "humanitarian imperialism" in which the West is "using human rights to sell war."[24]

Following these comments and paying attention to recent political events (Iraq; Libya), one is tempted to conclude that the AAA's prophecy of doom has been proven true and, unfortunately, the proponents of human rights as specifically Western and yet universal do not

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[22] Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror*. (New York: Pantheon Books, 2009), p. 276.
[23] Ibid.
[24] See Jean Bricmont, *Humaniterian Imperialism: Using Human Rights to Sell War*. Trans. by Diana Johnstone. (New York: Montly Review Press, 2006).

contest the justification of Western imperialism through human rights. Howard does not see human rights inevitable for other cultures because these societies are developing as did the West. For Donnelly, since human rights are liberal by nature, they have to increase liberalism in detriment of ancient or other forms of societal organization. As for Michael Ignatieff, the West has the responsibility to propagate and protect human rights in the world.[25] He even terms it "imperialist" himself, although he contends that it is a different kind of imperialism. He says, "America's empire is not like empires of times past, built on colonies, conquest and the white man's burden…the 21st century imperium is a new invention in the annals of political science, an empire lite, a global hegemony whose grace notes are free markets, human rights and democracy, enforced by the most awesome military power the world has ever known."[26] Yes! it may have changed, but it is imperialism nonetheless. In other words, the AAA's fears and the Third World critics' assessments have a strong basis.

Two challenges arise from these views. On the one hand, because of their Western origin, human rights are decried as Western and, therefore, they should not be imposed on other cultures. Understood as parochial to the Western world, they face the cultural relativism challenge and this issue has received much attention, as it underlined the debates on Universal Declaration of Human Rights (henceforth, UDHR) already during the drafting time. On the other hand, however, the imperialistic use of human rights by the West is an acute difficulty stemming from the global political context after the fall of Communism as a competing ideology with liberalism in 1990s. The worry is raised by Third World critics, but it has not received the seriousness it deserves. Yet, it affects the theoretical justification as well as the practice of human rights. For the critics, human rights are purposely framed in liberal terms because they

[25] See his *Human Rights as Politics and Idolatry*. (Princeton and Oxford: Princeton University Press, 2001).
[26] Cited by Bricmont, p. 41.

have to pursue and advance the Western project of conquering the entire world. Thus, the actual spread of Western liberalism under a human rights label is neither incidental nor accidental; it is a continuation of Western imperialism that started long ago with economic exploitation, slavery and colonization of the rest of the world. Human rights is only a neutral term to translate the same reality. To those who reply that the contemporary human rights regime starting with UDHR is a fruit of an international group with a diverse background, the critics respond that all of them were trained in the Western culture. And if one presents the role of local human rights activists in the non-Western world, the critics consider them as Western mercenaries in local colors. That is why, in my view, while it springs from the cultural critique, the imperialistic challenge to human rights is a very serious one because it attacks the human rights regime in its purpose and in its practice. It does not reject human rights only because they are extrinsic to the non-Western culture –cultural relativism—but rather human rights are rejected because they are a vehicle of oppression and exploitation as was and has always been Western imperialism.

The question now is: what do human rights become in this case? Is it possible to rescue them from both the cultural critics and imperialistic crusaders? Such a project would aim at maintaining and affirming the historicity of human rights as Western, yet showing that they are open to the possibility of being practiced in other cultures and other contexts. That it is the goal of this dissertation whose thesis is that, by domesticating human rights, we retrieve the purpose of human rights of protecting and enhancing human dignity and, at the same time, it becomes possible to satisfactorily address the cultural and imperialistic challenges. Indeed, instead of following Ignatieff by just saying that millions of people adopted human rights because they like their individualistic side,[27] or espouse Rainer Forst's view that the critics have a static view of

[27] See *Human Rights as Politics and Idolatry,* p. 63-77.

culture[28] –because these views are contentious!—the domestication of human rights pays attention to the process through which human rights as moral norms are incorporated in local cultures. Relying on the anthropological works of scholars like Engle Sally Merry and Mark Goodale, as their work has focused on how human rights norms are welcomed in different cultural contexts, my endeavor seeks to build a normative account of human rights based on these local practices. Philosophically speaking, domestication of human rights takes up Beitz's insight of human rights as an emerging practice, and brings it where it belongs; that is, to the beneficiaries of human rights purpose instead of remaining at the legal level where only states are accepted as credible interlocutors, while they are the most suspected violators of human rights. I believe that this perspective will cast new light over human rights challenges and allow a different normative approach.

The following section describes succinctly how this project will be brought about through three main parts.

II.

The first part of the dissertation is consecrated to the elaboration of the challenges identified as the most urgent, namely, the consideration of human rights as an imperialist project implemented through humanitarian intervention. The goal of this elaboration is to situate the imperialistic claim in a historical perspective, in order to highlight its patterns and see how they apply to the human rights project. Hence, this part is essentially descriptive because the aim is to expose the problem.

[28] See his *The Right to Justification: Elements of a Constructivist Theory of Justice.* Trans. Jeffery Flynn (New York: Columbia University Press, 2012).

Thus, the first chapter deals with the claim of human rights as an imperialist ideology. When Third World critics associate human rights with Western imperialism, they want to link them to the memory of the imperialism of the past. They stress that human rights are a continuation of a practice that started many years ago. That is the reason why this chapter situates the claim of human rights understood as imperialist ideology in the course of the history of Western imperialism itself. By trying to understand imperialism before the contemporary human rights movements, I delineate the distance between an imperialist project and the human rights movement, with a possibility, however, of singling out some signs of imperialism in certain understandings of human rights norms.

Chapter two then embarks on elaborating the practical challenge, which alleges that humanitarian intervention is another form of imperialism. While the first chapter constitutes a theoretical and historical elaboration of the contention that human rights are an imperialist project, the second chapter takes up the correlative challenge to human rights, that is, the humanitarian intervention in the name of human rights. Human rights in their conception are about protecting individual's dignity and collectivity's rights. In other terms, the frame of the contemporary human rights regime presupposes the means to implement them, with the state assumed to be the main entity to enforce them. In this sense, Beitz is correct to note that, in human rights instruments, the state plays an irreplaceable role, and when the state cannot fulfill its responsibility, the "international community" is to take over and intervene even inside the borders of the failed state. That is the logical consequence of the reading of human rights texts and even the intention of the drafters. However, that is where the critics see the imperialistic ambition and even the neocolonial goal, since most of the time the states evaluating and enforcing the protection of human rights are Western powers whose military capabilities are used

to intervene in non-Western states, whereas they do not apply the same rules to themselves when they fail to implement certain rights.

Although this critique is fair and has an empirical foundation, it would nevertheless be unfair to reduce the whole history and the entire intuition of humanitarian intervention to that sole view. Therefore, the chapter traces the historical background of humanitarian intervention, in the hope that this historical perspective will allow underlining the limits of the critiques and exposing, at the same time, the justification of the critique of seeing humanitarian intervention as neocolonialism.

Having elaborated and exposed the problem in the first part and believing that they deserve a philosophical account, the second part resorts to some philosophical discourses, in order to examine if we can satisfactorily address these challenges to human rights from their perspectives. In this regard, I present efforts by John Rawls and Jürgen Habermas because they are the most influential thinkers in the contemporary political and social thought.

Chapter three is consecrated to John Rawls, whose major part of his work was devoted to the question of domestic justice (*A Theory of Justice*, and *Political Liberalism*, hereafter respectively, TJ and PL). In 1993, he presented a paper on Law of Peoples[29] where he developed a theory of justice for the international community. In his own words, "by the law of peoples I mean a political conception of right and justice that applies to the principles and norms of international law and practice." His paper was "to sketch … how the law of peoples may be developed out of liberal ideas of justice similar to but more general to the idea [of] justice as

[29] John Rawls, *Collected Papers*, ed. by Samuel Freeman (Cambridge, London: Harvard University Press, 2001), p. 529.

fairness."[30] The paper would evolve into the book known today under the same title, *The Law of Peoples*, where Rawls gives more space to the same subject. It is in this context of elaborating a theory of justice for "international norms and practice" that Rawls evokes human rights.

Chapter three, therefore, focuses on this work of Rawls in order to study (1) the Rawlsian conception of human rights so that (2) I can examine whether, with it, we can respond to the challenges highlighted in the first part. The outcome of this confrontation cannot be decided in advance, but by following the role that Rawls assigns to human rights, namely that "they restrict the justifying reason for war and its conduct, and they specify limits to a regime's internal autonomy,"[31] one can readily see that human rights are conceived through the evolution of international law and international relations since World Word II, which are the target of the imperialist and neocolonialist critiques of human rights. The question is then to know whether this view of human rights playing a role in relations between states would address the challenges as previously stated. Chapter three has to answer this question.

In chapter four, I turn to Habermas. Being not only a leading intellectual in debates on social and global justice but also a prolific academician, it is without surprise that one encounters expressions such as rights, human rights, human dignity in his writings. However, contrary to Rawls whose work on human rights comes as an extension of his political liberalism from a domestic society to the international community, Habermas does not have a specific work dedicated solely to the subject. Human rights appear in relation to other topics such as law and morality, democracy, dignity, etc., but they are especially invoked in the global and international law context. Thus, his complex conception of human rights combines a doctrine of what he calls

[30] Ibid.
[31] Ibid., p. 79.

a system of rights and the current human rights regime. The former portrays human rights as (a) socially constructed; hence (b) intersubjective and (c) they are justified through the discourse principle which leads to the democratic principle. The system of rights is framed for a democratic political community, while the international human rights are considered from a cosmopolitan point of view.

The goal of this chapter is to deepen this Habermasian understanding of human rights in order to measure how far it can help to deal with the challenges that animate the whole project. Once more, I will not predict the result before studying thoroughly his complex view on human rights. However, a glance on his writings on the evolution of international law after WWII reveals that he adopts a positive view of it, as it embodies the Kantian idea of cosmopolitan law, even if there might still be some practical problems.[32] And when he confronts the accusation of a Western imposition of human rights on other cultures, he takes an apologetic position, arguing that "the standards of human rights stem less from the particular cultural background of Western civilization than from the attempt to answer specific challenges posed by a social modernity that has in the meantime covered the globe."[33] From this point of view, it can already be projected that it is not an easy task to respond to the critics who contend that modernity itself is the vehicle of Western imperialism, now disguised in these "a-cultural" human rights standards. Once again, however, this chapter works out the whole argument, and shows how far Habermas's theory of human rights can or cannot be used to respond to critics.

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[32] Jürgen Habermas, "Kant's Idea of Perpetual Peace: At Two Hundred Years' Historical Remove" in *The Inclusion of the Other: Studies in Political Theory,* ed. Ciaran Cronin and Pablo de Greiff (Cambridge, MA: MIT Press, 2000), pp. 165-201.

[33] Jürgen Habermas, "Remarks on Legitimation through Human Rights" in *Postnational Constellation*, trans. Max Pensky (Cambridge, MA: MIT Press, 2001), p. 121.

If the two philosophical discourses examined in Part II do not give a satisfactory way of responding to the identified challenges, the purpose of a third part will be to construct another philosophical discourse which can address them. To restate what I have already said, these challenges are very serious because they are founded on some palpable empirical data and historical events, and they are raised in the context where the respect and protection of human rights are the most needed –although I believe that there is not yet a historical society that fulfills all the aspirations enshrined in the human rights corpus. Therefore, the goal of this dissertation is to construe a conception of human rights based on local practices, which would then allow a philosophical justification of the said practices. When this effort is completed, it is then possible to address both the imperialist prophets who encourage the ideological use of human rights and the cultural critics who reject the normative content of human rights because of their possible –if not actual—abuse and their historical origin.

Hence, in chapter five, instead of assuming Beitz's statist model, I pay a closer attention to the actors who are involved in the practice of human rights, who try to reach out to the victims of human rights abuse. In this analysis, the state as the only credible agent for protecting, respecting and fulfilling human rights is incorporated in a broader web of actors, and the focus is shifted from human rights as "imperatives for foreign policy"[34] to their instrumental role in protecting and respecting the human dignity of the victim. Consequently, the battle for human rights is no longer –and should not be—limited to the international scene; rather it is delivered at the local level where human rights are needed and can make a difference. Methodologically, there are two assumptions and some consequences follow.

[34] Erin Kelly, "Human Rights as Foreign Policy Imperatives" in Chatterjee, D. K., Ed. *The Ethics of Assistance: Morality and the Distant Needy*. (Cambridge: Cambridge University Press, 2004).

As a first assumption, I take the existing human rights corpus in its evolution from the end of World War II until today as a starting point and I suspend the judgment for awhile about moral character. I do not make judgments such as human rights are an imperialist ideology or are moral norms. Such normative judgment is a result of the analysis of their local implementation. The second assumption, which is a fact, takes human rights historicity as Western for granted. Although I acknowledge that a diverse group from different countries drafted the UDHR and that the Covenants and consecutive conventions involved different nations, even the recently independent ones, I give the benefit of doubt to the critics who argue that all these processes did not include other cultural backgrounds. For while it is generally understood that, by Western rights, it is meant the classical liberal ones, the so-called social, cultural and economic rights also were fruits of the socialist system that derived inspiration from philosophies developed in the Western. In this sense, the ideologies underlining human rights are Western.

As these facts are assumed, I then look at the local practices and see who are the actors. Here the first difference catches the eye: instead of the state alone assuming the monopoly of protecting, respecting, fulfilling human rights, it is rather a web of actors involved in the practice of human rights: local activists, international activists, the state, the regional bodies and international community and finally and most importantly, the beneficiaries themselves. The practice is made through the interactions of these different actors and during this process, human rights get a new meaning –if not meanings—and different justifications. They are translated –not only literally but also metaphorically—into new languages and into new situations, and at each time, they acquire new meanings and new justifications. Hence, this model of local practice assumes a pluralistic justification of human rights. There is no one single foundation on which different actors rely for calling upon human rights. It is rather a constellation of justifications,

which share, however, the same goal: to make human rights effective to the beneficiary, the individual or group of individuals in need of them. Furthermore, that practice of human rights takes into account local contexts in their contingencies and their values. That is why it is not always through a smooth transition/translation that human rights are incorporated into local realities. However, through the tension generated by the practice of human rights into local contexts, human rights are domesticated to the point that local activists and beneficiaries call them *theirs*. This is where the analysis of the practices reveals that the local actors –activists and beneficiaries—do not see a human rights corpus as only legal texts—even for those with a legal character like Covenants and Conventions—but also, and even especially, as a moral source of inspiration for action.

Two consequences follow this outcome. First, the debate about the imperialistic use of human rights is no longer between–and should not involve—external actors and the critics. The reason why the external should not intervene is the fact that, being from the suspected side of perpetrating imperialism, their moral stand is theoretically compromised. Rather, it would confront local actors to their critics, sharing the same concern of their situation, justifying to each other the relevance or the nullity of invoking human rights in their context. This discussion benefits both sides in reforming the elements –both from within and without—that harm human dignity and save those that are judged consonant with a dignified life. The second consequence is that the metaphor of savage-victim-savior, (SVS)[35] famously used to describe the framework of the practice of human rights does no longer apply because the practice and its justifications are

[35] This is a metaphor that Makau Mutua uses to describe the practice of human rights. Savage designates the state violator of human rights, which, actually, is a target to culture depicted as "bad culture"; victim stands for the human being whose dignity and worth are trampled by the savage, so that they need to be rescued from the savage by the savior. According to Mutua, all this is construed in order to highlight the role of the redeemers who are "human rights corpus itself, with United Nations, Western governments, INGOs, and Western charities." See his *Human Rights*, p. 11.

carried out by the affected persons themselves. In such a context, the identity of the SVS is blurred, at least in the current understanding as developed by Mutua. In addition, as the practice reveals human rights as empowering moral norms consistent with a pluralistic foundation, the imperialist crusaders lose their ground because to embrace human rights does not mean to embrace liberalism, and even less so to adopt the individualistic interpretation of human rights. Peoples adopt human rights because they find them meaningful to their contexts without renouncing their comprehensive doctrines—to use Rawls's terminology—and they incorporate them in their narratives and value systems, taking those rights responding to their most urgent needs.

As this chapter five constructs a normative understanding of human rights that redeems human rights discourse from the tyranny of imperialistic goal and the risk of total rejection, then space for a concluding chapter is opened to assess how this new conception allows responding to challenges that motivated and animated my whole project.

Thus, in addition to being a way of concluding, chapter six reexamines the debate between the universalists and relativists with regard to human rights practice, and to reconsider the question of human rights universality through the lenses of the fruits of the fifth chapter. In this sense, instead of taking human rights as already universal in their framework because they can be found in every culture –which is disputable, because if it were the case, why would cultures resist them?—or looking for a thin core that can be assumed to meet universal agreement, leaving aside many important other human rights needed for enhancing human dignity, or justifying universality through the reading of terms like "everyone, everybody" which might be the intention of the drafters and not the effective universality, or even to assume the legal universality by the fact that many states have signed human rights instruments because it

does not ensure the effectiveness of their impact, the chapter presents a practical universality which can identify the process of domestication as a process of universalizing human rights. In this sense, universality of human rights is to be understood as underlying the practice of human rights and not as a prerequisite for adopting and practicing them.

Chap. 1. Human Rights as an Imperialist Ideology

> …human rights corpus is seen purely as a liberal project whose overriding goal, though not explicitly stated, is the imposition of Western-style liberal democracy, complete with its condiments.
>
> Makau Mutua

1.0. Introduction

Most of the Third World critics of human rights underscore the fact that human rights are serving an ideological purpose for Western imperialism, replacing the ancient ideologies, in a world dominated by the United States replacing former imperial powers. In Makau Mutua words,

> today the presence of the United States—which has succeeded France and the United Kingdom as the major global cultural, military, and political power—is ubiquitous… In a sense the United States chief executive sits atop a global empire. It is an empire governed by cultures, traditions, and norms of the Europeans West. The European powers of yesterday have, as it were, passed the torch to the United State. The United States has renewed and revitalized the Age of Europe. The domination of the globe exercised by European powers for the last several centuries has been assumed by the United States.[1]

Three points come out strongly from this critique. First, there is a continuation from what has been happening from centuries up to now. Only the actors have changed. Yesterday it was France and United Kingdom; today, it is the United States, but they serve the same master: Western empire. Second, the content of this project is the domination of the rest of the world by the West. Third, this domination permeates several spheres: political, cultural, traditions, military, economic and so on.

One can wonder then how human rights are involved in this new Western imperialism under a United States' banner. Makau Mutua once again observes that "increasingly, the human rights movement has come to openly be identified with the United States, whose chief executive

[1] Makua Mutua, *Human Rights*, p. 6.

now invokes human rights virtually every time he addresses a non-European nation."[2] This being the case, it follows that the Western global empire led by the United States to dominate the non-European world is justified through a human right rhetoric. Hence the title of this chapter: human rights as an imperialist ideology. However, to unpack what this title contains, will requires us a detour through the understanding of the ideology behind European imperialism before passing the torch to the United States. We hope that it will only be then that we will be able to grasp how human rights is being ideologically used by the West to justify its continued domination of the rest of the World.

To carry out this goal, three main points will structure this chapter. In the first place, I look at the imperialist ideology, focusing on the end of the nineteenth century and the beginning of the twentieth century for reasons that this period corresponds to the formal imperialism which consecrated the domination of the rest of world by the West. It now appears that the formal imperialism period thrived because of the work of international law. That is the reason why the second point pays attention to the relationship between international law and the imperialist ideology. Hoping that after these two first points will have highlighted the content of imperialist ideology, the third and last point then will analyze how human rights are incarnating this imperialist ideology. But, before I set out, there is a need for clearing the ground by delimitating the definitional scope of the concept of *imperialist ideology* (I leave the intricacies of *imperialism* to the first heading).

As a compound expression, *imperialist ideology* is composed of *imperialist* and *ideology*. *Imperialist* is an adjective derived from the noun *empire*. According to Henry Laurens, Raymond Aron distinguishes between *imperialist* and *imperial* especially when applied to politics. An

[2] Ibid.

imperialist politics would mean "the constitution of an empire in a juridical or effective term, it means to subdue foreigner populations to its law," while the imperial politics "consists in aiming at spreading its influence in a function of its interests considered vital in terms of security, access to raw materials and markets, and the constitution of alliances and military bases abroad."[3] Would it be the same when 'imperialist' is applied to 'ideology'? Before attending to this question, the latter is another very commonly used concept which needs to be delimited.

As can be expected, 'ideology' has been defined in many ways and by many different scholars. For instance, Justin Jennings states that "an ideology can be defined as a set of ideas and behaviors that promotes a social system that benefits some classes or interest groups more than others….Ideologies are embedded in the structure of all societies that exhibit some degree of social inequality… and the élite who benefit from these social systems endeavor to present a vision of the world that appears natural and timeless."[4] Herfried Münkler defines ideology from a Marxist perspective as "the (necessary) self-deception of political and social players regarding their own goals and purposes."[5] From a communicative perspective, Dennis Mumby treats ideology in "a pejorative sense," viewing it as "both socially located and as constitutive of social reality."[6] The Frankfurt Institute for Social Research lists *ideology* in the themes of its *Aspects of Sociology*, noting that the critique of ideology should not lead to forgetting its long history. Stemming again from a Marxist view, the Institute states that ideology is linked to the rise of the bourgeois society. It is stated, "if one disregards those oppositional countercurrents in Greek

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[3] Henry Laurens, *L'empire et ses ennemis. La question impériale dans l'histoire*. (Paris: Editions du Seuil, 2009), p. 129. The translations are ours.
[4] Justin Jennings, "The Fragility of Imperialist Ideology and the End of Local Traditions, an Inca Example" in *Cambridge Archaeological Journal*, Vol. 13, No. 1, April 2003, p. 108.
[5] Herfried Münkler, *Empires: The Logic of World Domination from Ancient Rome to the United States*, trans. by Patrick Camiller. (Malden: Polity Press, 2007), p. 84.
[6] Dennis K. Mumby, "Ideology & the Social Construction of Meaning: A Communication approach" in *Communication Quarterly*, Vol. 37, No. 4, 1989, p. 294.

philosophy which have fallen into disrepute due to the triumph of Platonic-Aristotelician tradition and which are being reconstructed with great difficulty only today, then, at least since the beginnings of modern bourgeois society at the turn of the sixteenth and the seventeenth centuries, the general conditions of false contents of consciousness began to be noted" and it goes back to Francis Bacon's critique of "idols".[7]

All these excerpts concur to Paul Ricoeur's observation that "the most prevalent conception of ideology in our Western tradition stems from the writings of Marx."[8] Our working definition of ideology will, therefore, be reconstructed from Ricoeur's lectures. The latter go through some important figures on ideology, such as young Marx's writings, Louis Althusser, Karl Mannheim, Max Weber, Jürgen Habermas and Clifford Geertz. All along, Ricoeur wants to maintain positive and negative sides of ideology; the former starting from the eighteen century French school, while the latter stems from Marx. As he puts it, "my hypothesis is that there is a positive as well as negative side to both ideology and utopia."[9] The negative side of ideology is its dissimulation of reality, while its positive side is in its constitutive role of what Weber calls legitimation. Reading it from Marx's writings, the negative role of ideology is the distortion of reality; it "means this reversal of reality."[10] For Ricoeur, however, the negative role of ideology does not exhaust its meaning. He remarks, "the concept of ideology will not be complete as long as we do not know to what we oppose it, to what we have to contrast it."[11] And here is where he brings in the positive role of ideology of legitimating authority. He highlights it in his

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[7] The Frankfurt Insitute for Social Research, *Aspects of Sociology*, with the preface by Max Horkheimer and Theodor W. Adorno, trans. by John Viertel. (Boston: Beacon Press, 1972), p. 183.
[8] Paul Ricoeur, *Lectures on Ideology and Utopia*, Ed. by George H. Taylor. (New York: Columbia University Press, 1986), p. 3.
[9] Ibid., p. 2, but it is a recurrent theme throughout the first part on ideology. See for instance, p. 77; 156; 161; 204; 259.
[10] Ibid., 30. See also the same idea on his p. 8; 10; 12; 70; 78; 156; etc.
[11] Ibid., 31.

interpretation of Weber, saying, "ideology functions to add a certain surplus-value to our belief in order that our belief may meet the requirements of the authority's claim. The Marxist notion of distortion makes more sense if we say that it is always the function of ideology to legitimate a claim of legitimacy by adding a supplement to our spontaneous belief. The function of ideology at this stage is to fill the credibility gap in all systems of authority."[12] In other words, in the very process of dissimulating and distorting reality, there is an active function of rational justification of a certain social order. The negative side is concealed (dissimulated) through this process of legitimation of "our spontaneous belief." From a Marxist perspective, this view seems to espouse the Frankfurt Institute's position that "*ideology is justification*."[13]

Coming back then to the object of grasping *imperialist ideology*, I conserve the two moments and say that it means the justificatory process of legitimating imperial and imperialist politics as defined by Aron, while, at the same time, concealing/dissimulating its true reality. Thus, human rights as imperialist ideology means that human rights are being used to positively justify a negative practice of domination. As a moral discourse, they serve a positive role of ideology of legitimation; but as they legitimate a negative practice, they serve the negative side of ideology. This is then a working definition whenever I use this expression of human rights as imperialist ideology.

1.1. On Imperialist Ideology

In the introduction above, I delineated the contour of this expression *imperialist ideology*. The issue at hand is to know what kind of ideology was behind the rise and the propagation of imperialism. But before getting to that ideology, we need to know what imperialism is and how it came about.

[12] Ibid., p. 183.
[13] Frankfurt Institute, Ibid., p. 189. Italicized in the text.

a). From Empire to Imperialism

Empire is a known vocabulary in political history. Deepak Lal notes that the oldest of empires "go back to the origins of civilization" and he documents them from about 4000 B.C. with Mesopotamia,[14] and as examples of imperialism in practice, Joseph Schumpeter chooses Egyptian, Assyrian and Persian empires.[15] Furthermore, Robert Aldrich remarks that, around the same period, we could also find examples of empires in Asia, South America and sub-Saharan Africa.[16] With such ancient roots, Greek and Roman empires, without mentioning Ottoman, the Spanish and Portuguese empires are just of yesterday, and *empire* becomes so familiar, especially that it seems to have been a worldwide experience. Yet, as Robert Aldrich puts it, "asked about 'empire',… many would immediately think of the colonial empires…Interrogated about what 'empire' means, respondents—especially those not of European heritage—might also speak of slavery, indentured labour, transported prisoners, conquest and war, and genocide."[17] Aldrich's nuance underlines the difficulty of defining what *empire* and its derivative *imperialism* mean.[18] However, the question is not only to define them; it is also about how we passed from empire to imperialism and from the latter to its ideological justification.

In his study on the evolution of the concept *empire*, James Muldoon shows that the term *imperium* underwent different meanings in the West from the ancient Roman World to its modern use through the middle Ages. He notes, "in the ancient Roman World, the term imperium meant power, specifically 'the legal power to enforce the law'… thus, originally,

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[14] Deepak Lal, *In Praise of Empires: Globalization and Order*. (New York: Palgrave, 2004), p. 9.
[15] Joseph Schumpeter, *Imperialism, Social Classes: Two Essays*. Trans. by Heinz Norden (New York: The World Publishing Company, 1971), p. 23.
[16] Robert Aldrich, "Introduction: Imperial Overview" in Robert Aldrich, ed., *The Age of Empires*. (London: Thames & Hudson Ltd, 2007), p. 8.
[17], Ibid., p. 7.
[18] As Laurens puts it, "au fond, l'empire et sa doctrine—impérialisme—sont peut-être les notions les moins bien comprises de l'historiographie moderne, et cette incompréhension est due tout autant à la complexité de leur histoire qu'aux critiques de leurs contempteurs," ibid., p. 13.

imperium had no territorial connotation." He adds that "the related term *imperator*, however, could include something of a territorial connotation because this title was granted to a successful general who had won a significant victory at a particular time and place."[19] This conception would evolve as time went by, to the point that "by the time of Augustus… the Romans appear to have begun to understand *imperium* not only in terms of power over other people, but also in a territorial sense to describe newly acquired lands, lands that has become 'subjected to the *imperium* of the Roman people'." He then concludes: "such use of *imperium* bridged the traditional use of the term and its modern use, that is, to describe specific territory or collection of territories."[20]

It is this understanding of empire that is underscored by scholars. For instance, after recognizing that the term "empire" is not easy to figure out, Aldrich states that "it may be seen at its most basic as the rule by a particular group in a political center over a diverse and different set of other, often distant countries and peoples, generally as a result of military conquest."[21] As for Laurens, he first links the conception of empire to its roman origin, but extracts its abstract definition as a domination that spreads over a plurality of peoples, religions and territories with different status. For this author, philosophically speaking, empire implies a system of domination of the might over the weak.[22]

This exploration of the term *empire* shows that it carries with it a negative content because it implies a negative experience of conquest and domination. Laurens even contrasts empire to the positive notions of kingdom or nation. This negative experience can, of course, be positively interpreted by the conqueror and even by the conquered. Nonetheless, empire is still

[19] James Muldoon, *Empire and Order: The Concept of Empire*, 800-1800. (London: Macmillan Press, 1999), p. 18.
[20] Ibid., p.18-9.
[21] R. Aldrich, ibid., p. 7.
[22] H. Laurens, ibid., p. 14-5.

stained by its negative origin of conquest and domination. This negative connotation becomes clear when one looks at imperialism—another derivative closely linked to empire.

Laurens asserts that the word "imperialism" appeared in French language to designate those favorable to imperial power (already used in 1525 and 1825), but such meaning would be quickly superseded by a second one, that of constituting an empire by subduing other states, politically, economically and culturally.[23] He argues that this meaning would win over the first one, due to its English use in 1878, before being applied again to the French empire in 1893. Many authors concur with this observation, although not necessarily agreeing on dates. For instance, Jennifer Pitts contends that "the term imperialism was, like most of political –isms, a coinage of the mid-nineteenth century. Since its earliest usage it has tended to be a term of opprobrium and one that emphasizes not only the extent but the unaccountability of the power exercised."[24] In her earlier work, she had affirmed that the word *imperialism* appeared during a discussion on the French occupation of Algeria in 1830, saying that "the very term *impérialisme* began at this moment [1830s and 1840s] to express aspirations for a renewal of the sense of national greatness the French had enjoyed with Napoleon conquests."[25] Pitts relies on the work of Richard Koebner who consecrated a whole chapter on the way the word got into the English language, "as a gloss on a regime which had been established in France."[26] That is why, "in the

[23] Ibid., p. 14.
[24] Jennifer Pitts, "Political Theory of Empire and Imperialism" in *Annual Review of Political Science*, Vol. 13, 2010, p. 214. Henceforth, "Political Theory…"
[25] Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France*. (Princeton: Princeton University Press, 2005), p. 167. Henceforth, A *Turn to Empire*
[26] Richard Koebner and Helmut Dan Schmidt, *Imperialism: The Story and Significance of a Political Word, 1840-1960*, (Cambridge: Cambridge University Press, 1964), p. 1. Trevor R. Getz and Heather Streets-Salter hold a different opinion as to the origin and the first appearance of the word imperialism. While agreeing that it takes origin in the Latin word *imperium*, they, however, contend that "it first appears in documents emanating from the court of French King Louis-Philippe, who applied it to express his power." Trevor R. Getz and Heather Streets-Salter, *Modern Imperialism and Colonialism: A Global Perspective.* (Boston: Pearson, 2011), p. 6.

early stage of its career the word imperialism was unequivocally understood by Englishmen to refer to the Empire of Louis Napoleon."[27]

While these authors explore the birth of the word imperialism and situate it into its historical context, the question as to its meaning is still to be answered, and many theories have been developed, all depending on political ideologies and economic interests. Wolfgang Mommsen had studied the main theories of imperialism, from the classic theory to the theories of neo-colonialism and under-development, through Marxist and other western theories.[28] It appears that imperialism is understood differently according to different schools. For instance, the first study on imperialist by John A. Hobson distinguishes imperialism from colonialism, and views it as a result of "a debasement of [the] genuine nationalism, by attempts to overflow its natural banks and absorb the near or distant territory of reluctant and unassimilable peoples."[29] For him, imperialism is intrinsically connected with expansion beyond national borders. For Lenin, imperialism is the highest stage of capitalism. It is synonymous with the domination of finance capital. As he puts it, "imperialism is capitalism at that stage of development at which the dominance of monopolies and finance capital is established; in which the export of capital has acquired pronounced importance; in which the division of the world among the international trust has begun, in which the division of all territories of the globe among the biggest capitalist powers has been completed."[30] As if responding to Lenin's view, Joseph Schumpeter refutes that capitalism is intrinsically imperialist. "In a purely capitalist world, he argues, what was once energy for war becomes simply energy for labor of every kind. Wars of conquest and

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[27] Ibid., p. 27.
[28] Wolfgang J. Mommsen, *Theories of Imperialism*; trans. by P.S. Falla. (New York: Randon House, 1980). Henceforth, *Theories.*
[29] John A. Hobson, *Imperialism: A Study* (London: James Nisbet & Co., 1902), p. 6.
[30] Lenin, *Imperialism, the Highest Stage of Capitalism: A Popular outline*. (Moscow: Progress Publishers, 1975), p. 83. It was first published in 1917.

adventurism in foreign policy in general are bound to be regarded as troublesome distractions, destructive of life's meaning, a diversion from the accustomed and therefore 'true' task." He therefore infers, "a purely capitalist world therefore can offer no fertile soil for imperialist impulses."[31] This defense of capitalism as anti-imperialist is founded on—if it does not found—his definition of imperialism as "the objectless disposition on the part of a state to unlimited forcible expansion."[32]

Although it is not easy to reconcile these ideological backgrounds, one outstanding character that permeates all the definitions of imperialism is *expansion*. Hence Hannah Arendt gets is right when she affirms that "expansion as a permanent and supreme aim of politics is the central political idea of imperialism."[33] However, expansion was not new because, as we already saw, empire implies the domination over other peoples, since the Roman period. Moreover, Spain and Portugal, just to mention few cases, expanded their territories when they invaded the Americas. Yet, when we talk about imperialism and as the history of the word shows, we seem to designate a different reality that happened later. Hence, some scholars call it "new imperialism".[34] What is then the difference between these two forms of imperialism? Getz and Streets-Salter respond to this question saying that "despite the obvious continuity with the preceding century, this New Imperialism arguably did represent something new in terms of an expanded *capacity* and *will* to acquire new formal colonies as well as spheres of influence." The authors nuance, however, that the capacity was not the biggest driving force behind the New Imperialism. Rather, "it was also the result of a new will to dominate others, representative of fierce cultures of imperialism that were emerging in industrialized and industrializing

[31] J. Schumpeter, ibid., p. 69.
[32] Ibid., p. 6.
[33] Hannah Arendt, *The Origins of Totalitarianism*. (New York: The World Publishing Company, 1958), p. 125.
[34] One of them is Hobson, ibid., Part. I, chap. I.

societies."[35] Talking about British, Hobson distinguishes colonialism from imperialism, where the former represent an establishment of a colony, where Britons settle in foreign lands but follow the law and custom of the mother country. He gives the examples of Australia and Canada. "Our other colonies, he notes, are plainly representative of the spirit of Imperialism rather than of colonialism. No considerable proportion of the population consists of British settlers living with their families in conformity with the social and political customs and laws of their native land: in most instances they form a small minority wielding political or economic sway over a majority of alien and subject people, themselves under despotic political control of the Imperial Government or its local nominees."[36] In other words, the new imperialism is a despotic domination of non-European peoples by Western powers. Some scholars call it the formal imperialism,[37] and for others it is simply the true imperialism,[38] while for some others it is "the high imperialism".[39] Whatever way they call it, they agree that this new imperialism roughly corresponds to the period between 1870s and 1914. Concretely, it was materialized by "the rapid acquisition of formal colonies in Africa, Asia and the Pacific by both existing and new imperial powers based in Europe, North America and Japan."[40] Basically, except Japan, the New Imperialism is characterized by the domination on the rest of the world by the West. However, the benchmark of this period was the formal colonization of Africa through the Berlin

[35] T.R. Getz & H. Streets-Salter, ibid., p. 213.
[36] Hobson, ibid., p. 6. Mommsen founds the difference between old and new imperialisms by the actors involved. In the old one, private individuals were the agents, while in the new, governments take the lead. As he puts it, "up to the 1880s the initiative for territorial expansion had generally come from interested business groups at home and at the periphery; governments as a rule preferred to let commercial companies go ahead, granting them a royal charter and hence protection in case of need, but otherwise keeping rather in the background. Now, however, the position was gradually reversed, as governments were pressed to annex overseas territories even though the immediate commercial involvement of their own nationals in the areas concerned was negligible". Mommsen, *Theories*…, p. 92.
[37] T.R. Getz & H. Streets-Salter, ibid., p. 214, 215.
[38] Laurens, ibid., p. 74, 95.
[39] Wolfgang J. Mommsen, "The End of Empire and the Continuity of Imperialism" in Wolfgang J. Mommsen and Jürgen Osterhammel, eds., *Imperialism and After: Continuity and Discontinuity*. (London: Allen & Unwin, 1986), p. 339. Henceforth, "The End of Empire…"
[40] T.R. Getz & H. Streets-Salter, ibid., p. 214. R. Aldrich does not mention Japan.

Conference of 1884-5, to the point that, for Mommsen, it became the igniting factor for the West to expand beyond their borders. In his words, "'the scramble for Africa' which began in the mid-1880s initiated a process of accelerated land-grabbing throughout the world which marked the age of 'high imperialism'."[41] Laurens is of the same opinion: the modern concept of imperialism was forged during the subdivision of Black Africa.[42]

At this point, we understand why we needed to go through all of this process of grasping the meaning of the concept of imperialism so that we can nail it down historically. Indeed, the goal of this chapter is to elaborate the claim from the Third World critics that human rights are another ideology to justify the continuation of Western imperialism. Now that we know during which period this Western imperialism was developed, we can now study what the ideology behind this Western expansion was, so that in the end we can compare and see if human rights do indeed play the same role. Hence, my next point is exactly about the imperialist ideology.

b). Ideological Justification of Imperialism

The New Imperialism corresponds to the industrial development in the West which allowed demographic growth and exacerbated the hunger for raw materials but also the market for the manufactured product. It is therefore certain that economic, political and demographic reasons lay behind the imperial expansion. It is true that, as Philip Curtin notes, "the role of economic motives behind the European drive for empire is still one of the most hotly debated of all historical problems concerning imperialism,"[43] and one of the leading scholars, Hobson, argues that imperialism was detrimental to the British economy.[44] Nonetheless, it cannot be denied that

[41] W.J. Mommsen, *Theories*, p. 339. For T.R. Getz & H. Streets-Salter, "perhaps the most astonishing element of this formal imperial expansion was the division and conquest of almost all of Africa—the so-called *scramble for Africa*." Ibid., p. 214.
[42] Laurens, ibid., p. 88.
[43] Philip D. Curtin, ed., *Imperialism*. (New York: Walker and Co., 1972), p. 132.
[44] Hobson, Part I., esp. chap. I.

economic motivations played a major role in the imperialist expansion. To quote Ronald Robinson, "the imperialist at least, imperialism was not simply something that Europe did to other countries, but also something they were persuaded or compelled from unequal economic partnerships and political alliances with sub-imperial contractors in other parts of the world."[45] Hannah Arendt also argues that "imperialism was born when the ruling class in capitalist production came up against national limitations to its economic growth."[46] In any case, the imperialists themselves justify their undertaking in economic terms. For the Belgian King Leopold II, "no country has attained historical greatness without colonies."[47] Therefore, he "will be happy to see Belgium trade with and exploit colonies in general but [he feels] that, in the interest of the country, it should have its own outside possession."[48] Cecil J. Rhodes, the imperialist who exploited the South African part, justified his enterprise in economic interests and as a solution to problems arising in England.[49] Jules Ferry, the French Prime minister, also defended the French imperialism by appealing to economic argument, as one among other main reasons—others being political and civilizational: "the need for an export market". Before the French national Assembly he said, "what is lacking to our great industry, drawn irrevocably on the path of exportation by the [free trade] treaties of 1860, what it lacks more and more is export markets."[50] It was in similar terms that Germany justified its imperialism. "We consider it one of

[45] Ronald Robinson, "The Excentric Idea of Imperialism, with or without Empire" in Wolfgang J. Mommsen and Jürgen Osterhammel, eds., *Imperialism and After: Continuity and Discontinuity*. (London: Allen & Unwin, 1986), p. 271.
[46] Arendt, ibid., p. 126.
[47] Cited in Ralph A. Austen, ed. *Modern Imperialism: Western Overseas Expansion and Its Aftermath 1776-1965*. (Lexington, MA: D.C. Heath & Co., 1969), p. 60.
[48] Cited in ibid., p. 61.
[49] Cited in ibid., pp. 64-67.
[50] Ibid., p. 71.

our most solemn duties to forward and to nourish the interests of our shipping, our trade, and our industry," argued von Bülow.[51]

In light of what precedes, it is clear that economic reasons were definitely one of the engines driving imperialist expansion. The latter might not have provided the expected results, but that does not exclude the fact that economics reasons were behind it at the beginning. Concerning the political motives, it is needless to mention that acquiring more colonies and having a growing economy increased the power and prestige, and therefore caused the competition among powers. The same German official—just to mention only him—is emblematic in that regard when he proclaimed that "the time has passed when Germany could abandon the land to one of its neighbors, the sea to another, and reserve for herself the heavens, where pure doctrine is king."[52] But there were also internal political problems as Arendt rightly points out. "All governments, she argues, knew very well that their countries were secretly disintegrating, that the body politic was being destroyed from within, and they lived on borrowed time."[53] The solution to this disintegration was imperialism. As to the demographic factor, suffice to quote Leopold II saying, "for those peoples whose working class does not emigrate but whose middle class lacks employment, such domains are precious."[54]Here again, Arendt holds the same view with a sharper sting that imperialism helped to export the surplus of the bourgeois society. In a very condensed paragraph, she sums up all of the three motives, making them work for the same purpose. She writes,

> Older than the superfluous wealth was another by-product of capitalist production: the human debris that every crisis, following invariably upon each period of industrial growth, eliminated permanently from producing society. Men who had become permanently idle were as superfluous to the community as the owners of superfluous wealth. That they were an actual menace to society had been recognized throughout

[51] Cited in ibid., p. 76.
[52] Ibid., p. 76. For a more detailed account of the political side of imperialism, see Hobson, ibid., Part II.
[53] Arendt, ibid., p.147.
[54] Ibid., p. 60.

> the nineteenth century and their export had helped to populate the dominions of Canada and Australia as well as the United States. The new fact in the imperialist era is that these two superfluous forces, superfluous capital and superfluous working power, joined hands and left the country together. The concept of expansion, the export of government power and annexation of every territory in which nationals had invested either their wealth or their work, seemed the only alternative to increasing losses in wealth and population. Imperialism and its idea of unlimited expansion seemed to offer a permanent remedy to a permanent evil.[55]

Arendt's analysis ties together the economic factors with the political and the demographic ones and, at the same time, it underlines an important point that imperialism was conceived as a "permanent remedy to permanent evil" that was gnawing away at Western society. Imperialism came as a solution to problems created by industrial growth that imparted the economy and demography. As usual, to deal with such problems was a political matter, both internally and externally. That is where the question of justification came in and the problem of ideology emerged as a possibility of *moral justification* of the imperial domination. What could be such an *acceptable moral* discourse that could legitimate imperialism and conceal the claim to the real motives at once? Sure enough, imperialist expansion was thought to resolve the internal trials of Western society. But, what kind of discourse existed to make it acceptable at home and sound positive for those who would endure the consequences? To recall Robison's words, which discourse could translate the belief into a claim that "imperialism was not simply something that Europe did to other countries, but also something [imperialists] were persuaded or compelled to do to themselves?"[56]

As he was developing the order of ideas that could justify imperial expansion, Jules Ferry evokes "the humanitarian and civilizing side," cautioning that it was not politics or history, but rather "political metaphysics."[57] The latter is blatantly stated, although it seems to come from "a higher and more truthful plane. It must be stated openly that, in effect, superior races have rights

[55] Arendt, ibid., p. 150.
[56] Robinson, ibid.
[57] Cited in Austen, p. 71.

over inferior races." To a left wing MP who objects that such a language is scandalous "in a country which has proclaimed the rights of man," Ferry just repeats that "superior races have a right, because they have a duty. They have the duty to civilize other races…"[58] Here was openly professed the famous "*mission civilisatrice*." And it is indeed a "political metaphysics!" The instrumental dimension of imperialist expansion as "a permanent remedy to permanent evil" –to reuse Arendt's words –is dressed into the moral language of right-duty, where the self-interest becomes benevolence. Through and with this language, the invasion and domination of other peoples in Africa, Asia and the Pacific have nothing to do with economic, political and demographic challenges that we saw. Rather, expansion springs from a moral right founded on an ontological duty almost *à la* Levinas, i.e., inescapable responsibility of the superior races to civilize the inferior ones. In a way, the history is repeating itself. We are back to the language of natural law that was used to justify the subjugation of Native Americans. In his argument against Bartholomew Las Casas's defense of Indians, Juan de Sepúlveda asserted that "it shall always be right and in accordance with natural law that these people should be subjected to the rule of more cultivated and human princes and nations…. If they refuse this rule, it may be imposed upon them by means of arms…. In conclusion: it is just, normal and in accordance with natural law that upright, intelligent and virtuous and human people *should have* dominion over those who lack these virtues."[59] Indeed, as for Ferry it is *a duty* for superior races to civilize, likewise it is in Sepúlveda's language: virtuous nations *should have* dominion. It is a categorical imperative. In this way, all the real interests have disappeared, only moral duty remains. As A.P. Thornton would say, that was the ruse of Great Powers. "Insisting on their privileges, setting their margins, and calculating their options, [they] built a framework within which the world of the nineteenth

[58] Ibid., p. 71-2.
[59] Cited in Sophie Bessis, *Western Supremacy: The Triumph of an idea*? Trans. by Patrick Camiller. (New York: Zed Books, 2003), p. 16. Emphasis added.

century grew and prospered. It did this so spectacularly that intelligent people everywhere believed they were the masters of the age of progress and the servant of a civilizing mission."[60]

Sophie Bessis thinks that the confession of this supremacy finds roots in the Enlightenment. According to her, "throughout the nineteenth century, those who claimed to be following Locke and Montesquieu made a decisive contribution that helped to root in Western minds a conviction of their superiority and of the legitimacy of their supremacy."[61] She is not completely wrong. Figures of Enlightenment par excellence such as Hegel claimed that some cultures—such as Africa—did not have any history (Hegel), while "Kant not only failed explicitly to condemn that 'peculiar institution' [of slavery] but constructed one of the most –some would argue *the* most –systematic accounts of 'race' prior to the flood tide of racial thinking accompanying the late nineteenth-century imperialism."[62]

As it is clear at the outset, the civilizing mission presupposed a racist theory. There are superior races and inferior ones. Nevertheless, Ferry did not tell us who were superior races and who were inferior ones. As the "civilizing idea" is expressed in a "political metaphysics," it is too abstract to give concrete answers. Only natural sciences that were developing at the same time would come to the rescue. For instance the founder of paleontology, Georges Cuvier classifies human species into three groups: "Caucasian or white, the Mongolian or yellow, and the Ethiopian or Negro." These three races are not only geographically separated and morphologically different; they are also situated according to their civilizations. Thus, "the

[60] A.P. Thornton, *Imperialism in the Twentieth Century*. (Minneapolis: University of Minnesota Press, 1977), p. 32.
[61] Sophie Bessis, ibid., p. 26.
[62] Thomas McCarthy, *Race, Empire, and the Idea of Human Development*. (Cambridge: Cambridge University Press, 2009), p. 43.

Caucasian, to which *we belong*[63][emphasis added] is distinguished by the beauty of oval formed by his head, varying in complexion and the colour of the hair. To this variety the most highly civilized nations, and those which have generally held all others in subjection, are indebted for their origin." That is the first category. The second, "the Mongolian is known by his high cheek bones, flat visage, narrow and oblique eyes, straight black hair, scanty beard and olive complexion. Great empires have been established by this race in China and Japan, and their conquests been extended to this side of the Great Desert. In civilization, however, it has always remained stationary." And finally, "the Negro race is confined to the south of mount Atlas; it is marked by a black complexion, crisped or woolly hair, compressed cranium, and a flat nose. The projection of the lower parts of the face, and the thick lips, evidently approximate it to the monkey tribe: the hordes of which it consists have always remained in the most complete state of utter barbarism."[64] With such classification, needless to say that all the positive qualities, sciences and virtues belong to the Caucasian, without much information about the rest. "It is by this great venerable branch of the Caucasian stock, that philosophy, the arts, and the sciences have been carried to the greatest perfection, and remained in the keeping of the nations which compose it for more than three thousand years."[65]

Now that we know for sure what the superior and inferior races are, we can deduce from it the subject and object of the right to civilize. But since this right is constructed on a racial basis, instead of being of a moral right, it becomes a physical might that Robert Knox would sing

[63] According to Alice L. Conklin, the imperialist ideology was not built on positing the non-Western as the other, especially in the French colony of West Africa. However, if we base the civilizing mission on these racial theories, it becomes difficult to deny that "once the non-Western world was constituted as irreducibly 'other,' the need for the Western democracies to civilize (and keep civilizing it) became all the more transparent." But to be fair, one has to underline that her analysis is circumscribed to French colonialism in West-Africa, although it can serve as analysis tool for other cases. Alice L. Conklin, "Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1985-1914" in *The American Historical Review*, Vol. 103, No. 2, 1998, p. 422.
[64] Curtin, ibid., p. 8.
[65] Ibid., p. 9.

apologetically. "From the earliest recorded times, might has always constituted right, or been held to do so…. By this kind of right, that is, power or might, we seized on North America, dispossessing the native races, to whom America naturally belonged; we drove them back into their primitive forests, slaughtering them piteously."[66] From might-right, Knox infers the nature of dark races. He writes, "since the earliest times, then, the dark races have been the slaves of their fairer brethren…. I feel disposed to think that there must be a physical and consequently a psychological inferiority in the dark races generally." And he explains: "this may not depend altogether on deficiency in the size of the brain *en masse*, nor on any partial defects…but rather, perhaps, to specific characters in the quality of the brain itself."[67] Once more, the *civilizing mission* is enveloped into metaphysics, since the defects of the dark races in congenital to the quality of the brain itself. It is useless to try to educate them unless there is possibility of recreating the brain. No wonder that Benjamin Kidd despaired of any viable political institutions in the Tropics. "We cannot look for good government under such conditions; we have no right to expect it." Rather, "the tropics in such circumstances can only be governed as a trust for civilization."[68] Trust of civilization was the English version of the French "*mission civilisatrice*."[69] Historians differentiate the British practice as indirect rule from the French one

[66] Cited in Ibid., p. 13.
[67] Ibid., p. 14. Jules Harmand draws the consequence from Knox's doctrine: "Enough has been said of the 'might' that makes 'right' through conquest. But whatever explanations are given, or arguments made in its favor, the fact remains that, from a strictly moral point of view, these are mere side issues. It is certain that to deprive a people of its independence is in itself an evil deed, and to do violently, most often with motives that are not beyond reproach, is immoral. It's a demonstration of that universal law of the struggle for survival in which we are all engaged, not only on account of our nature, which condemns us to win or die, but also on account of our civilization. It cannot permit such vast and fertile regions of the globe to be lost to us and to humanity by the incapacity of those who hold them and by the ill treatment given these lands so long as they are left to themselves…. On the day when constraint is no longer required empire will no longer exist." Ibid., p. 292.
[68] Ibid., p., 36-7.
[69] Kevin Grant argues that there were three ideologies in Britain to justify its slaveries as he calls them—sacred trusteeship; evangelical philanthropy and human right—but he observes that "in the end, British officials overlooked the human rights of Africans and other imperial subjects, choosing to base the mandates system on the traditional, imperial ideology of trusteeship." Kevin Grant, *A Civilized Savagery: Britain and the New Slaveries in Africa, 1884-1926.* (New York: Routledge, 2005), p. 10.

which was assimilation; but both presupposed Ferry's "political metaphysics" of superior races endowed with the ontological duty of uplifting the lower ones. Kipling's white men's burden is consumed.[70]

Thus the ideological justification of imperialism transformed the self-interested enterprise of Western powers trying to solve their internal problems into a moral duty to civilize the low races. In doing that, the imperialist ideology fulfilled the double role of ideology of legitimating a practice, and at the same time dissimulating the real motives. The Berlin Conference on the occupation of Africa is an illustrating case, where political and economic interests are covered by the humanitarian mission to Africa.[71] Yet, even at this level, the civilizing mission becomes another imperialist project, justified by the same prejudices of ontological inequalities between races and peoples. As Brett Bowden puts it, imperialism becomes "the extension of civilization to societies that are deemed less than civilized by modern standards of economic civilization, legal civilization, cultural civilization, and or [sic] sociopolitical civilization."[72] In other words, not only does the imperialist ideology function negatively by concealing the real reasons of Western imperialism, but also it is based on the negative relation of inequality between races and civilizations. Only then can it play its role of legitimation of imperialist practice positively as a moral duty.

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[70] "Take up the White Man's burden…/To seek another's profit/And work another's gain" in Münkler, ibid., p. 92. One of the first critiques of racial theories from the Black world was produced by the Haitian scholar and statesman, Anténor Firmin, *De l'égalité des races humaines*. (Port-au-Prince: Les Editions Fardin, 2011). The first edition was published in 1885. Otherwise, I find Hobson's deconstruction of these different imperialist narratives very instructive. Ibid.

[71] The whole document scarcely mentions any good that Africa would benefit from its colonial conquest. Even the so-called civilization is only mentioned here and there, while the rest of the document is concerned with how the colonial powers would facilitate and cooperate with each other in exploiting Africa. See. *Acte general de la Conférence de Berlin* (1885).

[72] Brett Bowden, *The Empire of Civilization: the Evolution of Imperial Idea*. (Chicago: The University of Chicago Press, 2009), p. 192.

The Third World Critics, however, do not only identify human rights with imperialist ideology, but also they precise the propagation of liberal imperialism. The question now is: was liberalism involved in the elaboration of this *civilizing mission*? That is our next topic.

c). Liberalism as Vehicle of Imperialist Ideology

According to Jennifer Pitts, "whether we apply the term liberalism strictly to theories developed after the 1810s, when "liberal" became a political category, or more broadly but conventionally to the languages of subjective rights and self-government stemming back to the early-modern period, the evolution of liberal thought coincided and deeply intersected with the rise of European empire."[73] This historical coincidence between liberalism and European imperialism make us weary about their relationship. Many critics have hit on of human rights as a continuation of liberal imperialism that was started during this period we are dealing with. Again Makau Mutua is the leading voice in this stream. For him, "the human rights doctrine is an ideology with deep roots in liberalism and democratic forms of government…the cultural biases of the human rights corpus can only be properly situated within liberal theory and philosophy. Understood from this position, human rights are an ideology with a specific cultural and ethnographic fingerprint."[74] Now, if human rights are an ideology rooted in liberal theory, and if it can be shown that liberalism was enmeshed with imperialism, then the hypothesis that human rights movement is a continuation of imperialist ideology will be solidly grounded.

Many scholars contend that indeed liberalism has been a big source of inspiration for European imperialism. According to Pitts, "liberalism arguably remains marked by features that rendered it often supportive of imperial domination, including commitment to progress and a teleological view of history, a suspicion of certain kinds of cultural or ethical particularism, and a

[73] Pitts, "Political Theory…" p. 216.
[74] Makau Mutua, "Terrorism and Human Rights: Power, Culture, and Subordination" in *Buffalo Human Rights Law Review*, Vol. 8, No 1, 2002, p. 6. Henceforth, "Terrorism…"

hospitable stance toward capitalism and the economic exploitation of nature."[75] This view is shared by many other authors who claim that "the imperialistic 'urge is internal to' liberalism (Mehta) that inherent in the very structure of liberal rationalism and abstraction is 'a propensity for colonial domination' (Sartori)."[76] Thomas McCarthy shows how John Locke was involved in the companies that were exploiting Native Americans and condoned slavery. James S. Mill was another defender of British imperialism in India. Furthermore, not only were the theorists defending imperialism, but they also held official positions and shares in those companies.[77] All those examples support the opinion that, effectively, liberalism is congenital to imperialism. However, McCarpthy and other authors observe that there were other liberal voices opposed to imperialism. For that reason, "given this diversity of views, it seems to me an oversimplification to argue…that imperialism is constitutive for liberalism as such, especially since the critiques advanced by anticolonial liberals have typically appealed to liberal values. On the other hand, it is undeniable that mainstream of liberal thought, running from Locke through Mill to contemporary neoliberalism, has continually flowed into and out of European-American imperialism, and that ideas of sociocultural development have been integral to that connection."[78] Andrew Fitzmaurice asserts the same tension within liberalism, when he says, "in the second half of the nineteenth century, opposition to empire was nothing new, although it found new material." He continues, "what was remarkable about this late-nineteenth-century critique of empire, however, was that it found a place at the heart of liberalism at a time when it had reached the high-water mark of pro-imperial sentiment. It therefore underlines the fact that,

[75] Pitts, Political Theory, p. 216.
[76] Ibid. Andrew Sartori states that "Mehta's core proposition [is] that liberal abstraction contains within its basic argumentative structure an immanent propensity for colonial domination" in "The British Empire and Its Liberal Mission" in *Journal of Modern History*, Vol. 78, No. 3, 2006, p. 623.
[77] McCarthy, ibid., p. 166-8; see also Pitts, *A Turn to Empire*, p. 123-32.
[78] McCarthy, ibid., p. 169. Pitts's *A Turn to Empire* is a study of the main figures of liberalism such as Burke, Bentham, the Mills, Constant and de Tocqueville, and they did not have the same position on imperialism.

even at its most pro-imperial, liberalism was characterized by conflict over empire, rather than doctrine."[79] Put otherwise, although, as McCarthy remarks, the tension within liberalism shows that the doctrine itself cannot be incriminated for imperialism and that there were liberals who were against imperialism, those who link liberalism and European imperialism have sound reasons. Indeed, those who were pro-imperialism used the same vocabulary and followed the same imperialist ideology undergirded by racial prejudices.

In her studies on liberalism and imperialism, Jennifer Pitts argues that the Mills (James and his son John) all –the father maybe more radically than the son –developed views based on the dichotomy between European and non-European societies. Talking about James Mill, Pitts says that "in short, James Mill's discussion of non-European cultures followed a persistent pattern. He recognized no differentiation among these peoples, so that all non-Europeans, from the South Sea island nomads to the peoples of the Chinese empire, were essentially 'rude' or 'barbarous,' whatever might be said about their particular means of subsistence, forms of government, or arts and practices." She adds, "he wrote as if every aspect of these cultures that might show them to be inferior to European civilization was telling, whereas anything that might suggest refinement was either trivial or misleading."[80] With such an opinion on non-European cultures, one is not far from Cuvier's racist views. It is from the same perspective that James Mill justifies the colonization of India, inasmuch as he characterized the "Indian society as barbaric" and "the Indians as incapable of self-government." Consequently, "the imposition of

[79] Andrew Fitzmaurice, "Liberalism and Empire in Nineteenth-Century International Law" in *American Historical Review*, Feb. 2012, p. 124.
[80] Pitts, A Turn, p. 131.

British rule on backward India was then justified in terms of tutelary duty to assist it, through colonial administration, in passing from its social childhood to social maturity."[81]

The son would follow the father's footsteps not without tension,[82] using the same vocabulary of "rude," "savage life," "uncivilized", "superiority-inferiority," and so on. For instance, he writes that "a rude people, though in some degree alive to the benefit of civilized society, may be unable to practice the forbearances which it demands."[83] And of course, for him, "rude people" or "uncivilized races" as he calls them cannot have the same kind of institutions as those fit for "civilized peoples". The latter deserve a democratic government that respects individual's rights, while the former needs a dictatorship. In his own terms, "a people in a state of savage independence, in which every one lives for himself, exempt, unless by fits, from any external control, is practically incapable of making any progress in civilization until it has learnt to obey." That being the case, "to enable it to do this, the constitution of the government must be nearly, or quite, despotic." [84] In this formulation, one can read the subtext of the myth of progress. The despotism is only a means for moving from barbary to civilization. This is even clearer in his *On Liberty*. "Despotism, he says, is a legitimate mode of government in dealing with barbarians, provided the end be of their improvement, and the means justified by actually effecting that end."[85] Through the same myth of progress, Mill is able to justify personal slavery in such a context of "savage independence". In his words, "even personal slavery, by giving a

[81] McCarthy, ibid., p. 168.
[82] Sartori notes that "Mill's most trenchant statements of liberal confidence in On Liberty and Considerations on Representatative Government were written at the moment of his greatest distance from Irish affairs…. It remains a puzzle to be sorted out, however, how the axiomatic hostility to 'custom' that Mill expressed in On Liberty fits with his own contemporary moves toward the embrace of 'custom' as a form of colonial governance in India." Ibid., p. 632.
[83] John S. Mill, *Considerations on Representative Government*, in *On Liberty and Other Essays*. Ed. John Gray. (Oxford: Oxford University Press, 1998), p. 209.
[84] Ibid., 232. He comes back to this point in many other instances. See p. 260; 284.
[85] John S. Mill, *On Liberty* in *Essential Works of John S. Mill*, ed. Marx Lerner. (New York: Bantam Books, 1971), p. 263.

commencement to industrial life, and enforcing it as the exclusive occupation of the most numerous portion of the community, may accelerate the transition to a better freedom than that of fighting and rapine."[86] Once more, the hope of civilizational improvement allows any form of government and reciprocal treatment. The end justifies the means; slavery and despotism are not evil in themselves; it depends on the stage of civilization and their end!

With such a position, we are not far from Jules Ferry's "political metaphysics", because while these considerations are still abstract, seeming to apply to an evolutionary theory, they get consistence when he applies them to historical contexts of what he calls British "dependencies". He subdivides the latter into two categories: "some are composed of people of similar civilization to the ruling country; capable of, and ripe for, representative government: such as the British possessions in America and Australia. Others, like India, are still at a great distance from that state."[87] Now we get to the heart of the matter: those who deserve a representative government are those similar to British civilization! In other words, the measure is the British civilization. He does not even mention the non-British peoples living in America and Australia. He couldn't because the latter are part of the "savage tribes" in need of despotic government, which superior civilizations are benevolently ready to bestow to them, because "under a native despotism, a good despotism is a rare and transitory accident." Not only the legitimate form of government for natives is despotism, but they cannot even afford a good despot. Hence, not being fit for a representative government and not being able to find a good despot in their ranks, they have to "be governed by the dominant country, or by persons delegated for that purpose by it," and the justification is the same: to improve their civilization. And "when the dominion they are under is that of a more civilized people, that people ought to supply it constantly… Such is

[86] Mill, *Considerations*, p. 232.
[87] Ibid., p. 447.

the ideal rule of a free people over a barbarous or semi-barbarous one."[88] Apparently, although he justifies the British despotism over non-British in order to improve their civilization, he does not envisage their progress to happen that soon, since he urges the dominant country to constantly supply "good despots"!

While many other liberal voices were against imperialism, support such as Mill's compromises liberalism vis-à-vis imperialism. And since the latter happened, it becomes difficult –if not impossible—to discharge the former. Therefore, the critics of human rights as an imperialist ideology have strong reasons to suspect its influence on imperialism. However, before I embark to that critique of human right as ideology, human rights regime has an international human rights law that Allen Buchanan qualifies as the heart of the whole human rights enterprise.[89] Yet, international law itself developed during the same period of European imperialism. Aren't we, as with liberalism, on the verge of another important factor of the spreading of imperialism? Hence, my next subject is about the relationship between international law and the imperialist ideology.

1.2. International Law as Legal Form of Imperialism Ideology

a). The Imperialist Origin of International Law

Relations between nations existed long before the period of the New Imperialism that is of concern in this part; they were regulated by certain practices and patterns among political entities. However, some scholars contend that positive international law emerged during imperial era, and therefore was framed to justify imperialism. After the positivism of John Austin challenged international law as not being a real law since it was not emanating from one

[88] Ibid., p. 454.
[89] Allen Buchanan, *The Heart of Human Rights*. (Oxford: Oxford University Press, 2013).

sovereign and hence could not be backed by physical force in case of disobedience,[90] international lawyers started to battle in order to affirm the positive validity of their subject. Martti Koskeniemi has shown that this endeavor started in Brussels, by the creation of the *Association internationale pour le progrès des sciences sociales* whose first ambition was to spread liberal ideas and values.[91] "The *Association internationale*, he observes, advocated liberal ideas, religious tolerance, freedom of opinion and free trade, as well as the development of contacts between peoples."[92] We see already that from its inception, international law is embedded in liberal culture and has a liberal mission of spreading liberal ideas. Made of lawyers, the *Association*'s intention would evolve into the *Institut de droit international* whose purpose was to further the progress of international law among civilized nations.[93] We encounter again the dichotomy now familiar that animated the whole imperialist ideology of the *civilized-uncivilized*. As we will see later, it would be become a corner stone of positive international law.

Antony Anghie goes even further back, to show that the emergence of international law itself is intrinsically connected with colonialism. He argues that, without the fact of what he calls "cultural difference",[94] there would not have been international law. Parting from the now accepted opinion that Francisco de Vitoria is the founder of international law, he shows that the Spanish scholar was the first to articulate the principles of international law developed in order to promote European imperialism, by confronting the fact of cultural difference. "Vitoria's attempt, he says, to address the problem of difference demonstrates the complex relationship between

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[90] On this subject of legal positivism, I rely on H. L. A. Hart, *The Concept of Law*. (Oxford: Clarendon Press, 1961). Concerning international law as not real law, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. (Cambridge: Cambridge University Press, 2002), p. 34.
[91] Martti Koskenniemi, *The Gentle Civilizer*, chap. 1.
[92] Ibid., p. 12.
[93] As Koskenniemi quotes it, "favoriser le progrès du droit international, en s'efforçant de devenir l'organe de la conscience juridique du monde civilizé." ibid., p. 41.
[94] Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law*. (Cambridge: Cambridge University Press, 2005), p. 3. *Imperialism*, hereafter.

culture and sovereignty, for Victoria's jurisprudence decrees that certain cultures—such as that of the Spanish—are universal and enjoy the full rights of sovereignty, whereas other culture practices—like those of the Indians—are condemned as uncivilized and non-sovereign."[95] As he studies Vitoria's work, Anghie highlights the positive dimension of Vitoria's theory, as Vitoria is able to defend Indians as rational beings, with public and private property rights as for Christians.[96] From this perspective, Vitoria cannot be accused of promoting an oppressive jurisprudence as he is, rather, defending Indians. However, what he gives with one hand, he takes it away with the other, when he starts to defend the right to travel under *jus gentium*. Spanish have right to travel wherever they want and establish trade relationships with, yet without consent with Indians, and the latter do not have rights to stop them as long as there is no harm. If they obstruct their travelling, then the Spaniards have right to wage war against Indians. As Anghie remarks, "the Indian who enters the universal realm of commerce has all the acumen and independence of market man, as opposed to the timid, ignorant child-like creatures."[97] But when it comes to defending their territory, Indians are excluded from being rightful subjects to engage in a just war, because only Christian subjects have such a right. As such, Vitoria does not recognize sovereignty to Indians. "The Indians who inevitably and invariably violate *jus gentium* are denied the status of the all-powerful sovereign who administers this law."[98] In Anghie's words, "Vitoria's insistence, in his analysis on just war, that only Christian subjectivity is

[95] Antony Anghie, "The Evolution of International Law: Colonial and Postcolonial Realities" in *Third World Quarterly*, Vol. 27, No. 5, p. 744. Hereafter "The Evolution…". See especially Antony Anghie, *Imperialism*, chap. 1. Martti Koskenniemi has shown that some vocabulary developed by this Salamanca school such *dominium* would be carried over into positive international law. Martti Koskenniemi, "Empire and International Law: The Real Spanish Contribution" in *University of Toronto Law Journal*, Vol. 61, No. 1, 2011, pp. 1-36.

[96] Concluding the first question in his Treatise on American Indians where he discusses "the dominion of barbarians, Vitoria states, "the barbarians undoubtedly possessed as true dominion, both public and private, as any Christians. That is to say, they could not be robbed of their property, either as private citizens or as princes on the grounds that they were not true masters (*ueri domini*)." in Francisco de Vitoria, *Political Writings*. Eds. By Anthony Pagden & Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), p. 250-1.

[97] Anghie, *Imperialism*, p. 21.

[98] Ibid., 29.

recognized by the laws of war, ensures that the Indians are excluded from the realm of sovereignty and exist only as the objects against which Christian sovereignty may exercise its power to wage war." [99]

Anghie argues that, by refusing sovereignty to the Indians, not only did Vitoria change the content of sovereignty, but also effectuated a "paradigm shift" in international law. The "sovereignty" that was its cornerstone was no longer operating. He replaced it rather with the concept of society which would play a seminal role in the development of imperialist ideology. That is how the cultural difference becomes the driving force of international law, challenging the traditional understanding of international law. "Vitoria's work suggests that the conventional view that sovereignty doctrine was developed in the West and then transferred to the non-European world is, in important respects, misleading. Sovereignty doctrine acquired its character through the colonial encounter."[100] This study of Vitoria's work as the origin of international law becomes a source of questions—such as: why were non-Europeans refused sovereignty? how did European ideas become universal in opposition? How did the resistance to imperialism become its source of justification, etc.—questions whose examination would lead "to write a different history of the relationship between colonialism and international law, and thereby, of international law itself."[101]

This is to say that international law is intrinsically linked to the colonial fact, but it is even clearer with the positive international law which developed during the apogee of imperialism. International lawyers who were building up the discipline were imbued with the same distinction between civilized and uncivilized, and they lent their services to the imperialist

[99] Ibid., p. 26.
[100] Ibid., p. 29.
[101] Ibid., 31.

powers by providing a legal justification of the imperial practice which had, once more, confronted Europe with non-European world. The questions asked were whether such an encounter would be regulated by the same principles that operated between European nations. As Koskenniemi formulates it, "penetrating deeper into the colonies—Africa in particular—Europeans come into contact with societies and cultural forms that seemed to share little of what they felt was the common core of their civilized identity. How were they to think such societies and Europe's relationship to them?" [102] This question supports Anghie's argument that international law was fundamentally defined by the fact of cultural difference.

We have already seen that the racial theories developed in justification of imperialist ideology of civilizing mission and we have mentioned the liberal origin in the development of international law. Moreover, taking John Stuart Mill as an example, it was illustrated that liberalism was pro-imperialism as long as the goal was the progress of civilization. As Koskenniemi puts it, "by the 1870s the assumption of human development proceeding by stages from the primitive to the civilized had come to form the bedrock of social anthropology and evolutionary sociology that provided much of the conceptual background for cultivated European reflection what Europeans often sweepingly termed the Orient." [103] In such a context, there is little chance that international law would not be informed by the same ideology, and that was indeed the case. "Like much of nineteenth-century social reflection, international law imagined itself in terms of progressive, or pedigree history."[104] Thus being the case, international law found itself to be deeply involved in imperialism although it might not have been its first goal. As was the case of Vitoria who ended up founding international law on imperialism

[102] Koskeniemi, *Gentle Civilizers*, p. 101.
[103] Ibid.
[104] Ibid., p. 102.

expansion after defending the rights of Indians, the same happened with the founders of international law. They "were liberals who supported the turn to formal empire in order to protect the natives from the greed of companies and ensure the orderly progress of the civilizing mission. They were imperialist not irrespective of their liberalism but as *a consequence of it*."[105] Backing the civilizing mission required the belief in the categories of civilized and uncivilized as normative ground to recognize or deny sovereignty. I now go through a few examples to illustrate how international law supported imperialism under the same ideological presuppositions.

b). The Challenge of the *Uncivilized* to International Law

One of the leading figures of international law[106] during this period of new imperialism is James Lorimer. He confronted the "fact of cultural difference" as an issue to the theory of recognition—which is instrumental to international law. Touching the question of race, Lorimer acknowledges that it was a thorny problem for Britain, because it would determine the kind of relationship to establish between Britain and certain countries, but more importantly with the British Indian empire. "It is on the views which we form of it [race], he argues, that must depend not only our future attitude to such countries as Russia, China, and Japan, but the ultimate destiny which we attempt to shape for our great Indian empire."[107] However important is the subject of race, Lorimer quickly dismisses it as non-important problem for international law, because it is not ethnic groups that are recognized as such. Rather, "it is only when, by the action of historical geographical factors, these have crystallized into political bodies, that they come

[105] Koskenniemi, "Empire…", p. 3.
[106] We will only look at three authors, but they are many. For a more detailed study, see Koskenniemi, *Gentle Civilizers*, ibid.
[107] James Lorimer, *Institutes of International Law. A Treatise of the Jural Relations of Separate Political Communties*. (Edinburgh and London: Blackwood, 1883), vol. 1, p. 99.

within the scope of a treatise of the law of nations."[108] That is how he gets to the problematic of recognition.

Lorimer is right to underline that international law is concerned with political bodies and one might think that he has discarded the racial card from his theory. However, one is quickly disenchanted, because his theory of recognition is built on the same ideological presuppositions that I have been highlighting thus far. He gets there by subdividing humanity into three groups which would then determine the degree of recognition. Depending on which category a part of humanity falls in, recognition will be different. Thus his theory: "as a political phenomenon, humanity, in its present condition divides itself into three concentric zones or spheres—that of civilized humanity, that of barbarous humanity, and that of savage humanity."[109] On the outset, questions prompt one's mind: what are the criteria used to determine these "concentric spheres"? He seems to offer a phenomenological description, but it would have been helpful to know the normative basis of his classification. Instead of providing such grounding reasons, he asserts that "to these, whether arising from peculiarities of race or from various stages of development in the same race, belong, *of right*, at the hands of civilized nations, three stages of recognition—plenary political recognition, partial political recognition, and natural mere human recognition." [110] Three consequences derive from this Lorimer's criteria for recognition. First, he attributes a plenary right to "civilized nations" to recognize and not to others. In other words, there is no reciprocity between the subjects involved in this process of recognition. Recognition comes from "civilized nations" and is extended to the other two parts of humanity. And of course, "the sphere of plenary political recognition extends to all existing States of Europe, with their colonial

[108] Ibid., p. 101.
[109] Ibid.
[110] Ibid.

dependencies, in so far as these are peopled by persons of European birth or descent; and to the States of North and South America which have vindicated their independence of the European States of which they were colonies."[111] The supremacy of European origin is stated without hesitation. Unless one belongs to Europe or is of European origin, he or she is uncivilized. And this is decreed by Europe and it does not need to be recognized by others. It is a one-way movement. Second, by founding his theory of international law on recognition without reciprocity, he confirms the imperialistic goal of international law that excludes non-Europeans from the spheres regulated by it. Third, whereas he excludes the race as factor of international law, it is definitely playing a key role in his theory, inasmuch as all right of recognition are granted to Europeans, while some others are simply excluded from political recognition on racial basis. They are humanly recognized, but politically negated. That is especially true for the third category of humanity—savage—which is not even plenary human but "the residue of humanity." This one can only be granted natural recognition. In his own words: "the sphere of natural, or mere human recognition, extends to the residue of mankind."[112] The following long excerpt summarizes Lorimer's view of international law in its relationship with non-European people, its racist foundation and its imperialistic tone. He asserts:

> It is with *the first* of these spheres alone that the international jurist has directly to deal; but inasmuch as jural progress consists not merely in perfecting the relations which arise within the sphere of political recognition, but in its *gradual expansion*, he is brought into continual contact with the external spheres, and must take cognizance of the relations in which civilized communities are placed to the partially civilized communities which surround them. He is not bound to apply the positive law of nations to savages, or even to barbarians, as such; but he is bound to ascertain the points at which, and the directions in which, barbarians or savages come within the scope of partial recognition. In the case of the Turks we have had bitter experience of the consequences of *extending the rights of civilization* to barbarians who have proved to be incapable of performing its duties, and who possibly do not even belong to *the progressive races of mankind*.[113]

[111] Ibid., p. 101-2.
[112] Ibid., p. 102.
[113] Ibid. The emphasis added.

This paragraph is clear by itself, but one cannot resist a few comments. First, three categories of humanity are strongly affirmed: civilized, barbarous, and savage. Second, international law is concerned only with Europeans and their descents living overseas. Third, it is brought to deal with other parts of humanity because of the imperial expansion which confronts it with "external spheres." Fourth, "rights of civilization" are extended to others from their ontological source! Fifth, the experience seems to confirm that there are some races that might be progressive! With these facts at our disposal, we can only side with Emmanuelle Jouannet that "if we understand imperialism to mean domination and the imposition on others of one's own legal and economic systems, it cannot be denied that classical, Eurocentric international law both accompanied and legitimated this imperialism."[114]

Lorimer was not alone in this endeavor of serving imperialism through international law. Pasquale Fiore is another international lawyer who contributed in the evolution of international law in the contact of the "uncivilized." Fiore constructs his theory by first challenging the existing belief that international law is only concerned with states. For him, this theory is not accurate. International law goes beyond the reciprocal relations between states. He distinguishes *Magna civitas* defined as "society of societies" from state, the former being the domain of international law. The first subject of this *Magna civitas* is *"l'homme*" (human being).[115]

[114] Emmanuelle Jouannet, "Universalism and Imperialism: The True-False Paradox of International Law ?" in *The European Journal of International Law,* Vol. 18, No. 3, 2007, p. 382.

[115] Pasquale Fiore, *Le droit international codifié et sa sanction juridique*. (Paris: Pedone, 1911), first Ed. 1890, p. 33. As he puts it, "D'après leur doctrine, il faudrait supposer que, dans la société internationale, il n'existe que les Etats, qu'il ne peut naître et se développer aucun rapport qu'entre les Etats, et que par conséquent la loi qui doit régir cette société ne peut intéresser que les Etats. En réalité, dans la grande société des sociétés, que nous qualifions de *Magna civitas,* on trouve avant tout l'homme, avec la personnalité et les droits qui lui appartiennent en sa qualité d'homme et indépendamment de sa condition de citoyen." Fiore seems to have been the precursor of some understanding of human rights as not depending on citizenship but rather on "humanness".

Following this argument, *Magna civitas* is constituted by three subjects, individuals, states and collectivities,[116] and as such international law is concerned with the whole of humanity.

However, this general conception itself will be challenged by the encounter with non-European civilization, inasmuch as *Magna civitas* is coined in order to include those that European states do not consider as political bodies. It is true that his aim was to build a rational argument against the omnipotence of the arbitrary and the politics of states.[117] Nonetheless, his argument is built on the assumption of civilized-uncivilized dichotomy, civilized nations versus barbarous tribes, encountered through colonial expansion. Thus, if international law were maintained at a states level, it would limit its sphere of influence. But by extending its scope, Fiore achieves an international law that covers every segment of humanity, yet with different rights. For instance, "barbarous populations" can claim their rights although they are not recognized as states.[118] They are qualified as non-civilized "*peuplades*", who cannot stand on the same plane with peoples and nations.[119]

Under this science invented to defend them against the arbitrary and politics of states, Fiore ends up excluding the non-civilized populations from international law, since they cannot enjoy a juridical personality although they enjoy some rights, such as the property right of land

[116] Ibid., p. 52.
[117] Ibid., p. 53.
[118] In his own terms, "la science du droit international, qui doit étudier le problème complexe de l'expansion coloniale, ne doit-elle aussi fixer les principes juridiques qui doivent régir les rapport entre les Etats civilisés colonisateurs et les races indigènes et barbares? Même en admettant la nécessité d'étendre la civilisation en colonisant, et la faculté d'occuper les terres superflues pour parer aux besoins impérieux des moyens de subsistance, peut-on soutenir que les populations barbares puissent être dépouillées violemment et traitées avec cruauté, et qu'on puisse leur porter la civilisation sur la pointe des baïonnettes, en les considérant comme en dehors du droit de l'humanité? N'appartient-il pas à la science du droit international de rechercher et d'établir les principes juridiques des rapports entre les peuples civilisés et les races indigènes, de façon à prévenir les spoliations au préjudice de ces dernières et toute forme de conquête arbitraire?" ibid., p. 52.
[119] Ibid. 121.

they effectively occupy.[120] However, they do not have right to resist the imperial land-grabbing project.[121] In other words, Fiore's theory of international law is based on the same ideological prejudices, is informed by "the cultural difference"—to use Anghie's term—and is meant to accommodate the imperialist project. Fiore, however, raises an important question. He pleads for non-violent means in relating to non-civilized and requires their consent for occupying their territories. How can there be consent when there is no reciprocal recognition between contracting parties? This question recalls Anghie's reading of Vitoria, who recognized Indians as rational trade partners, yet denied political legitimacy of sovereignty.

The last example—John Westake—to illustrate the imperialist role of international law will help answer this question. As Casper Sylvest notes, Westlake is one whose arguments "fittingly represent the imperial bent of much international law in Britain at that time."[122] In his *Chapters on the Principles of International Law*, only states are subjects of international law—contrary to Fiore—but this is only true for European states. "The result of the foregoing is that the states between which the rules of international law prevail are, First, those which are sovereign and independent constitutionally as well as internationally, such as France and the United Kingdom; Secondly, those which other states accept in their dealings with them as being sovereign and independent, although they may be nominally hampered by a weak constitutional tie."[123] For Westlake, statehood is based on European civilization and sovereignty is understood through European prism. He states, "the international law…is based on the possession by states

[120] Ibid., p. 124.
[121] He says, "On ne saurait refuser aux Etats civilisés la faculté d'occuper les terres dont les sauvages ne peuvent tirer profit; mais il leur incombe d'opérer cette occupation par l'emploi des moyens les moins nuisibles pour obtenir de la part des sauvages les terres qui leur sont sans utilité." Ibid., p. 125.
[122] Casper Sylvest, "'Our Passion for Legality': International Law and Imperialism in the Late Nineteenth-Century Britain" in *Review of International Studies*, vol. 34, No. 3, 2008, p. 405.
[123] John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894), p. 88.

of a common and in that sense an equal civilization."[124] This common civilization is European since even when applied to other countries such as Turkey, "her admission to that benefit cannot react on the statement of that law, which is what it is because it the law of the European peoples."[125]If international law is so strongly affirmed to be European, it can relate with non-European cultures either by imposition, or by exclusion.

Westlake relies on the now very familiar distinction between civilized and uncivilized, and for him international law is not concerned with the "uncivilized". "The form which has been given to the question, namely *what facts are necessary and sufficient in order that an uncivilized region may be internationally appropriated in sovereignty to a particular state?* implies that it is only the recognition of such sovereignty by the member of the international society which concerns us, that of uncivilized natives international law takes no account."[126] In other words, for Westlake, international law does not recognize the uncivilized, but rather he subsumes them under European states, and their rights are to be claimed under this tutelage. As he puts it, "this is true, and it does not mean that all rights are denied to such natives, but that the appreciation of their rights is left to the conscience of the state within whose recognized territorial sovereignty they are comprised, the rules of the international society existing only for the purpose of regulating the mutual conduct of its members."[127] He excludes the natives from the international law on his understanding of civilization. The latter is no longer understood from developmental perspective, both psychological and social, but rather from a political point of view. Hence, from international point of view, only a government is a sign of civilization. I have, nonetheless, hasten to mention that it is the European understanding of government. The traditional political

[124] Ibid., p. 102-3.
[125] Ibid., p. 103.
[126] Ibid., p. 136.
[127] Ibid.

structures are not recognized as forms of government, and therefore they do not deserve to be recognized as subject of international law. Defining civilization, he says:

> We have nothing here to do with the mental or moral character which distinguishes the civilized from the uncivilized individual, nor even with the domestic or social habits, taking social in a narrow sense, which a traveler may remark. When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes, which may prevent that life from being disturbed by contests between different European powers for supremacy on the same soil, and which may protect the natives in the enjoyment of a security and well-being at least not less than they enjoyed before the arrival of the strangers. Can the native furnish such a government, or can it be looked for from the European alone? In the answer to that question lies, for international law, the difference between civilization and the want of it.[128]

Westlake makes clear that civilization is defined in the imperialist terms. It concerns the protection of Europeans occupying non-European lands from the attack of rival powers. He wants the African and American cultures to play the same battle for supremacy, or then be expelled from civilization. The Europeans are not even required to inculturate and learn about these new cultures. It is rather a civilization test for the latter to offer the context where the former can continue to live their "complex life". He wants a conducive context for Europeans so that they can pursue their imperial goal without impediment. For "the inflow of white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied." [129] And since Africans and Americans are not Europeans and therefore cannot provide the European style of government, "international law has to treat such natives as uncivilized."[130] As such, international law has nothing to do with them. Rather, "it regulates, for the mutual benefit of civilized states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of the state to which the sovereignty is awarded, rather than sanction their interest being made an excuse the more for war between civilized claimants, devastating the region and the cause of suffering to the natives

[128] Ibid., p. 141.
[129] Ibid., p. 142-3.
[130] Ibid., p. 143.

themselves."[131] Here Westlake makes it more than clear that international law is a child of imperialism and the father of colonialism, because its role is to regulate the interests of European powers and their ambitions over the non-Europeans territories; and the natives' security is a byproduct.

At this point, Westlake responds to the question raised by Fiore about the consent needed for expropriating the natives. For Westlake, since natives do not have rights under international law, "it follows that no documents in which such natives are made to cede the sovereignty over any territory can be exhibited as an international title." The reason he gives is that "a stream cannot rise higher than its source, and the right to establish the full system of civilized government, which in these cases is the essence of sovereignty, cannot be based on the consent of those who at the most know but a few of the needs which such a government is intended to meet."[132] Without a European kind of government, imperialist international law excluded non-European peoples as its subjects, and yet they would try to conclude treaties with them for economic purpose.

c). Internal Contradiction in International Law

Being neither subject nor object of international law, the Natives would be conquered at the point of the gun, like the "exploit" of Carl Peters who narrates with satisfaction how he killed the Wagogo people in his expedition of building the German empire in East Africa. He says that his "gun had become so hot from frequent firing that [he] could scarcely hold it."[133] When they surrendered under the Maxim gun power and paid him a heavy tribute, Peters "consented to enter into a treaty with him [the chief of Wagogo], by virtue of which he was placed under German

[131] Ibid.,
[132] Ibid., p. 144.
[133] Cited in Curtin, ibid., p. 85.

authority."[134] It was the same case with Burundi whose king signed a treaty in 1908, conceding Burundi to Germany as colony. But these examples were not isolated cases and some did not even need to be signed under the power of the bullet. Bonny Ibhawoh gives a Nigerian example of a treaty between the British crown and King Docemo of Lagos (the current Nigeria), whose Article 1 reads, "I, Docemo, do with the consent and advice of my Council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain, her heirs and successors for ever the Port and Island of Lagos, with all the rights, profits, territories and appurtenances whatsoever thereunto belonging…freely, fully, entirely and absolutely…."[135] We can leave out the issue of customary law, which might nullify the treaty since "in strict West African customary law, tribal land was corporatively owned; the chiefs, as protectors of the tribal heritage, could not sign away lands of which in reality they were merely trustees."[136] The question rather lies on the part of the British crown which could deem King Docemo to have juridical personality to enter into a treaty. Another example is the Agreement signed between the Maasai of Kenya in 1904 and 1911, in order to take over their land. As James Thuo Gathii notes, "under the 1904 Agreement, Lenana, together with other signatories on behalf of the Maasai—who did not participate in writing the agreement and who did not read the agreement itself since they themselves could not read—agreed that the Maasai could not be moved from the Laikipia reserve 'as long as the Maasai as a race shall exist.' However, in 1911, the British administration

[134] Ibid., p. 86.
[135] Bonny Ibhawoh, *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African* History. (Albany: State University of New York Press, 2007), p. 89.
[136] Michael Mulligan, "Nigeria, the British Presence in West Africa and International Law in the 19th Century" in *Journal of the History of International Law*, Vol. 11, 2009, p. 279. See also Ibhawoh, ibid., p. 89-90.

in Kenya, under enormous pressure from settlers, sought to move the Maasai again, clearly in contravention of the 1904 Agreement."[137]

These examples are evoked in order to highlight the ambiguity in the application of imperial international law. How could these powers enter into a treaty with entities which they did not recognize as sovereign? What was the value of such treaties and Agreements, especially when signed under constraint conditions? On the one hand, there is the illusion that the colonial powers were recognizing the sovereignty of the political institutions, as they sought Agreement with the representative of the people—although sometimes through manipulation as in the Maasai case. If it was not a delusion, the consequence would have been that it obliged both parties. On the other hand, however, the truth is that all these "legal instruments" were construed for the advantages of the imperial powers. For instance, in "one of the most celebrated cases over land rights, of *Amodu Tijani v. the Secretary of Southen Nigeria in 1914*", when Chief Oluwa demanded compensation for the land of Lagos, the colonial state argued that the land had been ceded through Docemo's treaty, and yet it recurred to the customary right in order to refuse any compensation for Chief Oluwa.[138] In other words, the treaty could work only when conferring rights to the colonial power, but not the other way around. The same was the case with Maasai who were not able to plead their case of breaching the 1904 Agreement.[139] As explanation, the Court said that "treaties are the subject of international law which is a body of rules applied to the intercourse between civilized states….The protected states or communities are not subject to a law of which they never heard, their relations to the protecting state are not therefore

[137] James Thuo Gathii, "Imperialism, Colonialism, and International Law" in *Buffalo Law Review*, Vol. 54, No. 4, 2007, p. 1028.
[138] Ibhawoh, ibid., p. 96-7.
[139] See *Ol le Njogo* case in Gathii, ibid., p. 1034-1043.

determined by International Law."[140] Similarly to *Tajini case*, "on the one hand, the court found that the Maasai were capable of entering into a treaty, and on the other hand the court also found that the relation between the Maasai and the British government could not be governed by rules of international law."[141] That being the case, one can only wonder with Gathii: "if Maasai-British relations could not be governed by international law, how could Maasai enter into a treaty which, by definition, is a creature of, and is governed by, rules of international law? How could international law only be available for the purpose of establishing that the Maasai could enter into a treaty but not for the purpose of establishing if the treaty had been observed in accordance with rules of international law?"[142]

These rhetorical questions underscore the contradiction that guided the imperialist international law. Conceived to further the imperialist project, it served imperial powers to justify legally their practices and manipulated at will in the disadvantages of the non-European, under the imperialist ideology of civilizational progress. As Anghie would say, "jurists using the conceptual tools of positivism postulated a gap, understood principally in terms of cultural differences, between the civilized European and uncivilized non-European world: having established this gap they then proceeded to devise a series of techniques of bridging this gap, of civilizing the uncivilized."[143] International law was one of those tools at the service of imperialist ideology, and the Third World critics claim that human rights movement is playing the same role. It is time now to look closely to this claim.

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[140] Ibid., p. 1040.
[141] Ibid.
[142] Ibid., p. 1040-1.
[143] Anghie, *Imperialism*, p. 37. James Tully goes in the same sense and sums up well the whole scenario of manipulating international law when he says that "the various means include recognizing local rulers as quasi-sovereigns and making unequal treaties with them, civilizing or westernizing local elites and making them dependent on imperial economic and military power and bribes, dividing and conquering opposition, training the indigenous armies to protect the imperial system of property and trade law and to fight proxy wars for them, inciting resistance so the trading companies can claim compensations for damages and lost profits." James Tully, "Modern Constitutional Democracy and Imperialism" in *Osgoode Hall Law Journal*, Vol. 46, 2008, p. 482.

1.3. Human Rights as Ideology through a Metaphor

Many scholars, especially from the Third World criticize "the human-rights wave of the twentieth century…as an international agenda pursued by the major powers in order to satisfy strategic goals, rather than as motivated by humanitarians such as Eleanor Roosevelt."[144] As such, they insist, it is the continuation of Western imperialism under the leadership of the United States of America, in which human rights play the ideological role of legitimation and dissimulation at the same time, replacing the ancient civilizing mission. According to Münkler, "the United States has also followed in the footsteps of the great empires by offering a guarantee of extensive peace as the central justification for its claim to supremacy—except that, in the case of a democratic empire, the peace is measured by the assertion and preservation of human rights, which have replaced the claim to civilizing mission that empires frequently used to declare. At the same time, the promise of future prosperity, which also has a long tradition, continues as before."[145] Put in other words, human rights have become the new ideology masking the Western democratic empire. Other scholars go even deeper to accuse the human rights movement of being a repetition of the imperialist pattern of ideology. One of them is Mutua who framed human rights as ideology through a metaphor. Through the following, I explore the so-called metaphor and its content, and then analyze how it fits into the imperialist ideology pattern.

a). SVS Metaphor

Mutua characterizes the human rights movement[146] as a continuation of the imperialist project through a three-dimensional metaphor of savages-victims-saviors (SVS henceforth). As he puts it, "the human rights movement is marked by a damning metaphor. The grand narrative of

[144] Fitzmaurice, ibid., p. 138.
[145] Münkler, ibid., p. 83. Bowden goes in the same line: "willingness and ability to protect human rights has become a new standard for Europe." Ibid., p. 166.
[146] I adopt the same definition of "human rights movement" as "that collection of norms, processes, and institutions that traces its immediate ancestry to the Universal Declaration of Human Rights (UDHR), adopted by the United Nations in 1948.", Ibid., Note 1, p. 160.

human rights contains a subtext which depicts an epochal contest pitting savages, on the one hand, against victims and saviors on the other."[147] Not only is the metaphor descriptive, but it also depicts the normative foundation of human rights regime in its justification as well as its practice. That is radical and therefore challenging the human rights project, and needs to be taken seriously. As he declares, "the human rights corpus is driven –normatively and descriptively—by what I have called the savage-victim-savior metaphor, in which human right is a grand narrative of an epochal contest that pits savages against victims and saviors."[148]

Before explaining the metaphor itself, the author underscores the flaws that permeate human rights corpus constituting its bedrock. The underling subtext is that the human rights corpus is essentially Eurocentric. Mutua contends that "first, the corpus falls with the historical continuation of the Eurocentric colonial project, in which actors are cast into superior and subordinate positions."[149] By this sentence, Mutua implies that human rights carry the same imperialist and colonial project, and are undergirded by racist prejudices. And in terms of their normativity, it challenges human rights universality. This last point is strongly emphasized since the author claims that human rights movements ignored non-Western cultures and human rights activists. "These historically important struggles, he says, together with the norms anchored in non-Western cultures and societies have been either overlooked or rejected in the construction of the current understanding of human rights."[150] Second, not only is the corpus Eurocentric, but also it does not allow, he alleges, any "cross-contamination of cultures" because it "promotes a

[147] Mutua, *Human Rights*, p. 10. The three terms that constitute the SVS metaphor are also metaphors in themselves. As he puts it, "the savages-victims-saviors (SVS) construction is a three dimensional compound metaphor in which each dimension is metaphor in itself." Ibid.
[148] Mutua, "Terrorism," p. 5.
[149] Mutua, *Human Rights*, p. 12
[150] Ibid.

Eurocentric ideal."[151] Although this is a goal of human rights project, its ideological dimension allows it to dissimulate it, since "the subtext of human rights is a grand narrative hidden in the seemingly neutral and universal language of the corpus."[152] It remains a fact, nonetheless, that human rights corpus with its Eurocentric origin and purpose poses the problem of cultural legitimacy—third flaw—and the question of power is raised as one wonders why the European culture should be the source of norms that claim to be universal—fourth flaw. However, the big blow to the human rights project—fifth flaw—is its racial underpinning. According to Mutua, "in the human rights narrative, savages and victims are generally nonwhite and non-Western, while saviors are white." Its ideological role allows the transformation of the racial relationship into an imperialist narrative and a psychological soteriology "in which whites who are privileged globally as a people—who have historically visited untold suffering and savage atrocities against nonwhites—redeem themselves by 'defending' and 'civilizing' 'lower,' 'unfortunate,' and 'inferior' peoples."[153]

Human rights project is Eurocentric through and through; in its inception, its formulation, its practice and even in its results. The nonwhites are just tools. In clear terms, human rights are an undercover of the "emergence of European and American senses of global predestination and mission to civilize by universalizing Eurocentric norms."[154] We retrieve the imperialist ideology of civilizing mission, this time under a human rights cloak. In David Holloway's terms, "here, the idea of 'human rights' substitutes for, and becomes indistinguishable from, older terms such

[151] Ibid.
[152] Ibid., p. 12-3.
[153] Ibid., p. 14.
[154] Ibid. It is a very recurrent reference throughout the whole book. See for instance, p. 15, where he says that "the globalization of human rights fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world." Or pp. 21-2 as he notes, "the zeal to see all humanity as related and the impulse to help those defined as in need is noble….But…what the high school or college student ought to realize is that his or her zeal to save others—even from themselves—is steeped in Western and European history. If one culture is allowed the prerogative of imperialism, the right to define and impose what it deems good for humanity, the very meaning of freedom itself has been abrogated."

as 'progress' or 'civilization,' and the gamut of racialized ideologies depicting white Anglo-Americanism as the engine of these values that first became part of the dominant US culture's explanations for its own domestic hegemony during the nineteenth century."[155] For, according to Mutua, it is indeed the history repeating itself and this is what his metaphor aims to underline.

As already alluded to, the metaphor is construed on three terms, each one being another metaphor on its own. Hence the first metaphor is the savage. Now, the state is the cornerstone of human rights instruments as it is in charge of protecting and fulfilling them. At the same time, however, human rights are to protect the individual from a state that is viewed as predator of the same rights it is supposed to guarantee. Ishay observes that "we find ourselves pondering the role of the state as both the guardian of basic rights and as the behemoth against which one's rights need to be defended."[156] Mutua deciphers the classical savage in this ambiguous role of the state vis-à-vis human rights. "Underlying the development of human rights is the belief that the state is a predator that must be contained. Otherwise it will devour and imperil human freedom. From this conventional international human rights law perspective, the state is the classic savage."[157] However, as "state in itself is simply a construct that describes a repository for public power, a disinterested instrumentality ready to execute public will, whatever that maybe," the author thinks that the savage has to be beyond the state as such. It is to be looked for in that which gives birth to state and that, for Mutua, is culture. "The state, he says, should be unmasked as being a mere proxy for the real savage." Consequently, "that leaves the historically accumulated wisdom, the culture of a society as the only other plausible place to locate the savage."[158]

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[155] David Holloway, "The War on Terror Espionage Thriller, and the Imperialism of Human Rights" in *Comparative Literature Studies*, Vol. 46, No. 1, 2009, p. 32.
[156] Ishay, ibid., p. 8.
[157] Mutua, *Human Rights*, p. 22.
[158] Ibid.

Once the real savage is identified, few consequences follow. First, Mutua seems to not agree that one can criticize a valid cultural norm as a local truth by an external standard. For him, such an initiative "is extremely problematic, if not altogether an invalid exercise." Second, he acknowledges however that a culture is dynamic due to the confrontation within different variables composing it or in contact with other cultures.[159] Third, the state is not representative of the entire culture, but rather the expression of a "particular cultural vision" of the "dominant class or political interests," so much so that "the state is more a conveyor belt than an embodiment of particular cultural norms." The conclusion follows: "when human rights norms target a deviant state, they are really attacking the normative cultural fabric or variant expressed by that state. The culture, and not the state, is the actual savage." In almost Huntingtonian terms, Mutua says, "from this perspective, human rights violations represent a clash between the culture of human rights and the savage culture."[160]

Following what we have been saying that human rights movement is essentially Eurocentric, it is needless to precise then that the human rights culture is the Western culture clashing with non-Western ones. From this perspective, human rights manifest their ideological color because the state, "the classical savage," scourged by human rights corpus is simply an ideological code to designate the non-Western culture, and the state in question is not every state, but rather the non-Western state. To illustrate this fact, Mutua resorts to different examples such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)

[159]His point is not very clear here. If he claims that culture cannot be criticized from an external standard, how then is it influenced by other cultures? Isn't it rather through the confrontation with external cultural norms that some internal ones to a given culture are challenged and eventually changed? Perhaps the author of this exercise could add some clarity; i.e., insiders may change their culture by getting inspiration from external norms, while imposing them by an outsider would rightly be "problematic if not invalid exercise." In any case, this is the assumption of my dissertation that external norms such as human rights can be incorporated into other cultures through a domesticating process. Not only is this process legitimate but also beneficial for human rights justification.

[160] Ibid., p. 22-3.

and other International Non-Governmental Organizations (INGOs) that channel cultural savagery in their reports by targeting Third World countries. “Images of practices such as “female genital mutilation,” dowry burnings, and honor killings have come to frame the discourse, and in that vein stigmatize non-Western cultures.”[161] There is also the political savagery, fruit of the West states and INGOs that demonize non-Western political structures that do not fall into the Western-liberal democracy, leading to the pleading by INGOs for banning financial aid, especially asking that the West conditions its cooperation on the adoption of this Western political style. “When it rejects non-Western political culture as undemocratic, the human rights corpus raises the specter of political savagery.”[162] Through all these examples, especially those related to the Female Genital Mutilation (FGM), human rights project has “picked up where European colonial missionaries left off. Savagery in this circumstance acquires a race—the black, the dark, or non-Western race.”[163] In other words, cultural and political imperialism continues through human rights movement.

The second metaphor is that of the victim. According to Mutua, this metaphor is the pillar of the human rights ideology condensed in this three-dimensional metaphor. As he declares it, “without the victim there is no savage or savior, and the entire human rights enterprise collapses.”[164] Mutua substantiates his statement by arguing that the whole human rights project is a response to “potential and actual victim” and the solution for a victimless society is Western liberal democracy. He then analyses how the victim is presented at international level, in human rights law and in human rights literature.

[161] Ibid., p. 24.
[162] Ibid.
[163] Ibid., p. 26.
[164] Ibid., p. 27.

On the international scene, the United Nations is the main actor that "ostensibly seek to prevent conditions that create human victims." For that purpose states are engaged, through human rights treaties, "to avoid depriving, to protect from depriving and to aid the deprived." As such, "human rights law protects against the invasion of the inherent dignity and worth of the potential victim."[165]

While the United Nations and human rights law set normative context to protect the victim, they do not identify who is the victim nor do they name or show the visage of the perpetrator. Human rights literature fills the gap by presenting the victim "as a helpless innocent who has been abused directly by the state, its agents, or pursuant to an offensive cultural or political practice."[166]More than just being innocent, however, the image of the victims is that of powerlessness in front of the brutality of the perpetrator, be it the state or the culture, which are not without recalling the savage metaphor. They are described in such terms that are at the antipodes of the "civilized". "The usual human rights narrative generally describes victims as hordes of nameless, despairing, and dispirited masses. To the extent they have a face, it is desolated and pitiful. Many are uneducated, destitute, old and infirm, too young, poorly clad, and hungry: peasants, the rural and urban poor, marginalized ethnic groups and nationalities, and lower castes. Their very being is a state of divorce from civilization and a large distance from modernity."[167] This is the main characteristic. But there is also the language used by the victims themselves to call for outside help. They are also presented as sympathetic innocents whose plea cannot be ignored without feeling morally guilty. Above all, "the face of the prototypical victim is nonwhite."[168] This is where the second metaphor joins the imperialistic project of human

[165] Ibid., p. 28.
[166] Ibid.
[167] Ibid., p. 28-9.
[168] Ibid., p. 30.

rights because, for Mutua, since the movement took off after World War II, "the major focus of human rights advocacy by both the United Nations and INGOs has been in the Third World in Latin America, Africa, and Asia." This attitude has reinforced the sentiment that "human rights problems afflict people "over there" and not people "like us"." We are brought back to the colonial era, where the civilized nations had to bring civilization to backward or stagnant cultures, especially when one notices the similarities in the vocabulary of "the weak and poor native" of the imperial era with powerless and helpless victim of human rights literature. The author cannot help to conclude that "there is a colonial texture to the relationship between human rights victim and the West." For that reason, human rights regime is a continuation of the imperialist international law project of "ordering the lives of non-European peoples" by imposing on them "European norms, values, ideas and cultures."[169] Once more, the imperialism project continues under the disguise of human rights movement.

Finally, there is the metaphor of savior. As the term indicates, it has a religious connotation. While the victim metaphor is the bulwark of the human rights regime, the third metaphor translates better the imperialist project of imposing Eurocentric values and norms on non-Europeans through human rights ideology. It is "constructed through two intertwining characteristics—Eurocentric universalism and Christianity's missionary zeal."[170] The Eurocentric universalism stems from Western Enlightenment, but it developed through the assumption of double standard for evaluating cultures, some deemed superior and others inferior, with the moral duty of bringing the lower ones to the higher level, as already seen. The same is operating in the human rights movement. In addition to this Eurocentric universalism, the project also has a similarity with the Christian missionary zeal, because the universality is sustained by

[169] Ibid., p. 31.
[170] Ibid.

the belief in the inequality between cultures. Indeed, "inherent to any universalizing creed is an unyielding faith in the superiority of at least the belief of the proselytizer over those potential convert, if not over the person of the convert."[171] In other words, the savior metaphor highlights the ideological push that was behind imperialism, which was realized through imperialist expansion and colonialism. The imperial project to conquer and exploit the non-European world was covered by this positive project of saving the "primitive and savage" from the state of backwardness. To engage in such an enterprise requires a belief in the possibility of improving from an uncivilized to the civilized, from a damned to the saved state.

Mutua contends that "human rights law continues this tradition of universalizing Eurocentric norms by intervening in the Third World cultures and societies to save them from the traditions and beliefs that it frames as permitting or promoting despotism and disrespect for human rights."[172] While both imperialism-colonialism and human rights might be conceptually different, they both aim at westernizing non-Western cultures. Moreover, one has to remember that even the imperialist mission was never professed in the open; rather it was presented under the civilizational mission umbrella. Likewise, human rights discourse is a positive cover of the same mission of westernizing the non-Western world, through the universalizing process. To the proponent of the universality of human rights who celebrate the fact that "*All* states in the contemporary world have accepted that human rights are a legitimate subject of international relations,"[173] Mutua responds by doubting the legitimacy of some Third World states to represent their peoples and asking whether they are free to reject human rights. "Do non-European states really have a choice of rejecting in any sustained manner any doctrine of international law,

[171] Ibid., p. 32.
[172] Ibid., p. 33.
[173] Donnelly, *International Human Rights*, p. 15.

particularly human rights, which represent the ultimate civilizing project of international law? Why should credence be given to states here when many, if not the majority, do not even speak for their peoples or cultures? Might states not just be acting cynically because they want to be seen to belong among the ranks of the "civilized?" These questions add weight to the argument that the savior metaphor wants to bring home: "human rights are part of the cultural package of the West, complete with an idiom of expression, a system of government, and a certain basic assumptions about the individual and his relationship to society."[174] That is what is promulgated while claiming to save the victim of savage cultures.

The question now is: who is/are the savior(s)? The answer to this question seems easy because it is the West that is spreading its culture through human rights. But Mutua goes beyond this general characterization to offer concrete faces of saviors-crusaders of this new campaign. The first of these identified by Mutua is United Nations. As it is the guaranteeing body of human rights, UN activities and machineries to protect and enforce human rights, focus on non-Western states "to ensure the incorporation, dissemination, and enforcement of human rights norms." From that perspective, "the United Nations is, in a sense, the grand "neutral" savior, and Western liberal democracies treat it as such."[175] The second actors involved in the saving mission of human rights are "Western states and Western or Western-controlled institutions." As already mentioned, these states condition their financial aid and their diplomatic ties with non-Western states by the adoption of human rights. They "usually employ a horizontal state-to-state enforcement of human rights in which their foreign policies become the conveyer belts of "civilization"."[176] Finally, there are the INGOs. For Mutua, they "constitute perhaps the most

[174] Mutua, *Human Rigths*, p. 34.
[175] Ibid., p. 35.
[176] Ibid.

important element of the savior metaphor." Claiming to be ideologically neutral and applying the law, they, however, "promote paradigmatic liberal values and norms." The most powerful of these INGOs are based in the Western world, where they enjoy an unfailing support both morally and financially, and their "staffs are mostly well educated, usually trained in the law, middle class and white. They are very different from the people they seek to save. They are modern-day abolitionists who see themselves as cleansers, singlehandedly rooting out evil in Third World countries and culture by shining light where darkness reigns."[177] In other words, INGOs embrace human rights project without reservation, and as such they actively participate in propagating and spreading its ideology. They "are human rights movement's foot soldiers, missionaries, and proselytizers."[178]

b). The Content of the Metaphor

So far, it has been question of explaining the SVS metaphor which is used by human rights discourse to dissimulate its real goal of continuing the Western domination of other cultures. In that sense, human rights operate as an imperialist ideology in its double role of legitimating and dissimulating. We now can define that ideology and determine its content, a task that raises such questions as: what is the metaphor hiding? What is the content of this cultural and political imperialism promoted through human rights?

For Mutua, saying that human rights are Eurocentric and incarnation of European values and ideas, he specifically means that human rights are embedded in the Western liberal culture. The latter is formulated in terms of human rights and when these values and norms are universalized, it is synonymous with the universalization of liberal culture, in theory and

[177] Ibid., p. 36-7; 53.
[178] Ibid., p. 36.

practice. He repeatedly asserts that "the human rights regime is rooted in liberal theory."[179] It is because of this Western liberal origin that human rights cannot claim universality without being *ipso facto* imperialism, because it is universalizing a set of norms of a particular culture. Thusly, the saviors –UN, Western states and Western Institutions and INGOs –which make human rights claims on behalf of victims of human rights violations –non-Western—by the savage culture –be it states or its agents, or other cultural practices—are simply liberal crusaders. They are instrumentalizing human rights, making the whole regime "part of the Western conception of modern society and its ubiquitous domination of the globe."[180]

One of the obvious examples of this ideological use of human rights by liberalism is pushing the agenda of democracy in non-Western world. Democracy as participation in political processes that institute political institutions is congenital to the liberal tradition of guaranteeing "formal autonomy and abstract equality."[181] That is the kind of liberal democracy that has been the focus of human rights law, and yet this political conception evolved "from the domestic jurisprudence…over several centuries in the West." It cannot even be argued that the states that adopted the UDHR were representative, because "in 1948, most African and Asian states were absent from the United Nations because they were European colonies."[182] When they got their autonomy and tried to impart human rights corpus by insisting on development, economic and group rights, these efforts were either ignored or simply thwarted.[183] That is the reason why the

[179] Mutua, "The Iraq Paradox: Minority and Group Rights in a Viable Constitution" in *Buffalo Law Review*, Vol. 54, 2006, p. 940. See also his "The Banjul Charter and the African Cultural Fingerprint: an Evaluation of the Language of Duties" where he declares that human rights movement roots are in Western liberal traditions. In *Virginia Journal of International Law*, Vol. 35, 1994-95, p. 344; "Human Rights in Africa: the Limited Promise of Liberalism" in *African Studies Review*, Vol. 51, No. 1; 2008, p. 19, 22; etc. "Human Rights and Powerlessness: Pathologies of Choice and Substance" in *Buffalo Law Review*, Vol. 56, 2008, p. 1027-8; "Standard Setting in Human Rights: Critique and Prognosis" in *Human Rights Quarterly*, Vol. 29, No. 3, 2007, p. 550-1, 575, etc.
[180] Mutua, *Human Right*, p. 34.
[181] Ibid., p. 44, 45.
[182] Ibid., p. 46.
[183] Ibid., p. 47. See also Anghie, *Imperialism*, especially chap. 4.

right discourse as it has been developed thus far becomes problematic and limited outside the European context.[184] From these facts, Mutua infers that "the postwar elaboration and codification of human right norms has been the process of the universalization of liberalism and its outgrowth, Western political democracy,"[185] producing what he calls "a holy trinity: liberalism, democracy and human rights."[186] That is the content of the metaphor and its goal: spreading liberalism and liberal democracy. A world created by such a trinity "would in reality be governed by free market principles, political democracy, and a minimalist guarantee of core civil and political right." [187]

From this point of view, human rights movement is an ideology because it does not admit its real content. Rather, it is presented "as nonideological, universal and noncontentious." Yet, "the human rights movement is not post-ideological." It is rather "a proxy for a political ideology" founded on the ideological prejudices of cultural superiority-inferiority. "In Western lore, Mutua says, the native –defined as the non-European –has always been the savage. But in history, his savagery has been a function of his racial or ethnic ancestry, native mind, and culture. The civilizing mission, which is central to both international law and human rights, requires the definition of the native in particular language in which he is stripped of full humanity to justify the 'othering' process, or the re-creation of the non-European in the image of the European." [188] The metaphor operates to allow human rights discourse to play the same role of civilizing mission in the current international law. In creating the native savage, it retrieves and endorses the classical imperialist stereotypes about non-Europeans, and legitimates the

[184] Ibid., chap. 5&6.
[185] Ibid.
[186]Ibid., p. 44.
[187] Mutua, "Terrorism…" p. 6.
[188] Ibid., p. 7.

salvific endeavor. That is why "the native savage has always been racialized in human rights discourse and international law."[189]

Mutua is not alone in diagnosing human rights as ideology. For instance, David Holloway states that "the new hegemony of state-sponsored human rights discourse" is connected to "its specifically economic functions, enabling us in turn to view the state's new enthusiasm for human rights as an ideology produced by capitalist—and thus class-histories and conflicts." He adds, "human rights has become 'the ideology after the end of ideologies, the ideology at the end of history',"[190] surely alluding to Fukuyama's "end of history." This is another way of affirming that human rights are a Western device to advance liberalism in its economic, political and cultural forms. Brett Bowden proceeds in the same sense, although he broadens the spectrum. The West has set standards that have to be met if a state is to be recognized as member of international community. All of these standards are drawn from Western liberalism and one of them is human rights, carried under the label of liberal democracy. If they are not met, states are ostracized and stigmatized as uncivilized and rogue states. And most of these states—if not all—are non-Western, espousing Mutua's claim that human rights are playing a Western liberal game. Bowden's text is worthy citing:

> Today the term "modern liberal democracy" has much more riding on it than just electoral democracy; it entails issues of human rights, globalized free markets and free trade, and economic and cultural globalization. At the beginning of the twenty-first century, it is increasingly the case that in order to measure up to the revised standard of civilization, a growing set of criteria must be met. While it is an evolving standard, at present for a state to be considered a full member of the international society of civilized states, it must commit itself, at minimum, to the following principles: human rights and the rule of law, representative democracy in governance, economic liberalism and free markets open to international trade and foreign investments, religious and cultural pluralism, and the efficacy of science and technology. If, in the process of becoming globalized and liberalized, a state can claim to promote and adhere to these

[189] Ibid., p. 9. Zehra F. Kabasakal Arat also argues that human rights have reached a level of being called a political ideology very much informed by Western liberalism, although she claims that it has diverse sources; what Mutua and many others challenge. See her "Human Rights Ideology and Dimension of Power: A Radical Approach to the State, Property, and Discrimination" in *Human Rights Quarterly*, Vol. 30., No. 4., 2008.

[190] Holloway, ibid., p. 41. Elsewhere he says, "human rights…have become both the preferred ideological 'ism' of Western elites and governing ideology of American empire." Ibid., p. 22.

> principles, then it is deemed to have arrived at that exalted condition known as modernity, or more accurately, Western modernity. In contrast, states like Iraq, Afghanistan, Sudan, Somalia and much of sub-Saharan Africa, among others, are said to have "failed the modernity test." These failed or rogue states are characterized as uncivilized by comparison to the civilized liberal democratic states of the West. Furthermore, for some, the only hope they have of reaching modernity is "with a proper teacher—the west."[191]

Although it exceeds the scope of this chapter that is mostly focused on human rights, Bowden's point rightly highlights the same process under which the non-Western world is imposed standards to be met in order to be recognized. Moreover, the non-Westerners do not have a say in the setting of those standards, and cannot have their own list to impose to the West. In other words, it is a one-way relationship, and if it does not work, it is the fault of the loser. Now, since liberalism, democracy and human rights form a trinity from Mutua's jargon, it follows that what is said for "liberal democracy" can be attributed to human rights. Another way of stating the same: human rights movement is an ideology to cover up the liberal goals.

However, there is no area where human rights are ideologically manipulated than in what Anghie calls "imperialism as self-defense" where human rights are invoked as reasons for invading one of those rogue states. Through the pretext of national security, a Western state can unilaterally decree a state as a threat and consequently invade it in the name of human rights. In this context, "human rights is deployed as both an argument for invasion and then, the invasion having been completed, as an argument for transformation, in which international human rights law…stands for the norm that must be achieved in order to bring about a "civil state" thus, supposedly, bringing about international stability."[192] This manipulation of human rights in the hands of great powers sheds new light on the ideological role of human rights. As the same author underlines it, "it is in this way, through the invocation of human rights, that what might be seen as an illegal project of conquest is transformed into a legal project of salvation and

[191] Bowden, ibid., p. 186.
[192] Anghie, *Imperialism*, p. 303.

redemption."[193] There could not, therefore, be a clearer assertion of the ideological dimension of human rights using Mutua's metaphor.

Although –or perhaps because it is—framed into a metaphor, human rights regime becomes itself imperialist in that it seeks to impose itself over other cultures. As it is presenting something other than itself, it ends up being resisted. That is how Peter Erlinder qualifies the NATO invasion of Kosovo as "human rights imperialism,"[194] and that is how it will always be perceived as long as it does not enter into dialogue with the receiving cultures. To do so would require renouncing the imposition of itself as universal and appreciate the value of other cultures. In this case, however, human rights movement would have dropped its ideological mask. But as long as it is still the metaphor, human rights movement is imperialistic because it is imposed and it might become irrelevant to the context. Talking about the African context, Mutua notes that "to be useful to Africa's reconstruction, human rights cannot simply be advocated as an unreformed Eurocentric doctrine that must be gifted to native peoples." He adds, "I am afraid that this is how many in the West imagine what for them is a human rights crusade toward Africa. So far, this law-and-development model has not—and will not—work. Not only is it an *imposition,* but it would also deal mostly with symptoms, while leaving the underlying fundamentals untouched."[195] In conclusion as "even the international law of human rights, arguably the most benign of all the areas of international law, seeks the universalization of Eurocentrism,"[196] there is no other way it will be received by other cultures than as being imperialist because it will be imposed, especially that this will happen in conjunction with the

[193] Ibid.
[194] Peter Erlinder, "Human Rights or 'Human Rights Imperialism'? Lessons from the War against Yugoslavia" in *Guild Practitioner*, Vol. 57, 2000, p. 80.
[195] Mutua, "Human Rights in Africa: The Limited Promise of Liberalism", p. 35. Emphasis added.
[196] Mutua, "Critical Race Theory and International Law: The View of an Insider-Outsider", Keynote Address. In *Villanova Law Review*, Vol. 45, 2000, p. 850.

human rights ideological role of translating "an illegal act and conquest" into an act of redemption—to use Anghie's words.

Having explored how the human rights movement is a metaphor for ideology and presented the content of that metaphor, I conclude this section by analyzing whether this metaphor is definitely an imperialist ideology.

c). Human Rights as Imperialist Ideology

I have already touched on this topic up, but I want to now systematize it. The first section elaborated what is an imperialist ideology by showing that it is the civilizing mission that was used to justify and hide at the same time the imperialism project of conquering and exploiting the non-Western world in order to respond to West's internal problems. In the process, the imperialist ideology of civilizing mission benefited from the liberal belief in the progress of civilization and the work of international law in general, but particularly the positive international law. All three were based on racist presuppositions which conceived humanity or cultures into hierarchical orders. The reason why to go through this detour was that Third World critics of human rights, Mutua in particular, argue that human rights constitute a continuation of the same imperialist project. Thus, not only are human rights an ideology, but they are precisely an imperialist ideology. Still, the West is dominating the rest, although the leading powers have now changed. The role formerly played by Britain and France is assumed today by the United States. Comparing the two, can we confirm that human rights as SVS metaphor is an imperialist ideology?

To answer that question, I first consider the internal reasons that encouraged the imperialist expansion that would lead to the imperialist ideology. We have identified four main reasons: economic, political, demographic and industrial motives. Obviously, human rights

movement has different internal motives that Mutua himself acknowledges. Although there had been a lot of work to build an international human rights body since the dawn of Western modernity, it was the atrocities of the WWII that activated the process that would produce the actual human rights movement in question today. In his own words, "the human rights movement originated in Europe to curb European savageries such as the Holocaust, the abuses of Soviet bloc communism, and the denials of speech and other expressive rights in a number of Western countries. The movement grew initially out of the horrors of the West, constructing the image of a European savage."[197] In this sense, it cannot be argued that the human rights and civilizing imperialist ideology had the same internal reasons. However, all these reasons were particular to the West. Why did they then have to be imported to the non-Western world without any expressed demand from the receiver? Furthermore, other atrocities had happened to non-Europeans without creating the same human rights movement. That is how the Eurocentrism and even racial dimensions of human rights are manifest since its inception. Indeed, "neither the enslavement of Africans, with its barbaric consequences and genocidal dimensions, nor the classic colonization of Asians, Africans, and Latin Americans by Europeans, with its bone-chilling atrocities, was sufficient to move the West to create the human rights movement. It took the genocidal extermination of Jews in Europe—a white people—to start the process of the codification and universalization of human rights norms."[198] Put otherwise, human rights were not meant for non-Europeans; had it been the case they could have been codified well before 1948. What could then be the good reason for imposing them to other cultures, if not the "deep-seated sense of European and Western global predestination?" Simply put, although they do not

[197] Mutua, *Human Rights*, p. 16.
[198] Ibid.

have the same origin in terms of internal reasons, civilizing mission and human rights imperialist ideologies share the same goal of allowing the West to dominate the non-Western world.

Secondly, there is the language used in justifying that domination. We saw that the civilizing mission was justified by "a political metaphysics"—to recall Ferry's philosophy—which stipulates that superior races had a right springing from the moral duty of being superior, to civilize the lower races. I will not repeat what was said above (in section 1. 3. b) where it was noted that the SVS metaphor assumes the racial distinction between whites and non-whites, the former identified with the culture of human rights that has to be brought to the latter portrayed as savage cultures. Moreover, in many instances, Mutua uses human rights as civilizing mission, and the whole SVS metaphor is about that, like when he says, "in this civilizing orgy, human rights [are] often employed interchangeably with political democracy."[199] Therefore, on this level, the civilizing mission and human rights are in accord as imperialist ideologies.

Thirdly, the civilizing mission relied heavily on the liberal belief in the progress of civilization, and therefore condoned any despotic and colonial government as long as the goal was to uplift the natives. This of course, was based on the hierarchical anthropology, positing the civilized nations with a duty of bringing civilization to the uncivilized. On the other hand, however, it is not clear whether the human rights imperialist ideology relies on the liberal belief in the progress of human kind. Rather, from liberal point of view, while being used as a channel for liberal values and ideas, as the SVS metaphor has strongly emphasized, human rights imperialist ideology is built on double negativity. And this is new vis-à-vis the civilizing mission of imperialist ideology. The first negativity is that of the uncivilized native. During the civilizing mission, the liberals did not blame the native for his uncivilized situation. It is only that he had

[199] Mutua, "Human Rights in Africa…", p. 22.

not had a chance to improve his faculties, and that is why they believed civilization could be brought to him. The new civilizing mission through human rights assumes this first negativity, but has also to face the resistance of the uncivilized native to be civilized.

These two negativities are highlighted by one of the leading liberal scholars, Jack Donnelly, who celebrates liberal origin of human rights[200] and points out how it is also the continuation of imperialist ideology as they set new standards. In an article in which the glories of the West for using human rights in their foreign policy against non-European states—lending an unneeded help to Mutua's critique!—he declares that "despite the fatal tainting of the language of 'civilization' by abuses carried out under (and by the exponents of) the classic standard of civilization, internationally recognized human rights share a similar legitimating logic."[201] He does not seem to be concerned with the atrocities committed and justified by the civilizing mission. Rather, the latter sets a standard of civilization that offers legitimacy logic to human rights, that is, human rights can be imposed to spread liberal values and norms as the civilizing mission justified European imperial expansion. This is not a deduction, but rather a paraphrase of his own terms. After praising "west European states" to operated "from a moral high ground" as "in the 1980s and 1990s they increasingly emphasized human rights in their foreign policies," Donnelly also states, "European human rights initiatives have been missionary in the best sense of the term, seeking to spread the benefits of (universal) values enjoyed at home."[202] No comment is needed to underscore the imperialist tone of this sentence. Suffice only to notice that he seems to not recognize—unless he does so purposely—the contradiction in the terms. If indeed those values are universal and are being enjoyed at home, why do they need

[200] In one of his articles, he says that "as a matter of historical fact, the concept of human rights is an artifact of modern Western civilization." Jack Donnelly, "Human Rights and Human Dignity," p., 303.
[201] Donnelly, "Human Rights: A New Standard of Civilization?" in *International Affairs*, Vol. 74, No. 1, 1998, p. 15.
[202] Ibid.

missionaries to spread them, since being universal supposes to exist everywhere? If it is not the case, maybe it is true that they are not that universal, and the missionary proselytism is simply an imperialist mission. Notwithstanding this contradiction, he continues, "fear and historic guilt, arising from the moral blindness and abuses of missionaries operating under earlier standards of civilization, should not immobilize us in the face of abuses of power by murderous dictators hiding behind the legal norm of sovereignty or a claim to radical cultural difference."[203] Mutua couldn't be that right! Donnelly has just proven him so! He sets the "us" saviors who cannot stand immobilized in front of those savages "murderous dictators" who abuse power. At this point, the messianic soteriology has to happen. Something must be done. "Something like a standard of civilization is needed to save us from the barbarism of a pristine sovereignty that would consign countless millions of individuals and entire peoples to international neglect."[204] And that is when human rights intervene: "at the present historical juncture, only the idea of internationally recognized human rights, as expressed in authoritative documents such as the *Universal Declaration of Human Rights* and the international human rights covenants, seems capable of playing such a role." *Eureka!* we have found the panacea against the barbaric precipice of state sovereignty! The problem, though, is that some states resist against this new standard of civilization.[205] This is the second negativity constitutive of human rights imperialist ideology: the presupposition of "us" having to confront "others" resisting "our" civilization. As Mutua says, the redemption of the SVS metaphor springs from this "othering" process.

From that perspective, civilizing mission and human rights imperialist ideologies do not rely on the same liberal premises. Add to that the facts that the civilizing mission grew up from

[203] Ibid.
[204] Ibid., p. 15-6.
[205] Ibid., p. 16

the liberal jingoism, the pride of exporting something new and positive to the natives who did not have it, but could learn it. Human rights, on contrary, were codified to prevent the repetition of the horror that had befallen Europe in the WWII. That is why Donnelly recognizes that the new salvation is for "us" all and not only for "them." The problem is that the means for that salvation is only particular to one part of the world and is imported to the other. And that is why and how human rights become an imperialist ideology.

In sum, these arguments infer that liberalism played a role in both imperialist ideologies, but based on the different premises.

In the fourth place, it was seen how international law was born from liberal ideas and developed to give a scheme to the imperial enterprise. It assumed and gave legal legitimacy to the racist assumptions which, as I have already noted, were covered and justified by the civilizing mission. In other words, international law was born and sustained by this imperialist ideology of the civilizing mission. On the other hand, the human rights movement did not remain on the moral legitimation of liberal imperialism, but rather it took the form of international law, inspiring one scholar to call it "the heart of human rights."[206] As such, human rights imperialist ideology is not different from the civilizing mission. Even those—like Emmanuelle Jouannet—who believe that human rights law has revolutionized international law, they still caution that human rights as humanist values are "originally those of liberal democracies, be they European or American; and may, on this basis, be perceived as the fruits of a policy of imperialism or Western hegemony, liberal in nature, which merely repeats in another form the 'civilizing mission' of the past."[207] In other words, that human rights have been incorporated into international law did not purify the latter from its imperialist stain. Therefore, "at the very least,

[206] Allen Buchanan, ibid.
[207] Jouannet, ibid., p. 390-1.

it is essential to realize that we cannot simply act *as if* the issue of the imperialism of the legal values embodied in international law had been disposed of by virtue of the transcription of human rights into positive international law, their general acceptance through the ratification of international instruments, and thus their near-universalization at a textual level."[208] Legal scholars such as Mutua and Anghie, among others, do not use so much of a precaution. They rather strongly affirm that human rights law is a legal embodiment of liberal imperialism legitimated and dissimulated by human rights discourse. The whole SVS metaphor is based on this assumption that human rights movement has been encoded into a legal system, which becomes the instruments of Western states and institutions as well as the UN. As Mutua puts it, "even the international law of human rights, arguably the most benign of all the areas of international law, seeks the universalization of Eurocentrism. The human rights corpus is driven by what I have called the savage-victim-savior metaphor, in which human rights is a grand narrative of an epochal contest that pits savage against victims and saviors. In this script of human rights, democracy and western liberalism are internationalized to save savage non-Western cultures from themselves and to 'alleviate' the suffering of victims, who are generally non-Western and non-European."[209] In this sense, it is clear that both imperialist ideologies were/are theoretically and practically connected to a legal mechanism of international law, which assures them their efficacy. Now, seeing how human rights movement as ideology is framed in a similar pattern as the civilizing mission, the Third World critics such as Mutua have a solid

[208] Ibid. Anghie also expresses the ambiguity of human rights law when he says: "The International human rights law that emerged as a central and revolutionary part of the United Nations period offered one mechanism by which Third World peoples could seek protection, through international law, from the depredations of the sometimes pathological Third World state. It was for this reason that international human rights law held a special interest and appeal for Third World scholars. Human rights law was controversial, however, precisely because it legalized the intrusion of international law in the internal affairs of a state: it could be used to justify further intervention by the West in the Third World. This aspect of this intervention became evident after the collapse of the USSR and the intensification of globalization." See his "The Evolution of International Law…" p. 749.
[209] Mutua, "Critical Race Theory", p. 850-1.

ground to criticize it as an imperialist ideology, playing the same role as that of the civilizing mission vis-à-vis European formal imperialism. In a way, it is because the civilizing mission has been outdated as a term that the human rights movement has been invented; and otherwise, the reality is the same: Western imperialism continues under the umbrella of human rights movement.

Conclusion

This chapter examined the foundation of the alleged claim that human right movement has assumed the imperialist ideology of the civilizing mission. To do so, I have been obliged to go through a defining process, in order to understand what imperialism and ideology are, so that I could elaborate my working definition of imperialist ideology as a legitimating and dissimulating discourse at the same time. Three main points helped to structure the chapter. The first point defined the imperialist ideology, while the second analyzed the relationship between that ideology and international law. The third and last point was the place to elaborate human rights ideology in order to see how it corresponds to an imperialist one. Now, from the motivating reasons to the international law level, passing through racist language and the liberal bedrock, it was shown that the human rights movement, understood through the SVS metaphor, does indeed assume the characteristics of the civilizing mission.

This claim that human rights movement is the new face of the former civilizing mission touches the heart of human rights, in that it challenges the universality of human rights norms and their normative justification. It destroys the arguments that they were drafted by a diverse group from different cultures, by showing that most of the countries affected by this human rights ideology were still under Western domination when these norms were adopted. To a further argument that now all states have accepted international human rights norms, the authors of this claim question the legitimacy of such states to represent their peoples since they were post-colonial states installed to perpetuate the interests of the West. In that context, one has to agree with John Tasioulas that "to the extent that the [Philosophy of International Law] PIL…purports to reflect background moral norms of human rights, the worry is that the latter lack the requisite universality needed to confer legitimacy on the former. If so, human rights law is a mechanism through which non-Western societies are illegitimately pressured into

refashioning themselves along Western lines."[210] This is another way of asserting what Mutua has been saying that human rights are Eurocentric, because they "grow out of Western liberalism and jurisprudence."[211] This is what many have called parochialism objection to which, "it is not enough to point out that most states have ratified the major human rights conventions. The question is not whether states have agreed to treat human rights norms as if they were universally valid but rather whether they are universally valid. To elide the latter distinction is to assume that state consent, under current conditions, is sufficient for legitimacy."[212] A claim that is not defendable. Hence, the objection needs another substantial answer.

The claim, however, is not confined to the scope of human rights; it also reaches its moral core. To assert that human rights movement is an imperialist ideology is to assert that it is inherently wrong. It cannot be defended morally because it is a travesty in both its presentation and its content, as well as in its goal. In being an ideology that hides something else instead of presenting itself, the so-called human rights movement is a lie and a liar; by promoting imperialist domination (with all the background that we have seen), it is evil. That is why the normative justification of human rights is at stake, independently of their universality problematic. To be particular is only to limit the scope; it does not necessarily follow that it is morally wrong. Likewise, to be universal does not guarantee it to be morally sound. That is the reason why to philosophically confront the challenge posed by this claim that human rights corpus is an imperialist ideology, it requires one to go beyond the parochialism objection and respond to the issue of normative justification of human rights, or at least to think of the possibility of ways to normatively justify human rights.

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[210] John Tasioulas, "The Legitimacy of International Law" in Samantha Besson & John Tasioulas, eds. *ThePhilosophy of International Law*. (Oxford: Oxford University Press, 2010), p. 110.
[211] Mutua, Human Rights, p. 18.
[212] Allen Buchanan, "The Legitimacy of International Law" in in Samantha Besson & John Tasioulas, eds. *The Philosophy of International Law*. (Oxford: Oxford University Press, 2010), p. 95.

Human rights are not only challenged normatively; but also practically, because as they are being used ideologically for imperialist aims, they are invoked for humanitarian intervention, which is once again suspected of furthering a neo-colonialism under the cover of a humanitarian blanket. That is why, before trying to see what is/are the philosophical response(s) to the theoretical challenge, the next chapter explores this practical part.

Chap. 2. Humanitarian Intervention as Neocolonialism

> The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form, it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat.
>
> Carl Schmitt

2.0. Introduction

Human rights are one of the purposes on the United Nations, where it is stated that "the purposes of the United Nations are…to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging the respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[1] That is why as soon as it started working, the United Nations initiated a process of elaboration of a human rights bill, culminating with the adoption of the Universal Declaration of Human Rights (UDHR).[2] More human rights instruments were to follow, such as the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR) both entered into force in 1976. Together with the UDHR, they form the Bill of Rights.[3] In addition to this bill, there are other conventions of what Charles Beitz calls the "Core of human rights instruments"[4], which are: the Convention against Torture and other Cruel, Inhuman or Degrading

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[1] UN Charter, art. 1 (3).

[2] For the history of the UDHR, see among others, Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights.* (New York: Randon House Trade Paperbacks, 2001); Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. (Philadelphia: University of Pennsylvania Press,1999); John Humphrey, *Human Rights and the United Nations: A Great Adventure.* (New York: Transnational Publishers, 1984); *No Distant Millennium: The International Law of Human Rights.*(Paris: Unesco, 1989); René Cassin, *La pensée et l'action*. (Edition F. Lalou, 1972)

[3] Henry J. Steiner et al., *International Human Rights in Context: Law, Politics, Morals*. 3rd Ed. (Oxford: Oxford University Press, 2007), 60.

[4] Charles Beitz, *The Idea,*ix.

Treatment or Punishment (CAT, entered into force in 1987), Convention of the Elimination of all Discrimination against Women (CEDAW entered into force in 1981), Convention on the Elimination of all Forms of Racial Discrimination (CERD, entered into force in 1969), and the Convention on the Rights of the Child (CRD, entered into force in 1990).

What these instruments share among themselves and with other international treaties is the fact that they depend on the state parties which sign and ratify them. Their promotion and implementation depend on the good will of states parties, and that is where the problem arises. Indeed, while the "the peoples of the United Nations" were determined to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small," they were, first, "determined to save succeeding generations from the scourge of war, which twice in [their] lifetime has bought untold sorrow to mankind."[5] These wars to which we owe human rights were waged by states to which now is trusted the promotion, protection and the fulfillment of these human rights.[6] Scholars like Micheline Ishay underscore this apparent contradiction, saying that "we find ourselves pondering the role of the state as both the guardian of basic rights and as the behemoth against which one's rights need to be defended."[7] Henry Shue makes the same point when he writes: "If we do not believe that anyone beyond their own state can reasonably be asked to bear the responsibility of protecting these people against *the single most serious threat to their lives—their own states*—we do not believe in any practically meaningful way that they have a basic

[5] UN Charter Preamble.
[6] Cristina Lafont identifies three state's main actions with regard to human rights: to respect, to protect and to fulfill. See *Global Governance, Human Rights and the Responsibility to Protect*, Paper presented at Boston College Clough Center For The Study of Constitutional Democracy, on Nov 1, 2013, 30.
[7] Ishay, ibid., p. 8.

rights not to be killed."[8] While espousing Ishay's view, Shue's observation brings out three important points. First, he singles out the paradox that states are the most dangerous threat to human rights, whereas they are, at the same time, their protectors. In a way, it is like entrusting a lamb to a wolf. Secondly, he implies an extra-state body that can keep an eye on the state if the basic right to life is to have any meaning. The question consequent to this is: what can such an extra-state organ be? Finally –and as a consequence—one can infer from his remark that if things remain as they are, that is, counting on states to protect human rights, it is a lure and "we do not believe in any practically meaningful way" in the "basic right not to be killed."

This is another way of expressing the gap between the normative system instituted by human rights norms and their enforcement. As Nicholas Wheeler remarks, "as a result of the international legal obligations written into the United Nations system, clear limits were set on how governments could treat their citizens. For the first time in the history of modern international society, the domestic conduct of governments was now exposed to scrutiny by other governments, human rights non-governmental organizations (NGOs), and international organizations. But the new human rights regime was severely limited by the weaknesses of its enforcement mechanisms."[9]

These "weaknesses" in the "enforcement mechanisms" are, in fact, linked to the need highlighted in Shue's remark of an external monitor on how states perform their duties regarding human rights, which raises a normative question that goes beyond the practical dimension. Indeed, although they are feared to threaten human rights, states are protected by the United Nation system, which is built on and affirms the state sovereignty. Although the latter existed

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[8] Henry Shue, "Limiting Sovereignty" in Jennifer M. Welch, Ed. *Humanitarian Intervention and International Relations*. (Oxford: Oxford University Press, 2004), 21. Emphasis added.

[9] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*. (Oxford: Oxford University Press, 2000), 1.

before the UN Charter, since it is believed to stem from the Westephian treaty in 1648,[10] state sovereignty is codified as a cornerstone of the international system created in 1945. The famous article 2(4) asserts that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." It insists that "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter." It adds, however, "but this principle shall not prejudice the application of enforcement measures under Chapter VII."[11]

Now, enforcement measures in chapter VII are only concerned with "peace and security", and chapter VII never mentions any enforcement measure for violations of human rights. Its article 39 reads, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." The articles 41 and 42 referred to in art. 39 authorize the Security Council to recur to the use of armed force, but the Charter does not take the same step for the protection of human rights. The question now is: if states are protected by the Charter in whatever is under their domestic jurisdiction and yet they are "the most serious threat"—to quote Shue again, and if, at the same time, "the doctrine of human rights is the articulation of the public morality of world politics of the idea that each person is a subject of global concern" regardless of "what a person's special location might be or which political subdivision or social group the person might belong to,"[12] how is this global concern to be

[10] See Stephen D Krasner, *Power, The State and Sovereignty: Essays on International Relations* (London, New York: Routledge, 2009).
[11] UN Charter art. 2(7).
[12] Beitz, *The Idea*, 1.

materialized without violating the state sovereignty? If a state is engaged in human rights violation, who is to assume this "global concern" for the person's rights without interfering with state's sovereignty? This is where the tension between state sovereignty and the protection of human rights resides, and raises the question of humanitarian intervention.

Many scholars contend that the Charter does not forbid intervention. One of them is Jennifer Welch who argues that "the United Nations Charter does not explicitly enshrine non-intervention as a rule governing the relations between member states."[13] She illustrates her point by "the strong human rights commitments articulated in the Preamble and Articles 1(2), 1(3) and 55; and the powers given to the Security Council in Article 39-42 both to define what constitutes a threat to peace and security and to recommend action to counter such a threat."[14] Welch is right on that and Sean Murphy[15] corroborates her view. From this perspective, state sovereignty is not a barrier to the protection of human rights. However, it has to be interpreted through the language of "security and peace", and not human rights *per se*, as giving a right to humanitarian intervention.[16] That is why the question remains, and in order to elucidate it, we need to define humanitarian intervention.

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[13] Jennifer M. Welch, "A Normative Case for Pluralism: Reassessing Vincent's Views on Humanitarian Intervention" in *International Affairs*, Vol. 87, No. 5, 2011, 1196. See also Barry M. Benjamin, "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities" in *Fordham International Law Journal*, Vol. 16, No 1, 1993, 141, 149. Benjamin goes further to state that there have been resolutions that "have equalized the importance of the protection of human rights with the preservation of state sovereignty," 149; Patrick Macklem, "Humanitarian Intervention and the Distribution of Sovereignty in International Law" in *Carnegie Council for Ethics in International Affairs*, 2008, 371; Fernando R. Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*. (New York: Transnational Publishers, 1988), 131.

[14] Ibid.

[15] Sean D. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*. (Philadelphia: University of Pennsylvania Press, 1996), 137-8.

[16] Talking about the intervention for the Kurds in Northern Iraq in 1991, Richard Lillich notes that "Resolution 688 has in fact proved to be ground-breaking in that it was the first time that the Council had characterized severe human rights depravations having minimal external effects as a threat to international peace and security" See Richard B. Lillich, "The Role of UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World" in *Tulane Journal of International and Comparative Law*, Vol. 3, No 1, 1995, 7.

According to their study on the history of the word, Brendan Simms and D.J.B Trim state that humanitarianism is a quite recent neologism, which acquired its current meaning in the middle of nineteenth century. They say: "In the eighteenth century it was used purely theologically, in reference to questions about the humanity or divinity of Christ. In the sense in which it is most often used today, 'concerned with human welfare as a primary or pre-eminent good', or 'with humanity as whole', and 'action on the basis of [these] concern[s] rather than for pragmatic or strategic reason', both it and the cognate 'humanitarianism' date only to the mid-nineteenth century."[17] Other scholars recognize this fact as well.[18] Simms and Trim, nonetheless, contend that humanitarianism can be limited to this recent period only if one considers its connection with human rights concerns as they emerged in nineteenth century. But if one looks at the practice of states, these authors claim that we discover the same reality called today humanitarian, long before the coinage of the concept.[19]

Talking about states practices raises the question of intervention. The same authors argue that "in practice…actions termed (whether formally or informally) 'humanitarian interventions' have usually been undertaken in response to only certain kinds of humanitarian tragedy." They add, "When combined with 'intervention', 'humanitarian' typically refers to a response to mortality and brutality inflicted by humans on others, rather than accidentally arising from bacterial, viral, meteorological, or climatic caprice."[20]

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[17] Brendan Simms and D.J.B. Trim, "Towards a History of Humanitarian Intervention" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011), 3.
[18] See for instance Jeremy Sarkin, "the Role of the United Nations, the African Union and Africa's Sub-Regional Organisations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and Responsibility to Protect" in *Journal of African Law*, Vol. 53, No 1, 2009, 4; Jean-Pierre L. Fonteyne, "The Customary international Law Doctrine of Humanitarian Intervention: Its current Validity under U.N. Charter" in *California Western International Law Journal*, Vol. 4, No 2, 1974, 206, 232; Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law*. (Oxford: Oxford University Press, 2001), 3, 8.
[19] Ibid.
[20] Ibid.

This historical and analytical definition underscores two important facts. First, it distinguishes humanitarian intervention from other kinds of humanitarian action. The latter is concerned with natural or accidental catastrophes,[21] while the former is concerned with "mortality and brutality inflicted by humans on others". This is a very important distinction, but it does not tell who assumes and how these actions are carried out, and yet answers to these questions are crucial. Hence, the second important point is the standard definition of "humanitarian intervention as the use of force by a state [or group of states] that aims to protect innocent people who are nationals of another state from harm inflicted or allowed by that state's government"[22] without its consent.[23]

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[21] They, however, note that "it is increasingly being argued that, where human failings in responding to so-called 'acts of God' result in considerably increased mortality, then a humanitarian intervention could be justified", ibid., but this kind of intervention is not what we are concerned with. David Rodogno also notes that "Nineteenth-century Europeans distinguished massacre from natural disaster, in that the former was understood as an organized process of destruction of civilian lives and properties." See his "'The Principle of humanity' and the European Powers' Intervention in Ottoman Lebanon and Syria in 1860-1861" in Brendan Simms and D.J.B. Trim, Eds., ibid., 162. Chesterman broadens the scope of "the distinction between humanitarian intervention and other putative legal bases for actions that may include a humanitarian component. In addition to self-defense and Security Council authorized enforcement actions, these include claims of protection of nationals abroad (arguably a species of self-defense), consent of the target state, and authorization by treaty. It is necessary to make clear that the doctrine of humanitarian intervention as considered here concerns the threat or use of force—over the 1990s the term has sometimes been used to refer to less intrusive actions, such as the provision of food, medicine, and shelter. The term 'humanitarian *assistance*' will be used for such non-forcible actions" Chesterman, *Just war,* 3. For more distinctions between humanitarian intervention and other related humanitarian actions, see Eric A. Heinze, *Waging Humanitarian War: The Ethics, Law and Politics of Humanitarian Intervention*. (Albany: SUNY Press, 2009), 8-10.

[22] Terry Nardin, "Introduction" in Terry Nardin and Melissa S. Williams, Eds. *Humanitarian Intervention*. (NY and London: New York University Press, 2006), 1, 9. See also Joseph Boyle, "Traditional Just War Theory and Humanitarian Intervention" in Terry Nardin and Melissa S. Williams, Eds. Ibid., 32; Simms and Trim, ibid., 4-5. However, this chapter limits the scope of humanitarian intervention only to the use of force, contrary to what these authors hold on p. 7 that "to confine 'debates about humanitarian intervention to its military dimensions' will be too often to separate 'arbitrarily… issues that in practice overlap." Moreover, many authors rightly limit humanitarian intervention to the use of force without consent because the diplomatic and economic measures are still 'peaceful' means to resolve conflicts. See Jennifer M. Welch, 'Introduction' in Jennifer M. Welch, Ed. *Humanitarian Intervention and International Relations.* (Oxford: Oxford University Press, 2004), 3; James Mayall, "Humanitarian Intervention and International Society: Lessons from Africa" in Jennifer M. Welch, Ed., ibid., 121; Michael Newman, *Humanitarian Intervention: Confronting the Contradictions*. (New York: Columbia University Press, 2009), 4; Heinze, ibid., 2, 9; Bhikhu Parekh, "Rethinking Humanitarian Intervention" in *International Political Science Review*, Vol. 18, No 1, 1997, p. 55; Jerzy Zajadlo, "Legality and Legitimation of Humanitarian Intervention: Now Challenge in the Age of the War on Terrorism" *in American Behavioral Scientist*, Vol. 48, No 6, 2005, 658, 660-1; Adams Roberts, "Humanitarian War: Military Intervention and Human Rights" in *International Affairs*, Vol. 69, No 3, 1993, 445; Jack Donnelly, "Human Rights, Humanitarian Crisis, and Humanitarian Intervention" in *International Journal,* Vol. 48, No. 2, 1993, p. 608; Byron F. Burmester, "On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights" in *Utah Law Review*, Vol. 269, No 1, 1994, p. 270; Jennifer L.

This definition highlights the inherent link between human rights and humanitarian intervention, and it seems to answer Shue's concern about taking seriously the threat caused by states, inasmuch as humanitarian intervention means vindication of human rights when violated by the state that was supposed to protect them. As Thomas Probert puts it bluntly, "for human rights to have any meaning whatsoever, other states must be able to intervene in order to protect them."[24] From this point of view, human rights violations seem to provide legitimacy to humanitarian intervention and a right to other states to intervene within the state-violator of human rights and so without its consent. Fernando Tesón is one of the forceful proponents of this view, which he grounds in the liberal political philosophy. According to him, "humanitarian intervention is morally justified in appropriate cases. The argument centrally rests on a standard assumption of liberal political philosophy: a major purpose of states and governments is to protect and secure human rights, that is, rights that all persons have by virtue of personhood

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Czernecki, "The Limited Nations' Paradox: the Battle between Humanitarian Intervention and State Sovereignty" in *Duquesne Law Review*, Vol. 41, No. 2, 2003, p. 404; J. L. Holzgrefe, "The Humanitarian Intervention Debate" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003), p. 18.

[23] This is also the definition adopted by the International Commission on Intervention and State Sovereignty (ICISS). It is stated, "the kind of intervention with which we are concerned in this report is action taken against a state or its leaders, without its or their consent, for the purposes which are claimed to be humanitarian or protective. By far the most controversial of such intervention is military" In its *Report*, (par. 1.38), p. 8.

[24] Thomas J. W. Probert, "The Innovation of the Jackson-Vanik Amendment" in Simms and Trim, ibid., p. 323. This link between human rights and humanitarian intervention is very characteristic of the advocates of humanitarian intervention, arguing that the violation of human rights by a state forfeits its claim to sovereignty, and consequently giving right to other states to interfere in what was supposed to be domestic jurisdiction. See among others, Matthew Jamison, "Humanitarian intervention since 1990 and 'liberal interventionism'" in Simms and Trim, ibid., 365; Chantal de Jonge Oudraat, "Humanitarian Intervention: the Lessons Learned" in *Current History*, Vol. 99, No. 641, 2000, p. 422; Richard Gueli, "Humanitarian Intervention in Africa: Towards a New Posture" in *Scientia Militaria, South African Journal of Military Studies*, Vol. 32, No 1, 2004, p. 141; Andrew Altman and Christopher Heath Wellman, "From Humanitarian Intervention to Assassination: Human Rights and Political Violence" in *Ethics*, Vol. 118, No 2, 2008, p. 1; Donnelly, "Human Rights," 615-6; Allen Buchanan, "Reforming the international law of humanitarian intervention" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003), 131; Robert O. Koehane, "Political authority after intervention: gradation in sovereignty" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003), 279; Beate Jahn, "Humanitarian Intervention—What's in a name?" in *International Politics*, Vol. 49, No 1, 2012, 38; Kok-Chor Tan, "The Duty to Protect" in Terry Nardin and Melissa S. Williams, Eds. *Humanitarian Intervention*. (NY and London: New York University Press, 2006), 88-96.

alone."[25] For that reason, "governments and others in power who seriously violate those rights undermine the one reason that justifies their political power, and thus should not be protected by international law. A corollary of the argument is that, to the extent that state sovereignty is a value, it is an instrumental, not an intrinsic, value.[26] Sovereignty serves valuable human ends, and those who grossly assault them should not be allowed to shield themselves behind the sovereignty principle."[27] Consequently, "Tyranny and anarchy cause the moral collapse of sovereignty."[28]

While an argument like Tesón's is cogent in terms of moral reasoning, it begs some questions. First, agreeing that anarchy and tyranny cause moral collapse of state sovereignty, this is vis-à-vis to the citizens of the collapsing state. How does humanitarian intervention follow from it? Secondly, who is to be responsible for it? Tesón develops a liberal argument based on the Kantian understanding of duty and autonomy, and the conclusion is that "the right to intervene… stems from the general duty to assist victims of grievous injustice,"[29] because "if

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[25] Fernando R. Tesón, "The liberal case for humanitarian intervention" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003), 93.

[26] For the same idea that state sovereignty is not an inherent and absolute value, see also Parekh, Ibid., 63; Frederick J. Petersen, "Façade of Humanitarian Intervention in a Community of Sovereign Nations" in *Arizona Journal of International and Comparative Law*, Vol. 15, No 3, 1998, 83; John Davenport, "Just War Theory, Humanitarian Intervention, and the Need for a Democratic Federation" in *Journal of Religious Ethics*, Vol. 39, No 3, 2011, 520; Tom J. Farer, "Humanitarian intervention before and after 9/11: legality and legitimacy" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003), 55; Pratap Bhanu Mheta, "From State Sovereignty to Human Security (via Institutions?)" in Terry Nardin and Melissa S. Williams, Eds. Ibid., 264; Janina W. Dacyl, "Sovereignty versus Human Rights: From Past Discourse to Present Dilemmas" in *Journal of Refugees Studies,* Vol. 9, No 2, 1996, 194.

[27] Tesón, "The liberal case", 93.

[28] Ibid. Patrick Macklem develops the same argument but from an international law perspective. According to him, sovereignty is distributed by international law and therefore, it is not an intrinsic value. In his own words, "international law is already present, structuring, defining, distributing, and protecting the territorial and jurisdictional dimensions of a legal zone of autonomy that it recognizes as vesting in a sovereign state." Ibid., 384-5.

[29] Tesón, "The liberal case", p. 97. There are various moral arguments for a humanitarian intervention from different schools of thoughts—see for example Heinze's consequentialist argument, in Ibid., chap. 2, or Wheeler's solidarist theory of English school in his *Saving Strangers*, chap. 1—but what is disputed is this "right to humanitarian intervention." Tesón follows Ronald Dworkin in distilling international law from morality, which does not fit into the positive international law, although there are also those who think that from the positive international law, there is a right to humanitarian intervention. See Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of*

human beings are denied basic human rights and are, for that reason, deprived of their capacity to pursue their autonomous projects, then others have a prima facie duty to help them."[30] As to the question of the agent who is to assume this rescuing role, Tesón responds that it is the duty of "liberal governments…to promote global human rights."[31] Tesón is not alone in his view. Allen Buchanan also assumes that humanitarian intervention is to be undertaken by "democratic-liberal government" in violation of "UN-based humanitarian law,"[32] and Thomas Weiss calls on the "West to keep its word" on Darfur.[33]

At this stage, what was a moral ground for humanitarian intervention becomes a perplexing source of interrogation. If the moral norm of assisting victims of egregious injustice is addressed to the whole humanity, why only the democratic-liberal governments are to respond to this moral call? What is morally specific to them that they have the duty to save the rest of the world? Either one assumes a hierarchical moral standing or it is an ideological war to propagate liberalism rather than to protect victims of human rights violations, whereby the latter become the proxy of a liberal humanitarian imperialist agenda, which uses "human rights to sell war."[34] Both cases challenge such a moral justification of humanitarian intervention. In the first one, liberalism sins against its own principle of equality by assuming that liberals are morally superior to others; in the second, it uses liberalism for a hidden agenda. As Carl Schimitt says, one

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Humanitarian Intervention. (The Hague: Kluwer Law International, 1999). However, others strongly oppose any claim to a right of humanitarian intervention. One of them is Simon Chesterman who goes through all the theories to justify humanitarian intervention and practices of states, yet concludes that "there is no 'right' of humanitarian intervention in either the UN Charter or customary international law." Chesterman, *Just War*, 226.

[30] Ibid.

[31] Ibid., 127. See also his *Humanitarian Intervention*, 92, 121, and his "Ending Tyranny in Iraq" in *Ethics and International Affairs,* Vol. 19, No 2, 2005, 11.

[32] Buchanan, "Reforming International Law", 139.

[33] Thomas G. Weiss, "R2P after 9/11 and the World Summit" in *Wisconsin International Law Journal*, Vol. 24, No 3, 2006, 742.

[34] Bricmont, *Humanitarian Imperialism*.

"invokes humanity" in order "to cheat."[35] It is a way of "denying the enemy the quality of being human and declaring him to be an outlaw of humanity" so that "a war can thereby be driven to the most extreme inhumanity."[36]

This is even more evident when almost all scholars agree that in every humanitarian war there are states' interests at stake. Talking about the Security Council way of proceeding, Simon Chesterman observes that "the Council's practice of delegating its enforcement powers has depended more upon a coincidence of national interest than on procedural legality. I would be naïve", he adds, "to expect complete disinterestedness on the part of states exercising such delegated power."[37] At the end, one is brought back to the question: "*Who* has the responsibility to protect *whom* under *what conditions* and toward *what end?*"[38] When one remembers that the nineteenth colonial enterprise and the Western imperialism were justified by humanitarian goals, one is forced to heed those who think that this new humanitarian order is a kind of neocolonialism, both as a repetition of the West conquering the non-Western world—the liberal dominating the non-liberal—and also the continuation of colonial rule through the postcolonial structures which perpetuate economic domination of the West on the rest of the world. Hence, for scholars such as Mamdani, "the era of international humanitarian order is not entirely new. It draws on the history of modern Western colonialism. At the outset of colonial expansion in the

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[35]Carl Schmitt, *The Concept of the Political*. Trans. by George Schwab. (Chicago: University of Chicago Press, 2007), p. 54.
[36] Ibid.
[37] Chesterman, *Just War*, 165. See also D. J. B. Trim, " 'If a Prince Use Tyrannie Towards his People': Interventions on Behalf of Foreign Populations in Early Modern Europe", 43; John Bew, " 'From an Umpire to a Competitor': Castlereagh, Canning and the Issue of International Intervention in the Wake of Napoleonic Wars", 137; Matthias Schulz, "The Guarantees of Humanity: the Concert of Europe and the Origins of the Russo-Ottoman War of 1877", 204; Maeve Ryan, "The Price of Legitimacy in Humanitarian Intervention: Britain, the Right of Search, and the Abolition of the West African Slave Trade, 1807-1867", 243; William Mulligan, "British Anti-Slave Trade and Anti-slavery Policy in East Africa, Arabia and Turkey in the Late Nineteenth Century", 258. All these references are found in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011). See also Jane Stromseth, "Rethinking Humanitarian Intervention: The Case for Incremental Change" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003), 257.
[38] Mamdani, *Saviors and Survivors,* p. 276.

eighteenth and nineteenth centuries, leading Western powers—Britain, France, Russia—claimed to protect 'vulnerable groups'."[39] In other words, humanitarian intervention follows the same pattern: the same actors using the same justification for the same end: domination.

This view of humanitarian intervention as a neocolonialism constitutes the practical challenge to human rights project. For if, as Shue has earlier shown, human rights cannot be protected against their most dangerous threat, the state, because such an exercise is a neocolonialism, then the human rights project fails irremediably. Hence, the goal of this chapter is to elaborate this challenge and it is structured by three points. In the first place, since many scholars claim that the doctrine of humanitarian intervention originates from the just war theory as its moral bedrock, I revisit this theory, touching on key authors such as Thomas Aquinas, Francisco de Vitoria, Francisco Suarez and Michael Walzer, to see if they justify any kind of humanitarian intervention. The second point will look at the international law before, in and after the UN Charter as well as to some cases claimed to be instances of humanitarian intervention. Finally, we will see why and how some scholars characterize this practice of humanitarian intervention as neocolonialism.

2.1. Humanitarian Intervention and Just War Theory

When scholars are searching for the moral underpinning of humanitarian intervention, they go back to the just war theory. According to Chesterman, "the classical origins of what became known as humanitarian intervention lie in the emergence of a substantive doctrine of just war in the Middle Ages."[40] As for Francis Kofi Abiew, he asserts that "the ethical legitimacy of criteria for action relates directly to the question of whether the international community does have a moral duty to intervene to end egregious human rights violations that are conscience-

[39] Ibid.
[40] Chesterman, *Just War*, 9.

shocking." He adds, "These criteria are not new, for they are based on the principles of 'just war' theory."[41] In other words, both Chesterman and Abiew believe that the moral question confronted by humanitarian intervention justification is related to those found in just war theory. Now, in that tradition, Thomas Aquinas and Francisco de Vitoria are frequently mentioned. Francis Kofi Abiew, again, remarks that "St. Thomas Aquinas made references on the basis of religious solidarity to the effect that a sovereign has the right to intervene in the internal affairs of another when the latter greatly mistreats its subjects."[42] He holds the same opinion on Vitoria, saying that "Vitoria…contended that resistance to the heathen princes to the Christian missionaries and measures to force the Indians to return to paganism would entitle the Pope to remove the Indian Princes and justified war."[43] But what do they really say about humanitarian intervention? –noting that this a rereading of their writings under the prism of our current understanding of humanitarian intervention, since the concept itself did not exit then. How is it integrated into the just war theory they developed? In order to answer these questions, I have chosen four authors and I present them in chronological order: Aquinas, Vitoria, Suarez, and Walzer. I have taken Walzer because he is a modern author who has reconsidered the question of war as first a moral problem that can be argued about through a moral discourse.

Before I present each author, however, it is important to notice that the just war theory can be summarized by two concepts of *jus ad bellum* and *jus in bello*, although one can add *jus post bellum.* These three concepts prescribe principles to be followed respectively *for*, *during* and *after* waging a war. *Jus ad bellum* is generally defined by seven principles: just cause, proper authority, right intention, reasonable hope of success, overall proportionality, war as last resort

[41] Abiew, "Humanitarian Intervention and the Responsibility to Protect: Redefining a Role for Kind-hearted Gunmen" in *Criminal Justice Ethics*, Vol. 29, No 2, 2010, p. 98.
[42] Abiew, *The Evolution*, 34.
[43] Ibid., 34-5.

and peace as the end of war.[44] The first three constitute its core. As for *jus in bello* criteria, they are mainly related to the proportionality of means used during war and the immunity of non-combatants. *Jus post bellum* does not have fixed norms; it varies according to different authors. That is why just war theory is generally concerned with the two concepts of *jus ad bellum* and *jus in bello*, and those will be our focus here, although we might mention here and there *just post bellum.* It is also worth noting that humanitarian intervention is mostly concerned with *jus ad bellum*, since it is about finding the right cause to use forceful coercion.

a). Humanitarian Intervention and *Jus ad bellum*—Aquinas

It is recognized that the classical just war theory took form with St. Thomas Aquinas. He talks about war in the second part of the second part of his *Summa Theologica*, question 40 (ST II-II, Q. 40). While the question is framed in theological terms—is it sinful to wage war?—it is a moral inquiry into the legitimacy of warfare. That is why the arguments he gives are moral, although they are sometimes justified by theological or biblical quotations. To this question, Aquinas gives a positive answer, as long as three criteria –*jus ad bellum*—are fulfilled and the first of them is a *legitimate authority*. As he puts it, "three things are required for a war to be just," and "the first requirement is that the ruler at whose command the war is to be waged have the lawful authority to do so."[45] He justifies this first rule by two negative reasons and one positive. First, war has to be commended because a private citizen seeks reparation of injury endured through his/her superior. In other words, if he suffers an injury from another political authority, he/she is to report the case to his/her political legitimate authority who can then avenge him by waging a war against the injuring party. In Aquinas's words, "it belongs to no private citizen to initiate war, since private persons can pursue vindication of their rights through the

[44] James T. Johnson, *Morality and Contemporary Warfare*, (New Haven: Yale University Press, 1999), 27.
[45]St. Thomas Aquinas, *On Law, Morality and Politics*, 2nd Ed., Trans. by Richard J. Regan. (Indianapolis/Cambridge: Hackett Publishing Company, Inc., 2002), 164.

decision of their superiors."[46] Second, a private citizen does not have the moral authority and political power to summon people to wage war. Those are the two negative reasons; the positive one is the protective role that rulers have to play, both within and without their jurisdiction. Hence, in the same way "they lawfully use physical weapons to defend the commonwealth against domestic rebels when they punish malefactors," the same way they are allowed "to use weapons of war to protect the commonwealth against foreign enemies."[47] In the line of Aquinas's argument, a just war is a punitive war, and this leads to the second requirement for waging a war to be just: it should have a *just cause* which is to correct a wrong committed. He states, "there needs to be a just cause to wage war, namely, that the enemy deserves to have war waged against it because of some wrong it has inflicted."[48] According to his reference to Augustine, one infers that the wrong inflicted is a failure to rectify a wrong committed or to bring back property seized.

Looking at the way he formulates it, one might think that Aquinas is for avenging a very wrong committed anywhere. However, taking this second requirement with the first one, it becomes clear that the punitive war is limited by the jurisdictional limitations of the legitimate authority. The latter cannot have right to avenge the injury committed outside his/her jurisdiction. This clashes with Abiew's claim that "St. Thomas Aquinas made references on the basis of religious solidarity to the effect that a sovereign has the right to intervene in the internal affairs of another when the latter greatly mistreats its subjects."[49] At least for now, it is not clear how one would justify such a war from Aquinas's principles.[50] But there still is a third criterion:

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[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Abiew, *The Evolution*, 34.
[50] Joseph Boyle reaches the same conclusion, saying that "my application of Thomistic categories to the normative sources of political authority in the world today cannot resolve the important questions raised by the fact that a state's or an alliance's unilateral intervention to protect human rights may be illegal by the terms of U.N. Charter or

the *right intention*. According to him, "those waging war need to have a right intention, namely, an intention to promote good and avoid evil."[51]

In the eyes of those who suspect humanitarian intervention of neocolonialism, this is even harder to fulfill if one wants to justify humanitarian intervention in a liberal manner as Tesón does and taking into account the states' interests that are always involved. Indeed, once more using St Augustine, he notes that "desire to harm, vengeful cruelty, insatiate and implacable animus, savagery in renewing combat, lust for dominance, and the like are justly condemned in the matter of waging war."[52] If anything else, lust for dominance—ideological if not economic domination—is definitely part of the humanitarian advocates. Responding to accusation that he is promoting imperialism through his doctrine, Tesón, for example, responds that "if being a humanitarian imperialist means advocating that the hegemony use its might to advance (by appropriate moral means [what are they?]) freedom, human rights, and democracy, then I am a humanitarian imperialist."[53] In other words, he does not mind the use of humanitarian intervention in order to spread liberal values. Although this is not necessarily evil, it deviates from what is supposed to be the first intention: to help the victims of human rights violations. In that sense, it becomes evil because it is a lie. That is why he struggles to include the right intention into the criteria for humanitarian intervention, preferring to look at the outcome, almost in the Machiavellic terms whereby the end justifies the means. In his own words, "what the intervener does is the best evidence of its intention… the humanitarian outcome should be a

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by international law. The claim is only that in traditional just war theory the authority to undertake war lies in the sovereign, and that, in the world as it now is, a sovereign is the ruler of a sovereign state, and worldwide organizations are not sovereign states." See his "Traditional Just War," p. 37 and also the same idea on p. 48.

[51] Aquinas, Ibid.

[52] Ibid., 166.

[53] Tesón, "Of Tyrants and Empires: Reply to Terry Nardin" in *Ethics and International Affairs*, Vol. 19, No 2, 2005, 30. Such a goal is against the humanitarian intervention objective, as Jean-Christophe Merle observes. According to him, the goal of military humanitarian intervention "cannot be defined primarily with reference to the opponent's will, but with respect to the state of the civilian population." See his "The Problem with Military Humanitarian Intervention and its Solution" in *The Philosophical Forum*, Vol. xxxiv, No 1, 2005, 65.

central factor in evaluating the intention of the intervention."[54] This cannot be enough far from Aquinas's view, according to whom "even if legitimate authority declares war, and the cause is just, wars may be unlawful because they are waged with a wicked intention."[55]

Thus, a war to be just has to fulfill these three requirements and my few discussions show that it would be hard to justify humanitarian intervention from Aquinas's just war theory.[56] However, there might be another way of looking at his writings for the understanding of humanitarian intervention from Aquinas's writing on tyrant. In his treaty *On Kingship*, Thomas Aquinas characterizes tyranny as "the worst form of government,"[57] and therefore he suggests that the electoral process should allow selecting a political authority—a king in Aquinas's vocabulary—who will unlikely become a tyrant. But if it happens, there are three venues. First, if the tyranny is not extreme, Aquinas recommends to bearing with it, because "it is better to tolerate a mild tyranny for a time rather than to take action against it that may bring on many dangers that are worse than the tyranny itself."[58] If it "is so extreme that is unbearable"—the second venue—Aquinas prefers public authority to the private initiative to remove a tyrant. His argument is that a community can appeal to a higher authority to remove him (in case he depended on someone else), or to revolt and to remove a political authority because by becoming a tyrant he forfeits his legitimacy to rule over them. In such case, "the community should not be accused of disloyalty if it disposes a tyrant even if it had previously agreed to obey him forever, since he did not rule the community as the office of king requires and thus he deserved to have

[54] Tesón "Ending Tyranny", 8.
[55] Aquinas, Ibid., 165-6.
[56] Just to mention that Aquinas does not expand his just war theory to the *jus in bello* or *post bellum*.
[57] Aquinas, *On Politics and Ethics*, Ed. by Paul E. Sigmund. (NY, London: Norton & Company, 1988), 22.
[58] Ibid., 23.

his subjects break their agreement."[59] And finally, "if no human aid is possible against a tyrant, recourse is to be made to God." [60]

From this reading, even when it is a tyranny, Aquinas recommends the political resistance by the community,[61] but he never suggests that other political communities should intervene on behalf of the injured ones. As James Johnson rightly puts it,

> Aquinas and his contemporaries also had a specific word for the oppression of people by their rulers: tyranny. Against tyranny, which manifests injustice, there is a right of defense possessed by all those who are the objects of the wrong done. But, if we consider Aquinas's discussion, this right does not extend to neighboring temporal rulers to end the tyranny and punish the tyrant, for such rulers have no authority over the tyrannical ruler. The neighboring rulers may assist those directly affected by the injustice of tyrants, but they must be asked. This was not "humanitarian intervention" in the present-day sense but "intervention by invitation," another category in present-day law.[62]

In other words, Thomas Aquinas is not a good source for the justification of humanitarian intervention neither through his just war theory nor through his views on tyranny. But what did the late Scholastics keep from this Thomistic legacy? The next two sections will help to answer this question.

b). Just War Theory When It Encounters the Non-Western World—Vitoria

Francisco de Vitoria's discussion on the law of war stems from the need of confronting the Spanish expansion in the Americas and its challenge. Hence, he asserts on the outset that he wants to defend "the possession and occupation" of the lands of the "so-called Indians,"[63] and he does so by responding to four questions: "1. Whether it is lawful for Christians to wage war at all; 2. On whose authority war may be declared or waged; 3. What may be and ought to be the

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[59] Ibid., 24.
[60] Ibid., 25.
[61] For Swartz, "the resistance of tyranny is not only a right but o duty." See "Thomas Aquinas: On Law, Tyranny and Resistance" in *Acta Theologica*, Vol. 30, No 1, 2010, 155.
[62] Johnson, "Religion, Violence and Human Rights: Protecting Human Rights is Justified for the Use of Armed Force" in *Journal of Religious Ethics*, Vol. 41, No 1, 2013, 11. If this is true, then Fonteyne's view is problematic, when he asserts that "while rather vague statements, to the extent that a sovereign is entitled to intervene on the basis of religious solidarity in the internal affairs of another when the latter mistreats his own subjects beyond the limits of what seems acceptable, can be found as early as the writing of St. Thomas Aquinas." Ibid., 214.
[63] Vitoria, *Political Writings,*p. 295.

causes of just war; 4. What Christians may lawfully do against enemies, and to what extent."[64] These four questions encompass the war theory and I therefore follow it in order to see if there can be justification of humanitarian intervention.

Concerning the first question whether it is lawful for Christians to wage war at all, Vitoria holds that "a Christian may lawfully fight and wage a war,"[65] both defensively and offensively. The defensive war is justified through natural law, "since 'it is lawful to resist force with force'."[66] With regard to the offensive war, it can be initiated to repair or to avenge an injury. The goal is to deter the enemy from attacking a second time, thus ensuring peace and security for the commonwealth and for the world. [67]

The answer to this first question gives a first condition of *just cause* for a war to be waged justly, which is similar to the classical one from Thomas Aquinas, on which Vitoria insists in his third question. According to him, the only permissible reason to wage war is "*when harm has been inflicted.*"[68] The next question to this state is about the legitimate authority to declare and wage a war.

On this point, Vitoria distinguishes the private person from the commonwealth and the prince. Private persons can only declare and wage a defensive war "without any other person's authority, not only for the self-defense but also for the defense of their property and goods."[69] However, this self-defense is to be immediate, "a response to immediate danger, made in the heat of the moment," for a private person "does not have the right to avenge the injury, nor even,

[64] Ibid.
[65] Ibid., 297
[66] Ibid.
[67] Ibid., 5th, 6th and 7th proofs.
[68] Ibid. 300.
[69] Ibid., 299.

indeed, to seize back property which has been taken from him in the past."[70] It is because of these limitations that the commonwealth enters the scene. By commonwealth, Vitoria means "a perfect community," i.e. "one which is not part of another commonwealth, but has its own laws, its own independent policy, and its own magistrate."[71] Such an entity has the authority to declare and wage war because "it has the authority not only to defend itself, but also to avenge and punish injuries done to itself and its members,"[72] as a way of safeguarding the common good. In other words, the commonwealth has the authority to declare and wage both defensive and offensive wars through its monarch.

However, its war-making has to take into account the "law of nations or human law."[73] By this nuance, Vitoria goes beyond the moral argument to introduce a legal dimension in deciding the legitimate authority to declare and wage war. Therefore, according to him, "custom may establish the right and authority to wage war."[74] Vitoria also introduces "necessity" as an exception to this legitimate authority, which allows lower authorities—even a private individual –to wage war, if the higher one fails to defend them.[75] From this second criterion of Vitoria's just war theory, it is not clearly mentioned whether a prince can wage a war on behalf of citizens of another commonwealth. Therefore, it is not easy to justify the right of humanitarian intervention from the right authority criterion.

Concerning the permissible and just cause of war, Vitoria reaffirms that the injury is the sole just cause—rejecting difference of religion, enlargement of empire, personal glory or convenience of the prince as sufficient causes to wage war. He also introduces the principle of

[70] Ibid., 300.
[71] Ibid., 301.
[72] Ibid., 300.
[73] Ibid., 302.
[74] Ibid.
[75] Ibid.

proportionality, because "*not every or any injury gives sufficient grounds for waging war.*"[76] Therefore, if it is not "lawful to inflict cruel punishment such as death, exile, or confiscation of goods to all crimes indiscriminately," much caution should be taken to prevent war whose "effects are cruel and horrible –slaughter, fire, devastation" when it is for "trivial offences."[77]

These three questions sum up Vitoria's *jus ad bellum* of just cause, legitimate authority and proportionality. One is to note that he does not include the right intention as did Aquinas. The fourth and last question deals with the *jus in bello*, through which Vitoria concedes to an injured party to do whatever it takes "*to secure peace and security*."[78] However, he strongly defends the immunity of an innocent, both in their lives and their property, except when they are killed as "accidental effect."[79] He allows the execution of enemy combatants, but the execution "must take account of the scale of the injury inflicted by the enemy, of our losses, and of their other crimes, and base the scale of our revenge on this calculation, without cruelty or inhumanity."[80] As to the fate of the prisoners of war, whether captured or surrendered, Vitoria finds that, morally, they may be killed according to the principle of equity. Nevertheless, since international law stipulates otherwise, Vitoria endorses that "prisoners taken after a victory, when the danger is past, should not be killed unless they turn out to be deserters and fugitives."[81] Those are some principles he sets for his *jus in bello*.

Is it, therefore, possible to justify humanitarian intervention from Vitoria's just war theory? In his first principle, he introduces a very important new element: the scope of the purpose of offensive war goes beyond the borders of the commonwealth to include the peace and

[76] Ibid., 304.
[77] Ibid.
[78] Ibid., 304.
[79] Ibid., 315.
[80] Ibid., 320.
[81] Ibid., 321.

security of the whole world. In almost similar terms as those of the present-day justification of humanitarian intervention, Vitoria asserts that "surely it would be impossible for the world to be happy –indeed, it would be the worst of all possible worlds –if tyrants and thieves and robbers were able to injure and oppress the good and the innocent without punishment, whereas the innocent were not allowed to teach the guilty a lesson in return."[82] He comes back to this question under the fourth question, affirming that the world "could not exist unless some men had the power and authority to deter the wicked by force from doing harm to the good and the innocent" in accord with "the law of nations and the authority of the whole world."[83] The goal of providing peace to the world seems to fit into the humanitarian intervention. But who are those men in charge to "teach the enemy a lesson"? Where do they get such authority? What is this "authority of the world"?

It looks like, for Vitoria, the world as a whole constitutes a commonwealth granted with rights from natural law. Indeed, "if the commonwealth has these powers against its own members, there can be no doubt that the whole world has the same powers against any harmful and evil men."[84] In other words, Vitoria sees the world as a unity possessing powers, which can be exercised through the authorities of different commonwealths, and probably this authority is what he understands by "the authority of the world". As to the manner the princes are to exercise the authority of the world, Vitoria states that each prince who teaches "lesson to the enemy" according to the "law of nations and authority of the world" serves his own interests and those of the world at the same time. From this view, it follows that commonwealths serve the whole

[82] Ibid., 7th proof.
[83] Ibid., 305.
[84] Ibid., 305-6.

world indirectly, and does not clearly affirm a right of a prince to intervene on behalf of citizens of another commonwealth.

A last point important to the topic of humanitarian intervention is whether it is lawful to replace the political authority. Vitoria does not enounce a general principle on that, but rather suggests the judging case by case.[85] All in all, it seems that Vitoria's just war theory does not give a solid source for justifying humanitarian intervention.

However, one has to remember that Vitoria's theory is constructed in a Christian context. But when talking about "barbarians," he justifies that Christian princes could attack barbarians who practice anthropophagy and human sacrifices, in the name of justice. The victims neither need to ask for nor can they refuse the help. In Vitoria's words, "it is lawful to defend an innocent man even if he does not ask us to, or even if he refuses our help, especially when he is suffering an injustice (*iniuria*) in a matter where he cannot renounce his rights, as in the present case. No one can give another the right to kill him, whether it be to eat him or sacrifice him;" especially that the victims are usually children.[86] Vitoria insists on the moral rather than the cultural dimension of his justification. As he puts it, "it follows that the reason why the barbarians can be conquered is not that their anthropophagy and human sacrifices are against natural law, but because it involves injustice (*iniuria*) to other men."[87]

This is a clear case for humanitarian intervention justified on moral grounds, except that it involves what Anghie calls the "cultural difference" factor that influences the application of morality itself. Why the same argument does not apply to Christian cultures? Why injustice committed here does not occasion humanitarian invasion? Vitoria does not focus on the victims,

[85] Ibid., 325-6.
[86] Ibid., 225.
[87] Ibid., Vitoria develops this argument writing "On Dietary Laws, or Self-Restraint."

but on the conquest; he talks of the barbarians being "conquered". Here is where the frontiers between humanitarian intervention and colonial project are blurred, and it becomes manifest when, writing "On the Americans Indians," he considers "the just titles by which the barbarians of the New World passed under the rule of the Spaniards."[88] In other words, he is looking for a justification of the Spanish invasion and conquest of the American Indians. And one of the so-called good reasons "could be either on account of the personal tyranny of the barbarians' masters towards their subjects, or of the tyrannical and oppressive laws against the innocent."[89] In such circumstances, Vitoria states that "*in lawful defense of the innocent from unjust death, even without the pope's authority, the Spaniards may prohibit the barbarians from practicing any nefarious custom or rite."*[90] Put otherwise, Spaniards have the rights to judge the barbarians cultures and decide by their own authority whether it is appropriate to invade the "barbarians." There is no reciprocity; the "barbarians" cannot judge the Christians princes and defend the innocent suffering under oppressing laws. The righteousness is on one side and it is to impose itself on the "barbarians." Vitoria supports his view by theological and biblical arguments such as the fact that "the barbarians are all our neighbours, and therefore anyone, especially princes, may defend them from such tyranny and oppression." And if the "barbarians" resist, the Christians princes "may also force the barbarians to give up such rites altogether. If they refuse to do so, war may be declared upon them, and the laws of war enforced upon them; and if there is no other means of putting an end to these sacrilegious rites, their masters may be changed and new princes set up."[91] There is a shift from the moral argument of the defense of the innocent toward the apology of a cultural and political imperialism. The end of oppression is called to stop

[88] Ibid., 277.
[89] Ibid., 287-8.
[90] Ibid., 288.
[91] Ibid.

of certain acts judged "sacrilegious"—from a Christian point of view—and the setting of new political structures—in the image of the new masters.[92]

In conclusion, while it is not easy to justify humanitarian intervention from his just war theory, Vitoria has set a precedent of humanitarian intervention in other parts of his work, which can serve both the modern advocates for humanitarian intervention and their foes. It remains to see if his pace was followed by a later generation of scholastics.

c). Defense of the Innocent as a Case of Just War Theory--Suarez

Francisco Suarez was another influential scholastic thinker who wrote on the rules and conditions for waging a war. He deals with it in his *Disputatio XIII,* while writing on Charity. The text is subdivided into nine sections, with seven dedicated to war, while the last two are devoted to sedition and duel respectively. For Suarez, "an external contest at arms which is incompatible with external peace is properly called war, when carried on between two sovereign princes or between two states," while sedition is "a contest between the prince and his own states, or between citizens and their states." As to the duel, it is a contest between individuals.[93] His just war theory is concerned with proper war, which can be both defensive and offensive. Like his predecessors, the defensive war is justified by natural law for "the right of self-defense is natural and necessary."[94] As to aggressive war, to be justly waged, it has to fulfill a certain number of conditions: "first, the war must be waged by a legitimate power; secondly, the cause

[92] William Bain develops a sympathetic interpretation of Vitoria's thought on the defense of the innocent, although he himself finds it a puzzle. In his own words, "the reason why Vitoria adopts this position (that of considering defense of the innocent not as punishment) is somewhat less clear. He defends extrajurisdictional intervention to suppress 'nefarious' crimes against nature, cannibalism and human sacrifice, but he denies the legitimacy of intervention to suppress other sins against the law of nature. The answer of this puzzle is not found in a hierarchy of crimes, with serious crimes justifying intervention and lesser staying within the principle of non-interference." William Bain, "Vitoria: The law of war, saving the innocent, and the image of God" in " in Stefano Recchia and Jennifer M. Welch, Eds., *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill* (New York: Cambridge University Press, 2013), p. 90.

[93] Francisco Suarez, *On Charity*. On heinonline.org/HOL/Index?index=beal/sftw&collection=beal, 800.

[94] Ibid., 803.

itself and the reason must be just; thirdly, the method of its conduct must be proper, and due proportion must be observed at its beginning, during its prosecution and after victory."[95] The first two conditions constitute his *jus ad bellum*, while the last one is for *jus in bello*.

Concerning the legitimate power to declare war, Suarez draws his position from natural law and jurisdictional argument, and holds that "a sovereign prince who has no superior in temporal affairs, or a state which has retained for itself a like jurisdiction, has […] legitimate power to declare war."[96] In contrast to Vitoria, this "license must not be granted to a portion of a state or to a private person, save only within the limits of just defense."[97] The most innovative of Suarez's theory compared to Vitoria, is that this principle is valid for both "Christians and unbelievers" because "they are founded on natural law."[98] In other words, while Vitoria seems to favor the Christian princes vis-à-vis barbarians, Suarez puts them on the same standing with regard to this first principle.

The second criterion for waging an aggressive war is the just cause. First of all, Suarez rejects that military power, prestige and wealth are just causes for waging a war. From natural reason, a just war must have "an underlying cause of a legitimate and necessary nature," which is "the infliction of a grave injustice which cannot be avenged or repaired in any other way."[99] This means that war has to be the last resort. Suarez lists three main injuries of such necessary nature: first, "the seizure by a prince of another's property, and his refusal to restore it"; second, "his denial, without reasonable cause, of the common rights of nations, such as the right of transit

[95] Ibid., 805.
[96] Ibid.
[97] Ibid., 807.
[98] Ibid., 808.
[99] Ibid., 806.

over high-ways, trading in common, etc."; third, "any grave injury to one's reputation or honour."[100]

Before turning back to this second requirement, let us look at his *jus in bello* and *post bellum*, regarding the proper mode of conducting war. Suarez argues for a strong protection of innocent persons, both during and after the war. During the period of war, "it is just to visit upon the enemy all losses which may seem necessary either for obtaining satisfaction or for securing victory, provided that the losses do not involve an intrinsic injury to innocent persons, which would be in itself an evil."[101] He emphases this point, adding however that innocent persons can be killed incidentally in order to secure the victory. As he puts it, "innocent persons as such may in nowise be slain, even if the punishment inflicted upon their state would, otherwise, be deemed inadequate; but incidentally, they may be slain, when such an act is necessary in order to secure victory."[102]After the victory has been achieved, "a prince is allowed to inflict upon the conquered state such losses as are sufficient for a just punishment and satisfaction, and reimbursement for all losses suffered,"[103] and the victorious prince may use all the enemy's property needed to secure future peace, "provided that he spare [*sic*] the lives of the enemy."[104] Briefly, these are the principles he establishes for his *jus in bello* and *post bellum*.

Coming back to the just cause criterion, from the natural law perspective, it does not give rise to a justification of humanitarian intervention. This point is emphasized when Suarez considers the third kind of injury where he rejects completely any possibility of offensive war in the name of humanitarian intervention. He says that "the cause is sufficient if the wrong be

[100] Ibid., 817.
[101] Ibid., 840.
[102] Ibid., 845.
[103] Ibid.
[104] Ibid., 850.

inflicted upon one who has placed himself under the protection of a prince, or even if it be inflicted upon allies or friends."[105] This is what Johnson calls the "intervention by invitation."[106] Concerning friends and allies, Suarez says,

> But it must be understood that such a circumstance justifies war only on condition that a friend himself would be justified in waging the war, and consents thereto, either expressly or by implication. The reason for this limitation is that a wrong done to another does not give me the right to avenge him, unless he would be justified in avenging himself and actually proposes to do so. Assuming, however, that these conditions exist, my aid to him is an act of co-operation in a good and just deed; but if [the injured party] does not entertain such a wish, no one else may intervene, since he who committed the wrong has made himself subject not to every one indiscriminately, but only to the person who has been wronged. Wherefore, the assertion made by some writers that sovereign kings have the power of avenging injuries done in any part of the world, is entirely false, and throws into confusion all the orderly distinctions of jurisdiction; for such power was not [expressly] granted by God and its existence is not to be inferred by an process of reasoning.[107]

Suarez seems to reject categorically any humanitarian intervention and Richard Tuck is of this opinion. According to him, "the thrust of his argument was consistently against a wide-ranging right of intervention in the affairs of other states, even where the rulers of those states were committing extensive crimes against their citizens, and in favor of the separateness and autonomy of states."[108]

However, Suarez considers other just causes beyond the principles dictated by natural reason.[109] While he rejects most of those opinions—such as teaching true religion, avenging God, or the supremacy of Christian dominion—Suarez takes another stand when he considers the opinion that war can be waged on the "ground … that unbelievers are barbarians and incapable of governing themselves properly; and that the order of nature demands that men of this condition should be governed by those who are more prudent."[110] Although he remarks that "it is evident that there are many unbelievers more gifted by nature than the faithful, and better

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[105] Ibid.
[106] Johnson, "Religion", 214.
[107] Suarez, ibid., 817.
[108] Richard Tuck, "Grotius, Hobbes and Pufendorf on humanitarian intervention" in Stefano Recchia and Jennifer M. Welch, Eds. Ibid., 102.
[109] Suarez, ibid., 823-7.
[110] Ibid., 825.

adapted to political life,"[111] he concedes that there might be grounds for waging war on them, for instance when, they are "so wretched as to live in general more like wild beasts than like men, as those persons are said to live who have no human polity, and who go about entirely naked, eat human fresh, etc."[112] In such cases, Suarez states that "they may be brought into subjection by war, not with the purpose of destroying them, but rather that they may be organized in human fashion, and justly governed."[113] He restricts this kind of war to the defense of innocent people, bringing it back to be a defensive rather than offensive war. As he puts it, "this ground for war should rarely or never be approved except in circumstances in which the slaughter of innocent people, and similar wrongs take place; and therefore, the ground in question is more properly included under defensive than under offensive wars."[114] Suarez insists that it is not the duty of Christian princes only, "but also for every sovereign who wishes to defend the law of nature." [115]

Suarez seems to find a way of integrating humanitarian intervention in his just war theory based on natural law, allowing it to be applied to both Christians and unbelievers. He also seems to initiate the civilizing missions, since the purpose of such wars is not only to defend the innocent, but also to help "barbarians" to organize themselves politically. Finally, although he seems to doubt whether such "ground for war…really exists", it is founded on cultural bias that considers "barbarians" as living "like wild beasts than like men." This bias against non-Christians is even manifest when it comes to defending innocent Christians under an unbeliever prince and missionary work, or natural law. In such instances, Suarez grants Christian princes with special permission to wage war: "if a state subject to an unbelieving prince wishes to accept the law of Christ and the unbelieving sovereign prevents that acceptance, then Christian princes

[111] Ibid., 825-6
[112] Ibid. 826.
[113] Ibid.
[114] Ibid.
[115] Ibid.

have the right to defend that innocent people."[116] He adds, "but if the same kingdom wishes to submit to the law of unbelievers—for example, to the Mohammedan—and its prince is opposed to this submission, the an unbelieving Turkish prince would not have a similar right of war against that other sovereign."[117] Here, it is clear that this is a defense of a cultural imperialism using the defense of the innocent—humanitarian intervention—in order to spread and defend a certain cultural belief. Naturally, such imperialism is rooted in a cultural hierarchy which posits Christian cultures superior to others and worthy defending. Actually, that is the explanation given by Suarez himself: "the reason for this distinction," he says, "is that to prevent the acceptance of the law of Christ does indeed involve grievous injustice and harm, whereas there is no injury at all in prohibiting the acceptance of another law."[118] The same reason holds for defending the spreading of the Gospel and natural law, and stopping idolatry. "If any state wishes to worship the one God and observe the law of nature, or to listen to preachers who teach these things, and if the sovereign of that state forcibly prevents it from doing so, there would spring up in consequence a just ground for war to be waged by some other prince, even if the latter should be an unbeliever, and guided solely by natural reason; because war would be a just defense of innocent persons."[119]

From this perspective, a moral ground is provided for those who want to spread a certain cultural view on others, without any reciprocity, in the name of the defense of the innocent. In this sense, while Suarez rejects humanitarian intervention as an avenging war, he rehabilitates it through natural law as a defensive war, with a moral grounding that accords privileges to Christian princes over non-Christian ones. On this point, one is no longer sure that Suarez is

[116] Ibid.
[117] Ibid.
[118] Ibid., 826-7.
[119] Ibid., 827.

different from Vitoria, as Tuck suggests,[120] since both advocate for the defense of the innocent persons, privileging one culture over others. Suarez, however, differs from Vitoria on tyranny, because while the latter justifies an aggressive war to end a tyrannical oppression of the "barbarians", Suarez recognizes only the right to revolt of the state against its king, in direct line of Thomistic thinking. To sum up, Suarez's *jus ad bellum* allows a humanitarian intervention yet one with imperialistic flavor.

d). A Contemporary Version of Just War Theory--Walzer

Among contemporary scholars who have reflected on war, Michael Walzer comes in the front line, for he retrieves the medieval reflection on war into a current reality of war, weaving it with stories and experiences of that sad reality. As he calls it, his reflection is "a moral argument with historical illustrations."[121] As a moral reflection on war, Walzer's argument falls into the just war theory tradition. As he puts it himself,

> The moral reality of war is divided into two parts. War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt. The first kind of judgment is adjectival in character: we say that a particular war is just or unjust. The second is adverbial: we say that the war is being fought justly or unjustly. Medieval writers made the difference a matter of prepositions, distinguishing *jus ad bellum*, the justice of war, from *jus in bello*, justice in war.[122]

His argument being complex, this section will only touch on his reconstruction of *just ad bellum* and on how he justifies humanitarian intervention.

Walzer's condition to wage a war is constructed in his theory of aggression from what he calls a "legal paradigm", which he encompasses into six propositions. The first two are as follows: "1. *There exists an international society of independent states*," and "2. *This international society has a law that establishes the rights of its members—above all, the rights of*

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[120] Tuck, ibid., 101.
[121] Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*. Fourth Edition. (New York: Basic Books, 2006).
[122] Ibid., 21.

territorial integrity and political sovereignty."[123] These first two propositions represent the classical positivist understanding of the international society whose members are states understood on the model of domestic liberal society, whereby the individual has a right to private sphere exclusive of any external interference. Likewise, states as members of the international society enjoy rights that cannot be infringed without threatening their very existence. In such a system, "men and women are protected and their interests represented by their governments. Though states are founded for the sake of life and liberty, they cannot be challenged by any other states."[124] At this point, Walzer underscores the tension that can arise between the safeguarding of territorial integrity and political sovereignty and the protection of human rights. "The rights of private persons," he says, "can be recognized in international society, as in the UN Charter of Human Rights, but they cannot be enforced without calling into question the dominant values of that society: the survival and independence of the separate political communities."[125] One already senses the difficulty of accounting for humanitarian intervention understood as protection of human rights, as it seems that such a practice would destroy the international society as the society of independent states, whereas it is the latter that sustain and execute the former.

The affirmation of the first two principles that allows Walzer to define what an aggression is (proposition three) and from that to set the only condition for justifying a war (propositions 3&4). According to Walzer, "3: *Any use of force or imminent threat of force by one state against the political sovereignty or territorial integrity of another constitutes aggression and is a criminal act.*" [126] Because aggression is a crime, it "4. *justifies two kinds of violent*

[123] Ibid., 61.
[124] Ibid.
[125] Ibid.
[126] Ibid., 62.

response: a war of self-defense by the victim and a war of law enforcement by the victim and any other member of international society."[127] This criterion means that war is first justified as a defensive war, and from it Walzer deduces the sole reason for waging war. "5. *Nothing but aggression can justify war*."[128] Walzer stresses that aggression is the only reason to wage a war because the "purpose is to limit the occasion of war."[129] Therefore, "there must actually have been a wrong, and it must actually have been received (or its receipt must be, as it were, only minutes away)."[130] Consequently, he rejects other reasons that might be argued to justify a war, such as ideological reasons. "Nothing else warrants the use of force in international society—above all, not any difference of religion or politics. Domestic heresy and injustice are never actionable in the world of states: hence, again, the principle of non-intervention."[131] That is why he rejects "regime change" as a just cause for war. He states,

> According to the just war paradigm, resistance to aggression stops with the military defeat of the aggressor. After that, presumably, there is a negotiated peace, and in the course of the negotiations, the victims of aggression and their allies may legitimately look for material reparations and political guarantees against any future attack, but regime change is not part of the paradigm. It is a feature of just war theory in its classic formulations that aggression is regarded as the criminal policy of a government, and not as the policy of a criminal government—let alone a criminal system of government.[132]

Some pages later he adds, "I do not believe that regime change, by itself, can be a just cause of war. When we act in the world, and especially when we act militarily, we must respond to 'the evil that men do,' which is best read as 'the evil that they are doing,' and not the evil that they are capable of doing or have done in the past."[133] Again, one wonders how it can be possible to justify humanitarian intervention from this point of view, if domestic injustice cannot be the reason for war in a world society. The last proposition is that "6. *once the aggressor state has*

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[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid. , x
[133]. Ibid., xiii.

been militarily repulsed, it can also be punished."[134] This punishment of aggression would be the version of the medieval punitive war that was justified by just war theory. But for Walzer, it comes as a consequence of defensive war in order "to prevent war."[135]

Compared to the classical just war theory as it has been examined above, Walzer reduces it, inasmuch as he only accepts the defensive war that was so obvious for the medieval writers, because it was justified by natural law. From a natural law premise, only the offensive war was problematic, but now it is completely banned by this contemporary version of the just war theory. It is therefore understandable that Walzer does not go through other requirements as did the Thomistic tradition. Moreover, Walzer works out his theory in the context of a positive international law paradigm, whose core element is a territorially and politically sovereign state, in charge of guaranteeing individual rights. Hence the conflict between holding these values and the protection of human rights. As Johnson aptly observes, "if we want the triumph of an international order in which protection of human rights justifies the interventionary use of armed force by third parties, then we need to be aware that it is also the protection of human rights that lies behind the system of international order that has produced a conception of sovereignty as territorial integrity, so that any armed intervention is by definition aggression that may be fought against."[136] Thus, it remains to see how Walzer reconciles his *just ad bellum* with humanitarian intervention.

Although Walzer holds strongly on non-intervention, following John S. Mill, he concedes that there might be some instances in which boundary crossing is required, "but they… don't

[134] Ibid. 61.
[135] Ibid., 63.
[136] Johnson, "Religion", p; 12-3.

arise in every case of domestic tyranny."[137] He recognizes that "the ban on boundary crossing is not absolute,"[138] and identifies

> three sorts of cases where it does not seem to serve the purposes the purposes for which it was established:
>
> -when a particular set of boundaries clearly contains two or more political communities, one of which is already engaged in large scale military struggle for independence; that is, when what is at issue is secession or "national liberation;"
>
> -when the boundaries have already been crossed by the armies of a foreign power, even if the crossing has been called for by one of the parties in a civil war, that is, when what is at issue is count-intervention; and
>
> -when the violation of human rights within a set of boundaries is so terrible that it makes talk of community or self-determination or "arduous struggles" seem cynical and irrelevant, that is, in cases of enslavement or massacre.[139]

This third case corresponds to the humanitarian intervention inasmuch as it is about crossing the borders in order to protect egregious violations of human rights without the consent of the state and without it having committed an external aggression. For Walzer, "humanitarian intervention is justified when it is a response (with reasonable expectation of success) to acts 'that shock the moral conscience of human kind'."[140] This is the moral threshold for humanitarian intervention: massacre or enslavement. Walzer observes that, from a legal perspective, it is problematic because the legal paradigm recognizes aggression as the only legitimate cause for waging war. It is even more complicated when it is a unilateral intervention, because "we worry under the cover of humanitarianism, states will come to coerce and dominate their neighbors."[141] According to Walzer, however, since the addressee of humanitarian intervention is the whole humanity and not necessarily certain political leaders or particular political institutions, "morality…is not a bar to unilateral action, so long as there is no immediate

[137] Walzer, ibid., 89.
[138] Ibid.
[139] Ibid., 90.
[140] Ibid. 107.
[141] Ibid., 106.

alternative," as was the Bengali case.[142] In other words, as long as the intervention is about "to rescue peoples threatened with massacre,"[143] unilateral intervention is morally justified.

Walzer uses the same argument to justify regime change, although not as a legitimate cause of war, but rather as a consequence of humanitarian intervention. He asserts that "when a government is engaged in the mass murder of its own people, or some subgroup of its own people, then any foreign state or coalition of states that sends an army across the border to stop the killing is also going to have to replace the government or at least, to begin the process of replacement."[144] And later he adds, "just wars and humanitarian interventions will often be an occasion for forcible and justifiable democratization—and that will sometimes require an attack upon tradition hierarchies and customary practices: The exclusion of women from the political sphere is an obvious example."[145] Put otherwise, humanitarian intervention whose main aim is to rescue threatened people of massacre or enslavement, opens a door to forcible political and cultural changes.

This seems contrary to what he had said earlier that "the intervening forces have a mandate for political, but not for cultural, transformation."[146] It is true that Walzer cautions that "an authoritarian regime that is capable of mass murder but not engaged in mass murder is not liable to military attack and political reconstruction."[147] Nonetheless, he acknowledges that "it is not hard to find examples"[148] of using humanitarianism to dominate the neighbor, as the Cuban case—that he mentions—illustrates it. In this context, what are the moral warrants that his

[142] Ibid., 107.
[143] Ibid., 108.
[144] Ibid., x.
[145] Ibid., xi.
[146] Ibid.
[147] Ibid., x.
[148] Ibid., 106.

argument offers to quench such fears? In case there are none, isn't it legitimate to fear that humanitarian intervention is going to be used as a way of spreading the liberal democratic culture on the non-liberal ones? Moreover, such an attitude brings us back to the cultural hierarchy whereby one assumes some cultural values superior to others. Otherwise, what would be the moral reasons for using humanitarian intervention in order to forcefully impose democratization and demolish traditional customs, unless one assumes that liberal democracy is better than any other political ideology? Walzer himself acknowledges it, when he asserts that "genuine democracies have not engaged in the mass murder of their own citizens (even if their record abroad is less satisfactory)."[149] Leaving aside the meaning of "genuine democracies," perhaps that their "less satisfactory" behavior abroad vis-à-vis the citizens of non-genuine-democracies is the reason why the latter are suspicious of this moral leeway that Walzer accords to the former. In any case, the possibility of using humanitarian intervention for neocolonial and imperialistic goals is a real danger to the moral argument of humanitarian intervention.

At the end of this section, except for Thomas Aquinas, all other significant writers in the just war theory tradition justify a possibility of humanitarian intervention which pertains to colonial contexts or "the cultural difference"—to use Anghie's words, or sounds like a neocolonial project. That seems to justify the fears of those who think it is so. The next section examines whether this moral justification of humanitarian intervention finds a legal basis in international law.

[149] Ibid., xi.

2.2. Humanitarian Intervention during the Human Rights Era

I have noted that humanitarian intervention is linked to the emergence of the human rights movement. That is why this section looks at the justification of humanitarian intervention during this period of human rights. To that end, I consider the international law view both before and after the UN Charter, and also to other forms of moral arguments for humanitarian intervention.

a). Humanitarian Intervention in International Law before 1945

After recognizing that humanitarian intervention sprung from the classical just war theory developed during the Middle Age, Chesterman observes that it "achieved its most comprehensive and widely publicized form in the work in of the Protestant Hollander Hugo Grotius."[150] Grotius is also recognized as the modern origin of international law. Hence, Grotius's theory follows the just war theory in which he distinguishes private from public wars, although they have the same cause,[151] which is an inflicted injury. According to Grotius, "there is no other *reasonable* Cause of making War, but an *Injury* received."[152] In that mode, war is only justified for self-defense, recovery of one's property or for punishing an offense endured,[153] and kings are the legitimate authorities to punish. Grotius, however, expands the jurisdiction of kings beyond their own political entities, allowing an early justification of humanitarian intervention in international law. Kings can wage a punishing war to avenge injury inflicted on others and in the name of the law of nature and the international law. In his own words, "we must also know, that Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishment, not only for Injuries committed against themselves, or their Subjects, but likewise,

[150] Chesterman, *Just War*, 9.
[151] Hugo Grotius, *The Rights of War and Peace*, Book II. Ed. by Richard Tuck. (Indianapolis: Liberty Fund, 2005), bk. 392.
[152] Ibid., 393. See also p. 397.
[153] Ibid. bk. II, chap. 1. sec. 2.

for those which do not peculiarly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations."[154] This right of punishing beyond kings' normal jurisdictions is a consequence of the institution of civil society and juridical power, which stripped away the punishing power invested in every person by natural law. Therefore, these civil and juridical powers are in charge of human society "not as they have an Authority over others, but as they are in Subjection to none."[155] For Grotius, since the punishing power "proceeds from the Law of Nature" and not from the civil jurisdiction,[156] any act against natural law can be a legitimate cause to wage a war. "For the same Reason we make no Doubt," he says, "but War may be justly undertaken against those who are inhuman to their Parents," as well as "against those who eat human Flesh."[157] He, however, sets some safeguard so that this theory might not be used to "disguise their Ambition and Covetousness, under a Pretense of civilizing barbarous Nations."[158]

Furthermore, although he dismisses imposition of religion as a just cause for a war,[159] Grotius accepts that "they…who persecute Christians, as such, do make themselves justly obnoxious to Punishment;"[160] inasmuch as "the Christian Religion… is so far from doing any Thing destructive to human Society, that in every Particular it tends to the Advantage of it."[161] Finally, in addition to taking arms on behalf of one's citizens, allies and friends, Grotius asserts that "the Last and most expensive Reason of all for assisting others is that Relation that all

[154] Ibid., 1021.
[155] Ibid.
[156] Ibid., 1023.
[157] Ibid., 1022.
[158] Ibid., 1026. See also note 1 on the same page. One of those safeguards is to clearly distinguish the Law of Nature from a received custom. 1025.
[159] Ibid., 1041-3.
[160] Ibid., 1045.
[161] Ibid., 1044.

Mankind stand in to each other; and this alone is sufficient." [162] In other words, the principle of humanity puts everyone on moral duty to help each other.

Above all, however, Grotius poses the very question of humanitarian intervention as formulated in contemporary terms, when he asks "*Whether we have a just Cause for War with another Prince, in order to relieve his Subject from their Oppression under him*."[163] The founder of modern international law acknowledges that this question is of a different kind from the previous ones, because it assumes the existence of state sovereignty. Indeed, "since the Institution of Civil Societies, the Governors of every State have acquired some peculiar Right over their respective Subjects."[164] What can then be a sufficient reason to override such a right? For Grotius, the situation has to be extreme and unbearable to every human being. As he puts it, "if the Injustice be visible…as no good Man living can approve of, the Right of human Society shall not be therefore excluded."[165] It is clear that the answer is not straightforward, because it is a delicate question, especially that he categorically forbids any rebellious act against a Prince.[166] However, he justifies it as the possibility of someone else doing what another person cannot do. Following his explanation, there is no need of the oppressed subjects to request for help. "The Right of human society" should assume its responsibility wherever a situation of unbearable injustice occurs. In his own words, "whenever the Obstacle to any Action arises from the Person, and not from the Thing, then what one is not allowed to do himself, another may do for him; supposing the Case be such, as one Man may be serviceable in it to another."[167] He gives examples of "a Guardian, or any other," who "may carry on a Suit of Law for a Minor, because

[162] Ibid., 1157.
[163] Ibid., 1159.
[164] Ibid.
[165] Ibid., 1161.
[166] bk. II, chap. 22, sec. 9.
[167] Ibid., 1162.

he is not capable of doing it himself; and any one may without an Order or Commission plead for a Person absent."[168] One has to underline that the incapacity at issue here is not a physical but a moral one, because for Grotius, subjects are never morally justified to raise arms against their prince.

Following this reading, it is more than evident that for Grotius, state sovereignty is not absolute and therefore boundary crossing may be justified in the name of natural law and law of nations, for helping others (king's subjects, allies, friends or anybody else), and for humanitarian reasons.

However, all international lawyers who followed him did not embrace Grotius's views. One of them to strongly oppose any interference with state sovereignty was Emer de Vattel. For Vattel, sovereignty means independence from external interference[169] and it is the source of security and tranquility among nations. The latter being equal, "the natural society cannot subsist, unless the natural rights of each be duly respected."[170] Later he adds, "the laws of natural society are of such importance to the safety of all states, that, if the custom once prevailed of trampling them under foot, no nation could flatter herself with the hope of preserving her national existence, and enjoying domestic tranquility, however attentive to pursue every measure dictated by the most consummate prudence, justice, and moderation."[171] In other words, morality alone would not be enough to preserve international peace and security, once the non-

[168] Ibid.
[169] In his own words, "every nation is free, independent, and sole arbitress of her own actions." See Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*. Ed. by Béla Kapossy and Richard Whatmore. (Indianapolis: Liberty Fund, 2008), 266.
[170] Ibid., 75.
[171] Ibid., 76. Vattel comes back over and over it again through his work. See for instance, 290; 292, etc.

interference principle is not observed. That is why for Vattel, it is the cornerstone of the international system.

Although states are free and independent from each other, they owe each other an imperfect duty of mutual help, according to the possibility of each state, but never by force. Otherwise it opens the door to imperial goals, like "those ambitious Europeans who attacked the American nations, and subjected them to their greedy dominion, in order, as they pretended, to civilize them, and cause them to be instructed in the true religion,—those usurpers… grounded themselves on a pretext equally unjust and ridiculous."[172] It is in that regard that he criticizes Grotius's view that a state can intervene to help in other states' internal matters, finding "strange to hear the learned and judicious Grotius assert, that a sovereign may justly take up arms and chastise nations which are guilty of enormous transgressions of the law of nature."[173] Vattel wonders, "Could it escape Grotius, that, notwithstanding all the precautions added by him… his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless Pretext?"[174] He then gives the example of "Mahomet and his successors" who "have desolated and subdued Asia, to avenge the indignity done to the unity of Godhead; all whom they termed associators or idolaters fell victims to their devout fury."[175]

To avoid the debacle of international security and stability and to bar the route to imperialist ambitions, Vattel affirms a very strong statist model, without any moral right to violate it. He states,

> The sovereign is he to whom the nation has instructed the empire, and the care of the government: she has invested him with her rights; she alone is directly interested in the manner in which the conductor she has chosen makes use of his power. It does not then belong to any foreign power to take cognizance of the

[172] Ibid., 265.
[173] Ibid.
[174] Ibid.
[175] Ibid.

> administration of that sovereign, to set himself up for a judge of his conduct, and to oblige him to alter it. If he loads his subjects with taxes, and if he treats them with severity, the nation alone is concerned in the business; and no other is called upon to oblige him to amend his conduct, and follow more wise and equitable maxims.[176]

In that respect, any state that mingles in another's business is considered enemy and it shall be resisted. Even under treaties, the right of non-interference "cannot, in an affair of so delicate a nature as that of government, be extended beyond the clear and express terms of the treaties. In every other case a sovereign has a right to treat those as enemies, who attempt to interfere in his domestic affairs otherwise than by their good offices."[177] There is a categorical prohibition of interfering with state's domestic sovereignty. But what if, one would ask, a case of humanitarian intervention occurs, whereby a prince violates fundamental laws and creates a situation of unbearable injustice—to paraphrase Grotius? What is it to be done for the persecuted, for instance religious groups?

Vattel recognizes that such situations might happen and in such cases a state can come to help the oppressed party, but only when there is a demand. As he states, "if the prince, by violating the fundamental laws, gives his subjects a legal right to resist him,—if tyranny becoming insupportable obliges the nation to rise in their own defense,—every foreign power has a right to succour an oppressed people who implore their assistance."[178] It is the same case when there is a religious persecution.[179] In other words, Vattel holds his principle of non-interference even when there is tyranny; foreign states being allowed to intervene only on request, especially that he considers "a violation of the law of nations to invite those subjects to

[176] Ibid., 290.
[177] Ibid., 292.
[178] Ibid., 290.
[179] Ibid., 295.

revolt who actually pay obedience to their sovereign, though they complain of his government."[180]

If this reading is correct, then one has to disagree with Abiew that "authorities on international law considered humanitarian intervention to be in conformity with natural law."[181] For, while there is a case for humanitarian intervention in Grotius's writings, it is not so obvious with Vattel. For him, it would rather be what Johnson called "an intervention by invitation" instead of humanitarian intervention. Vattel himself, however, does not lack ambiguity. In one paragraph, he notes that "as to those monsters who, under the title of sovereigns, render themselves the scourges and horror of the human race, they are savage beasts, whom every brave man may justly exterminate from the face of the earth." He does not elaborate on this, except referring to Hercules who delivered "the world from an Antaeus, a Busiris, and a Diomede,"[182] with a footnote indicating that they were kings "known for owning man-eating horses."[183] One wonders what would be the foundation of this assertion except the natural law for which he had criticized Grotius. In addition, he uses the same example as did Grotius.[184] Perhaps the best way to understand him is through Jennifer Pitts's comment that "Vattel…was deeply critical of civilizing interventions and of the presumptions of outsiders to interfere in the efforts of nations to direct their common life together, even as he upheld obligations of universal concern."[185] It might be also the reason why one would not run to him for a ready justification of humanitarian intervention, as one would do with Grotius.

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[180] Ibid., 291.
[181] Abiew, *The Evolution*, 36.
[182] Vattel, Ibid., 291.
[183] Note 18, at 291.
[184] After affirming that kings have a right to avenge every injury beyond their jurisdiction, Grotius writes: "upon this Account it is, that *Hercules* is so highly extolled by the Ancients, for having freed the Earth of *Antaeus, Busiris, Diomedes* and such like Tyrants…" ibid., 1021.
[185] Jennifer Pitts, "Intervention and sovereign equality: legacies of Vattel" in Recchia and Welch, ibid., 147-8.

The same difficulty of accounting humanitarian intervention in international law before the UN Charter is observed in the legal positivism and also in state practice. Fonteyne notes that Arntz was a proponent of humanitarian intervention, arguing that

> When a government, even acting within the limits of its rights of sovereignty, violates the rights of humanity, either by measures contrary to the interests of other States, or by excessive injustice or brutality which seriously injure our morals and civilization, the right of intervention is legitimate. For, however worthy of respect the rights of sovereignty and independence of states may be, there is something even more worthy of respect, namely the law of humanity, or of human *society*, that must not be violated. In the same way as within the State freedom of *individual* is and must be restricted by the law and the morals of the society, the individual freedom of *States* must be limited by the law of human society.[186]

From the classic liberal understanding of state, its sovereignty is internally limited by individual rights and liberties, while it is externally under the law of humanity. At the same time, however, other international lawyers contended that there was no such a thing as a right of humanitarian intervention. One of them was the French publicist Pradier-Fodéré who held that

> This [humanitarian] intervention is illegal because it constitutes an infringement upon the independence of States, because the powers that are not directly, immediately affected by these inhuman acts are not entitled to intervene. If the inhuman acts are committed against nationals of the country where they are committed, the powers are totally disinterested. The acts of inhumanity, however condemnable they may be, as long as they do not affect nor threaten the rights of other States, do not provide the latter with a basis for lawful intervention, as no State can stand up in judgment of the conduct of others. As long as they do not infringe upon the right of other powers or of their subjects, they remain the sole business of the nationals of the countries where they are committed.[187]

The same positions were found in Italian[188] and German[189] schools. In other words, even in the positivist international law, the right of human intervention was not unanimously asserted.

As to the state practice before the UN Charter, the study edited by Simms and Trim documents all interventions in Europe since the sixteenth century, in order to show that the idea of humanitarian intervention is not as new as it appears. As early as in the sixteen century,

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[186] Fonteyne, ibid., 220. He, however, adds an important nuance. Those who defended humanitarian intervention limited it to the non-civilized nations. In his words, "more common, however, was the notion that the right to intervene for humanitarian motives was to be restricted to the relationship between 'civilized' and 'non-civilized' nations." 219, 227.
[187] Ibid., 216.
[188] Ibid., 215.
[189] Ibid., 217.

"Elizabeth I (r. 1558-1603) intervened in France against its Vallois monarchs and the Netherlands against its Spanish Habsburg rulers, on multiple occasions."[190] Similar actions were carried by the French Cardinal Richelieu in Germany and by Protestant princes who came to the help of minority Protestants in Catholic kingdoms.[191] In brief, as Brendan Simms puts it, "the historical reality is that states had always intervened in each other's domestic affairs, either to secure strategic advantage, or to protect the rights of co-religionists, or the political liberties of the populations, or for the three reasons combined."[192]

Following this observation, during this period, humanitarian motives were mixed with strategic, political interests, and religious motivations. That is why for Fonteyne, there were no humanitarian interventions until the nineteenth century, with the European powers intervening in the Ottoman Empire. According to him, "despite such early precedents as the Crusades, several of which could be considered humanitarian interventions, or the 16th and 17th century religious war, it seems that the institution of humanitarian intervention is in fact largely a creation of the latter part of the 19th century."[193] He adds, "this is certainly true so far as State practice *explicitly* referring to this justification is concerned. Earlier instances of humanitarian intervention are too closely tied with a feeling of religious solidarity to allow them to be classified as genuinely humanitarian."[194] Furthermore, the same end of the nineteenth century coincides with the European expansion, using humanitarian pretexts to colonize the non-Western world. Fonteyne

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[190] Trim, "Intervention in early modern Europe" in Simms and Trim, ibid., 41. In the same volume, see also Rodogno, "The European powers' intervention in Macedonia, 1903-1908: an instance of humanitarian intervention?"
[191] Andrew C. Thompson, "The Protestant interest and the history of humanitarian intervention, c. 1685-c. 1756" in Simms and Trim, ibid.
[192] Brendan Simms, "'A false principle in the Law of Nations': Burke, State Sovereignty, [German] Liberty, and Intervention in the Age of Westphalia" in Simms and Trim, ibid., 91.
[193] Fonteyne, ibid., 205-6.
[194] Ibid. 206.

rightly excludes such instances from being humanitarian –contrary to Abiew![195] —because they "seem to lack either a clear humanitarian motive or the highly coercive character of an armed intervention."[196] That is why, for him, "the analysis of pre-Charter precedents of forceful humanitarian intervention must be restricted to the notorious cases in Eastern Europe."[197] From this analysis, he wants to ground the existence of the right of humanitarian intervention under customary international law.[198] The consequence, however, is problematic: all the five cases that are considered to be "genuinely humanitarian"[199] are instances where European powers intervened in the Ottoman Empire. One then wonders whether it is imperialist motives that are behind the so-called genuine humanitarian intervention rather than humanitarian reasons, inasmuch as where the Ottoman Empire withdrew the European influence grew, such as in Middle East. Some scholars concur to this point. Wheeler notes that

> Frank and Rodley make three important rebuttals: first, they point out that the intervention of the nineteenth century Concert powers in the internal affairs of the Ottoman Empire have to be seen in the context of 'relations between unequal states…in which "civilized" states exercise *de facto* tutorial rights over "uncivilized" ones'… Secondly, they argue that intervention was legitimated only when it was collectively authorized by the Concert of Europe; individual state action was not permissible…Finally, Frank and Rodley question how far the interventions in Turkey's internal affairs were motivated by humanitarian considerations.[200]

Facing such challenges, even a proponent of the solidarist view of the English school, such as Wheeler, has to acknowledge that "the key question is not the purity of motives, but the relationship between motives and humanitarian outcomes,"[201] confirming Chesterman's remark

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[195] Abiew, *The Evolution*, 53-4.
[196] Ibid.
[197] Ibid., 206-7. In the footsteps of his Master Brownlie, Chesterman actually contends that maybe the only case of humanitarian intervention in the nineteenth century is the Syrian case. See his *Just War*, 33.
[198] Richard Lillich does the same exercise and concludes that before the United Nations Charter, "the doctrine [of humanitarian intervention] appears to have been so clearly established under customary international law that only its limits and not its existence is subject to debate." See Richard B. Lillich, "Intervention to Protect Human Rights" in *McGill Law Journal*, Vol. 15, No 2, 1969, 210.
[199] Intervention in Greece (1827-1830), intervention in Syria (1860-1861), intervention in the Island of Crete (1866-1868), intervention in Bosnia, Herzegovina, and Bulgaria (1876-1878), intervention in Macedonia (1903-1908; 1912-1913), ibid., 207-13. See also Abiew, *The Evolution*, 48-53.
[200] Wheeler, *Saving Strangers*, 46.
[201] Ibid., 47.

that "an analysis of the pre-Charter state practice illustrates the paucity of evidence of a general right of humanitarian intervention in customary international law."[202] This, once more, shows that even from state practice, the right of humanitarian intervention was not unanimously affirmed.

During the same period, however, humanitarian intervention received a strong moral support from John Stuart Mill. Mill is, in principle, against an aggressive war for ideology. However, he recognizes that there might be cases where the principle of non-interference can be infringed. In his words, "we have heard something lately about being willing to go to war for an idea. To go to war for an idea, if the war is aggressive, not defensive, is as criminal as to go to war for territory or revenue; for it is little justifiable to force our ideas on other people, as to compel them to submit to our will in any other respect."[203] He hastens to add, "but there assuredly are cases in which it is allowable to go to war, without having been ourselves attacked, or threatened with attack; and it is very important that nations should make up their minds in time, as to what these cases are."[204] Mill distinguishes three cases which deserve attention with regards to the principle of non-interference: taking part in a civil war, helping a struggling people for freedom, and the regime change in a country. Concerning the intervention in internal civil war, Mill believes that "intervention of this kind has been repeatedly practiced… that its legitimacy may be considered to have passed into a maxim of what is called international law."[205] That is why, for him, only the question of people fighting for freedom deserves discussion, whose answer will depend on whether the oppressing power is native or foreign powers. If it is a native power, Mill upholds a strong non-intervention because people should

[202] Chesterman, *Just War*, 24.
[203] John Stuart Mill, *A Few Words on Non-Intervention* in *New England Review*, Vol. 27, No 3, 2006, 258.
[204] Ibid.
[205] Ibid., 261.

fight for their own freedom. For Mill, "No people ever was and remained free but because it was determined to be so; because neither its rulers nor any other party in the nation could compel it to be otherwise."[206] Commenting on this position, Walzer notes that "Mill generally writes as if he believes that citizens get the government they deserve, or, at least, the government for which they are 'fit'."[207] And that is exactly Mill's position. "If a people…does not value it sufficiently to fight for it, and maintain it against any force which can be mustered **within** the country, even by those who have the command of the public revenue, it is only a question in how few years or months that people will be enslaved."[208] In other words, when the struggle is internal, there should be a restraint on intervention unless it is for self-defense.

It is different when the oppression is from a foreign power or is a native tyranny sustained by foreign arms. In this case, not only is the intervention legitimate, but also necessary, "the doctrine of non-intervention, to a legitimate principle of morality, must be accepted by all governments. The despots must consent to be bound by it as well as the free States. Unless they do, the profession of it by free countries comes but to this miserable issue, that the wrong side may help the wrong, but the right must not help the right."[209] That is why, in the case at stake, "to assist a people thus kept down, is not to disturb the balance of forces on which the permanent maintenance of freedom in a country depends, but to redress that balance when it is already unfairly and violently disturbed."[210]

From this reading, one infers that Mill upholds the principle of non-intervention save for helping a people fighting for its freedom against a foreign power and for humanitarian reasons in

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[206] Ibid., 262.
[207] Walzer, ibid., 88.
[208] Mill, ibid., 262.
[209] Ibid., 263.
[210] Ibid.

a civil war "in which the contending parties are so equally balanced that there is no probability of a speedy issue; or if there is, the victorious side cannot hope to keep down the vanquished but by severities repugnant to humanity, and injurious to the permanent welfare of the country. In this exceptional case it seems now to be an admitted doctrine, that the neighbouring nations, or one powerful neighbour with the acquiescence of the rest, are warranted in demanding that the contest shall cease, and a reconciliation take place on equitable terms of compromise."[211]

One important point, however, underlines Mill's theory. The principle of non-intervention is based on his distinction between civilized nations and barbarian ones, and the two categories are not under the same regime. His theory is only for "civilized peoples, members of an equal community of nations, like the Christian Europe."[212] And "to suppose that the same international customs and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error, and one which no statesman can fall into, however it may be with those who, from a safe and unresponsible position, criticise statesman."[213] The reason he gives is that, on the one hand, there cannot be reciprocity between the civilized and the barbarians; on the other hand, the latter are still on the stage whereby they should be conquered and kept under foreign subjection. That is why, for Mill, "a violation of great principles of morality it may easily be; but barbarians have no rights as a *nation*, except a right to such treatment as may, at the earliest possible period, fit them for becoming one."[214] In such a context, since "the barbarians" do not even have a right to be a nation and are not reciprocally recognized, the principle of non-interference does not apply and "a civilized government cannot help having barbarous neighbours… after a longer or shorter

[211] Ibid., 261.
[212] Ibid., 260.
[213] Ibid. 259.
[214] Ibid.

interval of forbearance, it either finds itself obliged to conquer them, or to assert so much authority over them…"[215]

Mill abolishes non-intervention and institutes conquest and colonialism for the non-European peoples, and in this context, the question of humanitarian intervention does not even arise, because no actions injurious to humanity can be committed against them! In this sense, Michael Doyle's observation that "today, Mill's most controversial case of disregard would be benign colonialism"[216] is a euphemism.

To sum up, before the UN Charter right of humanitarian intervention was not unanimously held both from natural law authorities and the positivist legal lawyers as well as in state practice . When it was possible to justify it—as with Grotius—there was a risk of opening a door to colonialism, and even the moral argument developed by J. S. Mill for humanitarian intervention turned out to be an apology for hard colonialism. This conclusion seems to back up those who are afraid that humanitarian intervention might be another form of neocolonialism. But before getting there, let look at how it is in the period following the UN Charter.

b). Humanitarian Intervention since the UN Charter

As I have noted, the UN Charter authorizes the use of force for ensuring peace and security but not for the protection of human rights, although they are part of its purposes. "The Charter clearly privileges peace over dignity…protection of human rights is limited to the more or less hortatory provision of Articles 55 and 56."[217] However, international lawyers do not agree

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[215] Ibid.

[216] Michael Doyle, "J. S. Mill on nonintervention and intervention" in Recchia and Welch, ibid., 282. Elsewhere he talks about "Mill's educative imperialism" different from "the paternalism of his father, James Mill, and other imperial liberals." See Doyle, "A few words on Mill, Walzer and Nonintervention" in *Ethics and International Affairs*, 2010, 365.

[217] Chesterman, *Just War*, 45. Sir Adam Roberts holds the same view that "the Charter is widely seen as fundamentally non-interventionist in its approach. Taken as a whole the Charter essentially limits the rights of states to use force internationally to cases of, first, individual or collective self-defence, and second, assistance in UN-

on the interpretation of the Charter's art. 2(4), and 2(7) which prescribe the non-interference. Some affirm that it does not prohibit humanitarian intervention while others hold the contrary opinion.

One of the strong voices interpreting art 2(4) in favor of humanitarian interpretation is Fernando Tesón. Defining humanitarian intervention in a liberal sense[218] as "the use of international force to help victims of government-directed human rights deprivations,"[219] he argues that art. 2(4) does not prohibit humanitarian intervention if one interprets it through his ethical theory of international law, rather than the positivist one. According to his reading of the "language and original intent," art. 2(4) does not prohibit the use of force. "The article requires states to refrain from using force only when that is against the territorial integrity and political independence of other states, or 'in any other manner inconsistent with the purposes of the United Nations'."[220] Following his interpretation, the words of this article do not prohibit every use of force across borders; rather they "seem to suggest that the drafters established three target prohibitions. The use of force is banned: a) when it impairs the territorial integrity of the target state; b) when it affects its political independence; or c) when it is otherwise against the purposes of the United Nations."[221] Now, since in his understanding, "a genuine humanitarian

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authorized or controlled military operations. Nowhere does the Charter address directly the question of humanitarian intervention, whether under UN auspices or by states acting independently." He, however, recognizes that "the Charter does set forth a number of purposes and rules, which are germane to humanitarian intervention." He adds, "some of these can be in conflict with others." See his "The United Nations and Humanitarian Intervention" in Welch, ed., ibid., 72.

[218] Jonathan Graubart calls this trend "pragmatic liberal interventionism." See his "R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests" in *Human Rights Quarterly*, Vol. 35, No. 1, 2013.

[219] Tesón, *Humanitarian Intervention*, 128.

[220] Ibid., 130.

[221] Ibid. 131.

understanding does not result in territorial conquest or political subjection,"[222] his first two conditions are verified.

However, Chesterman responds to this conclusion that any interpretation that claims that the use of force does not violate territorial integrity and political independence, "runs contrary to numerous statements by the General Assembly and the International Court of Justice (ICJ) concerning the meaning of non-intervention, and is inconsistent with the practice of the Security Council, which has on numerous occasions condemned and declared illegal the unauthorized use of force notwithstanding its temporary nature."[223] Thus, there is discordance here.

As for (c), Tesón notes that it does not need discussion because the promotion of human rights is part of the Charter's purposes.[224] "Therefore, the use of force to remedy serious human rights deprivations, far from being 'against the purposes' of the U.N. Charter, serves one of its main purposes. Humanitarian intervention is in accordance with one of the fundamental purposes of the U.N. Charter. Consequently it is a distortion to argue that humanitarian intervention is prohibited by article 2(4)."[225] Again, Chesterman replies that an interpretation of the art. 1(3) of the U.N. Charter "as in any way justifying a right of unilateral humanitarian intervention would stretch even the Orwellian school of interpretation."[226] In other words, even from this point of view, humanitarian intervention is not legally justified for all writers.

But Tesón does not limit his exploration on the original intent only. He also examines the *Travaux préparatoires* and the Nuremberg trials, and concludes that the textual reading of original intent cannot respond to questions about humanitarian intervention doctrine. According

[222] Ibid.
[223] Chesterman, Just War, 52.
[224] Art. 1(3).
[225] Tesón, *Humanitarian Intervention*, 131.
[226] Chesterman, *Just War*, 53. He still maintains, though, that "the human rights articles of the Charter opened the door to a much more innovative development." Ibid., 137.

to him, it is rather to be determined through customary international law, "and that can only be determined by examining state practice in the light of an appropriate substantive moral theory."[227] Writing in 1988, he considers four cases: the Tanzanian intervention in Uganda in 1979, The French Intervention in Central Africa 1979, the intervention of India in East Pakistan, 1971 and the intervention of the United States in Grenada, 1983.[228] For Tesón, these interventions set a precedent in customary international law, that individual human rights have priority over the inviolability of state sovereignty. Any government that violates those rights jeopardizes its claim to sovereignty and by the very fact, justifies a right of humanitarian intervention to rescue those endangered by the government. Hence, "the four precedents…stand for the proposition that governments owe their legitimacy to something more fundamental than sheer political power. Governments exist to make sure that human rights are respected. If we discount rhetoric, the international community has reacted eloquently toward these apparent breaches of international law. It is no longer possible to ignore these cases and dismiss them as not counting in the formation of customary rules."[229]

Tesón is not alone to conclude to the existence of a right of humanitarian intervention under the customary international law. After studying many more cases of state practice, Abiew is convinced that during the cold war, "analysis of state practice…showed the existence of the principle of humanitarian intervention in a situation of egregious violations of human rights. The examples of state practice discussed here demonstrate that states believe the right of unilateral humanitarian intervention is available to them as an option grounded in either the Charter or

[227] Tesón, *Humanitarian Intervention* 136.
[228] Ibid., 159-200. One notes that he does not mention the Vietnamese intervention in Cambodia in 1978, perhaps because Vietnam was not a liberal democracy!
[229] Ibid., 200.

customary international law."[230] This spirit was reinforced by the end of the Cold War, especially with the international community agreeing to intervene in Somalia in 1992. According to Catherine Lu, "with the end of the Cold war, some western leaders began to embrace the idea of humanitarian intervention…The appeal of the idea, however, was not confined to western leaders. In supporting United Nations Security Council resolution 794 authorizing the use of force in Somalia in 1992, for example, various African ambassadors talked of 'the universal conscience' being aroused by the desperate plight of Somalis."[231]

Yet other scholars take a more circumspect position. For instance, Sean Murphy studies ten cases from the Hungarian case in 1956 to the Panama's one in 1989-90, and suggests that in order to assert the right of humanitarian intervention, one has to go beyond states' justifications and look at the attitude of the international community.

> If the reason for the intervention was humanitarian and criticism by the international community was muted or nonexistent, the incident may stand as an example of acceptance or tolerance by the international community of unilateral humanitarian intervention under the UN Charter. If the international community was highly critical of the intervention, then even if the intervening state's primary reason for intervening was to protect human rights, it cannot be said that the incident supports the legality of unilateral humanitarian intervention under the UN Charter.[232]

The problem, however, is that "the action of the intervening state in many of these cases was censured by third states and the United Nations."[233] Chesterman proceeds in the same sense. Drawing from his study of even more cases from the Belgian one in 1960 to the collective intervention in the 90s, Chesterman opposes Tesón's conclusion of the existence of a

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[230] Abiew, *The Evolution*, 133.
[231] Catherine Lu, "Humanitarian Intervention: Moral Ambition and Political Constraints" in *International Journal*, Vol. 62, No. 4, 2007, p. 943. David Bills is not saying something different when he asserts that "Following the Nuremberg trials and the adoption of the Genocide Convention, various human rights instruments, such as the International Covenant on Civil and Political Rights, came into being that recognized the world community's commitment to affirming certain human rights over a state's claims of non-interference." See David Bills, "International Human Rights and Humanitarian Intervention: The Ramification of the United Nations' Security Council" in *Texas International Law Journal*, Vol. 31, No 107, 1996, 113. It is, however, important to note that every interference does not equal humanitarian intervention as understood here.
[232] Murphy, ibid., 86.
[233] Ibid.

humanitarian intervention right. For him, "it seems clear that writers who claim that state practice provides evidence of a customary international law right of humanitarian intervention grossly overstate their case."[234] Among all those cases, only the East Pakistan (1971), the Uganda (1978-9) and Kampuchea (1978-9) cases are "regarded favorably in retrospect by the international community."[235] Nonetheless, "in none of these cases was humanitarian concerns invoked as a justification for the use of military force."[236] He goes ever further to challenge Murphy's point that if the international community does not oppose the state's action, it condones it and therefore might provide a legal basis under customary international law. For Chesterman, "the fact that certain actions appear to have been tolerated by the international community is an insufficient basis on which to ground a right of humanitarian intervention. It does, however, challenge the bland claim that such actions are illegal."[237]

The result of these different interpretations is that we do not have a unique stand on whether there is a legal right of humanitarian intervention. It then begs the question of looking at moral grounding of those who defend humanitarian intervention. While there are many schools on this subject —solidarist,[238] consequentialist,[239] just to mention a few!—many supporters of humanitarian intervention ground their moral argument on the Kantian argument of perfect duty.

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[234] Chesterman, *Just War*, 84.
[235] Ibid.
[236] Ibid. Nigel Rodley also holds the same point of view. As he puts it, "the States that might have expected to invoke it (India, in respect of Bangladesh; Vietnam, in respect of Kampuchea; Tanzania, in respect of Uganda; and the United States itself, in respect of Grenada) have been notably hesitant to do so, at least in their formal legal justifications for their actions." See Nigel S. Rodley, "Human Rights and Humanitarian Intervention: The Case Law of the World Court" in *The International and Comparative Law Quarterly*, Vol. 38, No 2, 1989, 332. Thomas Frank seems to me to offer a balanced view on this question when he writes: "the strict letter of the Charter prohibits humanitarian intervention. In the practice of individual states, regional and mutual-defense organizations, and the U.N. organs, a pattern of exceptions is emerging that conduces to the making of case-by-case judgments in which necessity and common sense have a role in tempering the law, in narrowing the gap between legality and legitimacy, between the letter of the law and its spirit, between normativity and morality." See "Legality and Legitimacy in Humanitarian Intervention" in Nardin and William, Eds., ibid., 154.
[237] Ibid., 86.
[238] See Wheeler, *Saving Strangers*.
[239] Heinze, ibid.

One of them is Kok-Chor Tan who defends the duty to protect by the fact of the universality of human rights. For this author, "the universality of human rights means that state borders provide no immunity from international moral actions when the violations of rights within a country are severe enough."[240] According to this view, the universality of human rights overrides the state sovereignty, but what makes the humanitarian intervention permissible is their grievous violation. He then builds on Shue's[241] construction of the basic right to protect which generates the duty to protect. In Tan's words, "people whose rights are being violated have a right to protection, and this right will require that others *act* in the appropriate ways to provide the protection."[242] Consequently, "the force of human rights can…impose a duty on the part of third parties to intervene to combat rights abuses where necessary."[243] Such a duty to protect is equivalent to humanitarian intervention. This duty to protect, however, "is at best an imperfect one—it is a duty that cannot be morally demanded of any particular state."[244]

This is not the view of Carla Bagnoli. Also arguing from the Kantian perspective, Bagnoli contends that humanitarian intervention is a perfect duty, that is, "a strict moral duty to intervene when fundamental human rights are violated."[245] This duty aims at protecting the victims as well as to punish the offenders. She grounds her argument on the Kantian concept of humanity, showing that human rights impose on others a perfect duty because they contribute to being an autonomous person. According to her, "resisting the violation of basic human rights is not simply a duty of charity, or something that one may or may not choose to perform. It is a

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[240] Tan, Ibid., 90.
[241] Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. (Princeton: Princeton University Press, 1980).
[242] Tan, ibid., 91.
[243] Ibid.
[244] Ibid., 95.
[245] Carla Bagnoli, "Humanitarian Intervention as a Perfect Duty: A Kantian Argument" in Nardin and Willimans, ibid., 118.

perfect duty whose performance is morally obligatory. It is a duty that proceeds from respect for humanity. Human rights, such as rights to life, liberty, personal safety, social security, and membership or recognition are necessary for expressing who are and exercising our rational agency." [246] The consequence of this conception is that this protection does not need local assent to be enforced. As Bagnoli argues, "to say that protecting human rights is a moral matter is to say that human rights are universally binding, and therefore they are enforceable in those polities that do not recognize them. They have a normative force even when they are not supported locally."[247] If human rights are to be enforced even where they are not recognized or are locally supported, how can such enforcement escape from being seen as an invasion? Moreover, Bagnoli contends that humanitarian intervention as a perfect duty does not require the identification of the agent who is to perform it. But this is to abstract from an important component of humanitarian intervention which relies, in the last resort, on those who carry it out—especially that she assigns it a protective and punitive role!

Tesón takes up this challenge, founding also his theory on the Kantian principle of duty,[248] but also developing a political philosophy which yields an international law. His political philosophy is that states play an instrumental role of protecting human rights,[249] and that is why they can enjoy their sovereignty. But if they fail their task, especially if they engage in violation of these rights, they forfeit their legitimacy to be protected by international law, and humanitarian intervention is morally and legally justified. Tesón, however, goes further to determine that only liberal democracies are the ones responsible for taking up this role of humanitarian intervention in the name of human rights. As he puts it, "while the presumption

[246] Ibid. 125.
[247] Ibid., 121.
[248] Tesón, "The liberal case", 97.
[249] Tesón, "Collective Humanitarian Intervention" in *Michigan Journal of International Law*, Vol. 17, Winter 1996, 342. See also his *Humanitarian Intervention*, chap. 6.

should be that the oppressed people wish to be liberated from tyrants, democratic governments must make sure as best they can before they decide to intervene that such is indeed the case."[250] In another occurrence, he says that "when intervening for humanitarian reasons, it is preferable to have the support of the community of democratic states."[251] And he morally justifies illegal intervention, as long as it is executed by democracies. "Sometimes," he says, "unauthorized intervention by democratic governments is morally justified."[252] At the same time, he guarantees them immunity from intervention: "strict nonintervention is justified only among states where basic civil and political rights are respected—where liberty is given priority."[253] In other words, only liberal governments enjoy their sovereignty and we are back in the hierarchical world society of unequal states, with privileges for liberal governments. With such a justification of humanitarian intervention, those who suspect neocolonialism behind it stand on a solid ground. Their suspicion is even confirmed when, in such an unequal moral context, Tesón asserts that "the notion that states could intervene to uphold 'a minimum degree of civilization' has now matured: The 'uncivilized' of yesterday are the tyrants of today."[254] The message is passed over: the civilizing mission is not finished; it is to be carried through humanitarian intervention. The *white man burden* is transmitted to liberal democracies to uproot all tyrannies—all that are not liberals—in the world so that there might be 'a minimum degree of civilization!' And in that crusade, only civil and political rights count; other rights are of minimum importance!

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[250] Tesón, *Humanitarian Intervention*, 121.
[251] Tesón, "Ending Tyranny", 17.
[252] Ibid. Perhaps that is why he does not list the Kampuchea case as a humanitarian intervention, because Vietnam was not a liberal democracy. Clifford Orwin also holds that "the horror of deposing the Khmer Rouge fell instead to their former allies the Vietnamese Communists, whose motives were less humanitarian than imperial (and who were acting as a proxy for the Soviet Union against China)." Clifford Orwin, "Humanitarian Military Intervention: Wars for the End of History" in *Social Philosophy and Policy Foundation*, 2006, 197-8. See also Donnelly, "Human Rights," 634. One might ask why the same suspicion of imperialism is not valid for democratic governments.
[253] Tesón, *Humanitarian Intervention*, 71.
[254] Ibid., 159.

In this context, there are reasons to worry about humanitarian intervention. But today, there is an emerging norm called Responsibility to Protect. Is it different from humanitarian intervention?

c). Humanitarian intervention and the Responsibility to Protect

The Responsibility to Protect (R2P) is much more linked to the Canadian initiative of establishing an International Commission on Intervention and State Sovereignty (ICISS). But the Canadian government itself was responding to the concerns expressed by Kofi Annan, then UN Secretary General. However, the concept evolved from the scholarship of the Sudanese scholar and diplomat, Francis Deng, when in 1995, he coined the expression "sovereignty as responsibility".[255] It has to be recognized, though, that, while Deng sowed the conceptual seed of R2P, Kofi Annan propelled it into the international arena, and the ICISS gave it the theoretical framework. In 1999, Annan raised the dilemma in his *Two concepts of sovereignty*. On the one hand, he challenges those who hold onto the legality of humanitarian intervention asking, "Leave Kosovo aside for a moment, and think about Rwanda. Imagine for one moment that, in those dark days and hours leading up to the genocide, there had been a coalition of states ready and willing to act in defense of the Tutsi population, but the council had refused or delayed giving the green light. Should such a coalition then have stood idly by while the horror unfolded?"[256] And to those who believe in a humanitarian intervention evolving into a customary norm, Annan asks, "is there not a danger of such intervention undermining the imperfect, yet resilient, security

[255] Sarkir, ibid., 8.

[256] Kofi Annan, "Two Concepts of Sovereignty" in *The Economist*, 18 Sep. 1999, 2. Thomas Pogge argues against Kofi Annan and Thomas Frank that non-intervention in Rwanda was not a problem of international law, but rather of unwilling governments to intervene. In his strong terms, he says, "To be sure, the genocide in Rwanda was real enough, and it was certainly morally intolerable. What is entirely fantastic about Kofi Annan's case is his reference to states willing and able to stop the slaughter but held back by an unreasonable vote or veto in the U.N. Security Council. In the real world, there was only the coalition of the *un*willing: of those who did all they could *not* to get involved in Rwanda, while suppressing any use of the word 'genocide' (in favor of 'chaos' and 'civil war' and finally 'acts of genocide') as long as possible. They were no saviors, willing and able, held back merely by the Charter text." See Thomas Pogge, "Moralizing Humanitarian Intervention" in Nardin and William, ibid., 161.

system created after the second world war, and of setting dangerous precedents for future interventions without a clear criterion to decide who might invoke these precedents and in what circumstances?"[257] He would come back to these challenges during his annual report to the UN General Assembly of 1999 and that is how, in response to them, the Canadian government created the ICISS.[258] The latter produced a report in 2001 which consecrated and popularized the concept as it bore it as a title, *Responsibility to Protect*.[259] In 2005, the outcome document of the World Summit integrated the concept and States endorsed it.[260] In Resolution 1674 on the Protection of Civilians in Armed Conflicts, The Security Council reaffirmed it through the endorsing of paragraphs 138 and 139 of the Outcome Document, "regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against

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[257] Ibid.

[258] Newman, ibid., 188-9. On the evolution of the R2P, see also, Alex Bellamy, "Realizing the Responsibility to Protect" in *International Studies Perspectives*, Vol. 10, 2009, 111; "The Responsibility to Protect and the Problem of Military Intervention" in *International Affairs*, Vol. 84, No 4, 2008, 618-20; Ramesh Thakur and Thomas G. Weiss, "R2P: From Idea to Norm—and Action?" 20. On http://www98.griffith.edu.au/dspace/bitstream/handle/10072/40521/69417_1.pdf?sequence=1, accessed; Weiss, "R2P after 9/11", 744.

[259] ICISS, *Responsibility to Protect*. Report of the International Commission on Intervention and State Sovereignty. December 2001.

[260] In its paragraphs 138-9, it reads, "138. Each individual State has **the responsibility to protect** its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help states to exercise this responsibility and support the United Nations in establishing an early warning capability. 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapter IV and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of **the responsibility to protect** populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts breaks out." Emphasis added. Reproduced in Richard H. Cooper and Juliette Voinov Kohler, The "Responsibility to Protect:" The New Global Moral Compact, 2006, 25. On http://www.kentlaw.edu/faculty/bbrown/classes/HumanrsemFall2008/CourseDocs/12ResptoProtect.pdf. Accessed Dec.1, 2014.

humanity."[261] Today, it has reached regional organizations, as in its Constitutive Act, the African Union, although not using the concept of R2P, puts on the lists of its principles, "the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."[262]

With all these occurrences, the concept seems to have joined world politics and for some, it is an emerging norm in international law.[263] But what is the content of the R2P? What is its relationship with the humanitarian intervention as it has been developed and defended through human rights? Does it escape from the suspicion of conveying neocolonialism? Those are some questions that this section addresses.

The R2P is built on three pillars: the responsibility to prevent, the responsibility to react and the responsibility to rebuild. In the words of the Commission, "this responsibility to protect has three integral and essential components: not just the responsibility to *react* to an actual or apprehended human catastrophe, but the responsibility to *prevent* it, and the responsibility to *rebuild* after the event."[264] The responsibility to prevent covers all the efforts and measures taken to ensure that a state does not fall into a situation calling for forceful intervention. These may include socio-economic programs, analysis of early warning signs and root causes, conflict management and support of local initiatives, diplomatic missions both regionally and internationally. "In some cases, international support for prevention efforts may take the form of

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[261] Par. 4. In Cooper and Kohler, ibid., 27.
[262] Act, Art. 4(h).
[263] For instance, Louise Arbour says, "I wish to state very clearly my view that the responsibility to protect norm is not, as some have suggested, a leap into wishful thinking. Rather, it is anchored in existing law, in institutions and in lessons learned from practice. Its vitality flows from its inherent soundness and justice, as well as from the concept's comparative advantages over formulations of humanitarian intervention." See Louise Arbour, "The Responsibility to Protect as Duty of Care in International Law and Practice" in *Review of International Studies*, Vol. 34, No 3, 2008, 447-8.
[264] ICISS, ibid., 17. One paragraph earlier, it had been asserted that "the responsibility to protect means not just the 'responsibility to react,' but the 'responsibility to prevent' and the 'responsibility to rebuild' as well." Ibid.

inducements; in others, it may involve a willingness to apply tough and perhaps even punitive measures."[265] For instance, preventing root causes might involve "addressing *political* needs," "tackling *economic* deprivation and the lack of economic opportunities;" "strengthening *legal* protections and institutions" and sectorial "reforms to the *military* and other state security service."[266] For the Commission, "intervention should only be considered when prevention fails—and the best way of avoiding intervention is to ensure that it doesn't fail."[267]

Nonetheless, it may happen that the prevention fails and in that case, there is the responsibility to react and this is the heart of the R2P. This responsibility to react implies many sectors such as political, economic and sometimes, use of coercive means. "The 'responsibility to protect'," the *Report* reads, "implies above all else a responsibility to react to situations of compelling need for human protection. When preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required. These coercive measures may include political, economic or judicial measures, and in extreme cases –but only extreme cases –they may also include military action."[268] However, the most important element for the responsibility to react is the military part and that is where the R2P retrieves the question of classical humanitarian intervention. According to the Commission, it has to fulfill six criteria, all that are drawn from the just war tradition. The six elements are: "*right authority, just cause, right intention, last resort, proportional means and reasonable prospects*."[269] The first two are the most important, while the other four are prudential criteria in decision making for intervention.

[265] Ibid., 19.
[266] Ibid., 23.
[267] Ibid., 25.
[268] Ibid., 29.
[269] Ibid., 32.

The just cause constitutes the threshold criteria and the Commission identifies "two broad sets of circumstances, namely in order to halt and avert: *large scale of loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale 'ethnic cleansing,' actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape*."[270] Concretely, the just cause threshold touches the "types of conscience-shocking situation" such as, genocidal acts, ethnic cleansing, war crimes and crimes against humanity, state collapse and natural or environmental disaster.[271] Only the first four components are properly an object of humanitarian intervention, while the last two are rather in the realm of peacekeeping and humanitarian action. The Commission excludes from just cause the rescue of one's nationals, any human rights violation other than those mentioned and the defense for democracy.[272]

Concerning the right authority "to determine, in any particular case, whether a military intervention for humanitarian protection purpose should go ahead," the Commission strongly stresses that such authority is invested in the Security Council under the auspices of the United Nations and rejects the unilateral intervention. It affirms, "the UN, with the Security Council at the heart of the international law-enforcement system, is the only organization with universally accepted authority to validate such operations [of humanitarian intervention]. But it does not by itself have any operational capacity. For the UN to function effectively as a law-enforcing collective security organization, states must renounce the unilateral use of force for national purposes. But the corollary, not always as readily accepted, is that states should be willing to use

[270] Ibid.
[271] Ibid., 33.
[272] Ibid., 34.

force on behalf of, as directed by, and for the goals of the UN."[273] When the Security Council fails, two options are available: "the United for Peace" procedures and the recourse to regional or sub-regional organizations.[274] The Commission, nonetheless, warns the Security Council that its failing to act in face of "conscience-shocking situations," coalition actions will occur with two main consequences: first, they might be used for other goals than humanitarian, second, if carried legitimately and successfully, they might discredit the UN system.

Finally, the responsibility to rebuild is about the actions conducted in a peace building process after the military intervention. They include the questions of security, justice and reconciliation, and development. Its aim is "returning the society in question to those who live in it, and who, in the last instance, must take responsibility together for its future destiny."[275]

After the sketch of the content of R2P, we can show its relationship to humanitarian intervention. First of all, it is clear that R2P is broader than the humanitarian intervention as it has been defined. Secondly, while it is built on the acknowledgment of state sovereignty, it changes its content, "from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties."[276] In explaining this shift, the Commission states that "it is acknowledged that sovereignty implies a dual responsibility: externally, to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum content of a good international content of good

[273] Ibid., 49.
[274] Ibid., 53.
[275] Ibid., 45.
[276] Ibid., 13.

international citizenship."[277] This seems to be a big move from the Westephalian concept of sovereignty. Thirdly, the Commission claims that "**prevention is the single most important dimension of the responsibility to protect**."[278] If this were true, it would definitely make R2P very different from humanitarian intervention, which would be only a small part of the Report. Alas! The reality is that the Commission itself also recognizes that the "report is about the so-called 'right of humanitarian intervention': the question of when, if ever, it is appropriate for states to take coercive—and in particular military—action against another state for the purpose of protecting people at risk in that other state."[279] Almost a half of the report is indeed on that question.

This leads us to the last question whether R2P escapes from the biases attributed to the humanitarian intervention justified through the protection of human rights. It has been already mentioned that for some, R2P is an emerging norm in the international arena, legally, morally and in international relations. For instance, Tom Kabau observes that "the citation of the responsibility to protect concept in relation to the decisive and timely intervention in Libya is an indication that the concept's continued crystallization into a proper legal norm."[280]

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[277] Ibid., 8.
[278] Ibid., XI. Gareth Evans—who was one of the two Co-chairs of the ICISS—and Edward C. Luck—who is in charge of advocating for R2P in the UN—stress this point. See Gareth Evans, "The Responsibility to Protect: Rethinking Humanitarian Intervention" in *American Society of International Law*, Vol. 98, 2004, 84; Edward C. Luck, "The Responsibility to Protect: Growing Pains or Early Promise" in *Ethics and International Affairs*, Vol. 24, No 4, 2010, 352.
[279] Ibid., VII
[280] Tom Kabau, "The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union's Interventions" in *Goettingen Journal of International Law*, Vol. 4, No 1, 2012, 73. See also Arbour, ibid., Nicholas J. Wheeler, "The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society" in Welch, ed., ibid., 1; "A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit" in *Journal of International Law and International Relations*, Vol. 2, No. 1, 2005-6, 1; Bellamy, "Libya and the Responsibility to Protect: The Exception and the Norm" in *Ethics and International Affairs*, Vol. 25, No 3, 2011, 1; Jutta Brunnee and Stephen J. Toope, "Norm, Institution and UN Reform: The Responsibility to Protect" in *Behind the Headlines*, Vol. 63, No 3, 2006, 3.

However, not all agree on this assessment. Many scholars contest the emergence of R2P as a legal norm, while others see it, maybe, as a moral, but certainly, as a rhetorical tool. As an example, Mehrdad Payandeh claims that "the responsibility to protect cannot be understood as a norm or even as a potential norm under customary international law."[281] As to Bellamy, he argues that "thus far…RtoP is best employed as a diplomatic tool, or prism, to guide efforts to stem the tide of mass atrocities, and that it has little utility in terms of generating additional political will in response to such episodes."[282] And Jennifer Welch et al. argue that R2P cannot "avoid the conundrum surrounding the so-called right of humanitarian intervention by substituting the notions of 'responsibility to protect," because "it rests its case on a moral rather than a legal foundation."[283] Other scholars underline that R2P does not add anything new to the humanitarian intervention as it is mainly focused on it and is limited by its ambiguities.[284]

If R2P is not different from humanitarian intervention, there is no surprise that it undergoes the same critics as a neocolonial paradigm. David Chandler, for instance, sees the R2P

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[281] Mehrdad Payandeh, "With Great Power Comes Great Responsibility? The Concept of Responsibility to Protect with the Process of International Lawmaking" in *The Yale Journal of International Law*, Vol. 35, No 2, 2010, 481, 516;

[282] Allex Bellamy, "The Responsibility to Protect –Five Years On" in *Ethics and International Affairs*, Vol. 24, No 2, 2010, 166. See also Chesterman, "'Leading from Behind': The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya" Paper present at New York University School of Law, 2011, 5; Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" in *The American Journal of International Law*, Vol. 101, No 1, 2007.

[283] Jennifer Welch et al., "The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty" in *International Journal*, Vol. 57, No 4, 2002, 500.

[284] Carlo Focarelli notes that "the responsibility to protect doctrine, although it was first presented as a larger construction, is essentially focused on the question of humanitarian intervention." See his "The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine" in *Journal of Conflict and Security Law,* Vol. 13, No 2, 2008, p. 209. See also Christopher C. Joyner, "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention" in *Virginia Journal of International Law*, Vol. 47, No 3, 2006-7, 710; Andrew Garwood-Gowers, "China and the 'Responsibility to Protect': The Implications of the Libyan Intervention" in *Asian Journal of International Law*, Vol. 2, No 2, 2012, 4; David Chandler, "The Paradox of the 'Responsibility to Protect'" in *Cooperation and Conflict*, Vol. 45, No 1, 2010, 129-30, Jennifer M. Welch and Maria Banda, "International Law and Responsibility to Protect: Clarifying or Expanding States' Responsibility" in *Global Responsibility to Protect*, Vol. 2, 2010, 214. Even one of R2P's architects acknowledges its limits. See Gareth Evans, "The Responsibility to Protect: An Idea whose Time has Come… and Gone?" in *International Relations,* Vol. 22, No 3, 2008; "The Responsibility to Protect: Ending Mass Atrocities Crimes Once and for All" in *Irish Studies in International Affairs*, Vol. 20, 2009, 10-3.

as a way of imposing "the 'liberal' peace" to the non-liberal world. According to him, "despite the Commission's professed concern to listen to non-Western voices and opinions, the Report rejects the view that where there is no consensus in the Security Council the General Assembly under the 'Uniting for Peace' provisions should have the authority… Instead, the Commission favours granting legitimacy to interventions by ad hoc coalitions or individual states acting without Security Council or General Assembly approval."[285] And for Aidan Hehir, the R2P is nothing else than "the emperor's new clothes" which "creates an easily abused framework for Western states, and indeed powerful states generally, to intervene at will under the pretext of humanitarianism.[286]" As for Frédéric Mégret, R2P reproduces the biases of the humanitarian intervention.[287]

Following this reading, it is clear that R2P, no more than other traditions to justify humanitarian intervention, does not escape from neocolonial suspicion. Indeed, from the just war tradition to the era of human rights under the UN Charter through the emergence of natural and positive international law, every justification of the protection of the innocent was directed against the non-Western world; the civilized against the non-civilized. Even where it was not so overtly affirmed, the consequence was evident. Therefore, those who suspect the new "humanitarian order" as neocolonial have good reasons. It remains now to analyze why the claim is so and how they substantiate their claims as that is the topic of the next section.

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[285] David Chandler, "*The Responsibility to Protect*? Imposing the 'Liberal Peace'" in *International Peacekeeping*, Vol. 11, No 1, 2004, 71.

[286] Aidan Hehir, "The Responsibility to Protect: 'Sound and Fury Signifying Nothing?" in *International Relations*, Vol. 24, No 2, 2010, 223. See also Alicia L. Bannon, "The Responsibility to Protect and the Question of Unilateralism" in *The Yale Law Journal*, Vol. 115, No 5, 2006, 1158, 1161-2; S. Neil Macfarlane et al., "The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?" in *Third World Quarterly*, Vol. 25, No 5, 2004, 981.

[287] Frédéric Mégret, "Beyond the 'Salvation' Paradigm: Responsibility to Protect (Others) vs the Power of Protecting Oneself" in *Security Dialogue,* Vol. 40, No 6, 2009, 578.

2.3. Humanitarian Intervention as Neocolonialism

So far, we have seen that the way humanitarian intervention is justified gives reason to those who suspect it as being a new form of neocolonialism. But, how do they account for it?

a). Humanitarian Intervention as a Moral Problem

Humanitarian intervention mainly poses moral concerns. On the one hand, there is its origin, the reason it is even invoked. Many authors qualify it as "unbearable injustice" (Grotius), "acts injurious to humanity" (Mill), "actions shocking the conscience of human kind" (Walzer), or "conscience-shocking situations" (ICISS). At this level, both proponents and opponents agree that something should be done to alleviate such ills. For example, Mohammed Ayoob, one of the acerbic critics of humanitarian intervention, recognizes that "international sensibility regarding human rights and their violations have changed quite radically during the past 50 years and this reality cannot be ignored. Therefore, a moral case can certainly be made regarding the need for humanitarian intervention and the violation of sovereignty that such intervention may necessarily entail."[288] Anne Orford expresses the same feeling about the East Timor situation. Commenting on a leaflet calling for a rally for East Timor, she writes,

> my desire for intervention was made more urgent by the repeated representation of the Timorese as defenceless, powerless, 'hysterical' and unprotected, and by the focus on threats to babies, women and children… Hearing these reports left me feeling as unbearably and frustratingly powerless and helpless as the East Timorese. At the same time, if Australians and the international community were willing to use military force in response to this slaughter and devastation, we could be potentially saviours of the East Timorese, agents of democracy and human rights able to overpower those bent on killing and destruction."[289]

In other words, both spectra of the humanitarian intervention agree that it is a consequence of a situation that cannot leave anybody morally indifferent.

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[288] Mohammed Ayoob, "Humanitarian Intervention and State Sovereignty" in *International Journal of Human Rights*, Vol. 6, No 1, 2002, 94.

[289] Anne Orford, *Reading Humanitarian Intervention and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), 10.

The question, however, arises when it comes to its justification through human rights. For sceptics, humanitarian intervention pretends to protect human rights, but in reality it erodes them, because it is built on the helplessness of the victim, who is unable to act by him/herself unless a messianic savior comes from away. The only available actors in the situation are the killers/slaughterers versus helpless victims. For Orford, such a discourse does not serve the revolutionary power of the human rights discourse. "The way in which international law was narrated in fact served to confine any revolutionary potential inherent in human rights discourse, such that the right of intervention in the name of human rights became profoundly conservative in its meaning and effect."[290] It is the same claim by Mamdani who asserts that "the discourse on rights emerged historically as a language of resistance to power. Its political ambition was to turn victims agents. Today, the tendency is for the language of rights to become the language of power. The result is to subvert its very purpose, to put it at the service of a wholly different agenda, one that seeks to turn victims into so many proxies." [291]Other writers go ever deeper claiming that the humanitarian intervention discourse portrays a victim as an object rather than as a political subject. That is the point of view of Mégret who argues that the discourse of humanitarian intervention constructs "'victims' as essentially passive, depoliticized and in need of international intervention. The victim is cause, object, but never actor or subject."[292] As a consequence, humanitarian discourse abolishes the political rights that it claims to protect. In the words of Mamdani,

> The international humanitarian order… is not a system that acknowledges citizenship. Instead, it turns citizens into wards. The language of humanitarian intervention has cut ties with the language of citizen rights. To the extent the global humanitarian order claims to stand for rights, these are residual rights of the human and not the full range of rights of the citizen. If the rights of the citizen are pointedly political, the

[290] Ibid., 10-1.
[291] Mamdani, "The Responsibility to Protect or Right to Punish?" in *Journal of Intervention and State Building*, Vol. 4, No 1, 2010, 59-60.
[292] Mégret, ibid., 580.

> rights of the human pertain to sheer survival; they are summed up in one word, protection. The new language refers to its subjects not as bearers of rights –and thus active agents in their own emancipation – but as passive beneficiaries of an external 'responsibility protect'. Rather than rights-bearing citizens, beneficiaries of humanitarian order are akin to recipients of charity. Humanitarianism does not claim agency, only sustain bare life.[293]

Humanitarian intervention is the promotion of "dependency." That is why, for Mamdani, "humanitarianism heralds a system of trusteeship."[294] What is more problematic is the fact that this humanitarian intervention is targeting certain states and not all states. "Looked at closely and critically, what we are witnessing is not a global but a partial transition. The transition from the old system of sovereignty to a new humanitarian order is confined to entities defined as 'failed' or 'rogue' states. The result is once again a bifurcated system whereby state sovereignty obtains in large parts on the world but is suspended in more and more countries in Africa and Middle East."[295]

These authors are not without justification, for some proponents of humanitarian intervention advance an argument that denies the victim's rights. In Tesón's words, "external intervention aimed at overthrowing the tyrants and liberating the oppressed do not force men and women to fight for their rights because those rights are being denied by their government in the first place. *They have no rights to fight for*."[296] If this is the case, one can ask: if victims do not have rights to fight for, what are the rights the external intervention is fighting for? Either they bring their own rights to the victim –in which case, their intervention is unjustified –or it is fighting for something else–in which case, victims are only proxies. That is why this issue of humanitarian justification is its core moral problem.

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[293] Mamdani, "The Responsibility to Protect", 54-5.
[294] Ibid., 54.
[295] Mamdani, *Saviors*, 274.
[296] Tesón, *Humanitarian Intervention*, 75-6. Emphasis added.

Still on the rights concern, the proponent of humanitarian intervention discriminates some rights deserving defense over others which do not get international attention. Only political rights can motivate the international community and not others such as socio-political rights. For Tesón, "rights against the state, human rights, are the primary rights. Other types of rights, and particularly the right *to* a nation-state, are derivative."[297] And later, he adds, "qualitatively, only the violation of basic civil and political rights warrant humanitarian intervention."[298] While the focus on some rights might appear trivial to the subject, it bears heavy consequences in the context of humanitarian intervention. For instance, Orford remarks that the "institutionalized commitment to a narrow range of civil and political rights as the end of military and monetary intervention has shut out other opportunities for dissenting from the established order or achieving emancipatory ends."[299] As a consequence according to Mamdani, the crimes that justify external intervention become particular to a non-Western. Commenting on the case of International Criminal Court (ICC), he states that, "if the ICC is turning into a Western court to try African perpetrators of mass crimes, genocide too is becoming a non-Western crime. The official genealogy of genocide excludes the crimes perpetrated against Native Americans, against Africans in the course of modern trans-Atlantic slavery and the colonial era that followed it, as well as those perpetrated by the US in the course of the Indo-Chinese and Iraqi wars and counter-insurgencies."[300] Because humanitarian intervention is oriented toward crimes that are only observed in other parts of the world but the West and focuses on the political and civil rights, it serves a biased purpose.

[297] Ibid., 50.
[298] Ibid., 117.
[299] Orford, ibid., 202.
[300] Mamdani, "The Responsibility to Protect" 66, note 6.

All these worries touch the heart of the humanitarian intervention, and bring into the forum other normative questions. One of these is the deconstruction of state sovereignty. Both the liberal, moral and R2P justification of human rights challenge the classical understanding of sovereignty. The justification from the contractual theory conditions the legitimacy of state sovereignty to the respect and protection of individual rights. As to R2P doctrine, I noted that it shifts the conception of sovereignty from control to responsibility both internally and externally. For those questioning humanitarian intervention, despite the claim that R2P strengthens sovereignty,[301] intervention language destroys the concept of sovereignty. According to Chandler,

> rather than the traditional view that sovereignty implies non-interference, the redefined concept of 'sovereignty implies non-interference' implies the right of interference if the 'the community responsible states' decides this to be in the interests of protection. The background report spells out that 'sovereignty then means accountability to two separate constituencies: internally, to one's own populations; and internationally, to the community of responsible states'. This shift in 'accountability' clearly has major implications for sovereignty because a power which is 'accountable' to another external body clearly lacks sovereign authority.[302]

In other words, R2P, instead of strengthening sovereignty, destroys it. Yet, this is the cornerstone of the international system.

This denial of the classical sovereignty under the form of responsibility is threatening the existence of non-Western states since this understanding of sovereignty was the source of their creation. Bricmont observes that international law based on non-intervention "is the paper shield that the Third World believed could protect it from the West at the time of decolonization."[303] Now that it is being challenged, there are concerns that those who had robbed it in the past might repeat it. According to Ayoob, "during the past 50 years, following the emergence of post-

[301] Richard Luck mentions that "properly understood… RtoP, as accepted by the world's heads of state and government, would not impinge on interdependence sovereignty and might even bolster it when the state lacks capacity or is under siege by armed groups ready to ignore their own protection responsibilities." in "Sovereignty, Choice, and the Responsibility to Protect" in *Global Responsibility to Protect*, Vol. 1, 2009, 15.
[302] Chandler, "The Responsibility to Protect", 65.
[303] Bricmont, ibid., 99.

colonial states in large numbers, the notion of sovereignty and its corollary of non-intervention had forced the strong to make at least mildly credible cases for intervention into the affairs of the weak. Sovereignty had thus acted as a restraint on the former's interventionary instincts."[304] In other words, state sovereignty as control was less an impeachment for states to intervene in domestic affairs –"strong states have routinely intervened, even forcibly, in the affairs of weaker ones"[305] –than the protection of weak states against the stronger ones. That is why Ayoob raises many concerns for removing such a barrier. First, he remarks that, "given the disparity in power among states, humanitarian intervention has the strong potential of becoming a tool for the interference by the strong in the affairs of the weak, with humanitarian considerations providing a veneer to justify such intervention."[306] This means that sovereignty was playing a moral barrier to the expansion of political realism. Now that humanitarian intervention dilutes it, authors such as Ayoob fear that any strong state will take humanitarianism as a pretext to advance its political interests, and this will disrupt the international order. That is why the second concern for Ayoob is that "the selective derogation of state sovereignty by the use or misuse of humanitarian intervention may end up detracting from the most essential instrument, the principle of sovereignty, that has been used for the maintenance of international order during the past four centuries."[307] Understandably, such a situation will be detrimental to weak states which might fall into more chaos than they were. In this sense, state sovereignty is also source of domestic stability. Once it is distracted because of the humanitarian intervention, it becomes the source of disorder of the international order and also the non-respect of human rights domestically. In Ayoob's words,

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[304] Ayoob, "Humanitarian Intervention", 83.
[305] Ibid.
[306] Ibid., 92.
[307] Ibid. One might, however, ask Ayoob which kind of order is worth preserving since the kind of order that prevailed is what led to the human rights movement and its humanitarian consequence.

> State sovereignty, as a legal and normative concept, acts as the cornerstone for the only institutional architecture capable of providing order within territorially defined political communities. It goes without saying that the preservation of domestic order is essential for the maintenance of international order. But preserving domestic order is also essential for the attainment of other values, including human rights, that most people hold dear. By eroding the legal basis of sovereign authority, humanitarian intervention, especially as practiced during the past decade, may be opening the floodgates for domestic disorder. This, in turn, could negatively affect international order as well as the individuals' most basic requirements for civilized existence.[308]

These points show that, by changing the essence of sovereignty and diluting it, humanitarian intervention is rather creating a world of domination of strong states over weak ones, and through that, it has become a source of internal disorder and it disrupts international order.

Another normative question derived from the justification of humanitarian intervention is the conception of an international community. In the language of humanitarian intervention, an international community is to take over the protection of human rights when a state fails to fulfil it, or when it engages in their violation. In general terms, the international community seems to designate all other states but the one concerned. According to Payandeh's observation, "international community [consists] of states, regional organizations, civil society, and the private sector."[309] Yet, as we have already seen with some proponents of humanitarian intervention –such as Tesón —only liberal democracies are the legitimate authority to carry it out. In that case, as Ayoob observes, "a major problem emerges from the fact that the new interventionary logic 'presupposes the existence of a meaningful international community in whose name intervention may be carried out',"[310] because it begs the question of what is then the so-called international community, beyond the general terms.

From the challengers of humanitarian intervention, "international community" is an acronym for the West, and is conceived as the antithesis of the Third World. According to

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[308] Ibid., 92-3.
[309] Payandeh, ibid., 478. It is also the view of Murphy who conceives "'international community'" as "the United Nations, regional organisations, the general views expressed by governments, the views of only 'disinterested governments, or the views of such nongovernmental actors as human rights organizations or scholars." Ibid., 9.
[310] Ayoob, "Humanitarian Intervention", 85.

Orford, "The Third World has long been imagined as the double or other of the 'the West', now the international community."[311] The international community is that of "ordered world" with the mission to bring order to a troubled one; it is that of stable states determined to fix the rogue or failed/failing states. This is consonant with the construction of the victim as helpless, which provides a heroic character to the intervener. In a way, we retrieve the colonial stereotypes of civilized-uncivilized and Mill's argument that a civilized nation cannot stand a barbarous neighbor. Drawing from feminist and postcolonial literature, Orford sums up what is an international community and how it is operating. She says,

> The values of the new world order are defined through actions taken against just such secondary character – those disordered or evil rogue states, whose leaders need to be taught that the hard body of the international community can impose its will on them. Identification with the potent character of NATO or the Security Council is facilitated through the creation of a character lacking power and authority. The heroic narrative depends upon the constitution of that second passive character which the hero is able to shape or act upon in order to make his mark upon the world. International organizations and major powers are imagined as the bearers of human rights and democracy, while local peoples are presented as victims of abuses conducted by agents of local interests. The people of states in Africa, Asia, South America and Eastern Europe are portrayed as childlike, primitive, barbaric or unable to govern themselves. Those peoples are to be refashioned as an extension of the self of the hero. Through the deployment of such colonial stereotypes, the international community is 'defined in and through the white male body and against the racially marked male body'."[312]

Following this discussion, it is evident that those who doubt the good faith of humanitarian intervention do not do it only from a realistic point of view, but also have some solid moral arguments against it. Thus being the case, it leads us to look closely at the practice of humanitarian intervention.

b). Humanitarian Intervention in Practice

Following the conception and the content of the so-called international community, one wonders whether it intervenes for the rights of the victims or rather for their own interests, both geo-political and psychological. Moreover, it raises the question of who decides what state is failing and that the intervention is justified. Supposing that we follow the general standard that

[311] Orford, ibid., 153, 161.
[312] Ibid., 172-3.

only the UN Security Council is the legitimate organ to deal with these questions, UN itself does not have a military force. Therefore, states providing these forces have to decide it at the national level.[313] That is why Ayoob is right on the target when he says that "it is… impossible to prevent considerations of national interest from intruding upon decisions regarding international intervention for ostensibly humanitarian purposes," which "complicates the problem of deciphering the international will."[314] This cannot not fail to recall the colonial expansion, which used "anti-slavery and slave trade policy… to justify imperial expansion to an electorate which, until the 1880s at least, was sceptical about the acquisition of colonies."[315]

The proponents of humanitarian intervention such as Nicholas Wheeler responds that "the key question is not the purity of motives but the relationship between motives and humanitarian outcomes."[316] But, since normally, humanitarian intervention is justified by human rights, it becomes difficult to see how an intervention is going to have a "humanitarian outcome", when human rights are not its motivating cause. For according to Orford, "the practice of military intervention and post-conflict reconstruction limited the opportunities to make use of the radical potential of human rights to subvert the established order of things."[317] She continues, "in this sense, we are not now at the end of the human rights era. A commitment to human rights has long ceased to be the foundation of the work of the UN and other international organisations [that is the international community], if it ever was. Human Rights activists and scholars were aware well before 11 September 2001 that human rights and self-determination were not the

[313] Ramesh Thakur, one of the Commissioners of ICISS notes that "the formal authority for maintaining peace and security is thus vested in the Security Council. But the burden of responsibility, as a result of their having the power to make the most difference, often falls on the USA and other leading powers." See his "Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS" in *Security Dialogue*, Vol. 33, No 3, 2002, 334.
[314] Ayoob, "Humanitarian Intervention and State Sovereignty", 85.
[315] Mulligan, "British anti-slave trade", in Simms and Trim, ibid., 258-9.
[316] Wheeler, *Saving Strangers*, 47.
[317] Orford, ibid., 201.

priorities of powerful states."[318] In this context, it is hard to convince the skeptics that humanitarian intervention can have a humanitarian outcome.

This leads to the questions of the authors of humanitarian intervention, from the level of evaluating to the execution through the decision-making. Even when scholars such as Bagnoli claims that the legal duty for humanitarian intervention should be an organ with supranational authority,[319] questions as "who decides whether a situation has risen to the level of such crisis? Who defines the crisis is truly one of extreme necessity? Who decides whether the force deployed is appropriate and commensurate with the necessity? Who decides whether the motive of the intervener is humanitarian, as distinct from self-aggrandizing?"[320]—these questions remain unanswered until we look at the practice of humanitarian intervention.

From Vitoria to R2P through Mill and Tesón, humanitarian intervention has been carried by powerful states against weak ones, those civilized against those uncivilized, the West against the non-West world. Concerning the nineteenth century, Trim states that "it is notable that intervention has typically been undertaken against weaker states."[321] He continues, "to some extent it reflected a double standard among European liberals: civilised states and peoples might be guilty of excesses from time to time, but intervention ought not be practised against them, since all civilised polities were at a roughly equal stage of development. Uncivilised peoples and kingdoms, however, were not full members of the international system (invented and self-

[318] Ibid., 201-2.
[319] Bagnoli, ibid., 133.
[320] Franck, ibid., 148.
[321] Trim, "Conclusion: Humanitarian intervention in historical perspective" in Simms and Trim, ibid., 395. Mehta asserts the same, saying that "it is the paradox that humanitarian intervention is almost always an action of strong states with respect to relatively weaker states. Any general criteria for determining which occasion warrant intervention, like violations of human rights, are often difficult to enforce against states that can make the costs of intervention high because of their military capabilities." Ibid., 260. Farer also supports this view saying, "great powers are inevitably more self-regarding, inevitably more resistant to legal constraint than the generality of weak ones." In "Humanitarian Intervention", 75-6.

defined by European states!); they were thought to be at a more primitive stage of development, which meant they were inherently likely to commit acts of appalling barbarism, brutality and cruelty."[322] He completes his argument saying, "intervention by civilised, enlightened polities against uncivilised peoples or rulers was perceived as almost natural."[323] This shows that the justification of humanitarian intervention in the nineteenth century fits into the colonial scheme both in its language and its goal.

In the era of human rights, humanitarian intervention doctrine is also based on the distinction between the liberal West which champions it against the non-liberal part of the world which suspects it at best, or rejects it at worst.[324] As Pitts notes, "debate around humanitarian intervention often occupy the perspective of those powerful states that regard themselves as liberal and democratic, asking what 'we' liberal democrats should do about the problems *out there*."[325] Humanitarian intervention is another expression of paternalism, and that is why those concerned states repulse it. They resent it as a continuation of the Western civilizing mission. Already at the beginning of the 90s, a Zimbabwean official had expressed his "apprehension about who will decide when to get the Security involved in an internal matter and in what manner," asking, therefore, that "great care…be taken to see that the domestic conflicts are not used as a pretext for the intervention of big Powers in the legitimate domestic affairs of small States, or that human rights issues are not used for totally different purposes of destabilizing

[322] Ibid.
[323] Ibid.
[324] According to Priyankar Upadhyaya, "weak states have apprehensions about the possible misuse of humanitarian intervention; however, this is not the issue with the powerful countries. For them the critical concern is how to ensure the effective implementation of such intervention." see Priyankar Upadhyaya, "Human Security, Humanitarian Intervention, and Third World Concern" in *Denver Journal of International Law and Politics*, Vol. 33, No 1, 2004, 87. One might argue that the three cases of humanitarian intervention during the Cold War were discharged by non-Western states, but we have seen that they never justified their actions by humanitarian purposes.
[325] Pitts, "Intervention and sovereign equality", 133.

other Governments." [326] As for Welch, she observes that "the Non-Aligned Movement… and the Havana Group of 77 Summit…categorically rejected the so-called rights of humanitarian intervention."[327] China, one of the leading voices in that trend, commented that "The Chinese are very familiar with such 'humanitarian intervention' in their past and see it as a tool that was often used by advanced countries to conquer so-called 'barbarous ones' and to impose 'civilized standards'."[328] In other words, most non-Western governments are against humanitarian intervention because they are convinced of its susceptibility to political manipulation.

It is also the opinion of many scholars who believe that the international humanitarian order practically targets non-Western states. Ayoob, for instance, explains that these states are still in their unfinished state-making process which, inherently, implies some violence. Moreover, being economically poor and socially unstable, "these political and socioeconomic attributes, which make such states acutely vulnerable to internal dissention and external interference, greatly influence their attitudes toward humanitarian intervention and international administration."[329] Consequently, "they are apprehensive of the new international activism and the developing norm of humanitarian intervention that could potentially threaten their status."[330] Mamdani goes in the same line, arguing that the language of humanitarian intervention "justifies interventions by the big powers as an antidote to malpractices of newly independent small powers."[331] Today, humanitarian intervention is even supported by an international justice that is at the service of great powers. As he puts it, "the emphasis on big powers as the enforcers of rights internationally is increasingly being twinned with an emphasis on big powers as enforcers

[326] Lillich, "Humanitarian Intervention", 13.
[327] Welch, "Taking Consequences Seriously: Objections to Humanitarian Intervention" in Welch, ed., ibid., 66.
[328] Ibid.
[329] Ayoob, "Third World Perspectives on Humanitarian Intervention and International Administration" in *Global Governance*, Vol. 10, No 1, 2004, 100.
[330] Ibid.
[331] Mamdani, "Responsibility to Protect", 60.

of justice internationally."[332] Jennifer Pitts gets the whole point when she states, "in the decades following decolonization, many liberals in powerful states, distraught at widespread of human rights abuses in postcolonial states, concluded that sovereignty could not enjoy the sacrosanct status it had hitherto apparently enjoyed, but instead must be circumscribed in the interests of human rights."[333] She continues, "while this debate is generally couched in universal terms—sovereignty as such must be limited in the new global order –what is centrally, if often tacitly, at issue is the supposed sovereignty of third-world states, and the right to intervene by the liberal powers of the global north and by the international institutions these states dominate."[334]

As already observed, R2P also reproduces the same biases of humanitarian intervention. Therefore, it follows that scholars show it as also targeting the global south. For David Chandler, "the central area of R2P concern is the regulation of sub-Saharan Africa and, in this guise, the policy practice has not lagged behind the declaration of R2P intent."[335] Even Michael Ignatieff – also one of the ICISS's Commissioners whom Orford calls 'human rights warrior'[336] admits that R2P reproduces empire's benefits in a postcolonial context. Explaining the different points constituting R2P, he concludes that "all of these exercises in nation-building represent attempts to invent, for a post-imperial, post-colonial era, a form of temporary rule that reproduces the best effects of empire (inward investment, pacification, and impartial administration) without reproducing the worst features (corruption, repression, and confiscation of local capacity)."[337] And of course, this is done by "rich countries through an intervention continuum that begins with

[332] Ibid.
[333] Pitts, ibid., 138.
[334] Ibid.
[335] Chandler, "The Paradox", 133.
[336] Orford, ibid., 186.
[337] Michael Ignatieff, "State failure and nation-building" in J. L. Holzgrefe and Keohane, eds., ibid., 320.

prevention and ends with sustained follow-up."[338] Ignatieff confirms what Pratap Mehta observes that "using 'human rights,' 'democracy' or 'people's sovereignty' as a justification for intervention is too broad because it seems unduly to narrow the range of regimes that might be thought of as having a legitimate place in the international order."[339] The consequence is that "it runs the risk of giving legitimacy to a few powers to shape societies in light of their own values and images," which is "a form of colonialism."[340] For the sceptics of humanitarian intervention, it is no longer a risk; it is a fact.

All these elements prove sufficiently that both humanitarian intervention and R2P are suspected because they reproduce structures through which the liberal West wishes to impose the 'liberal peace' –to use the expression of one of the authors. But there is another element that taints the practice of humanitarian intervention. It is the selectivity of the place where to intervene. As Ayoob once more puts it, "the problem becomes more acute when these 'representatives' of the 'international community' choose targets for intervention selectivity while ignoring human rights violations of equal or greater magnitude elsewhere."[341] Edward Luttwark underscores that the humanitarian intervention is only for "easy cases" of weak states. In his words, "Kofi Annan's real problem is not with the hard cases like China, but rather with the many places where his new rule could be applied all too easily: weak states in which 'massive' human rights violations are a persistent reality."[342]

Talking about selectivity, the example of Rwanda immediately comes into one's mind, whereby the so-called international community stood by as the genocide unfolded. However,

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[338] Ibid.
[339] Mehta, "From State Sovereignty", 266.
[340] Ibid.
[341] Ayoob, "Humanitarian Intervention and International Society" in *Global Governance*, Vol. 7, No 3, 2001, 225.
[342] Edward Luttwark, "Kofi's Rule: Humanitarian Intervention and Neocolonialism" in *National Interest*, No 58, Winter 1999/2000, 60.

there are also other cases. Ayoob gives the example of the intervention in Northern Iraq, saying that "the decision in 1991 to create a safe haven for the Kurds in Iraq but not in Turkey, where human rights of Kurds were being violated with equal severity, cast grave doubt on the sincerity of the intervening powers."[343] But for Ayoob, the Palestinian case is the paradigmatic example of the selectivity of humanitarian intervention, because of "Israel's continuing occupation of Palestinian lands in defiance of UN Security Council resolutions and its blatant violation of provisions of the fourth Geneva Convention, prohibiting demographic and territorial changes in occupied land."[344] Hence, this "has made both [humanitarian intervention and the installation of international administration] suspect not only in the eyes of Middle Eastern peoples but also in much of the rest of the third world."[345]

This selectivity creates a double standard in the practice of the humanitarian intervention, since some states even outside the liberal West can violate human rights and even as the UN Security Council passes resolutions, actions are never taken. The habit seems to be that as long as you are one of the big powers or a friend to one of them, you shouldn't worry. It is what Brun and Hersh call the "interventionism of choice" through which there is the "so-called Western humanitarian intervention and regime change in some countries, while the same Western democracies maintain excellent relations with other tyrannical regimes… or refrain from military intervention in countries that are accused of violating human rights and of being undemocratic."[346]

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[343] "Humanitarian Intervention and International Society", 225. For the American attitude toward human tragedy without intervening, see Samantha Power, *"A Problem from Hell": America and the Age of Genocide* (New York: Basic Books, 2013).
[344] Ayoob, "Third World Perspectives", 110.
[345] Ibid.
[346] Ellen Brun and Jacques Hersh, "Faux Internationalism and Really Existing Imperialism" in *Monthly Review*, Vol. 63, No 11, April 2012., 45-6. These authors continue to raise the same questions as Ayoob does, saying, "connected to the selectivity argumentation other fundamental questions arise: why does the Western alliance under the

This perpetuates "the impression that the national interests of majors determine decisions regarding humanitarian intervention."[347] It also highlights the importance of what Mamdani calls "labelling." The latter is the process through which an act is qualified as crimes warranting a humanitarian intervention. It has been already shown that the non-intervention in Rwanda was due to the influence of big powers unwilling to use the word "genocide" because then, it would have put burden on the international community to intervene.[348] However, "labelling" also works in shielding the big powers and their friends from being targeted for humanitarian intervention.

Mamdani stresses this issue, for it ends up making the crimes only non-Western. He takes the example of Iraq and Darfur to show the importance of naming through which, "the distinction between war, counter-insurgency and genocide is blurred in practice," because "all three tend to target civilian populations." [349] In his narrative, Iraq and Darfur were both "counter-insurgencies," the Iraqi one "grew out of war and invasion," while the Darfuri one was "a response to an internal insurgency."[350] In Mamdani's evaluation, "if you were an Iraqi or a Darfuri, there was little to choose between the brutality of the violence unleashed in either instance. Yet, much energy has been invested in how to define the brutality in each instance: whether as counter-insurgency or as genocide." He continues, "we have the astonishing spectacle whereby the state that has authored the violence in Iraq, the United States, has branded an adversary state, Sudan, one that has authored violence in Darfur, as the perpetrator of genocide. Even more astonishing, we have a citizen's movement in America calling for a humanitarian

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leadership of the United States accept the Israeli occupation of Palestinian territory and the suppression of that people's national aspirations? Considered to be the 'only democracy in the Middle East,' Israel gets economic, political, and military support from the United States and the European Union without consideration of its oppressive policies and occupation being in contravention to international law! Double standard is crying out loud for those willing to listen." Ibid., 46.

[347] Ayoob, "Humanitarian Intervention and State Sovereignty", 87.

[348] Pogge, ibid., 161.

[349] Mamdani, "Responsibility to Protect", 57.

[350] Ibid.

intervention in Darfur, while keeping mum about the violence in Iraq."[351] This comment sheds light to two important points. First, the victims are not the ones determining what is happening to them. This is determined outside, far from their reach and decided by those who might be accused of the same crimes. Second, as a consequence, those determining the crimes find better terms for their own misconducts, so that they might escape from the fate of humanitarian intervention. That is why Mamdani's conclusion on the effects of the labelling is without ambiguity:

> Labelling is important, most obviously for legal reasons. Where mass slaughter is termed genocide, intervention becomes an international obligation; for the most powerful, the obligation presents an opportunity. But if genocide involves an international obligation to intervene, war and counter-insurgency do not… for they are understood as part of the exercise of sovereignty of states. They give expression to the normal violence of the state, the reason why states are said to have armies and armed forces. Labelling performs a vital function. It isolates and demonizes the perpetrators of one kind of mass violence, and at the same time confers impunity on perpetrators of other forms of mass violence.[352]

This partiality in the assessment of humanitarian intervention signs another blow to the legitimacy of humanitarian intervention. It condemns some and absolves others for political interests rather than moral reasons. That is why, for those challenging humanitarian intervention, the doubt about its moral foundation and the fairness in its practice are clear signs that humanitarian intervention is another form of colonialism.

c.). Humanitarian Intervention as Neocolonialism[353]

Generally, neocolonialism is a concept that is generally used to designate the political, social, economic and security structures that were implanted by the colonial rule in order to perpetuate itself under local new bourgeoisie that secures the interests of the colonial powers. Hence it is frequently used in the postcolonial studies. As Guy Martin remarks, "in essence, neo-colonialism is 'the survival of the colonial system of the colonial system in spite of formal

[351] Ibid., 58.
[352] Ibid., 59.
[353] Having shown that R2P does not change much about humanitarian intervention, "humanitarian intervention" is used here as a generic term.

recognition of political independence in emerging countries which become the victims of an indirect and subtle form of domination by political, economic, social, military or technical means."[354] He continues, "this new strategy has been devised by the European powers in order to allow them to carry on the economic exploitation of their former colonies, while relinquishing political power to a national bourgeoisie."[355] In this sense, the political independence so much hailed at its acquisition wasn't a real one, since the subjection continues. It is just a formal independence which does not yield any concrete benefice for the citizens since it is a tool for their political domination and a colonial venue for their economic exploitation. "The essence of neo-colonialism is that the State which is subject to it, is in theory independent and has all the outward trapping of international sovereignty. In reality its economic system and thus its political policy is directed from outside."[356] This new domination is maintained by the West through the international institutions, justified and sustained by a discriminatory international law, and which are designed to that effect. In this sense, when coercive means are used in these states, they are rather for protecting Western interests rather than the rights of the victims as it is usually alleged. As Bricmont observes, "the policies pursued since 1945… have given imperialism its

[354] Guy Martin, "Africa and the Ideology of Eurafrica: Neo-colonialism or Pan-Africanism" in *The Journal of African Studies*, Vol. 20, No 2, 1982, 22.
[355] Ibid. James Fearon and David Laitin call it "neotruteeship, or more provocatively, postmodern imperialism. The terms refer to the complicated mixes of international and domestic governance structures that are evolving in Bosnia, Kosovo, East Timor, Sierra Leone, Afghanistan and, possibly in the long run, Iraq." They then compare it to the classical imperialism, saying, "similar to classical imperialism, these efforts involve a remarkable degree of control over domestic political authority and basic economic functions by foreign countries. In contrast to classical imperialism, in these new forms of rule subjects are governed by a complex hodgepodge of foreign powers, international and nongovernmental organizations (NGOs), and domestic institutions, rather than by a single imperial or trust power asserting monopoly rights within its domain. In contrast to classical imperialism but in line with concepts of trusteeship, the parties to these complex interventions typically seek an international legal mandate for their rule. Finally, whereas classical imperialists conceived of their empires as indefinite in time, the agents of neotrusteeship want to exit as quickly as possible, after intervening to reconstruct or reconfigure states so as to reduce threats arising from either state collapse or rogue regimes empowered by weapons of mass destruction (WMD)." See James D. Fearon and David D. Laitin, "Neotrusteeship and the Problem of Weak States" in *International Security*, Vol. 28, No 4, 2004, 7.
[356] Ibid.

neocolonial form. Countries remain formally independent, but every form of coercion is brought to bear to keep them under Western domination."[357]

This is the common view of neocolonialism. But there is another one, derived from what I would call an 'etymological' sense, whereby neocolonialism is the repetition of the mechanisms of the classical colonialism. The two are not opposed to each other, but rather they are mutually reinforcing, and it is important for the subject of humanitarian intervention. Indeed, when scholars qualify humanitarian intervention as a neocolonialism practice, both conceptions are represented, that is, the repetition of the nineteenth colonial expansion,[358] and the consolidation of the existence of the neocolonialism inherited from decolonization. While the new international institutions and international law that legalizes and legitimizes them work for the postcolonial neocolonialism, they resort to vocabulary, means and technics reminiscent of the nineteenth-century colonialism.

Most of the scholars underline the similarity between the practice of humanitarian intervention and the practice of imperialism and colonialism, which "acquired a 'humanitarian' gloss."[359] According to Fearon and Laitin, "there is indeed a valuable analogy between contemporary developments and nineteenth- and early twentieth-century classical imperialism."[360] They illustrate this analogy saying, "as with classical imperialism, we increasingly see the strongest states taking over, in part or whole, the governance of territories

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[357] Brichmont, ibid., 35-6.
[358] Richard Miller notes that "the idea that interventions might be morally acceptable provokes suspicion because some past interventions by Western powers have had imperialistic purposes and have produced enormous suffering. More than a few parts of the world continue to feel the crippling effects of Western colonialism, even after they have achieved political independence." See his "Humanitarian Intervention, Altruism, and the Limits of Casuistry" in *Journal of Religious Ethics*, Vol. 28, No 1, 2000, 5.
[359] Norrie MacQueen, *Humanitarian Intervention and the United Nations*. (Edinburgh: Edinburgh University Press, 2011), 3.
[360] Fearon and Laitin, ibid., 12.

where Western-style politics, economics, and administration are underdeveloped."[361] They continue, "their actions generally have had international legal authority behind them, in parallel with international legalization of the former German and Italian colonies (as League of Nation mandates) after World War I."[362] Mamdani goes in the same direction, arguing that "the era of international humanitarian order is not entirely new. It draws on the history of modern Western colonialism. At the outset of colonial expansion in the eighteenth and nineteenth centuries, leading Western powers... claimed to protect 'vulnerable groups'." He adds, "when it came to lands not yet colonized, such as South Asia and a large part of Africa, they highlighted local atrocities and pledged to protect victims against rulers."[363] This focus on the victim is also a permanent feature of humanitarian intervention discourse. For instance, one of the conditions to legitimize humanitarian intervention is that "the victims of human rights violations welcome the foreign invasion."[364] And many other proponents of humanitarian intervention highlight how it takes the victim's point of view. [365] To take the victim's position, however, is not the issue. The problem is that this victim's position is rather a pretext to justify the intervener's interest rather than the victim's. As in the nineteenth century, European powers used humanitarian motives to justify and consolidate their colonial strongholds; likewise the humanitarian discourse is used to justify an external intervention for the purpose of great powers' interests.

This is not deduced only from the liberal defense of humanitarian intervention, like Tesón who, in Nardin's words, shifts the "the focus of debate from concern for the interests…of those

[361] Ibid.
[362] Ibid.
[363] Mamdani, *Saviors*, 276. De Jonge also notes that "armed intervention for humanitarian purposes developed a bad reputation in the nineteenth century, when military interventions by European powers were frequently justified on humanitarian grounds." Ibid., 422.
[364] Tesón, Humanitarian Intervention, 119.
[365] See Bellamy, "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq" in *Ethics and International Affairs*, Vol. 19, No 2, 35; Evans, "The Responsibility to Protect: Rethinking Humanitarian Intervention", 83; Cooper-Kohler, ibid., 8, to mention a few.

who are to be rescued to concern for the interests of the intervening state and its citizens."[366] It is also affirmed by Western leaders. Talking about NATO's intervention in Kossovo, Tony Blair, then British Prime Minister, stated

> As we address these problems at this weekend's NATO Summit we may be tempted to think back to the clarity and simplicity of the Cold War. But now we have to establish a new framework. No longer is our existence as states under threat. *Now our actions are guided by a more subtle blend of mutual self interest and moral purpose in defending the values we cherish. In the end values and interests merge*. If we can establish and spread the values of liberty, the rule of law, human rights and an open society then that is in our national interests too. The spread of our values makes us safer. As John Kennedy put it "Freedom is indivisible and when one man is enslaved who is free?"[367]

Blair recognizes that self-interests are mixed with moral purposes, and it was the same position for Bill Clinton, the former US President, who stated that "where our values and our interests are at stake, and where we can make a difference, we must be prepared to do so."[368] Most importantly, however, Blair acknowledges that humanitarian intervention is also a means to spread a certain ideology. Three years later, he would make even clearer that "global interdependence requires global values commonly or evenly applied. But sometimes force is necessary to get the space for the values to be applied."[369] Blair's statement is not so different from what the first chapter showed that colonialism expanded through bullet and blood in the colonies, while it was wrapped into humanitarian intentions at home. In this sense, when Blair claims that force might be used to create space for Western values, he confirms what the opponents to humanitarian intervention suspected, that is, a new colonial enterprise. Those who view humanitarian intervention as neocolonialism would insist that it is not only moral and ideological interests that are behind humanitarian practice, but also economic interests.

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[366] Terry Nardin, "'Humanitarian Imperialism': Responding to 'Ending Tyranny in IRAQ" in *Ethic and InternationalAffairs,* Vol. 19, No 2, 2005, 23.
[367] Tony Blair, Speech Delivered in Chicago on April 22, 1999. Emphasis added.
[368] Bill Clinton, Speech of June 10 1999, quoted by Mathew Jamison, ibid., 365.
[369]Tony Blair, Speech of April 7 2002, quoted by Mathew Jamison, ibid., 365.

But before proceeding with that idea, it is worth highlighting that humanitarian intervention employs colonial vocabulary of bringing civilization to barbaric cultures and setting a standard for civilization for the whole world. Ayoob, among many others, is adamant on this point. Commenting on the shift from the Westphalian concept to sovereignty as responsibility, he cannot avoid finding it similar to the nineteenth civilizing mission. Ayoob writes,

> without denying the considerable moral force of the 'sovereignty as responsibility' approach, one cannot help but notice echoes of the 'standard of civilization' argument in this proposition. According to this latter thesis… only those countries that had reached a certain standard of civilized behavior had the rights to attain sovereign status and interact with each other on the basis of mutual recognition of sovereignty. The others, being barbarians if not savages, were to remain subject to, or under the tutelage of, sovereign (European) powers… The resurrection of the "standard of civilization" assumption in the late twentieth century, and their application under the guise of 'sovereignty as responsibility' thesis, once again raises the spectre of a return to colonial habits and practice on the part of major Western powers. It also has the potential to divide the world once again into zones of civilised and uncivilized states and legitimate predatory actions by the former against the latter.[370]

Thus, like in the time of colonialism, humanitarian intervention opposes the stable states whose sovereignty is still understood as control and therefore to whom the principle of non-interference is upheld, and those labelled tyrants or rogue states that have become, in Tesón's terms, today's uncivilized cultures who need a minimum of civilization. We are back even to the use of the imperialist era and the "othering" process –to borrow Mutua's vocabulary. For

[370] Ayoob, "Humanitarian intervention and State Sovereignty", 84-5. In a different article, he says, "Given the high degree of stratification in the international system, such interventions, whether authorized by the Security Council or not, readily come to be viewed as instruments of depredation by the strong against the weak. They conjure up images of colonial domination under the guise of the nineteenth-century 'standard of civilization' doctrine. States unable to meet the new standard, defined in terms of human rights, become potential targets of intervention and tutelage if not conquest. When these standards are applied in total disregard of the social and political contexts in which human rights violations may have taken place, but at the same time selectively to suit the interests of the major powers, they leave the impression that, as in the nineteenth century, hidden agendas are at work… Therefore, the question of agency—who constructs and codifies human rights—becomes crucial. Currently, the power to determine both where human rights have been violated and what needs to be done such violations is concentrated more or less in the hands of the same agents. Although ostensibly there is an international rights regime, the most important decisions are made either by the three Western permanent members of the Security Council or by members of NATO when the former cannot have their way in that body. When so much power is concentrated in the hands of agents who until a few decades ago were among the leading imperial powers, the legitimacy of such decisions becomes very dubious. This perception is reinforced when one realizes that almost every former colonial power is a member of NATO today." In Ayoob, "Humanitarian Intervention and international Society", 226. Nathaniel Berman finds that the intervention in Kosovo is similar to the establishment of the French protectorate over Morocco. See his "Intervention in a 'Divided World': Axes of Legitimacy" in *The European Journal of International Law*, Vol. 17, No 4, 2006, 765-8.

instance, Clifford Orwin states that "*We Westerners* no longer aspire to rule other peoples and have lost most of our optimism that we can teach them to rule themselves. *We* made trade with them, which profits us and may also be deemed to benefit them. In the realm of politics, we leave it to international organizations to patrol the interface between ourselves and the barbarians."[371] Orwin clearly asserts that humanitarian intervention is between "We Westerners" and "the barbarians" not for the interest of the latter, but rather for the ensured economic profits for the former and only a probable positive consequence for the latter. "It is the white man's burden purged of its inconvenient whiteness. Precisely because it passes for nonpolitical, the relief of suffering affords a uniquely noncontroversial ground for political action."[372] From such a view, the manipulative side and disguise of humanitarian intervention can no longer be disguised. Moreover, the just cause for humanitarian intervention is to be judged by the "conscience of all civilized peoples."[373] The bedrock of such a statement presupposes the existence of civilized and uncivilized, on the one hand, and on the other hand, it assumes that the judgment of the "uncivilized" does not count in determining the humanitarian intervention. That is why the crimes committed are more "uncivilized acts" than anything else; consequently, humanitarian intervention is conceived as a protection of "civilization" rather than the protection of victims of human rights abuse. Writing on the solidarist English school, Welch notes that "at the core of solidarism is the notion of collective punishment for infringement of the community's norms of

[371] Clifford Orwin, ibid., 216. Emphasis added. He is even more incisive in another paragraph, when claiming that humanitarianism is particularly Western in opposition with the non-Western world, he says, "true, humanitarianism is a distinctly Western development. With rare exceptions, humanitarian intervention is an encounter between Western or Westernized nations and non-Western ones, between lands where liberal democracy and technology have triumphed and lands where they have not. It is a cardinal instance of what political scientist Pierre Hassner calls the dialectic between 'the bourgeois and the barbarian': 'an encounter between two kinds of societies' of which the one characteristically shrinks from violence while the other takes its dominion for granted." Ibid., 203.
[372] Ibid., 203.
[373] Devonport, ibid., 544.

'civilized' behavior."[374] In other words, it is the protection of the civilized group/community that is at stake and not the members of the "barbarous" society. Before the humanitarian intervention order, "the core crime…was… that of aggression by one state against another. But in our society of states, *as it is*, the list of crimes has expanded to include acts of individuals against individuals. And states can no longer use the shield of sovereignty to deny accountability for such uncivilized acts."[375] Again, state sovereignty as control is abolished because it shields "uncivilized acts", which supposes a certain civilization that sets standards. At this point, one can only agree with Hehir that "in terms of the discourse of intervention it is evident that a perceived schism between civilized and uncivilized states is being proliferated both consciously and unconsciously,"[376] and it strikes at the heart of humanitarian intervention legitimacy.

By resorting to force to impose a certain ideology and by using the colonial vocabulary, humanitarian intervention gives a free ride to those who suspect it as neocolonialism. But it is not only them, because even the supporters of humanitarian intervention agree that it may be used for a neocolonial end. According to Heinze, who defends humanitarian intervention on consequentialist grounds, asserts that "after all, impulses in favor of humanitarian intervention are not terribly different from those that justified some of the most unjust and brutal undertakings in human history, the civilizing mission of colonialism being one example."[377] As to Roberts, he notes that "in the UN, as in other fora, representatives of states have put forward numerous justifications for a sceptical stance toward 'humanitarian intervention'… Even if a US-led intervention has its origins in genuine concern about atrocities, it may be perceived by other

[374] Welch, "A Normative Case", 1203.
[375] Ibid., 1203-4.
[376] Aidan Hehir, *Humanitarian Intervention After Kosovo: Iraq, Darfur and the Record of Global Civil Society* (New York: Palgrave, 2008), 106.
[377] Heinze, ibid., 144.

states as an act of expansionism and strategic threat."[378] And Newman remarks that "a recent study, which is broadly sympathetic to the enterprise [here it mostly about international administration after military intervention], nevertheless concluded that in practice it has sought to impose Western standards of economic and political liberalism, and the underlying assumptions have resembled nineteenth-century beliefs that such intervention is justified by a civilizing mission."[379] Others just call humanitarian intervention a "recolonization". That is the view of Ali Mazrui who, after the Rwandese tragedy, thinks that "the successive collapse of the state in one African country after another during the 1990s suggests a once unthinkable solution: recolonization", that is, an "external recolonization under the banner of humanitarianism,"[380] as a solution to state disintegration. William Pfaff is of the same idea, except that for him, he openly advocates for another European colonialism under a French leadership in a complete disregard of the United Nations. Answering his own question on "who is competent to supply not only peacekeeping and peacemaking in Africa but serious support for building administrations, economies, and infrastructure," he says: "Neither the United Nations nor the United States… As its former colonial ruler, the Italians know Somalia, just as the French know West and Central Africa, the British, East Africa, and the Portuguese, Angola and Mozambique." He continues, "They still have among them not only former colonial administrators but specialists and scholars concerned with these regions. If anybody is competent to deal sympathetically with these countries, the Europeans are."[381] As he clearly demonstrates, Pfaff encourages Europe to retake its shares from Berlin Conference in another "project of a half-century, perhaps a century" in

[378] Roberts, "UN and Humanitarian Intervention", 88.
[379] Newman, ibid., 143; see also 145.
[380] Ali Mazrui, "The Message of Rwanda: Recolonize Africa?" in *New Perspectives Quarterly,* Vol. 2, No 4, 1994, 18. The Kenyan historian, however, advocates for local colonialism, arguing that "the 'white man's burden' would, in the sense, become humanity's shared burden." Ibid.
[381] William Pfaff, "A New Colonialism? Europe Must go Back into Africa" in Foreign Affairs, Vol. 74, No 1, 1995, 5.

which "the European pledge to the Africans would be: We imposed this ordeal of modernization on you, which you are determined to complete. We are prepared to rejoin you and support you in that enterprise."[382] A very surprising way of cooperation through which the author of the evil becomes the savior! To start with, if modernization was imposed as ordeal, why is one determined to complete it? The logical way would be to reject the ordeal as an act of freedom. On the other hand, if one is determined to continue what was started, why is there need of recolonization, while the first try did not yield satisfying result? How certain are we that this new colonialism will not lead to the same consequences as the first one?

These are some examples which show that even from the sympathetic side of humanitarian intervention, there is recognition of neocolonialism undergirding humanitarian intervention.[383] Newman, however, evokes the other important side of humanitarian intervention as neocolonialism. Not only is humanitarian intervention analogous to the classical colonialism in its means, mechanism and vocabulary, it feeds from the postcolonial neocolonialism. The newly created states have to follow the international economic regulations which are elaborated without and yet imposed to them, from which they do not gain much since they are meant to protect Western interests. As these economic and political structures are domestically felt as imposed, they are sustained by heavy security institutions maintained by the elite bourgeois servant of the Western domination. Add to that the lack of local legitimacy, the artificial formation of colonial and postcolonial states, and the ingredients for social unrest are gathered,

[382] Ibid., 6.

[383] See also Gareth Evans who highlights problems connected with R2P concerning its possible misuse and its association with "neo-imperialism or neo-colonialism." See his "The Responsibility to Protect, An Idea", 288; he also raises the issue of double standard. See "From Humanitarian Intervention to the Responsibility to Protect" in *Wisconsin International Law Journal,* Vol. 24, No 3, 2006, 711; See also Alex Bellamy who underlies different neocolonial challenges to R2P in his "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit" in *Ethics and International Affairs*, Vol. 20, No 2, 2006. 147-8;

which leads to the situation of civil wars in which crimes against humanity and violations of human rights are committed. Authors like Orford pay attention to the economic and social causes that led to situations of Kosovo and Rwanda, causes that were most of the time externally provoked. That is why, according to her, "the principle lesson we should have learned from Yugoslavia or Rwanda was…not primarily that we need a UN rapid deployment force, but rather that intellectuals and activists concerned about democratic and human rights issues should lobby their government's representatives and directors to oppose support for this model of economic liberalization and marketization."[384] Michael Byers and Simon Chesterman, focusing particularly on Africa, raise the question whether "the adjective 'humanitarian' is appropriate on a continent that has been the target of a great many interventions directed to other ends… military action may be a poor substitute for preventive measures addressing the economic and social problems that lead to humanitarian intervention."[385] As for Mamdani, "the ICC heralds a regime of legal and political dependency, much as Bretton Woods Institutions pioneered an international regime of economic dependency in the 1980s and 1990s."[386] And as the proponents and official speeches attest, humanitarian intervention is to serve the value and interests of the West, which are both economic and ideological. This reinforces Schmitt's observation that "in its ethical-humanitarian form, [humanitarian intervention] is a specific vehicle of economic imperialism."[387] At this stage, there is no need to demonstrate parallelism with the classic colonialism since the first chapter showed how the latter also was carried out for economic reasons, among others. Hence, humanitarian intervention is neocolonialism both as a

[384] Orford, 121.
[385] Michael Byers and Simon Chesterman, "Changing the Rules about Rules? Unilateral Intervention and the future of International Law" in Holzgrefe and Keohane, ibid., 191.
[386] Mamdani, "Responsibility to Protect", 65.
[387] Schmitt, ibid.

reproduction of classical colonialism and the maintenance of postcolonial structures that perpetuate Western domination.

Conclusion

The goal of this chapter was to elaborate the second challenge to a theory of human rights, that of considering humanitarian intervention as neocolonialism. For indeed, how can we be taking human rights seriously, if we are not able to protect them? This chapter, however, discovered that the critics of humanitarian intervention have good reasons, as most of the time, whenever humanitarian intervention was invoked, it involved an unbalanced relationship between the entities involved and the prejudices in its justification. Furthermore, it became more popular in the age of colonial expansion whereby humanitarian discourse was used either to justify or to cover atrocities committed by Westerners against non-Western peoples. Hence, the first point went through the just war theory to discover that even there, whenever the protection of innocent was justified, it was non-Europeans protected by Europeans, justifying by the same token the European colonial ambitions outside the European continent. The second section looked at the legal foundation of the right of humanitarian intervention, from both natural law and positivist perspectives. The outcome was that there is no consensus on the legality of humanitarian intervention, as reasonable people disagree about different texts of international law and state practice. That is why only the moral justification and the politics behind humanitarian intervention remain as a source of contention. From the analysis of these two, the sceptics have good reasons to suspect humanitarian intervention; reasons rooted on moral ground, the practice of humanitarian intervention and the language used in its justification. All these three instances manifest a clear parallelism with classical colonialism but also participate in the maintenance of the postcolonial neocolonialism. That was the result of the third section.

Now, if theoretically, human rights are an imperialist ideology and if their practice is a reproduction of nineteenth-century structures of domination and a means for maintaining the neocolonial institutions inherited from decolonization, how can human rights be justified as tools of resistance against power and oppression? For they are being accused of being travestied as they are seen as an instrument of domination. What does philosophy offer as a response to these challenges, a response that justifies the validity of human rights and yet takes seriously the doubts and skepticism, and avoids falling into the same discourse of human rights that ends up portraying them as an imperialist ideology and another form of imperialism? The second part of this dissertation attends to these questions.

Chap. 3. Rawls and the Challenges to Human Rights

> If international stability requires the personal allegiance of non-liberal, but decent peoples, to the core values of liberal democracies whereas these values are external to their culture and tradition, these peoples are placed in a situation of deep inequality and we are faced with cultural imperialism.
>
> Catherine Audard

3.0. Introduction

The previous chapters (1&2) have elaborated the theoretical and practical questions addressed to the human rights project. On the one hand, by showing that human rights are simply an ideological tool to propagate the Western liberal imperialism, this criticism targeted the heart of the philosophical justification of human rights. On the other hand, by demonstrating that the humanitarian intervention for the protection of human rights is not legally founded, and is a moral travesty since it covers neocolonialism, this point attacks the practical side of human rights. The second part of this dissertation looks at whether philosophy can respond to these challenges. To do so, I focus on two philosophers who have marked political and social philosophy in the last decades, namely, John Rawls and Jürgen Habermas. Hence, this third chapter deals with Rawls's understanding of human rights, while the fourth is consecrated to Habermas.

Talking about John Rawls, he is one of the most influential philosophers in contemporary debates. His thought in political theory has renewed political philosophy showing, as Thomas Pogge puts it, "how philosophy can do more than play with its own self-invented question (Are moral assertions capable of being true or false? Is it possible to know that the external world exists?)–that it can work out thoroughly and creatively on important questions that every adult

citizen is or should be taking seriously."[1] While the major part of his work was devoted to the question of domestic justice,[2] in 1993 Rawls presented a paper on "Law of Peoples" in his Oxford Amnesty International Lectures on human rights, where he developed a theory of justice for the international community.[3] In his own words, "by the law of peoples I mean a political conception of right and justice that applies to the principles and norms of international law and practice," and his paper aimed "to sketch […] how the law of peoples may be developed out of liberal ideas of justice similar to but more general to the idea [of] justice as fairness."[4] The paper would evolve into a book today known under the same title,[5] where Rawls gives more space to the same subject.

It is in this context of elaborating a theory of justice for "international norms and practice" that Rawls evokes human rights. Already in his 1993 paper, he noted that the "sketch of that law covers more ground and includes an account of the role of human rights."[6] Hence, Rawls's treatment of human rights is much developed in this last major work. He, however, acknowledges that his theory streams from his political theory of justice as fairness as developed in TJ, and continued but also reworked in PL. Summarizing the role of his work, Rawls observes that "both A Theory of Justice and Political Liberalism try to say how a liberal society might be possible. The Law of Peoples hopes to say how a world Society of liberal and decent Peoples

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[1] Thomas Pogge, *John Rawls: His Life and Theory of Justice* (Oxford: Oxford University Press, 2007), viii.
[2] John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971) henceforth, TJ, and *Political Liberalism* (NY: Columbia University Press, 1993), hereafter, PL. An abridged edition of his theory of justice as fairness was edited by Erin Kelly in John Rawls, *Justice as Fairness: A Restatement*. (Cambridge, MA: The Belknap Press of the Harvard University Press, 2003), henceforth, JF.
[3] John Rawls, *Collected Papers*, ed. Samuel Freeman. (Cambridge, MA: Harvard University Press, 2001), hereafter, CP.
[4] CP, 529.
[5] John Rawls, *The Law of Peoples, with "The Idea of Public Reason Revisited."* (Cambridge, MA: Harvard University Press, 1999), hereafter, LP.
[6] CP, 529.

might be possible."[7] This being the case, before I set to studying his conception of human rights and what response he gives to the question of humanitarian intervention, it is important to go briefly –in the limit of a chapter—through his previous major works (TJ and PL), in order to show what and at what extent LP owes to them. This is even so when one recalls that Rawls's Law of Peoples is an extension of his political liberalism to international law. For this reason, understanding LP requires grasping what is the specificity of his political theory, which is rooted in his original idea of justice as fairness. However, since the goal is to focus on his theory of human rights, the interest for his former works will be limited to the extent to which they help in that endeavor. For instance, it is not question of the soundness of his theory of justice and his political liberalism, unless it is related to his conception of human rights. That is why the first point will be much more expository rather than critical.

To that end, this chapter is structured around three main points. In the first point, I trace the development of LP from TJ through PL, touching the main ideas of these two previous works. The second point focuses particularly on the Rawlsian conception of human rights in order to see if through it, one can respond to the theoretical critiques raised in the first chapter. The third and last point reconstructs Rawls's justification of humanitarian intervention for protecting human rights in order to examine whether it satisfactorily answers the worries of its critics.

[7] LP, 6.

3.1. The Path to The Law of Peoples in Rawls's Thought

a). Justice as Fairness

Rawls became a legend in political philosophy after the publication of his TJ, a work that Robert Paul Wolff said is reminiscent of Plato than of Locke or Bentham or Mill."[8] Indeed, according to many commentators,[9] TJ reenergized political and social philosophy in the Anglo-Saxon world that has been turning between different variants of utilitarianism and intuitionism. As Rawls puts it himself, those who have been criticizing those theories were not able "to construct a workable and systematic moral conception to oppose it. The outcome is that we often seem forced to choose between utilitarianism and intuitionism."[10] Rawls's project is to get out of that dilemma and to offer an alternative that is both "workable and systematic," and also superior. That is his theory of justice understood as justice as fairness.

Rawls constructs his theory from the contractarian tradition of Locke, Rousseau and Kant, carrying "to a higher level of abstraction the familiar theory of the social contract."[11] The subject of this theory of justice is the basic structure because the latter determines the distribution of rights and duties, and as such, it deeply affects individuals. In his own words, "the basic structure is the primary subject of justice because its effects are so profound and present from the start."[12] Thus, now that I have noted the subject of his theory, the next question is to know how fair it is. The answer to this question corresponds to "the higher level of abstraction," for the principles of justice have to be the result of an original contract, which will regulate subsequent

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[8] Robert Paul Wolff, *Understanding Rawls: A Reconstruction and Critique of A Theory of Justice*. (Princeton: Princeton University Press, 1977), 15.

[9] Sebatiano Maffettone, for instance, calls Rawls's work, "a revolution." See his *Rawls: An Introduction*. (Malden: Polity, 2010), 9.

[10] TJ, viii. J Donald Moon, however, thinks that the work of Rawls is "a restatement of liberalism designed to answer the challenges to liberal modernity." See his *John Rawls: Liberalism and the Challenges of Late Modernity*. (NY, London: Rowman & Littlefield, 2014), 4.

[11] Ibid., 11.

[12] Ibid., 7. Later in JF, he says that "the basic structure is the way in which the main political and social institutions of society fit together into one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time." JF, 10.

agreements. In order to make sure that the process of yielding to these principles is fair, Rawls resorts to an original situation, hypothetical in nature, in which free and rational individuals, concerned with the advancement of their interests, choose principles that are to regulate their basic institutions, and constitute their terms of cooperation. Justice as fairness is in "this way of regulating the principles of justice."[13] In other words, the fairness of his theory of justice resides in the possibility of framing principles in a situation of freedom and equality, and that is the role played by the idea of original position.

In order to properly play its role of granting fairness, Rawls introduces another important element in the elaboration of his theory, the veil of ignorance. While the persons present in the original position are free, equal and rational, they do not have access to all kinds of information. The veil of ignorance is introduced to distill information so that the representatives in charge of choosing the principles of justice receive only the information needed to stay fair and are precluded from the kind of information that would bias them. Thus, in the original position, "no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like."[14] Rawls believes that by proceeding this way, he ensures that no one is being disadvantaged due to natural conditions or social circumstances. In that sense, the original situation allows the symmetrical relation between the persons, and the outcome of their agreement will be fair since it will be chosen under fair conditions. In Rawls's terms, "the original position is, one might say, the appropriate initial status quo, and thus the fundamental agreements reached in it are fair."[15]

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[13] TJ, 11. JF elaborates this point, noting that "the idea of original position is proposed … as the answer to the question of how to extend the idea of fair agreement to an agreement on principles of political justice for the basic structure.", JF, 16.
[14] TJ, 12.
[15] Ibid.

Having designed the context in which the principles of justice are to be chosen, Rawls sets now to elaborate the content of his theory that is supposed to be presented to the representatives in the original position. That content is contained in the two principles of justice which are situated in a lexical order; that is, the first is to be satisfied before turning to the second one. In the final statement, the first principle is that "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberties for all."[16] Despite Brian Barry's comment that the quality of Rawls's liberalism is archaic,[17] this first principle is well-known as setting the liberal tone of this theory of justice, as it strongly affirms the traditional liberal basic rights founded on the moral nature of a human person as free and equal. As Rex Martin notes, "Rawls's first principle of justice establishes a particular 'list' of basic liberties; it identifies a specific set of liberties which are to acknowledged as being held equally by all."[18] The second principle reads, "social et economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, consistent with the just savings principles, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity."[19] Mostly known as the equality of opportunity and difference principle, the second principle of justice as fairness considers the question of distributive justice. The same way the relationship between the first and second principle is lexical, so also is the equality of opportunity prior to the difference principle. In Pogge's words, "the second principle… imposes two requirements upon the social and economic inequalities an institutional scheme may generate: the opportunity principle and the difference principle. These are serially ordered so that

[16] Ibid., 302.
[17] Brian Barry, *The Liberal Theory of Justice: A Critical Examination of the Principal doctrines in* A Theory of Justice *by John Rawls*. (Oxford: Clarendon Press, 1973), 32.
[18] Rex Martin, *Rawls and Rights*. (Lawrence: University of Press of Kansas, 1985), 29. Maffettone talks of "liberalism of liberties." Ibid., 53.
[19] TJ, 302.

the former ranks lexically above the latter, just as the first principle ranks lexically above the second principle as a whole."[20] This second principle regulates the distribution of what Rawls calls primary goods, which are "rights and liberties, opportunities and powers, income and wealth,"—later he adds self-respect.[21] According to Rawls, these are goods that individuals as rational persons need for realizing their moral powers of having and pursuing the conception of the good as well as the sense of justice. By its attention for providing a social minimum to the least advantaged so that she can enjoy the basic liberties, justice as fairness is egalitarian. As Samuel Freeman remarks, "what distinguishes justice as fairness is its egalitarianism: it defines the social minimum in terms of the difference principle."[22] In other words, Rawls's liberalism is not only concerned with rights and liberties, but also the distributions of income and wealth.

Rawls believes that, under the circumstances of justice of moderate scarcity and mutual disinterestedness, once situated in the original position regulated by the veil of ignorance, the representatives being moral persons, will choose to regulate the basic structure of their political, social and economic institutions by these two principles of justice, over the utilitarian or intuitionist versions, because he believes that his theory responds better to their moral nature as free and equal. One has to note, however, that for Rawls, these principles are to regulate a closed society that one enters by birth and exits by death. Such a society arranged on these principles is a fair system of reciprocal cooperation. Rawls calls such a society a well-ordered society.[23] In this sense, Rawls follows Kant in providing a deontological theory that gives priority to the right, but he constructs his theory for institutions rather than for individuals as Kant did. Maffettone

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[20] Thomas W. Pogge, *Realizing Rawls*. (Ithaca: Cornell University Press, 1989), 161-2.
[21] TJ, 92.
[22] Samuel Freeman, "Introduction" In Samuel Freeman, Ed. *Cambridge Companion to Rawls*. (Cambridge: Cambridge University Press, 2002), 9.
[23] In JF, Rawls notes that the well-orderedness of a political society means that (a) it is regulated by a public conception of justice, (b)its basic structure is based on the principles of justice and (c) citizens have the sense of justice. JF, 8-9.

rightly observes that "Rawls aims to provide a deontological rather than teleological foundational ground for the principle of justice. In this sense, his inspiration is typically Kantian. Unlike Kant, Rawls centers his theory on institutions rather than individuals."[24]

Now, as a theory designated to regulate a society, one thing is to show that it is superior to other alternatives—in this case, utilitarianism and intuitionism—another thing is to attest that the institutions built on it are stable, which is the question of political philosophy *par excellence*. The institutional arrangements "must insure that just institutions are stable."[25] As David Rasmussen shows,[26] it is this question of stability that Hobbes struggles with and tries to resolve instrumentally, while Rawls wants stability for rights reasons. That is why, in order to make sure that justice as fairness is stable, Rawls has to show that it can also be endorsed by individuals as they pursue their different and diverse rational plans of life. In other words, it has to be demonstrated that individuals do not accept the principles of justice for instrumental reasons or as a compromise, but rather on the moral ground, and that the theory of justice fits into their conceptions of the good. That is what Rawls calls stability for right reasons. As Rasmussen remarks, Rawls, "in contrast to Hobbes who favored an instrument framework, tried to achieve stability from a moral point of view."[27]

Rawls resolves this question of stability by reaffirming the priority of the right over the good—since his theory is, as Maffettone rightly notes, deontological and not teleological—and, at the same time, he recognizes that rational individuals have plans of life that they consider to be good. The stability then is attained when not only the rational plan of life of individuals does not

[24] Maffettone, ibid., 25-6.
[25] TJ, 32.
[26] David M. Rasmussen, *Rawls, Religion and Clash of Civilizations*. Unpublished Paper.
[27] Rasmussen, "The Emerging Domain of the Political" in *Philosophy and Social Criticism*, Vol. 38, No 4-5, 2012, p. 460.

conflict with the principles of justice, but also that individuals as rational beings consider the principles of justice and a society their regulate—a well-ordered society—as also good. The question here is, "how is it possible [for] persons to fulfill adequately their own self-interests and at the same time comply with the demands of justice?"[28] To that end, Rawls distinguishes two theories of good, a thin and a full theory of the good. The thin theory of the good focuses only on the primary goods—liberties and basic rights, opportunities, wealth, income and self-respect—needed for rational representatives in the original position to frame the principles of justice. As to the full theory of the good, it is a comprehensive exploration of the good. Now, since the "purpose of the thin theory is to secure the premises about primary goods required to arrive at the principles of justice,"[29] the stability question needs only this thin theory of the good. As Rawls states, "if within the thin theory it turns out that having a sense of justice is indeed a good, then a well-ordered society is as stable as one can hope for."[30] He continues, "not only does it generate its own supportive moral attitudes, but these attitudes are desirable from the standpoint of rational persons who have them when they assess their situation independently from the constraints of justice. This match between justice and goodness I refer to as the congruence."[31] In other words, the stability one is hoping for is this congruence of justice and goodness, accounted through the sense of justice fitting into the thin theory of the good.

The idea of congruence brings together the two moral powers of the human person, as having the capacity to conceive, follow and revise, when necessary, a rational plan of life, and the sense of justice. In this sense, Freeman is on target when he observes that "in *Theory* Rawls sees the moral powers in Kantian terms; as the powers of practical reasoning in matters of

[28] Rasmussen, *Rawls*, 11.
[29] TJ, 396.
[30] TJ, 398.
[31] Ibid., 398-9.

justice, they are the essential capacities for moral and rational agency."[32] The question remains, however, as to know what is the sense of justice and how it fits into this Kantian frame of human nature. To answer this question, Rawls resorts to the developmental psychology, showing that a human person develops as a child from the morality of authority in the family to the morality of principles lived in just institutions through the morality of association where she learns the importance of mutual cooperation through socialization. These are what he later calls the three psychological laws. He also reconstructs Aristotle, showing that people strive for the best, and they choose situations where they challenge themselves by exercising their best faculties. This is what he calls the Aristotelian principle.

Concerning the sense of justice, Rawls defines it as "an effective desire to apply and to act from the principle of justice and so from the point of view of justice."[33] It is acquired during the third law of morality, that is, morality of principles, but the "inherent stability is a consequence of the reciprocal relation between the three psychological laws."[34] It is for this reason that "the most stable conception if justice…is presumably one that is perspicuous to our reason, congruent with our good, and rooted not in abnegation, but in affirmation of the self."[35] It is stable because it corresponds to the moral nature of the human person as free and equal, rational in her interest, but also ready to cooperate with others once she is assured that others will do their part. Put otherwise, it is stable because it demonstrates that "it is rational… for those in a well-ordered society to affirm their sense of justice as regulative of their plan of life."[36]

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[32] Freeman, *Introduction*, 5.
[33] TJ, 567.
[34] Ibid., 498.
[35] Ibid., 499.
[36] Ibid., 567.

Rawls is convinced that justice as fairness fulfills these requirements of a stable conception of justice, because it is construed on human nature of individuals who regulate their social cooperation on the principles of justice, and they do it on reciprocal terms and not for instrumental reasons. Thanks to the thin theory of goods, they see the sense of justice as a primary good they need, and they value the society built on the principles of justice as good since it is a well-ordered society. In this way, the isolation and the assurance problems are resolved on a moral basis, and not instrumentally, as Hobbes would have proposed. In Rasmussen's words, "Rawls claims that the experience [of] the sense of justice and the evolution of moral experience does the same thing as Hobbes does but this time on a moral level, i.e., connect 'the question of stability with that of political obligation.' Significantly, at this point in his development Rawls believes that he has resolved the isolation and the assurance problems on moral grounds."[37] Rasmussen is indeed right, because Rawls concludes his discussion on stability by asserting that "a well-ordered society satisfies the principles of justice which are collectively rational from the perspective of the original position; and from the standpoint of the individual, the desire to affirm the public conception of justice as regulative of one's plan of life accords with the principles of justice of rational choice."[38] In other words, he has proven that from an individual point of view, regulating his rational plan of life on the principle of justice is rational, and this was the heart of the stability concern. Hence, Rawls can easily assert that "these conclusions support the values of community, and in reaching them my account of justice as fairness is complete."[39] Not only is the sense of justice rational for the individual, but also the well-ordered society is valued as a good. For this reason, justice as fairness is complete.

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[37] Rasmussen, *Rawls,* 13.
[38] TJ, 577.
[39] Ibid.

Now, if his justice as fairness was complete because it is stable, why did Rawls not content himself with the TJ? What is the cause of his further production that seemed even to correct his TJ? The next section attends to this question.

b). Unstable Stability and the Need for Political Liberalism

As already mentioned above, Rawls's project was not only to offer a theory of justice that is systematically superior to utilitarianism and intuitionism, but also such a theory had to be the most stable. Although at the time of the TJ's completion Rawls was convinced that justice as fairness fulfilled that requirement, he came to realize that his theory was not as stable as he thought. He discovered that the problem of a democratic society is that it is composed of citizens holding religious and metaphysical views that are irreconcilable, and none can be affirmed generally. Rawls terms this situation as the fact of pluralism, which is not accidental, but rather congenital to the free exercise of practical reason under free democratic institutions. In his own words, "the serious problem is this. A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines."[40] In that sense, the fact of pluralism challenges the quest for stability of just institutions regulated by the two principles of justice as fairness. For this reason, the revision of the stability issue in TJ stems from "trying to resolve a serious problem internal to justice as fairness, namely from the fact that the account of stability of part III of *Theory* is not consistent with the view as a whole."[41]

One might ask the reason why the third part of TJ is not consistent with the whole and how it fails to address properly the stability question. Rawls observes that, while the substance and structure of justice as fairness is strongly affirmed in the TJ, his theory is presented as a

[40] PL, xvi.
[41] Ibid., xv-xvi.

moral theory at par with the Kantian and Mill's liberalisms. Consequently, justice as fairness is as comprehensive as any other comprehensive doctrines professed in a modern democratic society. In TJ, he does not distinguish moral from political domains. "Nothing is made of contrast between comprehensive philosophical and moral doctrines limited to the domain of the political."[42] Yet, it is a fact that the modern democratic society is characterized by pluralism. Therefore, its stability cannot be based on any of these comprehensive views. It has rather to be erected on a conception of justice that can be endorsed by these different comprehensive doctrines. Now, since the stability argument deployed in TJ does not take into account the fact of pluralism, Rawls judges it unrealistic as is the idea of a well-ordered society, because "it is inconsistent with realizing its own principles under the best of the foreseeable conditions."[43]

At this point, we have the answer to the question about the reason that pushed for the revision of a theory that was first judged complete and stable. It is the fact of pluralism that challenges the stability of modern democratic societies. The recasting of the account of stability, however, would require the revision of some fundamental ideas, especially the reconceptualization of justice as fairness as a political theory instead of being another comprehensive view. Furthermore, Rawls would have to revise his former premise that justice is an uncompromising value as is truth, giving up his epistemological foundation,[44] and even introduce new ideas. As he puts it, "this change in turn forces many other changes and calls for a family of ideas not needed before."[45] The first task now will be to redefine political liberalism as a political conception of justice which, consequently, will shift the question of stability itself.

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[42] Ibid., xv.
[43] Ibid., xvii.
[44] Rasmussen thinks that Rawls does go completely beyond epistemology when he adopts reasonableness instead of truth. See his "Defending Reasonability: The Centrality of Reasonability in the Later Rawls" in *Philosophy and Social Criticism*, Vol. 30, No. 5-6, 2004, p. 536, note 1.
[45] Ibid.

Instead of thinking that stability will be achieved once it is demonstrated that (i) justice as fairness fits into the rational plan of individuals, (ii) the sense of justice is part of the thin theory of the good, and (iii) the well-ordered society is appreciated as a good, the question of stability now is about finding a political conception that accommodates the diverse comprehensive moral, religious and philosophical doctrines that constitute the democratic culture. That is what Rawls calls political liberalism. In his own terms,

> the problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines? Put another way: How is it possible that deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime? What is the structure and content of a political conception that can gain the support of such an overlapping consensus? These are questions that political liberalism tries to answer.[46]

Not only does this quotation contain the central question of political liberalism of stability and legitimacy,[47] but it also introduces many important ideas. Before coming back to them, it is worth noting that Rawls's turn from the theory of justice seen as a comprehensive doctrine to justice as fairness conceived as political happens from the eighties and forward, a period during which Rawls's intellectual work set to remove "the ambiguity of *Theory*" and "justice as fairness is presented from the outset as a political conception of justice."[48] Rasmussen[49] argues that the presentation of justice as fairness as a non-comprehensive doctrine first appeared in Rawls's essay of 1985, entitled: "Justice as Fairness: Political and not metaphysical." Rightly, in this paper, Rawls mentions that he wants to move from his earlier

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[46] Ibid., xviii.
[47] Maffettone, 211. Kok-Chor Tan concurs in the same idea saying that "in Political Liberalism, Rawls tells us that one of the main challenges facing a liberal democratic society is the problem of maintaining legitimate stability in the face of deep and irreconcilable moral, religious and philosophical diversity found in most contemporary states." In his "Liberal Toleration in Rawls's Law of Peoples" in *Ethics*, Vol. 108, No. 2, 1998, p. 277.
[48] PL, xvii.
[49] Rasmussen, *Rawls,* 15. He contends that "this paper marks a major development in Rawls' thought." See note 19. Later, he states, "I regard this as a major turn in Rawls' philosophical development which stems from the frank acknowledgement that modern political history has so effected the discipline of political philosophy that it can no longer rely on the insights of philosophy alone to justify its orientation. The reasons for this are, as he argues, both historical and cultural." Ibid., 16.

theory of justice, "because it may seem that this conception depends on philosophical claims I should like to avoid, for example, claims to universal truth, or claims about the essential nature and identity of persons."[50] In other words, he abandons the earlier epistemological foundation of his theory for an interpretive project as he turns back to the democratic culture,[51] and alters his Kantian moral grounding of the conception of the human person for a political one. These are the steps for conceptualizing his political liberalism which avoids an allegiance to any comprehensive doctrine, be it religious, moral or philosophical. Rather, as designed for a constitutional democracy, it has to be free-standing. "The idea is that in a constitutional democracy the public conception of justice should be, so far as possible, independent of controversial philosophical doctrines."[52] Thus, while this political conception of justice keeps the basic structure as its subject, it however has to be free-standing and is constructed from the democratic culture.[53] This brings us back to other main ideas that constitute the Rawlsian political liberalism.

The first notion that undergoes transformation is the idea of the person. Instead of using the Kantian notion of human person as an autonomous rational being, Rawls reconstructs a political conception of the human person as a citizen; that is, someone who bears rights and duties in a democratic political community. As he says, "in the transformation from the comprehensive doctrine of justice as fairness to the political conception of justice, the idea of the person as having a moral personality with the full capacity of moral agency is transformed into that of the citizen."[54] And since this reconstruction takes place in the modern democratic culture,

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[50] CP, 388.
[51] Jonathan Quong holds a contrary view, as he claims that "political liberalism is a justificatory project, not an interpretive one." See his *Liberalism without Perfection* (Oxford: Oxford University Press, 2011), 155.
[52] CP, 388.
[53] PL, 11-15.
[54] Ibid., xliii.

the citizen is conceived and perceived as a free and equal person. Hence the question of a political conception of justice is about how *free and equal citizens*, marked by reasonable and yet irreconcilable comprehensive doctrines, can live together in just and stable institutions.

As already noted, the fact of pluralism is at the source of the revision of his stability account. However, Rawls distinguishes the pluralism *per se* from the pluralism that is reasonable. As he notes, as a result of the exercise of practical reason under free institutions, there can be every kind of pluralism, even mad comprehensive doctrines. "In their case the problem is to contain them so that they do not undermine the unity and justice of society."[55] But, reasonable pluralism is at the heart of political liberalism,[56] because it is one of the major characters of democratic institutions, and "not an unfortunate condition of human life."[57] It expresses the reality of the democratic cultures that free and equal citizens hold diverse comprehensive doctrines that are reasonable although irreconcilable, as the result of the exercise of their practical reason under free institutions. Because of that, none of these comprehensive doctrines can offer a source of legitimation for the coercive power. If it happens, it generates "the fact of oppression."[58] Instead, the legitimacy of the coercive power has to be based on a public conception of justice that is politically free-standing from all of them, and yet endorsed by all these reasonable comprehensive doctrines. This need of support for the political conception of justice "by at least the majority of its politically active citizens"[59] is the core of the stability issue and it touches another central idea of Rawls's political liberalism: the overlapping consensus.

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[55] Ibid., xvii.
[56] This was a move from his former works, for instance his essay on "The idea of Overlapping Consensus" of 1987 where he uses fact of pluralism of the fact of plurality without qualification. See CP, 425.
[57] Ibid., 37.
[58] Ibid.
[59] Ibid., 38.

Rawls had talked of the overlapping consensus in TJ, but he acknowledges that it has to undergo a transformation as he revisits the stability problem.[60] This idea matures as Rawls develops his political liberalism. Rasmussen observes that Rawls wrote three papers on overlapping consensus with one that was included as a chapter of PL.[61] In most of these editions the idea of overlapping consensus is closely linked to the question of stability and is presented as the second stage constitutive of the political liberalism, in addition to being a free-standing theory. While the first stage of political liberalism construes a conception that is independent of comprehensive doctrines, the second stage tries to establish its stability, by showing how these controversial metaphysical or religious views endorse the political conception from their own respective perspectives. In other words, it is a stability that takes into account the modern democratic condition.[62] Such stability is based not on a *modus vivendi*, a pragmatic compromise through which a comprehensive doctrine awaits an opportunity to impose itself on others; neither is it a stability imposed by the power of a forceful coercion. Rather, the idea of overlapping consensus conveys the fact that the reasonable comprehensive doctrines appreciate the political conception of justice and endorse it as the stable condition conducive to their development. That is how a political conception of justice generates "its own support in a suitable way,"[63] leading to a stability for right reasons, instead of an instrumental one. Rasmussen is correct to remark that the overlapping consensus constructed from the interpretive way of the democratic culture is not

[60] Talking about the changes that might occur, he observers that "one apparent exception is the idea of an overlapping consensus. Yet its meaning in *Theory*, pp. 387f., is quite different." Ibid, xvii, note 5.
[61] He claims that Rawls wrote two papers in 1988 and another one in 1993, which became the chapter of PL. see Rasmussen, *Rawls*, 20. The CP, however, mentions only two, one published in 1987, p. 421 and another one issued in 1989, p. 473 and then the chapter in PL.
[62] In his 1987 paper, he observes that "the idea of overlapping consensus enables us to understand how a constitutional regime characterized by the fact of pluralism might, despite deep divisions, achieve stability and social unity by the public recognition of a reasonable political conception of justice." CP, 422-3. In his second paper, in 1989, he asserts that the overlapping consensus contains the idea of "a consensus in which diversity of conflicting comprehensive doctrines endorse the same political conception, in this case, justice as fairness." CP, 486. And in PL, "In such a consensus, the reasonable doctrines endorse the political conception, each from its own point of view." PL, 134.
[63] CP, 488.

"a compromise between comprehensive doctrines but as a process that must accommodate itself to the emerging domain of the political."[64]

Another important move from the theory of justice as a comprehensive doctrine to the political conception of justice as fairness is the shift from the epistemological realm to the interpretive model. This shift impacts the moral powers that are so central to the political liberalism, as they are no longer referring to the full moral personality, but rather to the faculties of a free citizen acting in free democratic institutions among equals. As Freeman notes, "in *Political Liberalism*, the moral powers are characterized in less ambitious terms; they are the capacities that anyone needs if he or she is to occupy the role of citizen and engage in, benefit from, and comply with the demands of social cooperation in a democratic society."[65] Thus, instead of the concept of truth underlying justice as fairness in TJ, Rawls relies heavily on the notion of reasonableness, which he distinguishes from the idea of rationality. That is why, not only does this idea of the reasonability qualify the fact of pluralism, it also distinguishes reasonable comprehensive doctrines from the unreasonable ones, and it plays a central role in the political justification offered by justice as fairness as a freestanding conception of justice.

For Rawls, reasonableness is characterized by two main features. First, it conveys the idea of reciprocity in a system of fair cooperation; second, it comprises the fundamental disagreement[66] that underlies the reasonable comprehensive doctrines in a democratic culture. That is what Rawls calls "the burden of judgment."[67] In Rawls's words, "persons are reasonable in one basic aspect when, among equals say, they are ready to propose principles and standards

[64] Rasmussen, *Rawls*, 18.
[65] Freeman, "Introduction," 5.
[66] This is taken from Rasmussen who notes that Rawls recognizes that the democratic culture is "characterized by radical disagreement." See Rasmussen, *The Possibility of Global Justice: Kant, Rawls and the Critique of Cosmopolitanism,* unpublished essay, 16.
[67] PL, 54.

as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so."[68] Once more, one notes that Rawls resolves the assurance and isolation problem on a moral ground, instead of resorting to an instrumental mechanism as Hobbes does. That it is the reason why he distinguishes it from rationality, which is the adjustment of means to an end by an isolated agent. Reasonability implies reciprocity since it is conceived in a system of mutual cooperation. Concerning the second basic aspect, it consists in "the willingness to recognize the burdens of judgement and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime."[69] A reasonable person recognizes the fact of reasonable pluralism as an enduring feature of the democratic culture and, therefore, no comprehensive doctrine can be invoked to legitimize the coercive power. Rather, when addressing each other on a subject of public concern, citizens offer fair terms of cooperation that can be accepted by the interlocutor. Hence the need of the idea of public reason as a consequence of the combination of the fact of reasonable pluralism and the idea of reasonable.

The very idea of *public* reason implies that there are *non-public* reasons, and Rawls makes a clear distinction between the two. For Rawls, public reason is singular, while non-public reasons are plural, because they are those reasons at associational or domestic levels. Moreover, public reason is not opposed to private reason, since "there is no such thing as private reason."[70] Hence, for Rawls, public reason is intrinsically linked to the democratic culture and that is why it is one of those fundamental ideas of political liberalism. In his own words, "public reason is characteristic of democratic culture: it is the reason of its citizens, of those sharing the status of

[68] Ibid., 49.
[69] Ibid., 54.
[70] Ibid., 220, note 7. .

equal citizenship."[71] As such, the public reason is public in the sense that (i) it is the reason of citizens as they constitute the political body as a public, (ii) its subject is the good of the public and matters of fundamental justice, and (iii) its content and nature are public.[72] Concerning the latter, its content is public because it is the political conception of justice as construed through the interpretive enterprise of the democratic culture. That is why its content is essentially liberal, and a political conception of justice is liberal if it (i) specifies basic rights, liberties and opportunities; (ii) affirms the priority of the right over the good and, (iii) assigns all-purpose means to all citizens so that they may benefit from their basic liberties and opportunities.[73] Seen from this point of view, the idea of public reason ties together the idea of reasonableness and the political conception of justice designed to accommodate the fact of reasonable pluralism, characteristic of the modern democratic society.

After exploring the political conception of justice, one would like to know what a well-ordered society looks like, since the one developed in TJ was deemed unrealistic because it was founded on a comprehensive doctrine. Such a society is still a closed one that one enters through birth and exits through death, and it is conceived as a fair system of cooperation. However, it is conceived as a political society and not as a community or an association with intent of ordering the individual's life according to a certain end. Rather, it affirms the priority of the right over the good. That is why the agents are citizens and not firstly as moral personalities. Therefore, under the political conception of justice as fairness, a well-ordered society means three main things: (i) it is a society characterized by reciprocity, since "everyone accepts, and knows that everyone else accepts, the very same principle of justice;" (ii) it is regulated by the principles of justice and

[71] Ibid., 213.
[72] Ibid.
[73] Ibid., 223.

its basic structure is publicly known to satisfy them; (iii) its citizens have a sense of justice that allows them to comply with just-basic-institutions.[74]

Those are some of the important ideas that were reworked or introduced in his PL. It was mentioned at the beginning that my interest in the Rawls's previous work to LP was motivated by its influence on his understanding of human rights. Having touched some of the ideas of his political liberalism, I can now analyze how he moves from the political conception of justice for a domestic society to the elaboration of principles for the global society.

c). A Liberal Theory for a Global Society

In TJ, Rawls had already talked about international law, saying that the "problem, then, is to relate the just political principles regulating the conduct of states to the contract doctrine and to explain the moral basis of the law of nations from this point of view."[75] At this stage, Rawls wanted to extend the principles derived from his theory of justice as fairness to the conduct of nations. That is why he proposes an original position of peoples representing these nations in order to choose principles that would guide their mutual cooperation. He says, "at this point one may extend the interpretation of the original position and think of the parties as representatives of different nations who must choose together the fundamental principles to adjudicate conflicting claims among states."[76] Rawls claims that the resulting principles would be "political principles, for they govern public policies towards other nations."[77] From that international original position, Rawls believes that two main principles would be identified. First, there is the

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[74] Ibid.,35.
[75] TJ, 377.
[76] Ibid., 378. The conditions for that original position are described in the same way as for the original position for the domestic justice. The representatives of nations do not have all kinds of information. For example, "they know nothing about the particular circumstances of human life, they know nothing about the particular circumstances of their own society, its power and strength in comparison with other nations, nor do they know their place in their own society." Ibid.
[77] Ibid.

equality principle with two consequences: (a) the principle of self-determination and (b) the principle of self-defense. Secondly, they would adopt the principle of observing the treaties, "provided they are consistent with the other principles governing the relations of states."[78] One astonishing remark about these principles is the absence of human rights among the principles regulating international cooperation. Thus, even at the outset, there is a big difference between the principles elaborated in TJ and those in LP, twenty years later.

As already seen, after Rawls published his TJ, his political philosophy underwent a thorough revision of his fundamental concepts that led to the production of his PL. Some of those shifts were his affirmation that his theory of justice is political and not metaphysical,[79] and the development of the ideas of overlapping consensus and the emergence of the political.[80] But most importantly, the fact of reasonable pluralism as a permanent feature of modern society led him to restructure his political question and to develop his political liberalism as a response to this challenge. As he puts it, "political liberalism addresses two fundamental questions. The first is: what is the most appropriate conception for specifying the fair terms of social cooperation between citizens regarded as free and equal? The second question is: what are the grounds of toleration understood in a general way given *the fact of reasonable pluralism as the inevitable* result of powers of human reason at work within enduring free institutions?"[81] This shift from a comprehensive (TJ) to a freestanding political liberalism (PL) transforms the idea of the person into that of the citizen, and relies on the overlapping consensus of reasonable comprehensive doctrines on political values as a way of stabilizing a democratic constitutional regime. It is in this context that the LP occurs, and it is logical to expect that, at this time, the Rawlsian notion of

[78] Ibid.
[79] CP, 388.
[80] Ibid., 473.
[81] PL, 47. Emphasis added.

international cooperation had been affected by the shift inside his political thought, and that is why he calls it "The Law of Peoples" instead of the classic "law of nations". "By Law of Peoples," he means "a particular conception of right and justice that applies to the principles and norms of international law and practice."[82]

As he endeavors to elaborate his Law of Peoples, Rawls recalls that "in §58 of *A Theory of Justice* I indicated how justice as fairness can be extended to international law (as I called it there) for the limited purpose of judging the aims and limits of just war."[83] In other words, his international theory in TJ was motivated by the question of just war. But "here [LP] discussion covers more ground."[84] This larger ground is constituted by five different kinds of societies. The first type is that of *reasonable liberal peoples*, the second is that of *decent people*, the third is of *outlaw states*, the fourth is of *societies burdened by unfavorable conditions,* and fifth, is *benevolent absolutisms.*[85]

The first type, reasonable peoples, relies on what Rawls had already elaborated in PL about reasonability, with its two basic aspects, i.e., fair terms of cooperation and the burdens of judgment.[86] This idea of reasonable leads to the question of legitimation through public reason, which is the corner-stone of Rawls's political liberalism. These features also structure what Rawls understands by reasonable liberal peoples. As he states, "the idea of public reason for the Society of Peoples is analogous to the idea of public reason in the domestic case when a shared

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[82] LP, 3. This definition did not change from his Oxford Lecture of 1993 to the book of 1999, and he argues that it is derived from the ancient expression, *ius gentium*. See CP, 529, note 1. However, while in the same note of CP, Rawls acknowledges that his use of "Law of Peoples" is the closest to the phrase *ius gentium intra se*, as what peoples have in common, he takes distance from this interpretation in his book, saying that law of peoples is rather "the particular political principles for regulating the mutual political relations between peoples." LP, 3, note 1.
[83] LP, 4.
[84] Ibid.
[85] Ibid. Emphasis added.
[86] PL, 48-58.

basis of justification exists and can be uncovered by due reflection."[87] As to the decent hierarchical peoples, Rawls introduces them to illustrate the toleration that has to characterize the Law of Peoples, so that it passes the test of universality and not only be considered ethnocentric to the Western world.[88] For Rawls, toleration "means not only to refrain from exercising political sanctions –military, economic, or diplomatic –to make a people change its ways. To tolerate also means to recognize these non-liberal societies as equal participating members in good standing of the Society of Peoples."[89] And decent hierarchical peoples are "societies [that] are associationist in form: that is, the members of these societies are viewed in public life as members of different groups, and each group is represented in the legal system by a body in a decent consultation hierarchy."[90] In order to be tolerated by the reasonable liberal peoples, decent hierarchical peoples have to satisfy two principles: (1) Non-aggression; (2) a. protection of human rights; b. imposition of duties and obligations on all persons within peoples' territory; c. judiciary system functioning for the interest of the common good.[91] These two principles are related to the conduct of decent peoples both internally and externally. For Rawls, these two types of society constitute what he calls "well-ordered peoples",[92] and them only can participate in the elaboration of the Law of Peoples.

For conceiving the principles for the Law of Peoples, Rawls resorts again to his "device for representation", that is, the original position. He suggests three original positions, two for reasonable liberal peoples and one for decent hierarchical peoples. The first original position is for deciding reasonable principles guiding domestic justice in liberal societies. In his words, "the

[87] LP, 16.
[88] It still needs to be examined how successful Rawls is in this.
[89] LP, 59.
[90] LP, 64.
[91] Ibid., 64-6.
[92] Ibid., 4.

first use of the original position, it models what we regard –you and I, here and now –as fair and reasonable conditions for the parties, who are rational representatives of free and equal, reasonable and rational citizens, to specify fair terms of cooperation for regulating the basic structure of this society."[93] He then sets five essential features for such a model of representation to work: (1) parties are representing citizens fairly (2). as rational; (3) they select the principles from available ones for the basic structures; (4) they do so for appropriate reason; (5) and for citizens considered as rational and reasonable.[94] For the second original position, Rawls suggests an extension of the original position for domestic justice to justice among reasonable liberal peoples. "This time, the rational representatives of liberal peoples are to specify the Law of Peoples, guided by appropriate reasons."[95] Following the first model, there is fairness between "both the representatives and the people they represent" because they "are situated symmetrically." Moreover, they are rational and subjected to the veil of ignorance. This second position satisfies the five essential features and therefore it is sound.[96] From this second original position, Rawls derives the principles that are to constitute the Law of Peoples:

1. Peoples are free and independent, and their freedom and independence are to be respected by others.
2. Peoples are to observe treaties and undertakings
3. Peoples are equal and are parties to the agreements that bind them
4. People are to observe the duty of non-intervention
5. Peoples have the right of self-defense but no right to instigate war for reasons other than self-defense
6. *Peoples are to honor human rights*
7. Peoples are to observe certain specified restrictions in the conduct of war
8. Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.[97]

Compared to the international theory developed in TJ, one notices many differences. In TJ, the theory comprised only two principles; but the Law of Peoples is shaped by eight principles—one

[93] Ibid., 30.
[94] Ibid., 30-1.
[95] Ibid., 32.
[96] Ibid., 32-3.
[97] Ibid., 37. Emphasis added.

more compared to the list of principles of his 1993 Oxford Amnesty International lecture.[98] More importantly, human rights are now part of the principles that are to guide the cooperation among peoples.

The third original position comes as a second extension of the law of peoples to decent peoples to see if they can endorse the same principles as reasonable liberal peoples do. If the former adopts them, Rawls assumes that he will have proved that those principles are universal and not only constrained to the Western world. Now, among the principles that could cause some friction between liberal and non-liberal peoples is the principle regarding human rights. However, Rawls had taken great care to include honoring human rights into the criteria that define decent hierarchical peoples. Therefore, it becomes easy to presume that by submitting these principles to the representatives of decent peoples, they "would adopt the same eight principles as those […] adopted by representatives of liberal societies."[99] As in his theory of justice for a domestic society, Rawls does not want international relations to be based on self-interest as the realist school would advocate, nor does he go in the line of hard cosmopolitanism.[100] Rather, he believes that his Law of Peoples is the middle way between the

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[98] CP, 529. In this paper, he omits the eighth principle enouncing the assistance duty of burdened societies; maybe, because there, he does not have the same typography of societies. See CP, 540.

[99] LP, 69.

[100] The most cited in this category of hard cosmopolitanism from whom Rawls takes his distance are Thomas Pogge and Charles Beitz. For the former, see, for instance, his *Realizing Rawls*, ibid., "An Egalitarian Law of Peoples" in *Philosophy and Public Affairs*, Vol. 23, No 3, 1994, 195-224; or "Do Rawls's Two Theories of Justice Fit Together?" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006). Concerning Beitz, see his *Political Theory and International Relations*. (Princeton: Princeton University Press, 1999), "Rawls's Law of Peoples" in *Ethics*, Vol. 110, No 4, 2000, "Human Rights as a Common Concern" in *The American Political Science Review*, Vol. 95, No 2, 2001; "Human Rights and the law of peoples" in Deen K. Chatterjee ed., *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2004 or his *Idea of Human Rights*. Ibid. But it seems to me that one can also add Kok-Chor Tan. See for example his *Toleration, Diversity, and Global Justice* (Pennsylvania: The Pennsylvania State University Press, 2000), "The Problem of Decent Peoples" in Rex Martin and David Reidy, eds., ibid., or his "Critical Notice" a review of the Law of Peoples in *Canadian Journal of Philosophy*, Vol. 31, No 1, 2001. Other strong cosmopolitan voices seem to be Andrew Kuper and Seyla Benhabib. For the former, See "Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons" in *Political Theory*, Vol. 28, No 5, 2000; and for the latter, see her *The Rights of Others: Aliens, Residents and Citizens* (Cambridge University Press, 2004).

two extremes[101] and, therefore, it provides a moral foundation for international relations through international law, without being a comprehensive one. Thus, his political conception of international justice rests on principles regulating relations between peoples, making it not a *modus vivendi*, but rather a stable cooperation for appropriate reasons.

Without further considering this matter for now, two questions arise: if the two types of peoples are to adopt the same principles, why did Rawls need two original positions? Second, why peoples and not states are actors in international cooperation, as it is a custom to use state rather than peoples? Although Rawls recognizes equality between liberal and decent peoples at the second level model –which elaborates the Law of Peoples[102]–he, however, does not answer the first question. And actually, there is no answer because the Law of Peoples is for liberal peoples and it is only extended to decent hierarchical peoples. That is why some scholars such as Mitchell Avila –who otherwise defends the Law of Peoples –argues that we must reject the possibility of the decent peoples to enter into an original position.[103] Even the justification that Rawls gives[104] is to show that decent peoples would agree on it.[105] But why can't decent people propose their own principles founded on their own conception of justice which is based on the

[101] See Rex Martin and David Reidy, "Introduction: Reading Rawls's The Law of Peoples" in Rex Martin and David Reidy, eds., ibid., 7; David Bucher, "Limiting What Rights Permits with What Interests prescribes: Rawls's Law of Peoples in Context", in Rex Martin and David Reidy, eds., ibid., 21, 25.
[102] LP, 70.
[103] Mitchell Avila, "Defending A Law of Peoples: Political Liberalism and Decent Peoples" in *the Journal of Ethics,* Vol. 11, No. 1, 2007, 104. And also his "Human Rights and Toleration in Rawls" in *Human Rights Review*, Vol. 12, 2011, 12.
[104] LP, 69.
[105] This is understandable because Rawls conceives a liberal society as closed, which "persons enter only by birth and exit only by death" (LP, 29) and is self-sufficient. If such a society were to exist, it would not need any interaction with any other society unless for self-dense, and to enter into business with other societies with different cultural backgrounds would be under the mode of toleration. As Allen Buchanan has shown, such a kind of society was that envisioned in Westphalia, but now it has vanished. Liberal peoples need other peoples by necessity, and not only by toleration. See his "Rawls's Law of Peoples: Rules for a Vanished Westphalian World" in *Ethics*, Vol. 110, No. 4, 2000. Rawls's supporters might reply that Rawls is constructing an ideal theory as Samuel Freeman does. According to Freeman, the questions raised against Rawls's law of peoples are due to the lack of not considering that it is an ideal theory. See his "The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice" in *Social Philosophy and Policy Foundation*, 2006, 33, 68. But this defense does not hold for long because Rawls's ideal theory is intended to be a realistic utopia, meaning that it has to espouse, in some way, facts.

common good? Following this principle of equality, why should they be tolerated instead of participating in the elaboration of the principles and not only to endorse principles that have been already derived from a liberal political culture? Why doesn't Rawls imagine that, on the same principle of equality, decent people might want to meet among themselves, suggest a list of principles that would be extended on other peoples–liberal peoples included–in order to be tolerated? I come back to this point when dealing with his claim that, by showing that decent people agree on the liberal principles, the latter become universal.

Concerning the second question, Rawls contends that there is a difference between peoples and states. The difference between the two lies in his distinction between reasonable and rational. For him, peoples are reasonable while states are rational. As he puts it, peoples have three main characteristics: institutional, cultural and moral,[106] while states "are often seen as rational, anxiously concerned with their power –their capacity (military, economic, diplomatic) to influence other states –and always guided by their basic interests."[107] That is why "the Law of Peoples that regulates the Society of Peoples takes peoples as the actors, just as individuals are actors in domestic society."[108] According to Philip Pettit, "peoples are treated by Rawls as capable of agency and as possessed of something that parallels the psychology of an individual agent," because they can make a commitment, "they can both give and receive respect from one another; they can insist on 'receiving from other peoples a proper respect and recognition of their equality'."[109] Clearly, Rawls wants to overcome the *modus vivendi* that reigns in international relations by introducing the idea of reasonableness, and this is a laudable initiative. Nonetheless, with the evolution of international law, the conception of the modern state has eroded Rawls's

[106] LP, 23.
[107] LP, 28.
[108] Bucher, ibid., 26.
[109] Philip Pettit, "Rawls's Peoples" in Rex Martin and David Reidy, eds., ibid., 42.

conception of state and brought it closer to his idea of peoples, so much that it is not easy to disentangle them. John Tasioulas, for example, observes that "since the middle of the previous century, the legal position has been that the sovereign state is no longer completely unencumbered externally, in its relations with other states and extra-territorial authorities, nor internally, in its relations with its own citizens and authorities within its territory."[110] And looking at the task ascribed to liberal peoples by Rawls, they are not that different from the role of states. For instance, Rawls asserts that "liberal people do […] have their fundamental interests as permitted by their conceptions of right and justice. They seek to protect their territory, to ensure the security and safety of their citizens, and to preserve their free political institutions and the liberties and free culture of their civil society."[111] They also cherish their "self-respect, amour-propre" *à la Rousseau*.[112] Yet, as once again Tasioulas remarks, "these are precisely the hallmarks of the modern sovereign state as a mode of political organization."[113] In other words, the practice in international relations has already challenged and therefore changed the notion of state that Rawls wants to discard and come closer to his understanding of peoples.

These questions on Rawls's Law of Peoples in general will become sharper when talking about human rights in particular. Indeed, as it was noted above, one of the new elements added to the list of principles regulating international relations is that of human rights. They are also the stumbling stone of the relations between liberal and non-liberal, since honoring human rights guarantees toleration and acceptance into the society of Peoples, while non-honoring them opens the door to political sanctions including military intervention. Hence, the second point is about

[110] John Tasioulas, "From Utopia to Kazanistan: John Rawls and the Law of Peoples" in *Oxford Journal of Legal Studies*, Vol. 22, No 2, 2002, 374.
[111] LP, 29, 34, 38-9
[112]. Ibid.
[113] Tasioulas, ibid., 375.

Rawls's understanding of human rights and how it faces the challenges elaborated in the first chapter.

3.2. Rawls vis-à-vis Human Rights as Imperialist Ideology

a). The Rawlsian Conception of Human Rights

I have previously shown that human rights are part of the "basic charter of the Law of Peoples." But what does Rawls understand by human rights? What are they and what is their role? Before Rawls introduces human rights in his theory, he had been talking about rights in his previous works. Rex Martin notes that "Rawls is one of the few contemporary philosophers who uses *natural rights* as his standard term."[114] He continues, "We will assume, though, that he means by natural rights roughly what others have meant by human rights."[115] Patrick Hayden is also of that opinion, that the basic rights elaborated in TJ should not be understood as "'natural rights' in some deep metaphysical sense."[116] Rather, "it would perhaps be more useful to regard them simply as human rights," since "Rawls conceives of basic rights as natural rights insofar as they are universal and unconditional, yet in order to satisfy the actualization of social justice, these rights must be elaborated in the form of a sociopolitical institution, including the rule of law."[117] Part of Hayden's study aims at situating Rawls in the contractarian tradition where human rights emerged from natural rights, and he shows that the Universal Declaration of Human Rights can easily be understood from this tradition of thought

Rawls used natural rights in his TJ, but by the time he writes LP, he had gone through the purification of his theory of any metaphysical basis in order to let it emerge as freestanding. Therefore, human rights evoked in LP are to be understood on a political conception basis and

[114] Martin, *Rawls and Rights*, 31
[115] .Ibid.
[116] Patrick Hayden, *John Rawls: Towards a Just World Order* (Cardiff: University of Wales Press, 2002), 60.
[117] Ibid.

not justified by comprehensive doctrines, religious, moral or philosophical. Moreover and for this reason, Rawlsian human rights are not to be considered only Western, but rather universal. Hence, for Rawls, "human rights are recognized as necessary conditions of any system of social cooperation. When they are regularly violated, we have command by force, a slave system, and no cooperation of any kind."[118] This is a political conception of human rights, because they "do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature."[119] And since they are "conditions for any system of social cooperation", Rawls accounts for them in two ways. "One is to view them as belonging to a reasonably just liberal political conception of justice and as a proper subset of the rights and liberties secured to all free and equal citizens in a constitutional liberal democratic regime. The other is to view them as belonging to an associationist social form."[120] In other words, human rights are accounted for as belonging to the "well-ordered peoples", and they are to serve as an important criterion in their mutual cooperation as well as the cooperation with other types of peoples. Hence, in the line of the Law of Peoples itself, human rights are developed from the political liberalism and they play a great role in international cooperation since they are designed as a platform for liberal foreign policy. As Rawls asserts, "it is important to see that the Law of Peoples is developed within political liberalism and is an extension of a liberal conception of justice for a domestic regime to a Society of Peoples."[121] Here, Rawls is emphasizing the free-standing features of this Law of Peoples as is his political liberalism. The consequence of this background is that "in developing the Law of Peoples within a liberal conception of justice, we work out the ideals and principles

[118] LP, 68.
[119] Ibid.
[120] Ibid.
[121] Ibid., 9.

of the *foreign policy* of a reasonably just liberal people."[122] He adds, "this concern with the foreign policy of a *liberal* people is implicit throughout."[123] It is for this reason that human rights also are conceived in a non-comprehensive way and are meant to play a great role in the liberal foreign policy with regard to other peoples. Beitz would say that Rawlsian human rights play a public role and they constitute the principles for international affairs.[124]

As a subset of liberal rights, Rawls gives a detailed list of rights that are to be recognized as human rights. He says, "among the human rights are the rights to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)."[125] For Rawls, these "human rights express a special class of urgent rights."[126] Compared to the usual list of rights enshrined in the Bill of Rights (UDHR, International Covenant on Civil and Political Rights [ICCPR], and International Covenant on Social, Economic and Cultural Rights [ICSECR]), Rawls's list is clearly very short, because he wants to overcome the parochialism so often attributed to them. Hence, he is confident that "human rights, thus understood, cannot be rejected as peculiarly liberal or special to the Western tradition. They are not politically parochial."[127] It has been, however, underlined

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[122] Ibid., 10.
[123] Ibid. This accent put on the role of the law of peoples in foreign policy has been acknowledged by many Rawlsian scholars. See for example, Gillian Brock, "Recent Work on Rawls's Law of Peoples: Critics versus Defenders" in *American Philosophical Quarterly*, Vol. 47, No1, 2010, 91; Samuel Freeman, "Distributive Justice and The Law of Peoples" in Rex Martin and David Reidy, eds., ibid., 244; David Reidy, "Rawls on International Justice: A Defense" in *Political Theory*, Vol. 32, No 3, 2004, 305; Alyssa Bernstein, *Human Rights Reconceived: A Defense of Rawls's Law of Peoples*. A PhD Dissertation at Harvard, 2000, 3; Erin Kelly, "Human Rights as Foreign Policy Imperatives" in Chatterjee, ed., ibid., 188; David Rasmussen, *The Possibility of Global Justice: Kant, Rawls, and the Critique of Cosmopolitanism*. Unpublished paper, 7.
[124] Beitz, "Human Rights as Common Concern," 276.
[125] LP, 65.
[126] Ibid., 69.
[127] Ibid.

that decent hierarchical people are brought into the original position, not to craft their own principles, but rather to agree on liberal principles. Does it make human rights universal because they are understood in other cultural contexts? I will come back to this issue in due time. Right now, I proceed with the role that Rawls attributes to them.

Rawls assigns two main roles to human rights in the society of reasonable peoples: "they restrict the justifying reason for war and its conduct, and they specify limits to a regime's internal autonomy."[128] In this way and as Rawls himself notes it, human rights join the evolution of international law and international relations since World War II, which evolution has restricted the use of war as a political means and thus set a limit to the understanding of state sovereignty.[129] It is important to notice here that, for Rawls, human rights play a political role in international politics. That is why he makes sure to distinguish them from constitutional and other rights guaranteed by institutions. In his own words, "human rights are distinct from constitutional rights, or from the rights of liberal democratic citizenship, or from other rights that belong to certain kinds of political institutions, both individualist and associationist. Human rights set a necessary, though not sufficient, standard for the decency of domestic political social institutions."[130] Rawls is more than clear that human rights are understood according to the role they play in the toleration of decent people. Thus, they are not for individual persons,[131] nor are they for decent peoples as such. They are the conditions set by liberal peoples to be met by non-liberal peoples in order to be tolerated. Therefore, only non-liberal peoples who honor human rights are considered decent. "Hence the special class of human rights has three roles: 1. Their

[128] LP, 79.
[129] Rasmussen concurs on this point. See his "Rawls on Human Rights and Political Justification" in Miodrag Jovanović & Dragica Vujadinović (Eds.). *Identity, Political and Human Rights Culture as Prerequisites of Constitutional Democracy* (Hague: Eleven International Publishing, 2013), 90.
[130] LP, 79-90.
[131] As Kenneth Baynes would say, for Rawls, human rights are not for the human well-being. See his "Toward a Political Conception of Human Rights" in *Philosophy and Social Criticism*, Vol. 35, No. 4, 2009, p. 379.

fulfillment is a necessary condition of the decency of a society's political institutions and of its legal order; 2. Their fulfillment is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military intervention; 3. They set a limit to pluralism among peoples."[132] These three roles can be summarized as inclusion, exclusion and limitation. They play the inclusive role by defining decency; they perform the exclusive task by forbidding any intervention from the well-ordered peoples; and their limitative role is about the peoples that are to be admitted into the society of peoples. The last point is important because it stresses Rawls's goal of extending the liberal conception of justice to the foreign policy of liberal peoples. Consequently, not all peoples are accepted in the society of peoples constructed on the Rawlsian model and that is how human rights play a limiting role.

Having gone through the understanding and the role of human rights and their root in the LP, I now examine how the Rawlsian conception of human rights responds to challenges posed by considering them as an imperialist ideology.

b). Human Rights Minimalism and Human Rights as Imperialist Ideology

Rawls's conception of human rights has provoked a very vivid debate in international law and international social justice, and has ushered in a new philosophical justification of human rights. Charles Beitz argues that the LP offers a "'practical' conception" of human rights which differs from what he calls "orthodox view",[133] that is what he would later call "naturalistic theories."[134] The LP is also the source of his (Beitz's) double model theory of human rights, which he presents as "a fresh start" vis-à-vis other theories of human rights. As he says, "the alternative approach I shall suggest, is implicit in the view of human rights taken by John Rawls

[132] Ibid., 80.
[133] Beitz, "Human Rights and the Law of Peoples" in Chatterjee, ed., ibid.
[134] Beitz, *The Idea of Human Rights,* 48-72.

in the Law of Peoples. Although I shall not endorse his view as Rawls presents it, I believe his way of understanding human rights is instructive in its departure from the more familiar positions."[135] Erin Kelly's claim that "human rights are foreign policy imperatives" also finds its source of inspiration in Rawls's view that human rights are necessary conditions for social cooperation in the society of peoples.[136] David A. Reidy, on his part, almost apologetically, argues that "if we conjoin Rawls's doctrine of basic human rights with the foregoing account of the politics of human rights, we see that Rawls has set out a powerful vision of how free peoples, following their own historical paths and faithful to the limits of a liberal conception of international rights, might arrive at a world within which[…]liberal democratic rights are universally recognized and enforced as human (though not basic human) rights."[137] These few examples show that the Rawlsian conception of human rights has initiated a new thinking and even generated some disciples. Does it, nonetheless, eschew the reefs of parochialism and imperialism that have always accompanied the human rights discourse? Before responding to this question, a quick reminder of what are the main critiques of human rights, as elaborated in my first chapter, is appropriate at this point.

The strong critics of human rights as an imperialist ideology put forward four main arguments. Firstly, like the civilizing mission was used to cover the Western colonizing enterprise of the rest of the world, human rights is another way that the West has found to perpetuate its influence on the rest of the world. Secondly, the civilizing mission was undergirded by the racial prejudice of the West superiority over the rest of the world, and therefore had the duty to bring civilization to the inferior races, in order to bring them to the level

[135] Ibid., 96.
[136] Kelly, "Human Rights as Foreign Policy Imperatives" in Chatterjee, ed., 188.
[137] Reidy, "Political Authority and Human Rights" in R. Martin and D. Reidy, eds., ibid., 186. Joseph Heath goes even further to suggest that denying LP would be denying Rawls's philosophy. See his "Rawls on Global Distributive Justice: A Defense" in *Canadian Journal of Philosophy*, Supplementary Vol. 31, 2005, 194.

of civilization. In the same way, the human rights project carries out the same aim of the West to bring salvation to the savages who do not know and do not have human rights. That is the meaning of the savage-victim-savior metaphor. Thirdly, the civilizing mission was supported by the liberal belief in the progress of civilization based on the hierarchical anthropology. The critics contend that the human rights movement is also a liberal ambition to spread it on the non-Western world. Fourthly, under the push of liberalism, this whole project of the civilizing mission was secured by international law as its legal scheme. On this level, critics show that human rights have been incorporated in international law that is mostly liberal, and therefore, human rights law is a continuation of the universalization of Eurocentrism. The seriousness of these arguments to prove that human rights are another imperialist ideology is that they touch the moral core of the human rights movement. For if human rights are an ideology in its negative sense, it means they are a lie and a liar, because they are not what they claim to be, and they serve an evil end. That is why responding to them is more than just showing that human rights are universal, since their universality concerns their scope and not necessarily their moral validity. The question then is to see whether the Rawlsian Law of Peoples and his conception of human rights address these worries satisfactorily.

Concerning his law of peoples, one has, at the outset, to be fair to Rawls. His law of peoples is far from seeking the Westernization of the rest of world –at least in his intention. Being the extension of his political liberalism, it is inspired by the fact of reasonable pluralism and, therefore, posits a situation whereby there are other forms of political organizations –decent peoples as he calls them –that deserve respect and cooperation with liberal peoples without changing their way of life. That is why he refutes the cosmopolitanists and liberal crusaders who

criticize his theory as worse than realism,[138] or too tolerant.[139] As such, it is with no surprise that the fact of pluralism underlines his understanding of human rights.[140] However, does Rawls's conception of human rights successfully respond to the critics who view human rights as an imperialist ideology? It is not easy to tell, but there are reasons to suspect it does not.

To repeat it again, the Law of Peoples is an extension of Rawls's political liberalism. I have expressed that political liberalism as a political conception of justice is construed through an interpretive model that looked at the history of the constitutional democracy and constructed ideas developed in that culture. Rawls even points to the Reformation period as the date of birth of liberalism. In his own words, "the historical origin of political liberalism (and of liberalism more generally) is the Reformation and its aftermath, with the long controversies over religious toleration in the sixteenth century and seventeenth century."[141] Not only does Reformation constitute the historical origin of political liberalism, but it gives the latter its substantive matter, for "political liberalism starts by taking to heart the absolute depth of that irreconcilable latent conflict."[142] From this position, liberalism in general –political liberalism included –is culturally situated and originates from particular historical conditions. Moreover, one remembers that the Law of Peoples is first framed during the second original position, during an *aparte* for liberal peoples, and then extended to other societies without having participated in their elaboration. From this perspective, the critics might argue that the extension of the Law of Peoples is

[138] Fernando Tesón, "Some Observations on John Rawl's The Law of Peoples" in *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 88, 1994, 22.
[139] Tesón, "The Rawlsian Theory of International Law" in *Ethics and International Affairs,* Vol. 9, No 1, 1995, 79, 84. In this same paper, he also labels the law of peoples as relativist and conservative.
[140] Rasmussen, "Rawls on Human Rights," 89-7, 89.
[141] PL, xxiv.
[142] Ibid., xxvi.

synonymous with spreading a cultural imperialism as Audard observes, since norms and values are elaborated in one cultural context and placed on other peoples.[143]

Furthermore, according to the critics, human rights as imperialist ideology carry with them the civilizing mission's prejudice of racial and cultural superiority. For sure, Rawls does not advance any racial superiority. But the critics could point out that he seems to believe in the superiority of the liberal political institutions, for if the Law of Peoples is tolerant of decent peoples, it is in the hope that, at the end, they will evolve into liberal societies, for Rawls asserts that "if a liberal constitutional democracy is, in fact, superior to other forms of society, as I believe it to be, a liberal people should have confidence in their convictions and suppose that a decent society, when offered due respect by liberal peoples, may be more likely, over time, to recognize the advantages of liberal institutions and take steps toward becoming more liberal on its own."[144] Rawls expresses the same idea in another instance, saying that "if peoples are exposed to liberal civilization and culture's basic principles and ideals in a positive way, they may become ready to accept and act on them."[145] Following these views, despite Rawls's insistence that "liberal peoples must try to encourage decent peoples and not frustrate their vitality by coercively insisting that all societies be liberal,"[146] the critics could also argue that he posits liberal civilization and its cultural principles as the goal to be reached by non-liberal peoples.

Another reason that the critics put forward to assert that human rights are an imperialist ideology is the way the human rights movement proceeds through demonizing other cultures, setting the "us" liberals against the "other" non-liberals. Critics reading the Law of Peoples could

[143] Audard, "Peace or Justice", 313.
[144] LP, 62.
[145] Ibid., note 6, 94.
[146] LP, 62.

contend that there is a distinction between different peoples and in the process of elaborating the principles for the Society of Peoples, other peoples receive (or acquiesce to) what liberals have decided. Only liberals have agency and are active, while others peoples come later. Liberals meet in their original position and come up with norms that are to regulate the Society of Peoples by extension. In other words, international cooperation is regulated by liberal values,[147] designed by liberals and extended to some other peoples if they are decent, and imposed on others if they cannot be ignored.

Concerning the question of international law as a legal scheme with a purpose to spread liberal ideas through the civilizing mission, the critics can highlight that Rawls defines the Law of Peoples as "a particular political conception of right and justice that applies to the principles and norms of international law and practice."[148] Having shown that this Law of Peoples is a liberal theory for the liberal foreign policy, and having contended that its content is liberal, they could conclude that human rights as one of the principles of this Law of Peoples are another way of propagating liberal ideology. For although, according to Rawls, human rights are different from any institutionalized right, be it liberal or associationist,[149] they still constitute the content of the Law of Peoples that was elaborated by the only liberal peoples.

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[147] Many scholars mention this point of liberal values constituting the core of international cooperation. See for instance, Chris Naticchia, "Human Rights, Liberalism and Rawls's Law of Peoples" in *Social Theory and Practice*, Vol. 24, No 3, 1998, 368; Farid Abdel-Nour, "From Arm's Length to Intrusion: Rawls's 'Law of Peoples' and the Challenge of Stability" in *The Journal of Politics*, Vol. 61, No 2, 1999, 328; Luis Cabrera, "Toleration and Tyranny in Rawls's Law of Peoples" in *Polity*, Vol. 34, No 2, 2001, 172; David Miller, "Collective Responsibility and International Inequality in *The Law of Peoples*" in R. Martin and D. Reidy, eds., ibid., 202. Bernstein, "A Human Rights to Democracy? Legitimacy and Intervention" in R. Martin and D. Reidy, eds., ibid., 273; Chris Brown, "The Construction of a 'Realistic Utopia': John Rawls and International Political Theory" in *Review of International Studies*, Vol. 28, No 1, 2002, 18; Reidy, "A Just Global Economy: In Defense of Rawls" in *The Journal of Ethics*, Vol. 11, No 2, 2007, 2015.

[148] LP, 3.

[149] Ibid., 81-2.

Now, for Rawls, to show that human rights are not imperialistic goes in hand with the assertion of their universality, and he believes that his theory of human rights passes the test of universality. He writes, "human rights thus understood, cannot be rejected as peculiarly liberal or special to the Western tradition. They are not politically parochial."[150] And he explains that this universality of human rights is to be understood "in the following sense: they are intrinsic to the Law of Peoples and have a political (moral) effect whether or not they are supported locally. That is, their political (moral) force extends to all societies, and they are binding on all peoples and societies, including outlaw states."[151] Critics could once more challenge this justification of human rights universality, showing that, as already underscored, human rights occur as one of the principles that are to guide the cooperation between liberal peoples understood as reasonable. It is during the second original position that they are extended to the decent hierarchical peoples, not as their principles, but as the conditions to fulfill in order to be tolerated. Only at the third original position are these principles extended to every other society. Now, if decent hierarchical peoples would accept human rights because they have been included in the second original position, the question arises as to why and on what basis human rights are to be imposed on outlaw states. Why should outlaw states be asked to comply with a law that they did not participate in its formulation? Alistair Macleod also finds a problem here and notes that if decent people could endorse these liberal principles, "it is difficult to see why the representatives of so-called 'outlaw' societies should be thought to be under an obligation to respect human rights about which liberal and decent societies happen to be in agreement."[152] It is also Beitz's question: "Why would the liberal and decent peoples be justified in establishing adherence to

[150] Ibid., 65.
[151] Ibid., 80-1.
[152] Alistair Macleod, "Rawls's Narrow Doctrine of Human Rights" in R. Martin and D. Reidy, ibid., 144.

human rights as a threshold of membership in international society?"[153] In other words, the critics' challenge has a reasonable basis.

It is helpful to recall that Rawls defines outlaw states as those refusing to comply with the reasonable Law of Peoples and violating human rights.[154] This definition, however, raises questions because it is a functionalist definition. Outlaw states are defined by what they do not do, that is, not to comply with honoring human rights. The question now is: Is it a refusal to honor human rights that they had made? For example, is it a liberal people or decent people who partook in the original position, and later refused to comply with the principles of the Law of Peoples? If that is the case, then there can be moral reasons and reasonable motives to impose human rights on such a state which becomes outlaw by the very fact of not complying with the Law of Peoples. Nevertheless, if it is the other way around, it becomes problematic. If indeed the outlaw states were not represented in the original position, it becomes difficult to justify why human rights should apply to them. Therefore, unless representatives of all peoples have participated in the original position that frames the Law of Peoples, it becomes difficult to see how such a law can claim universality and validity over all peoples, without being received as an imposition. Critics could then use this imposition of human rights on outlaw states as another sign that Rawls's conception of human rights does not address their challenge to human rights as an imperialist ideology.

All these observations related to the universality of human rights bring to the fore the critics' claim of its imperialist use by the Western world over the rest. But before I address that problem, I now examine if all peoples would limit their rights to the list that Rawls suggests.

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[153] Beitz, "Rawls's Law of Peoples," 684-5.
[154] LP, 5.

Sanja Ivic celebrates Rawls's conception of human rights as a post-modern definition that is more open than the UDHR,[155] while many of those who have oriented their attention to Rawls's LP are struck by his narrow list of human rights. Costa calls it "a short list,"[156] while Wilfried Hinsch and Markus Stepanians note that "Rawls's account of human rights contrasts, indeed, starkly with what Beitz calls the 'conventional view' which found expression, for example, in the Universal Declaration."[157] Therefore, "in view of the rather sparse and minimalist account of human rights in LoP, one may also wonder why so many rights acknowledged as human rights in international declaration and covenants are not included in Rawls's short-list."[158] Others, however, have recognized the benefits of this short list of "proper rights," especially in a multicultural context. For instance, Joshua Cohen argues that "minimalism may be more than we should ever reasonably expect,"[159] although he distinguishes between "justificatory" and "substantive" minimalism.[160] Still others have argued that this limited list of human rights allows "for an unforced agreement on the Law of Peoples that is not parochial or subject to the charge of imperialism."[161] However, before pursuing it further, it is worth analyzing the relationship between Rawls's list of human rights and the actual international human rights culture, since some scholars contend that Rawls draws his Law of Peoples from the ideas already implicit in the international culture.[162]

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[155]Sanja Ivic, "Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism" in *Trans/Form/Ação, Marília*, Vol. 33, No 2, 2010.
[156] Costa, ibid., 49.
[157] Wilfried Hinsch, & Markus Stepanians, "Human Rights as Moral Claim Rights" in Martin, R. & Reidy, D.A., Eds, ibid., 126.
[158] Ibid., 123.
[159] Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" in *The Journal of Political Philosophy*, Vol. 12, No. 2, 2004, 191.
[160] Ibid., 210.
[161] Hinsch and Stepanians, ibid., 122.
[162] See Pettit, ibid., 53; Leif Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian" in R. Martin and D. Reidy, Eds., ibid., 104; also Huw Lloyd Williams, *On Rawls, Development and Global Justice: The Freedom of Peoples* (New York: Palgrave, 2011), 20.

The minimal list of what Rawls calls "human rights proper" corresponds to articles 3-18 of the UDHR, which constitute roughly the first generation of liberal human rights. In Rawls's own words, "Consider the Universal Declaration of Human Rights of 1948 [….] Articles 3 to 18 may all be put under this heading of human rights proper, pending certain questions of interpretation."[163] Rawls adds that human rights are related to extreme cases of genocide and apartheid. These are the human rights that Rawls considers to be included for defining the decency of non-liberal peoples. Other rights are the expression of liberal inspiration –as in art. 1 of UDHR –or require specific political institutions for implementation. Therefore, they should not be extended to non-liberal peoples.[164] One has to recognize here Rawls's effort to avoid liberal imperialism, proceeding "from the international political world as we see it,"[165] a world marked by different comprehensive doctrines and cultural pluralism. Nonetheless, many critics have shown that Rawls leaves out many rights that are fundamental for the realization of what he calls "human rights proper." This critical trend refers to the UDHR's articles 19-21, which emphasize the right to freedom of expression and opinion, the right to association and the right to democratic participation. For instance, Buchanan argues that it appears "that, other things being equal, the Rawlsian human rights will tend to be more secure in a democratic society than in a society that includes only a consultation hierarchy,"[166] whereas Hayden holds that "both democracy and human rights are at risk unless each includes the other."[167]

Rawls has a point in insisting that liberal peoples should not aim at imposing a liberal political organization, since the latter is hermeneutically interpreted from the Western culture. Moreover, as the goal of his understanding of human rights is for foreign policy, he clearly sets

[163] LP, 80, note 23.
[164] Ibid.
[165] Ibid., 83.
[166] Buchanan, "Justice", 88.
[167] Hayden, ibid., 122.

himself aside from any liberal imperialist endeavor, at least against decent peoples. However, even with his "human rights proper," a question arises as to the implementation of some of them. For instance, the right to liberty includes a "right to a sufficient measure of liberty of conscience to ensure freedom of religion and of thought."[168] Now, for one to exercise his/her religion or his/her freedom of thought would need the right of expression and the right of association. Furthermore, religion normally implies a community of faith and a thought is such because it is expressed. Hence, the right to liberty will not be granted if he excludes these and other articles of UDHR are ignored. The same questioning reaches the right to life which, for Rawls, appeals to the right "to the means of subsistence and security."[169] It is certain that "the means to subsistence and security" are to be interpreted in the context of what is contained in UDHR's art. 25 as right to food, to clothing, to housing, medical care, etc. In other words, Rawls's list of "human rights proper" involves more than the articles 3 to 18 of UDHR, yet the international human culture today admits the interconnectedness of all the generations of human rights[170] in order to be effective.

Concerning the right to democracy, Rawls is correct to warn the liberal champions that it would be unreasonable to impose on other peoples their liberal understanding of democracy. And once again, conceived for foreign policy, human rights should not be used for this purpose. Nonetheless, if the right to democracy is to be understood as an inherent right of a people and is to be understood according to different cultures,[171] there are no good reasons for an inclusive

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[168] LP, 65.
[169] Ibid.
[170] See James Nickel, "Are Human Rights Mainly Implemented by Intervention" in Martin and Reidy, ibid., 275; and *Vienna Declaration and Programme of Action*, 1993, no 5.
[171] Amartya Sen is among many scholars who have shown that democracy basically understood on a public reasoning and dialogue basis can have global origins. See his *Idea of Justice* (Cambridge: Harvard University Press, 2009), 329-35. As for Sheila Benhabib, she says that "I am assuming that the equal right of persons to take part in the affairs of governing their collective existence through the medium of law and the articulation of their opinion and

original position not to secure it as a basic right of participating in one's government. It is worth noting that the right to participation in one's government –which I take to incarnate the basic fundamental feature of the right to democracy—meets Rawls's aspects of reasonableness. Indeed, (1) having assumed that all participants are capable of reasonableness, they would agree on that principle as a feature of a reasonable law of peoples; (2) originating from different cultures, they would recognize that its implementation can be different from one culture to another. Actually, from a colonial perspective, these very rights discarded by Rawls were instrumental for claiming independence from colonial powers without necessarily becoming liberal.

Hence, once the proposition of one inclusive original position is adopted, many of, if not in all the articles of UDHR, would be found acceptable to the representatives of peoples. The actual situation of human rights practice on a global level showing the majority of states ratifying most of the human rights instruments is a palpable sign and even a positive point that can be considered as a sign of emerging shared international norms.[172] But this would be so because the role assigned to human rights would have changed. Before taking up this issue, I now go back to the question of imperialism.

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preferences in a political community through the rights of freedom of speech and association is the essence of the democratic form of government. Whether this is institutionalized through periodic elections, a multi-party system, proportional representation, mandates and recalls, and the like are questions which do not belong to the idea of democracy itself but to its concretization in specific socio-historical circumstances, and there can be quite an acceptable range of variations here." See her *Dignity in Adversity: Human Rights in Troubled Times* (Malden, Cambridge: Polity Press, 2011), 234, note 25. This vision is contrary to Cohen's who conceives democracy as "one form of collective self-determination." See Joshua Cohen, "Is there a Human Rights to Democracy?" in Sypnowich, C., Ed. *The Egalitarian Conscience: Essays in Honor of G.A. Cohen* (Oxford: Oxford University Press, 2006), 233. For him, democracy is liberal, since it presupposes the idea of individual equality. Ibid., 239-42. Certainly, if that were the only understanding of democracy, then there would be no such thing as a right to democracy. But I contend that democracy is more than a form of self-determination. It first means the process itself of self-determination based on public justification and dialogue, before being institutionalized, although the two are not mutually exclusive. In this sense, there is a basic right to democracy as the foundation of self-determination.

[172] Benhabib, *Dignity in Diversity*, ibid.

Most of the critics of human rights as instruments of the Western World argue that human rights are just Western instruments for propagating Western imperialism. In the words of one the most acerbic critics, "[the legitimation] of cultural imperialism[…]is particularly the case if the human rights corpus is seen purely as a liberal project whose overriding goal, though not explicitly stated, is the imposition of Western-style liberal democracy, complete with its condiments."[173] Sure enough, Rawls is not pushing for such a vision of human rights, as he even excludes the right to democracy from the list of proper rights. However, from the previous discussion on the universality of human rights which has shown that they are elaborated during the original position of liberal peoples and human rights being part of a liberal theory for foreign policy, critics could interpret them as having an imperialistic goal, since human rights are extended to non-liberals.

Moreover, Rawls's functionalist view of human rights makes them vulnerable to an ideological use, deviating from their goal of empowering individuals facing oppression. Indeed, human rights for Rawls are conditions for social cooperation for the well-ordered peoples. In other words, they are what Erin Kelly calls foreign policy imperatives and that is why they are narrowly conceived. According to her, "given the foreign policy stakes involved and room for significant and not unreasonable disagreement about the requirement of domestic justice, only a narrow conception of human rights could be collectively endorsed."[174] This foreign policy oriented conception of human rights is different from the goal of the international human rights movement, and conflicts with the current international practice. Not only did the evolution of international relations alter the internal sovereignty of states and limit their rights to war, but most importantly human rights were not drafted for foreign policy, but rather for protecting

[173] Mutua, *Human Right*, ibid., 5.
[174] Kelly, ibid., 188.

individuals' rights. This was and is the big change in the international arena, that "the individual is treated as a subject of international rights."[175] Benhabib goes even further to show that even for Kant and other scholars like Beitz and Pogge, "it is *individuals* who are the units of moral and legal rights in a world society and not *peoples.*"[176] And for justifying the R2P, Antonio Guterres insists that state sovereignty cannot be an excuse when individuals' rights are violated. Rather, "the sovereignty of the individual must be paramount."[177] In this perspective, human rights after WWII were not conceived first and for most to limit state sovereignty and the right to war. Rather, the latter are limited because the importance of the individual's rights have become a concern for international concern.

One would want to understand Rawls for not taking individuals as a subject of international rights, because, as Tasioulas observes, "the interests of individuals are assumed to be directly catered for at the domestic level, by the conceptions of political justice that define liberal and decent regimes."[178] It is also the consequence of his political conception of justice as fairness, which adopts a political conception of the human person as a citizen, and this is not necessarily the same in other political forms of society. Furthermore, Rawls's society is closed and self-sufficient. However, if well-ordered peoples are self-sufficient and yet want to get involved in outlaw states' business, it would be difficult to do it in the name of human rights without being suspected of imperialism.

In addition, although scholars like Kelly think that Rawls has concern for persons' rights, he says that "some primitive societies" with no interest with liberal and decent peoples are not a

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[175] H.J. Stein, et al., *International Human Rights in Context: Law, Politics, Morals*. 3rd Ed. (Oxford: Oxford University Press, 2007), 144.
[176] Benhabib, *The Rights of Others*, ibid., 97.
[177] Antonio Guterres, "Millions Uprooted: Saving Refugees and the Displaced" in *Foreign Affairs*, Vol. 87, No. 5, 2008, 93.
[178] Tasioulas, ibid., 373.

big issue. Only "those that are more developed, seeking trade or other cooperative arrangements with liberal or decent societies, are a different story," meaning, well-ordered peoples have to check how they honor human rights in order to enter into cooperation with them.[179] In other words, persons' rights in societies that are not part of well-ordered peoples are not an issue, as long as the former do not seek any sort of cooperation with the latter. This sounds like a realist view, whereby well-ordered peoples get concerned with human rights only when they are engaged in trade or other mutual arrangements. In this scheme, the individual is doubly hurt. First, he/she is living under an oppressive regime; second, the international community–in our case, well-ordered peoples—does not care about him/her as long as his/her society has nothing to offer. However, the ambition of the international human rights movement aims at reaching out to any human being's rights to have his/her urgent needs satisfied.

In summary, while Rawls wants to avoid the ethnocentric and imperialist challenges to human rights, the latter being part of his Law of Peoples, he does not satisfactorily address the concerns of the critics of human rights as an imperialistic ideology, used to spread liberal imperialistic culture. Although he takes into account the fact of pluralism in the global order, the Law of Peoples is still the work of liberal peoples, which is then extended to non-liberal peoples. In this sense, other peoples do not contribute to the framing of this Law that is going to be applied to them. Furthermore, the Law of Peoples is designed for a liberal foreign policy and human rights are the criterion for being tolerated and accepted into the society of well-ordered peoples. Hence, since human rights assume the role for toleration of non-liberal peoples in the liberal foreign policy, human rights cannot be easily defended as not spreading the liberal

[179] LP, 93, note 6.

culture. Even the principle of reciprocity that Audard[180] thought would save Rawls from being accused of defending imperialism, does not help that much. Reciprocity is linked to the reasonableness and, from the Rawls's, the fact of global pluralism is not reasonable. In this sense, despite Rawls's principle of toleration of liberal peoples for other peoples, the critics' challenges are not satisfactorily addressed. Hence, another conception of human rights is needed that can address these challenges. But before that, there is the question of humanitarian intervention. How does Rawls respond to it?

3.3. Rawls and Humanitarian Intervention as Neocolonialism

a) Rawls's Justification of Humanitarian Intervention

My second chapter argued that humanitarian intervention draws its moral background in the just war doctrine, especially in its reasons for waging a war –*jus ad bellum.* In this context, human rights are invoked as a legitimate/just cause to wage war against those regimes accused of violating them. For those advocating for such an intervention, human rights give a moral ground for a humanitarian intervention. But for many critics, such a justification is an apology for another form of colonialism, both as a repetition of the Western domination in the name of human rights and as an economic exploitation of the non-Western world through the international institutions. The question at stake now is: does Rawls condone humanitarian intervention in the name of human rights? If he does, does he address the concerns of those suspecting neocolonialism behind such an intervention?

To start with, Rawls dealt with the question of just war theory since his TJ. After elaborating, in his original position, the principles that should guide international law, such as the principle of equality, whose consequences are self-determination, self-defense and reciprocal

[180] Audard, "Peace or Justice? Some Remarks on Rawls's Law of Peoples", in *Revue Internationale de Philosophie*, Vol. 60, No. 237 (3), 2006, p. 325.

respect of treaties, he concludes that "these principles define when a nation has a just cause in war or, in the traditional phrase, its *jus ad bellum*."[181] From this perspective, only the self-defense constitutes the moral motive for waging war. In this sense, Rawls subscribes to the traditional principle of non-intervention, as he strongly affirms the right to self-determination and the right to self-defense, both originating from the fundamental principle of international law: the equality of states. He does not include human rights among the principles that would be adopted in his original position as a guiding principle for international relations. Therefore, they cannot be the cause for humanitarian intervention.

This position had changed when he considered the question of humanitarian intervention in the Law of Peoples. His Law of Peoples is composed of three parts, two constituting the ideal theory during which he frames the principles of the law of peoples –first among liberal peoples, and then extended to decent peoples –while the third part considers how the ideal theory can be put into practice. As he asserts it, "non-ideal theory asks how this long-term goal might be achieved, or worked toward, usually in gradual steps. It looks for policies and courses that are morally permissible and politically possible as well as likely to be effective." [182] It seems to me that this is where Rawls's Law of Peoples aims to be a realistic utopia. It is not enough to elaborate a theory; it is also important to see how it can be effective. It is in this context that Rawls evokes the question of right to war. One, however, has to recognize that the transition from ideal to non-ideal theory is not clear. For instance, we find the question of right to war in the ideal theory part,[183] and as he just affirmed, the non-ideal part of his theory looks for morally acceptable means to apply the ideal principles; meaning that even this part comprises a

[181] TJ, 379. He goes further to elaborate the *jus in bello*, but it is not needed here.
[182] LP, 89.
[183] See for example LP, 26-7.

normative background. It is the same as the question of humanitarian intervention that is in both the ideal and non-ideal parts.[184] In Buchanen's words, "although Rawls does distinguish between ideal and nonideal theory in the Law of Peoples, nothing he says suggests that his nonideal theory relaxes his Westphalian assumption of deep unity within states,"[185] that is, there is a normative assumption in the non-ideal part.

Notwithstanding this, Rawls reconfirms that the only reasonable cause for waging war is self-defense. He excludes the rational motives as conferring a right to war to well-ordered peoples. If they wage war for their own interests, the well-ordered peoples become outlaw states. As he also notes it, "no state has a right to war in the pursuit of its *rational*, as opposed to its *reasonable*, interests. The Law of Peoples does, however, assign to all well-ordered peoples…and indeed to any society that follows and honors a reasonable just Law of Peoples, the right to war in self-defense."[186] Further, he adds, "a liberal society cannot justly require its citizens to fight in order to gain economic wealth or to acquire natural resources, much less to win power and empire. (When a society pursues these interests, it no longer honors the Law of Peoples, and it becomes an outlaw state.)"[187] As Rawls clearly and strongly affirms, only self-defense confers the right to war for the well-ordered peoples. Moreover and more importantly, imperialism and state interests are excluded from the morally acceptable reasons for war.

So far, the self-defense principle is classic in international law, justified already by the natural law tradition. That is why the self-defense is not in contradiction with the principle of non-intervention that was affirmed in TJ. However, even in the ideal theory, Rawls warns that "a principle such as the fourth—that of non-intervention—will obviously have to be qualified in the

[184] Ibid., 37, 93.
[185] Buchanan, "Rawls's Law of Peoples," 718.
[186] LP, 91.
[187] Ibid.

general case of outlaw states and grave violations of human rights."[188] Moreover, when defining the role of human rights, Rawls states that they set the limit to the conduct of war and the state sovereignty. He says, "human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy."[189] It is in this dynamic that Rawls adds the grave violation of human rights as a second reason that can justify war, a condition of what is normally known as humanitarian intervention. As he puts it, "war is no longer an admissible means of government policy and is justified only in self-defense, or in grave cases of intervention to protect human rights."[190] For Rawls, therefore, it is clear that, after WWII, the principle of non-intervention in internal affairs of a given state is no longer absolute. To use Ronald Dworkin's expression, human rights trump state sovereignty.[191] In the same sense, for Rawls, human rights limit the state sovereignty and they justify interference and even a humanitarian intervention when they are not respected.

This is a change from the theory of international law developed in TJ; for there, the principle of non-intervention was strongly affirmed based on the principle of equality of states that guaranteed them the right to self-determination. But with the Law of Peoples, "a people's right to independence and self-determination is no shield from that condemnation, nor even from coercive intervention by other peoples in grave cases."[192] In other words, Rawls supports humanitarian intervention in order to protect human rights. It does not need aggressiveness or imperialist motives. In a particular footnote, Rawls asserts that even when outlaw states are

[188] Ibid., 37.
[189] Ibid., 79.
[190] Ibid.
[191] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: The Belknap Press of Harvard University Press, 2011), 332.
[192] LP, 38. See also Jean-François Thibaut, "L'Interprétation limitée du politique dans 'The Law of Peoples' de John Rawls" in *Politique et Société*, Vol. 20, No 2-3, 2001, 168.

rather weak and not aggressive and expansionist, an egregious violation of human rights is "a prima facie for intervention of some kind in such cases."[193] Human rights violation becomes a just cause for interfering in other's state business and this is part of their functional role in the liberal foreign policy.[194]

This intervention, however, is selective, for only those peoples in a relation with well-ordered peoples are threatened by human rights vindication. This selectivity in monitoring the respect for human rights is based on the subdivision and ordering of cultures, assuming some as primitive, while others are a developed civilization, although not at the level of a liberal one. That is why, in Rawls's view, even when there is such a prima facie case for intervention, "yet one must proceed differently with advanced civilizations than with primitive societies. Primitive, isolated societies, with no contact with liberal or decent societies, we really have no way to influence."[195] He continues, "but those that are more developed, seeking trade or other cooperative arrangements with liberal or decent societies, are a different story."[196] It has been already highlighted that Rawls esteems liberal institutions to be better than other forms of society. From this point of view, critics would underscore that he is using the same vocabulary that was developed during the civilization mission, vocabulary of primitiveness and civilization, and the degree of civilization. Furthermore, it seems that the intervention is not really envisioned for the sake of the human rights, but rather in order to expand liberal influence. In addition to that, liberal or decent peoples are presented as not in need of any influence from outside; that is why they are accorded the right to protect their cultures and their institutions, while the same

[193] Ibid., 93, note 6.
[194] Buchanan challenges this direct connection between human rights and intervention saying that "to assume that human rights have this direct connection with intervention is nothing less than a stipulative redefinition of 'human rights,' and Rawls gives us no good reason to accept it." See his "Taking the Human out of Human Rights" in R. Martin and D. Reidy, eds., ibid., 65.
[195] LP, 93, note 6.
[196] Ibid.

right is not granted to all peoples. Liberal and decent peoples are presented as having everything they need, since only the other peoples seek to trade or cooperate with them, as if it is not a reciprocal need. Yet, the history proves the contrary: the West, as far as it represents the liberal tradition in Rawlsian theory, invaded the non-liberal West in order to solve its internal socio-economic conflicts. There is no reciprocity here. When the West wants trade or other cooperative arrangements, it can do them without any criterion imposed on it by the non-Western world. However, when the latter wants to cooperate with the liberal or decent peoples, their performance in human rights becomes a moral requirement that might even lead to a coercive intervention. That is why critics would disagree with Alistair Macleod who claims that "Rawls's doctrine of human rights in *LoP* offers hope for more effective protection of human rights in all parts of the world;"[197] for clearly, only those parts of the world that are advanced in civilization and are a subject for liberal and decent interests will raise concern about their human rights record.

One of the crucial questions when dealing with humanitarian intervention is about the participants involved in it. The question then is: *who* intervenes and *where* in the name of human rights? From a Rawlsian perspective, the answer is straightforward: it is the responsibility of the well-ordered peoples (liberal and decent peoples) to intervene for protecting human rights. Now, Rawls calls states that violate human rights outlaw states. "An outlaw state that violates these rights is to be condemned and in grave cases be subjected to forceful sanctions and even to intervention."[198] Hence for Rawls, well-ordered peoples have the rights to intervene in outlaw states in order to protect human rights, and this intolerance of outlaw states springs from liberalism and decency as such. In Rawls's words, decent and liberal peoples "simply do not

[197] Alistair Macleod, "Rawls's Narrow Doctrine of Human Rights" in R. Martin and D. Reidy, eds., ibid., 138.
[198] LP, 81.

tolerate outlaw states. This refusal to tolerate those states is a consequence of liberalism and decency."[199] He continues, "if the political conception of political liberalism is sound, and if the steps we have taken in developing the Law of Peoples are also sound, then liberal and decent peoples have the right, under the Law of Peoples, not to tolerate outlaw states. Liberal and decent peoples have extremely good reasons for their attitude."[200] One has to recall that it is not clear whether the outlaw states were part of the framing of this Law of the Peoples that is being applied to them, since the different typology of societies is given on the outset of the Law of Peoples.[201] Whatever the situation, critics would argue that as some societies are not recognized as peoples and therefore are not represented in the original positions that generate the principles of the Law of Peoples, human rights universality is not morally grounded. Consequently, their universal application –the protection of human rights –is not morally justified. Yet, Rawls confers the right of enforcement of the Law of Peoples to well-ordered peoples, and so even to non-members of the Society of Peoples, that is, outlaw states.

The case of outlaw states is challenging to both the universality of human rights and their defense through humanitarian intervention. When he explains "democratic peace and stability," Rawls writes that "the Society of Peoples needs to develop new institutions and practices under the Law of Peoples to constrain outlaw states when they appear."[202] Clearly, Rawls's language on outlaw states is not of toleration. While human rights play an exclusive role towards decent peoples from intervention, here they constitute a justificatory role for intervention. Well-ordered peoples are called to be intolerant towards the outlaw states, not only when the latter are

[199] Ibid.
[200] Ibid.
[201] Later, he seems to suggest that even liberal peoples can become outlaw states. See LP, 91.
[202] LP, 48.

aggressive, but even when they violate human rights.[203] Two comments on this position deserve to be mentioned. First, by assigning the role of justifying intervention, Rawls sets human rights under the risk of imperialistic use, as recent history has shown it. Second, while it is true that outlaw states might be dangerous and aggressive, they can also come together for their own self-defense, and even, unfortunately, for fostering their aggressive goals. The Second World War can serve as an example, where Italy and Japan joined Germany in its expansionist project.[204] Now, the fact that, according to Rawls, well-ordered peoples never go to war against each other, does not guarantee that they are more powerful militarily than the outlaw states. Then, should the well-ordered peoples intervene whenever human rights are violated without examining the prospect of victory? Surely, Rawls would agree that they should not. But if he agrees, then he will open the door to the critique of human rights as an imperialistic means through the humanitarian intervention. That is why it is necessary to now see whether Rawls's justification of humanitarian intervention quenches the fears of those who think of humanitarian intervention as neocolonialism.

b). Rawls and Humanitarian Intervention as Neocolonialism

As a reminder, neocolonialism is generally understood as the maintenance of colonial power under the creation of local bourgeoisie. However, when the critics of humanitarian

[203] This claim might be what is today known as "the right to protect, R2P." In the words of Antonio Guterres, "the R2P doctrine maintains that a state's sovereignty is inseparable from its responsibility to protect the people living in its territory and cannot be merely a form of control, and that the international community has a duty to take appropriate action when this responsibility is neglected or violated. This is not an open invitation to military intervention, which must always be an option of last resort, exercised only in exceptional circumstances. Rather, it is an urgent call to states to assume their rightful role in recognizing, respecting, and protecting the rights of their people." See Guterres, ibid., 92-3.

[204] Joshua Cohen argues that "democracies win their wars more frequently than non-democratic," (Cohen, "Is There a Human Rights to Democracy, ibid., 227, note 1), while Rawls states that "none of the more famous wars in history was between settled liberal democratic peoples" (LP, 52). These views seem to suggest that if the world were under liberal democracy, there would be peace. But now that we aren't yet there, any war between democracies and non-democracies would result in the victory of the former. Such a reading of history, if it were correct, would lead to a deterministic view of history. What happened in the past cannot ensure us about the future. At the best, we can assume and even project ourselves in that future, but it will remain uncertain. Hence we can only hope that there won't be war as we cannot predict the outcome.

intervention identify it with the neocolonialism, they allude to the repetition of the colonial methods and imperialistic strategies and language in order to spread liberal culture and gain economic and political influence. They substantiate their critiques from both a moral point of view and from the practice itself of humanitarian intervention.

From the moral perspective, humanitarian intervention is justified by the helplessness of the victim, which deviates from the revolutionary power of human rights. It also focuses on the political rights, discriminating against other rights. The consequence is that the crimes that call for humanitarian intervention are generally non-Western crimes. Another normative argument against humanitarian intervention is the fact that it deconstructs the traditional understanding of state sovereignty, a deconstruction that threatens the existence of many non-Western states, especially the postcolonial ones that were created on the assumption of respect for state sovereignty. The outcome is that it gives a lee-way to strong states –generally Western ones—to intervene in the weaker ones, creating an international order based on domination. Finally, there is the conception of the international community understood as the liberal states of the West, viewed as stable and well-ordered with the mission to stabilize the non-liberal troubled world. This dichotomy is reminiscent of the civilizing mission, which was founded on the opposition civilized-uncivilized; or the Mill's argument that a civilized nation cannot stand a barbarous one in the same neighborhood.

As to the practice of human rights, it poses problems because humanitarian intervention is never only a moral issue; it also—and decisively—involves political and strategic motives, which give reason to the critics of suspecting that human rights are being used ideologically to hide self-interests. The other important question in the practice of humanitarian intervention is the agent who determines that a situation is an egregious violation of human rights. The practice

shows that, in most of the cases, it is the Western strong states that decide, through their international institutions, where to intervene and it has been always in the non-Western ones. Moreover, this practice is selective, setting a double standard when it comes to protect human rights through humanitarian intervention. As long as it is a strong state or one of its friends, it can openly violate human rights without fearing a humanitarian involvement. Another element that stains the practice of humanitarian intervention is the labelling process, through which the liberal-Western states identify the victim without his/her consent, and demonize the non-Western states as tyranny or rogue/failing states, whereas they find better terms for their own misconducts.

These are the reasons why the critics of humanitarian intervention, while recognizing that there are situations of human rights violations that shock the conscience of humanity and, therefore, require international involvement. They also show that there are serious reasons to suspect that the practice of humanitarian intervention is another form of neocolonialism. Does Rawls's justification of humanitarian intervention escape from this suspicion and does it respond satisfactorily to the critics' worries?

Concerning the first moral reason of justifying human rights on the helplessness of the victim, Rawls does not use that kind of argument, for his human rights play a role in the liberal foreign policy instead of focusing on the individual. However, for the question of discriminating some rights and giving priority only to political rights, it has already been shown that his narrow list of human rights is limited to the first generation of human rights, commonly known as negative liberal rights—although not all are included—as his human rights proper are a subgroup of the liberal constitutional rights. In this sense, Rawls's justification of humanitarian intervention does not meet the expectation of defending all rights equally. In the case of

humanitarian intervention only being concerned with non-Western crimes, Rawls maintains that liberalism emerged as a cultural practice of constitutional democracy in the West since the Reformation. Then, he asserts that human rights are already respected in liberal and decent peoples. From these premises, it follows that the crimes against human rights are outside the Western world, and therefore the critics will still have their case confirmed.

The deconstruction of state sovereignty does not need more elaboration, since for Rawls, after WWII, independence and self-determination do not shield a state from external interference, especially when there are grave cases of a violation of human rights. The fear of strong states invading the weaker ones in the name of humanitarian intervention becomes evident under Rawls's justification of humanitarian intervention. Rawls justifies interference by well-ordered peoples into the outlaw states' internal affairs even when the latter are weak, and not aggressive or dangerous. As to the claim that humanitarian intervention is carried out by liberal Western powers under the cover of the international community, the Rawlsian justification of humanitarian intervention also falls in this accusation, as he gives rights to the well-ordered peoples to ensure that the international order is secured, and Rawls affirms that they have good reasons to do so. Moreover, he uses the concepts of "civilization" and "civilized peoples" which suppose the antithesis of uncivilized ones, the so-called barbarous or primitive societies. Through this model, civilization means following the ideals of the Law of Peoples, a law that is first conceived by liberal peoples, and only after is extended to those defined as decent. "These become ideals and principles of liberal and decent civilizations, and principles of the Law of all

civilized Peoples."[205]All of these points show that Rawls's justification of humanitarian intervention does not address its critique as a neocolonialism.

The dissatisfaction of Rawls's justification of humanitarian intervention on a moral level is also observed when confronting the problems posed by the practice of humanitarian intervention. Rawls says that the non-ideal part of his theory looks at what are the morally permissible means to apply the Law of Peoples, and also politically possible as well as realistically doable. The critics convincingly show that there is no humanitarian intervention that has ever taken place for human rights sake only. Most of the time, there are political and geostrategic interests that are involved, and human rights come in as a moral cover. This appears this way because the liberal-Western states that have interests at stake are the ones that determine where and when humanitarian intervention should take place. For example, discussing the Darfur case and the inculpation of President El Bashir, Mahmood Mamdani observes that "more than the innocence or guilt of the president of Sudan, it is the relationship between law and politics[…]that poses a wider issue, one of the greatest concerns to African governments and peoples."[206] The point here is about who makes the decision of implementing this intervention and for what. While ideally, Rawls has ruled out the rational interests in his Law of Peoples by substituting peoples for states, the non-ideal context confronts Rawls with real politics. Do the well-ordered peoples intervene to protect human rights or do they pursue their own interests? In as much as the goal is to extend the liberal foreign policy to all societies, it would be difficult to persuade the critics of humanitarian intervention of the contrary. Furthermore, it has been underlined that not all violations of human rights provoke indignation of the well-ordered peoples. Only do those happening in the "advanced civilizations" seeking trade and cooperative

[205] LP, 113.
[206] Mamdani, *Saviors and Survivors*, 273.

arrangements alert the liberal and decent peoples about egregious violations of human rights. This actually is the consequence of Rawls's functionalist conception of human rights, whereby the latter play a role in the foreign policy of liberal peoples. From this perspective, the risk of human rights manipulation for political interests is high. This claim is reinforced by the fact that the non-ideal theory takes the international order as *it is*, contrary to the ideal part that was trying to imagine it as *it should be*. The actual international order is not made of peoples as Rawls's Law of Peoples suggests, but rather by states, and Rawls himself acknowledges that they are more rational rather than reasonable. They most often act for self-interest and power rather than for moral reasons. Since humanitarian intervention falls in this non-ideal theory, the fears of human rights manipulation for intervening for political, economic and geostrategic interests are not excluded from the application of the Law of Peoples.

For the same reason, it is not clear whether the Rawlsian justification of humanitarian intervention would respond to the question of selectivity and a double standard that are observed in the actual practice of humanitarian intervention. These concerns are also linked to the possibility of manipulating human rights in order to intervene for self-interest and the interests of allies. Furthermore, as it has already been underscored, with Rawls, the right to humanitarian intervention is granted only to the well-ordered peoples, and other peoples seem to not have the same right. Yet, in the practice of humanitarian intervention, it is less the morally upright that is invoked than the mighty that is convoked to carry it out. As already stated, to be declared an outlaw state, does not mean a military weak state, and the forceful intervention has to weigh the chances of success. In other words, to reserve that right to humanitarian intervention to a certain category of states that might not be able to intervene, while those excluded might have been, can be detrimental to the cause of human rights as such.

The critics also underline the labelling process through which non-liberal and hence non-Western states are demonized, while the liberal ones find euphemisms for their own violations of human rights. They can invade other countries and get away with it, under the principle of state sovereignty that they refuse to those they declare outlaw states. Rawls confronts this case and says that any liberal state that acts for self-interest is an outlaw state.[207] But as we are in the non-ideal theory that is supposed to provide what is politically realizable, it seems to me that he does not answer the question raised here of double standards applied in the humanitarian intervention, whose consequence is the labelling process. Moreover, Rawls himself resorts to the same practice because he calls states that do not comply with his Law of Peoples as outlaw states or burdened societies, or benevolent absolutisms; all these being excluded from the international order constituted of well-ordered peoples. Even in the latter, the real members are the liberal peoples; decent ones are just tolerated. Once thus classified, the outlaw states are already targeted by their being called so. And as we saw that these outlaw states are likely to be non-Western states, it is clear that the law of peoples does not properly address the fear of a resurgence of neocolonialism through humanitarian intervention.

However, the most critical concern is the fact that humanitarian intervention destroys the emancipatory power inherent to the conception of human rights. Critics like Mamdani do not believe that the rights protected under the humanitarian intervention are proper rights. They are "residual rights." For him, "to the extent that the global humanitarian order claims to stand for rights, these are residual rights of the human and not the full range of rights of the

[207] LP, 91, especially note 3, which recognizes that when the so-called liberal states behave this way, it is a proof that they can act wrongly.

citizens."[208]This view challenges Rawls's understanding of human rights and challenges the role he wants human rights to assume on the international scene. Rawls conceives human rights as playing a role in the foreign policy of liberal peoples, and also as a justification for humanitarian intervention. But none of these roles seems to reach the essence of human rights as tools in the hands of the oppressed to resist oppression. Through their functionalist role, human rights are robbed of their revolutionary and emancipatory power, and that is why they are exposed to political manipulation.

Sure enough, Rawls suggests the creation of institutions to monitor the implementation of human rights[209] or to speak in the name of the whole world like the UN.[210] However, these institutions are created by the well-ordered peoples and, therefore, they are likely to be rejected by those excluded from the process of putting them into place. That is why, if there is to be a justified intervention in the name of human rights which would not be considered imperialistic, there will have to be an inclusive process for designing those structures, so that they can be deemed neutral in their judgment about intervening for protecting human rights and in establishing the modalities to carry out such a mission. But, if humanitarian intervention follows Rawls's Law of Peoples, there will be good reasons to suspect and fear that human rights will be used for imperialist and neocolonialist motives.

That is why retrieving that emancipatory power of human rights will have to diverge from the use of human rights in liberal foreign policy in international politics. From the Rawlsian model, humanitarian intervention aims at institutional change, since the concern is to help these

[208] Mamdani, *Saviors and Survivors*, 274. Reading the humanitarian intervention through neo-colonialism lenses, he claims that this order is anti-political, because it uses concepts which do not accord a central role to citizens. See ibid., 275 ff.
[209] LP, 48.
[210] Ibid., 62.

societies to join the society of well-ordered peoples. For example, Kelly who follows Rawls's conception of human rights and views human rights as imperatives for foreign policy suggests that well-ordered peoples use trade, aid and intervention in order to protect human rights.[211] But nowhere does she examine or refer to the consequences of such sanctions on individuals. Yet, as Sen so often remarks, officials never starve. Most often, such sanctions hurt the most vulnerable individuals and allow more abuse of human rights, while they strengthen the oppressors' domination. Even removing a tyrant through military intervention does not guarantee that the successors will be much better. In other words, when human rights are conceived as playing a role in foreign policy they do not pay much attention to the protection of individuals' rights and the empowerment of the individual in order to resist oppression. In this sense, the role Rawls attributes to humanitarian intervention does not meet the challenge expressed by the critics of humanitarian intervention who characterize it as neocolonialism. Hence, even on this area of humanitarian intervention, it is clear that we need another justification that would attend to these concerns.

Conclusion

One of the principal concerns for Rawls as he constructs his Law of Peoples was to make it political; that is, not justified by comprehensive doctrines. This concern for a political conception comes out strongly when he talks about human rights. He notes "these rights do not depend on any particular comprehensive religious doctrine or philosophical doctrine of human nature."[212] He wants his theory of human rights to be freestanding from all comprehensive doctrines, due to the fact of pluralism in today's world society. In doing so, Rawls achieves a political justification of human rights, as he had also done for the principles of justice as fairness

[211] Kelly, ibid., 180-1.
[212] LP, 68.

in PL. In attempting to take into account the fact of global cultural pluralism, Rawls has set a new path for approaching human rights, because then "there is no need for a single, commonly agreed justification of human rights."[213] Unfortunately, as much of this chapter illustrates, Rawls's method does not yield a convincing justification of human rights' universality, nor does he eschew the critics of imperialism under a human rights banner. As such, it is difficult to respond to the different challenges to human rights as imperialist ideology and their protection through humanitarian intervention as neocolonialism. Most importantly, the role he attributes to human rights is counterproductive vis-à-vis the goal of the international human rights of protecting individuals' rights. That is why, while his political conception of human rights is a contribution to the philosophical debate about human rights, his conclusions are not practical today.

For instance, not only have many events happened since *The Law of Peoples*,[214] but also his model does not give space to the individual and local-international NGOs involved in promoting and protecting human rights. As Beitz rightly observes, Rawls "notices but does not take into account the broad array of non-coercive political and economic measures that might be used by states and international organizations to influence the internal affairs of societies where human rights are threatened…And he does not represent human rights as justification for individuals and nongovernmental organizations to engage in reform-oriented political action."[215] Beitz concludes, "in all these respects, Rawls's conception of the political human rights is narrower than what we observe in present practice."[216] Talking about present practice, it relies much on the activities on a local level where the human rights are used by local activists to

[213] Beitz, "Human Rights and the Law of Peoples," 202.
[214] Rasmussen, "Rawls on Human Rights," 92.
[215] Beitz, "Human Rights and the Law of Peoples," 203.
[216] Ibid.

empower local individuals and NGOs to claim their own rights and set a priority on what rights come first according to present circumstances. Moreover, in the actual practice of international human rights, they assume more functions than what Rawls attributes to them.[217]

Therefore, instead of working out a liberal view for well-ordered peoples only that is to be extended to other societies, Rawls's methodology can be of great help by hermeneutically taking into account the present practice of human rights in order to find the emerging norms of international law. Indeed, as many countries are now signatory to human rights Declarations, Covenants and Conventions, it is a good sign that a common culture is being built in which values/norms are shared and therefore can constitute a basis to construct a political justification of human rights, without setting the world into groups of well-ordered and "ill-ordered" peoples, which might end up in antagonistic relationships.

[217] Nickel, ibid., 270.

Chap. 4. Habermas and the Challenges to Human Rights

> Habermas's cosmopolitanism ethics favours too strongly the Western liberal order. Liberalism is an ideology that informs both emancipatory and imperial aspirations…peace building missions have taken a neo-colonial character as international civilian administrators have taken control over these war-torn societies.
>
> Carlos Yordán,

4.0. Introduction

This chapter follows the scheme of the previous one. It is about looking at another perspective, presently the Habermasian understanding of human rights, in order to examine whether it is possible to respond to the challenges raised against human rights. The reason of choosing Jürgen Habermas is that he is among the leading intellectuals who are engaged today in the debate about international and global justice, and he represents another school of thought—critical theory—that pays particular attention to social questions. As David Ingram portraits him, he "is indisputably an international star in the pantheon of living thinkers, but he is also a public intellectual who has engaged political and religious leaders…a spokesperson on behalf of public policies that advance equal rights and the common good, at home and abroad."[1] Being such a great figure on the font of global issues, it is with no surprise that one encounters human rights in many of his works. His interest in human rights is not only rooted in his global engagement, but also in his constant interest in politics and morality that permeates his whole career. As Habermas acknowledges it himself, "the public sphere as space of reasoned communicative

[1] David Ingram,*Habermas: Introduction and Analysis* (Ithaca: Cornell University Press, 2010), 1, 2.

exchanges is the issue that has concerned me all my life. The conceptual triad of 'public space,' 'discourse,' and 'reason,' in fact has dominated my work as a scholar and my political life."[2]

This assertion cannot be more than true when one recalls that Habermas's first book was on the emergence and the transformation of the bourgeois public sphere.[3] In that work, not only is the conceptual triad already present although at its nascent stage, but also more other themes such as human rights are addressed. For example, having talked about the liberal negative rights, he notes that "today basic social rights to welfare are found…in the United Nations Declaration of Human Rights of December 10, 1948."[4] From this point of view, Ingram is on target when he observes that "Habermas's interest in law and morality is the single constant thread running throughout his career and predates his interest in knowledge and morality."[5] This preoccupation for law and morality with emphasis on human rights would reoccur in subsequent works. For instance, chapter two of his *Theory and Practice* which deals with "natural law and revolution," shows the process through which natural law was put into a positive form through the French and American human rights declarations, as the fundamental human rights had lost their religious and metaphysical foundations.[6] By the time he writes his *Legitimation Crisis*,[7] most of the themes that were to constitute the architectonic of his theory are elaborated. He formulated the basic insight that a modern secularized society can no longer rely on the traditional authority for its integration, because it is highly rationalized. Rather, its stability has to be founded on the discursive justification. As he puts it, in such a kind of society, "at every level, administrative

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[2] Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays*. Trans. Ciaran Cronin (Malden: Polity Press. 2010), 12-3.
[3] Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* Trans. Thomas Burger (Cambridge: MIT Press, 1991).
[4] Ibid., 225.
[5] Ingram, *Habermas*, 153.
[6] Habermas, *Theory and Practice*. Trans. John Viertel (Boston: Beacon Press, 1973), especially 112-20.
[7] Habermas, *Legitimation Crisis*. Trans. Thomas McCarthy (Boston: Beacon Press, 2005).

planning produces unintended unsettling and publicizing effects. These effects weaken the justification potential of traditions that have been flushed out of their nature-like course of development. Once their unquestionable character has been destroyed, the stabilization of validity claims can succeed only through discourse."[8] Although the book mentions human rights only in few instances, the way is set and it reaches its fulfilment in his work on law and democracy.[9]

This short overview shows that the human rights theme is recurrent in Habermas's voluminous work. However, he does not have a book solely dedicated to the human rights subject. Moreover, while expressions such as subject rights, individual rights, human rights, political rights, civil rights, a system of rights and so forth permeate his writings, it is not clear whether they mean the international human rights corpus. Hence in this chapter, my main task is to better understand Habermas's theory of human rights before examining whether through it one can respond to the challenges identified in the first two chapters.

In his "Remarks on Legitimation through Human Rights," Habermas mentions that he made a "proposal…for reconstructing the internal relation between democracy and human rights,"[10] and a note appended to this proposal shows his *Between Facts and Norms.*[11] Indeed, the author devotes a whole chapter on human rights, with a strong accent to its relationship with democracy. It is in this seminal text that one has to go back and see how Habermas gets to the system of rights. Once there, one discovers that the system of rights is reconstructed from "a

[8] Ibid., 72.
[9] Habermas, *Between Fact and Norm: Contributions to a Discourse Theory of Law and Democracy*. Trans. William Rehg (Cambridge: MIT Press, 1998).
[10] Habermas,"Remarks on Legitimation through Human Rights" in *Postnational Constellation*. Trans. Max Pensky. (Cambridge: The MIT Press, 2001), 113.
[11] Ibid., the endnote no. 1, 184.

discourse-theoretic standpoint."[12] A question, therefore, arises as to what a discourse-theory means. Thus, this chapter is structured around three main points. In the first point, I attempt to grasp the meaning of the Habermasian discourse theory –in the limit of a chapter—as it is the grounding source of his reconstruction of his system of rights. The second point, then, focuses on his understanding of human rights and confronts it with the theoretical challenges to human rights. Finally, my third and last point analyzes Habermas's view on the doctrine and practice of humanitarian intervention in order to examine whether, here too, one can satisfy the practical challenges to human rights implementation.

4.1. Discourse Theory as a Basis for a System of Rights

a). From Instrumental to Communicative Rationality

Habermas's thought originates from the modern critical theory school of Frankfurt, commonly associated with Max Horkeimer and Theodor Adorno. While it is true that his conceptual triad of "public sphere," "discourse," and "reason" have been present throughout his academic career, his methodology of maintaining them together evolved. David Rasmussen, for instance, notes that Habermas's earlier work in the critical theory was epistemological in nature. "Critical theory was for Habermas, at least originally, the problem of 'valid knowledge,' i.e., an epistemological problem."[13] This epistemological tone of his project is affirmed in the preface of his *Knowledge and Human Interest*[14]. That epistemological project, however, is not motivated by interest in the status of knowledge as such. It is rather undertaken as an archeological search for an important forgotten moment in philosophy, i.e., self-reflection. As he puts it, he undertook "a historically oriented attempt to reconstruct the prehistory of modern positivism with the

[12] Habermas, *Between Facts and Norms*, 105.
[13] David Rasmussen, "Critical Theory and Philosophy" in David M. Rasmussen, ed. *The Handbook of Critical Theory* (Cambridge: Blackwell Publishers, 1996), 31.
[14] Habermas, *Knowledge and Human Interest*. Tans. Jeremy J. Shapiro. (Boston: Beacon Press, 1971).

systematic intention of analyzing the connection between knowledge and human interests."[15] He continues, "in following the process of the dissolution of epistemology, which has left philosophy of science in its place, one makes one's way over abandoned stages of reflection."[16] He adds, "retreading this path from a perspective that looks back toward the point of departure may help to recover the forgotten experience of reflection."[17] Commenting on this passage, Thomas McCarthy observes that the book is "an effort to open—or rather reopen—certain avenues of reflection that were blocked by ascendancy of positivism during the last hundred years."[18] For McCarthy, this "forgotten experience of reflection" refers to the abandonment of the German tradition by the positivism "from Kant to Marx," and indeed, Habermas goes back and engages them. However, the forgetfulness was not particular to the positivism. The earlier critical theory also focused only on Marx, leaving aside other main figures of German thought. According to Rasmussen, Habermas's critical theory "began to take shape as an alternative argument to the one which Horkeimer and Adorno put forth. In this context, Habermas would avail himself of certain resources within the tradition of contemporary German philosophy which his mentors had overlooked."[19] In that sense, Habermas's critique is not aimed at the positivism only, but it is also a critique of the critical theory itself. It challenges the premises of its understanding of rationality. From the beginning, Habermas wants to redeem the project on the Enlightenment, believing in the emancipatory power of reason.[20] That is why he follows it until a certain point.

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[15] Ibid., vii.
[16] Ibid.
[17] Ibid.
[18] Thomas McCarthy, *The Critical Theory of Jürgen Habermas* (Cambridge: MIT Press, 1981), 53.
[19] Rasmussen, "Critical Theory," 31.
[20] Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*. Trans. Frederic G. Lawrence (Cambridge: MIT Press, 1990).

The Frankfurt school had shown that, instead of being liberating, the modern reason has become a source of oppression as it only operates instrumentally, abolishing all possibility of freedom. Under the guidance of modern reason, social relationships follow the domination model of the relationship between subject and object. The *Dialectic of Enlightenment*[21] is an exposé of the failure of the modern reason to deliver its emancipatory promise, instituting rather domination and estrangement. Indeed, by its very definition, "Enlightenment, understood in the widest sense as the advance of thought, has always aimed at liberating human beings from fear and installing them as masters."[22] However, as things stand now, "Enlightenment is totalitarian."[23] It "stands in the same relationship to things as the dictator to human beings. He knows them to the extent that he can manipulate them. The man of science knows things to the extent that he can make them."[24] Horkeimer and Adorno capture that paradox in this excerpt:

> In the enlightened world, mythology has permeated the sphere of the profane. Existence, thoroughly cleansed of demons and their conceptual descendants, takes on, in the gleaming naturalness, the numinous character which former ages attributed to demons. Justified in the guise of brutal facts as something eternally immune to intervention, the social injustice from which those facts arise is as sacrosanct today as the medicine man once was under the protection of his gods. Not only is domination paid for with the estrangement of human beings from the dominated objects, but the relationships of human beings, including the relationships of individuals to themselves, have themselves been bewitched by the objectification of mind. Individual shrinks to the nodal point of conventional reactions and the modes of operation objectively expected of them. Animism had endowed things with souls; industrialism makes souls into things.[25]

The message here is that modern reason has subjected everything to the objectification process, which makes it blind to the critical power that it was supposed to have; a critical power to uncover the source of social injustices. In that process of objectification, human beings lose their contact with objects and among themselves because all their social interactions follow the instrumental model. There is no more space for spontaneity and freedom; the instrumental reason

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[21] Max Horkeimer and Theodor Adorno, *Dialect of Enlightenment: Philosophical Fragments*. Ed. Gunzelin Schimid Noerr; trans. Edmund Jephcott (Stanford: Stanford University Press, 2002).
[22] Ibid., 1.
[23] Ibid., 4.
[24] Ibid., 6.
[25] Ibid., 21.

imposes certain reactions to things and souls. In that sense, reason operating in industrialism is not different from animism; they are just playing at different levels, but both are an expression of bondage, as they both suppress the space where human beings can be free. Herbert Marcuse raised the same concern about technologized society. "By virtue of the way it has organized its technological base, contemporary industrial society tends to be totalitarian. For 'totalitarian' is not only a terroristic political coordination of society, but also a non-terroristic economic-technical coordination which operates through the manipulation of needs by vested interests."[26]

The founder-fathers of the Frankfurt school were criticizing the modern society under the power of modern reason as expressed in modern science and technology, which led to industrialization and modern capitalism. Habermas is aware of this social situation and in a way, shares their diagnosis.[27] He concurs with Weber's sociological analysis that modern society has gone through the process of rationalization, resulting into the differentiation of the spheres of value. The consequence is that the unity of reason has been shattered, engendering the loss of meaning and freedom.[28] However, he refuses to throw the reason away and that is where the critique of the critical theory yields its fruits. For Habermas, the remedy to the negative consequences of the instrumental reason is not outside the realm of reason. Rather, he still believes that the alienating role of reason is due to a certain understanding of rationality that has dominated the philosophical discourse since modernity. Therefore, the solution is not to reject the reason altogether, but to look for other forms of rationality that would redeem that project of

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[26] Herbert Marcuse, *One-Dimensional Man: Studies in the Ideologies of Advanced Industrial Society*. (Boston: Beacon Press, 1991), 3.

[27] See for instance Habermas, *La technique et la science comme idéologie*. Introd. and trad. Jean-René Ladmiral. (Paris: Gallimard, 1973), especially the first chapter which is a lecture offered at the seventieth birthday of Herbert Marcuse.

[28] Weber comes again and again in Habermas's writings. But for a thorough and a systematic analysis, see Habermas, *The Theory of Communicative Action. vol. 1: Reason and The Rationalization of society*. Trans. Thomas McCarthy (Boston: Beacon Press, 1984).

modernity, that is, the commitment to freedom through reason and at the same time, to eschew the damages of its possible instrumentalization.

By engaging "the forgotten experience of reflection" and other main figures of German thoughts, Habermas discovers that the modern philosophical discourse has been constructed around the subject. One is to recall that philosophical modernity points to that experience whereby philosophy is weaned off its religious or traditional foundation. It had to rely on reason and reason alone. In Rasmussen's words, "the discourse on modernity begins from the striking realization that precisely the 'modern' problematic is that reason has no recourse other than itself, has no tradition to fall back upon, no myth to rely upon, on religion for which it may exist as a rational counterpart. Philosophy suddenly finds itself alone, perhaps even at an end."[29] The consequence of this "loneliness" of philosophy is that the philosophical activity becomes a lonely exercise, where the subject retracts in his consciousness to construct the reality through his rational capacity. In the philosophy of the subject, everything has now to obey the order of the concept constructed by the knowing subject who considers the rest of reality as his/her object under an obligation to obey him/her. Self-consciousness becomes the master of everything else through objectification. As Habermas puts it, in the philosophy focused on consciousness, "subjective reason regulates exactly two fundamental relations that a subject can take up to possible objects. Under 'object' the philosophy of the subject understands everything that can be represented as existing; under 'subject' it understands first of all the capacities to relate to oneself to such entities in the world in an objectivating attitude and to gain control over objects, be it theoretically or practically."[30] In that context, as Rasmussen remarks, "self-consciousness will eventually link up with absolute knowledge [as Hegel's philosophy exemplifies] which leads

[29] Rasmussen, *Reading Habermas* (Oxford: Basil Blackwell, 1990), 8.
[30] Habermas, *Theory of Communicative Action*, vol. 1, 387.

simply to an endorsement of that which is."[31] Consequently, "the attempt to embody the emancipatory principle of enlightenment in the philosophy of subject ends by the legitimating all forms of institutional repression. This is the paradox of the dialectic of enlightenment."[32]

For Habermas, critical theory succumbed to this philosophy of subject; that is why it could not find a way through reason to go beyond the instrumental rationality, because it was denouncing it through a negative dialectics. Habermas maintains that "the program of early critical theory foundered not on this or that contingent circumstance, but from the exhaustion of the paradigm of the philosophy of consciousness."[33] It is Habermas's conviction that critical theory could not solve the problem raised by its critique of instrumental reason, because it is still in the boundaries of the philosophy of the subject. In his own words, "the critique of instrumental reason, which remains bound to the conditions of the philosophy of the subject, denounces as a defect something that it cannot explain in its defectiveness because it lacks a conceptual framework sufficiently flexible to capture the integrity of what is destroyed through instrumental reason."[34] A critical theory bound to the philosophy of the subject cannot correct the defect because it is expressed in the same relation of subject-object. And as Rasmussen observes, "all subject-object formulations are instrumental."[35] Therefore, "a critique of instrumental reason developed within the confines of the philosophy of consciousness will be unable to free itself from the very instrumentalism implicit in the subject-object formulation."[36] That is why, according to Habermas, in the forties, Horkeimer and Adorno had abandoned the previous project of the critical theory of developing a critique of society through an "interdisciplinary

[31] Rasmussen, *Reading Habermas*, 9.
[32] Ibid.
[33] Habermas, *Theory of Communicative Action,* vol. 1, 386.
[34] Ibid., 389.
[35]. Rasmussen, *Reading Habermas*, 25. See also his "Critical Theory,", 35.
[36] Rasmussen, *Reading Habermas*, 25

materialism," which required a theoretical knowledge. It developed into a philosophy that withdrew "behind the lines of discursive thought to the 'mindfulness of nature'," which betrayed then the very goal that was assigned to a critical theory.[37]

b). Communicative Reason and Discourse Theory as Basis for A System of Rights

Having identified the problem and committed to redeeming the emancipatory project of modernity through reason carried through a critical theory, Habermas endeavors to look for another understanding of rationality that fits the task. He finds it in the shift of paradigm from the philosophy of consciousness to the communicative rationality. He contends that "a change of paradigm to the theory of communication makes it possible to return to the undertaking that was *interrupted* with the critique of instrumental reason; and this will permit us to take up once again the since-neglected tasks of a critical theory of society."[38] From there on, Habermas embarks on the second methodological route that some have called "the linguistic turn."[39] As Ingram observes, "taking up the 'linguistic turn'—the expression used by philosophers to designate the twentieth-century turn away from psychological experience to language and logic as the proper place for investigating knowledge—Habermas set aside his earlier work on knowledge-constitutive interests and developed an entirely new philosophical approach which he dubbed the *theory of communicative action*."[40] This theory was systemically developed in his two volumes of *Theory of Communication action*,[41] aiming at showing intersubjective rationality inscribed in the daily communication through language, contrary to the solipsist rationality of the philosophy

[37] Habermas, *Theory of Communicative Action*, vol. 1, 385-6.
[38] Ibid., 386.
[39] Christina Lafont, *The Linguistic Turn in Hermeneutic Philosophy* (Cambridge: MIT Press, 1999).
[40] Ingram, *Habermas,* 67.
[41] Habermas, *Theory of Communicative Action. vol. 1: Reason and Rationalization of Society*. Trans. Thomas McCarthy (Boston: Beacon Press, 1984); vol. 2: *Lifeworld and System: A Critique of Functionalist Reason*. Trans. Thomas McCarthy (Boston: Beacon Press, 1987).

of the subject. Habermas's thesis is that, from a performative perspective, the fundamental goal of the use of language is to reach an understanding between those engaged in communication.

Although the idea received a thorough systematization in the latter work, it was already present in his earlier works, as Habermas started looking at the philosophy of language and logic to demonstrate that the communicative action is inherently different from and cannot be reduced to the instrumental one. For example, in *Knowledge and Human Interest*, Habermas criticizes Peirce for not having seen that investigators are engaged in dialogue that cannot be reduced to the instrumental action. In that sense, for Habermas, Peirce's pragmatism already contained the way out from the subject-object relationship of the philosophy of consciousness. He writes, "in continuing his analysis, Peirce would have to come upon the fact that the *ground of intersubjectivity* in which investigators are always already situated when they attempt to bring about consensus about methodological problems is not ground of purposive-rational action, which is in principle solitary."[42] In other words, at this stage already, Habermas distinguishes two different grounds for purposive activity and the dialogue that leads to consensus. The former is solitary whereas the latter is intersubjective. Furthermore, the latter requires the recognition of the individuals taking part in it. Only can the intersubjective use of language be called communication, for "the communication of investigators requires the use of language that is not confined to the limits of technical control over objectified natural process."[43] Rather, "it arises from symbolic interaction between societal subjects who reciprocally know and recognize each other as unmistakable individuals. This communicative action is a system of reference that cannot be reduced to the framework of instrumental reason."[44] Once more, it is clear that already

[42] Habermas, *Knowledge,* 137.
[43] Ibid.
[44] Ibid.

at this time, Habermas had identified a kind of rationality that can go beyond the instrumental reason that was the target of the critical theory since the beginning. In his other major earlier works, he goes further to emphasize that "reaching an understanding is a normative concept; everyone who speaks a natural language has the intuitive knowledge of it and therefore is confident of being able, in principle, to distinguish a true consensus from a false one."[45] By the time he writes *Legitimation Crisis,* Habermas is confident enough in his new theory that he can set the program of this theory of communication. He says, "social systems can maintain themselves vis-à-vis outer nature through instrumental actions (according to technical rules), and vis-à-vis inner nature through communicative actions (according to valid norms), because at the socio-cultural stage of development animal behavior is reorganized under imperatives of validity claims. This reorganization is effected in structures of linguistically produced intersubjectivity."[46] Consequently, "practical reason can no longer be founded in the transcendental subject. Communicative ethics appeals now only to fundamental norms of rational speech, an ultimate 'fact of reason'."[47] This excursus on some works before the publication of the *Theory of Communicative Action* is meant to show that Habermas got the idea of going beyond the philosophy of consciousness very early in his career, but it received its systematic treatment is the latter.

To work out his theory of communication, Habermas analyzes the philosophy of languages, especially the speech acts, in order to formulate what he called a formal/universal pragmatics, in opposition to the empirical pragmatic. The latter is concerned with the analysis of a particular use of language, while the former is concerned with the use of language in active

[45] Habermas, *Theory,* 17.
[46] Habermas, *Legitimation*, 10.
[47] Ibid., 120.

communication among individuals who want to reach understanding about something in the world. As he puts it, "the task of universal pragmatics is to identify and reconstruct universal conditions of possible mutual understanding."[48] Maeve Cooke underlines that, while Habermas used universal pragmatics in his earlier work, he later preferred the term of formal pragmatics because it relates to the formal semantic analysis of language.[49] Nonetheless, he goes beyond the latter by analyzing the use of language in everyday communication. That is why, as he says, "formal-pragmatic analysis starts with idealized cases of the communicative action that is typical of everyday life of modern societies."[50]

Following Austin's distinction between locutionary (expressing states of affairs), illocutionary (performing an action by saying something) and perlocutionary (producing something upon the hearer) speech acts, Habermas identifies the illocutionary speech acts as those fitting into the communicative action oriented toward reaching understanding.[51] Indeed, in illocutionary acts such as commands, promises, greetings, etc., "the speaker lets a hearer know that he wants what he says to be understood as greetings, warning, explanation, and so forth."[52] On the other end, the hearer has to take a position about what the speaker says, and it is only in this way that the speaker succeeds to bring about his illocutionary intention. Contrary to the perlocutionary acts that aim at producing effects on the hearer by hidden motives, the illocutionary operates in the open and relies on this transparency in the intention from the

[48] Habermas, *On the Pragmatics of Communication*. Ed. Maeve Cooke (Cambridge: MIT Press, 1998), 21.
[49] See the introduction to *On the Pragmatics*, 2.
[50] Habermas, "A Reply to my Critics" in John B. Thompson and David Held, Eds. *Habermas: Critical Debates* (Cambridge: MIT Press, 1982), 236.
[51] Habermas, *Theory of Communicative Action*, vol. 1, 288ff.
[52] Ibid., 290.

speaker, so that the hearer is not cheated. That is why for Habemas, "what we mean by reaching understanding has to be clarified *solely* with the connection to the illocutionary acts."[53]

Analyzing then these illocutionary speech acts, Habermas shows that the hearer takes a "yes" or "no" position to the utterance of the speaker.[54] Such a position is possible because the hearer assumes some arguments/reasons justifying the speaker's utterance, and the speaker is ready to justify his utterance, should it be rejected. This leads Habermas to assert that every speech act raises what he calls validity claims which can be redeemed through argumentation. According to him, every speech act raises a claim to truth, to normative rightness and to truthfulness at once, although only one can be raised directly, while the two others are raised indirectly. In Cooke's words, "every speech act can be shown to raise precisely one claim in the first instance (or 'directly'), and this claim determines its illocutionary mode and its speech-act category. In addition to this 'direct' claim, each speech act raises two other claims 'indirectly.' Habermas expresses this intuition as the thesis that the speaker, with every speech act, raises three validity claims simultaneously."[55] The importance of these validity claims is that they offer a possibility to the hearer to challenge any speech act and rejects it if the conditions of its acceptance do not obtain. Taking the example of asking for a glass of water, Habermas shows that a speech act such as "please bring me a glass of water," can be rejected from the three validity claims perspective,[56] and concludes that

> what we have shown in connection with this example holds true for *all* speech acts oriented to reaching understanding. In contexts of communicative action, speech acts can always be rejected under each of the three aspects: the aspect of the rightness that the speaker claims for his action in relation to a normative context (or, indirectly, for these norms themselves); the truthfulness that the speaker claims for the expression of subjective experiences to which he has privileged access; finally, the truth that the speaker,

[53] Ibid., 293.
[54] Klaus Günther argues that the communicative freedom is rather linked to the possibility of negation. See his "Communicative Freedom, Communicative Power, and Jurisgenesis" in *Cardozo L. Rev.*, Vol. 17, 1996, 1038.
[55] Maeve Cooke, *Language and Reason: A Study of Habermas's Pragmatics* (Cambridge: MIT Press, 1994), 59.
[56] Habermas, *Theory of Communicative Action*, vol. 1, 306.

> with his utterance, claims for a statement (or for the existential presuppositions of a nominalized proposition).[57]

These three validity claims raised in every speech act define the latter's structural components—"the propositional, the illocutionary and the expressive,"[58]—and "they represent three fundamental modes and form the basis for distinguishing three corresponding categories of speech act: the constative, the regulative, and the expressive."[59] Thus, as reaching understanding "means, at the minimum, that at least two speaking and acting subjects understand a linguistic expression in the same way,"[60] the validity claims offer the conditions under which a hearer can accept what the speaker says, in which case the speaker can redeem them by offering the reasons that underlie them. As he puts it, "validity claims aim at being acknowledged intersubjectively by speaker and hearer; they can only be redeemed with reasons, that is discursively, and the hearer reacts to them with rationally motivated 'yes' or 'no' positions."[61] That is why they also become the conditions for communication oriented toward understanding.[62]

The discovery of this validity idealization inherent to the pragmatic use of language opens a door to a new understanding of another form of rationality that can salvage the project of modernity and carry forward the critical theory ambition. The analysis of everyday communication reveals reason at work, no longer in a solipsist way, but rather intersubjectively between at least two competent subjects engaged in actual communication. On the other hand, when they enter into communication, they are motivated by the need for consensually coordinating their action as social subjects. Habermas calls "interactions communicative when

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[57] Ibid., 307. See also Habermas, *Moral Consciousness and Communicative action*. Trans. Christian Lenhardt & Shierry Weber Nicholsen (Cambridge: MIT Press, 1990), 58; and his *On Pragmatics*, 317.
[58] Habermas, *Theory of Communicative Action*, vol. 2, 62.
[59] Cooke, *Language,* 59.
[60] Habermas, *Theory of Communicative Action*, vol. 1, 307.
[61] Habermas, *Postmetaphysical Thinking: Philosophical Essays*. Trans. William Mark Hohengarten (Cambridge: MIT Press, 1996), 74. Also his *Justification and Application: Remarks on Discourse Ethics*. Trans. Ciaran Cronin (Cambridge: MIT Press, 2001), 29.
[62] Leslie Howe, *On Habermas* (Belmont: Wadsworth, 2000), 20.

the participants coordinate their plans of action consensually, with the agreement reached at any point being evaluated in terms of the intersubjective recognition of validity claims." [63]That is why for him, the communicative action becomes the embodiment of a new form of rationality that goes beyond the instrumental reason and solves the problem caused by its critique, because it relies on the reciprocal recognition between those engaged in communication. At the same time, the latter becomes a way of social integration and the means for the coordination of the social action through the medium of language. Moreover, as it relies on the criticizability of validity claims raised by every speech act in an actual communication, the communication action retains the theoretical moment that the founders of the critical theory school were tempted to reject. Indeed, "in communicative action one actor seeks *rationally* to *motivate* another by relying on the illocutionary binding/bonding effect…of the offer contained in his speech act."[64] Thus, by communicative action, Habermas means "the type of interaction in which *all* participants harmonize their individual plans of action with one another and thus pursue their illocutionary aims *without reservation*."[65]

In tying the communicative action to this coordination of action through the illocutionary aims, Habermas distinguishes it from the strategic action.[66] The latter can also serve for action coordination, but the speaker uses influence on or manipulation of the hearer so that he/she can get to his/her personal interest. In terms of Austin's categories of speech acts, the strategic action would correspond to the perlocutionary acts because the speaker seeks to produce an effect on

[63] Habermas, *Moral Consciousness*, 58. Also, Between Facts and Norms, 18.
[64] Ibid.
[65] Habermas, *Theory of Communicative Action*, vol. 1, 294.
[66] Many have criticized this Habermas's theory of communicative action. Among others, Ernest Tugendhat, "Habermas on Communicative Action" and the whole third section in David Rasmussen & James Swindal, eds. *Jürgen Habermas*, vol. 1. (London: Sage Publications, 2002); Axel Honneth and Hans Joas, eds. *Communicative Action: Essays on Jürgen Habermas's The Theory of Communicative Action*. Tans. Jeremy Gaines and Doris L. Jones (Cambridge: MIT Press, 1991); John B. Thompson and David Held, Eds. *Habermas: Critical Debates* (Cambridge: MIT Press, 1982), just to mention but a few.

the hearer by hiding his intention. He/she calculates all the ways to use languages as a means to get advantage of the hearer. There is no cooperation between the speaker and the hearer, as the latter ignores the motives behind the speaker. Habermas qualifies such a usage of language as a parasite to the original goal of reaching understanding, and there can only be consensus when there is no reservation on the part of the participants. As Habermas says, "I count as communicative action those linguistically mediated interactions in which all participants pursue illocutionary aims, and only illocutionary aims, with their mediating acts of communication. On the other hand, I regard as linguistically mediated strategic action those interactions in which at least one of the participants wants his speech acts to produce perlocutionary effects on his opposite number."[67] In other words, while the communication action coordinates social interactions through a linguistically mediated consensus, strategic action aims at success through a linguistically mediated influence or manipulation.

The communicative rationality operating through the communicative action is the paradigm needed to go beyond the aporia raised by the critique of instrumental reason, for the strategic action almost follows the model of instrumental reason. The same way the instrumental reason posits a subject-object relationship of domination, strategic actors use the other party in order to reach their personal interest. They count on their wittiness and manipulative power to achieve the success of their project. That is what is impossible with the communicative action, because the illocutionary aims require the cooperation and the outcome is never assured from the

[67] Habermas, *Theory of Communicative Action*, vol. 1, 295. In one of his replies to the critics of his theory of communicative action, Habermas gives nuance between effects arising from the semantic content and those "effects as occur contingently independently of grammatically regulated interconnections." He then asserts, "I term those effects strategically intended which come about only if they are not declared or if they are caused by deceptive speech acts that merely pretend to be valid. Perlocutionary effects of this type reveal that a use of language oriented toward reaching understanding is deployed for strategic interactions." See Habermas, "A Reply" in Axel Honneth and Hans Joas, eds. *Communicative Action: Essays on Jürgen Habermas's The Theory of Communicative Action*. Tans. Jeremy Gaines and Doris L. Jones (Cambridge: MIT Press, 1991), 240.

start since it depends on the consensus resulting from the intersubjective interaction. In Habermas's words, "illocutionary aims can…only be achieved cooperatively and are never, as it were, at the disposal of an individual party to interaction. Strategic action also occurs under condition of the double contingency of actors equipped with a freedom of choice. Yet these purposive actors, who condition one another with a view to their own perspective success, can be reached by one another only as entities *within* the world."[68] He adds, "they have to attribute successes and failures solely to themselves, namely as their causal intervention in the supposedly regular nexus of innerworldly processes."[69]

Communicative action avoids the shortcomings of the strategic action because it relies on the validity claims raised in every speech act. These validity claims transcend the context in which they are invoked, and yet they are to be redeemed in the actual coordination of action through the acts of communication. In this sense, they are both context-transcendent and yet context-bound. As Habermas argues, "the validity claims factually raised and recognized within an action-coordinating role, an element of unconditionality enters into everyday communicative practice," because "at least from the viewpoint of the participants, they transcend all merely local agreements and base themselves on a subversive, continually flexible potential of disputable reasons. Yet they must be raised here and now within a specific context and with coverage provided by an unquestioned cultural background and accepted (or rejected) with a view to non-reversible action sequences."[70]

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[68] Habermas, "A Reply," 241-2.
[69] Ibid.
[70] Ibid., 243. In another instance, he says that "the theory of communicative action *detranscendentalizes* the noumenal realm only to have the idealizing force of context-transcending anticipations settle in the unavoidable pragmatic presuppositions of speech acts, and hence in the heart of ordinary, everyday communicative practice." See *Between Fact and Norms*, 19. Rasmussen argues that this form of idealization is difficult to justify and therefore constitutes the weakness in Habermas's argument. See for instance Rasmussen, "Jurisprudence and Validity" in *Cardozo L. Rev*., Vol. 17, 1995-6, 1060, 1070, 1074.

From this context, the underlying idea of the communicative action is the argumentative reason through which participants in communicative action exchange rational arguments. This leads to what Habermas calls argumentation. By argumentation Habermas understands "a procedure for exchange and assessment of information, reasons, and terminologies."[71] In the context of communicative action, argumentation occurs when the hearer rejects with rational reasons the offer of the speaker. The latter has to justify his illocutionary aims, likewise through rational reasons. In other words, argumentation occurs when there is a disruption of communication oriented toward reaching understanding. In that reciprocal "exchange and assessment" of given reasons, the validity claims are intersubjectively redeemed.[72]

It is on this argumentation basis that Habermas constructs his discourse theory, elevating the communicative rationality discovered in the daily communicative action to the abstract level, in order to theorize the reflexive exercise of argumentation. In the daily communicative action, reasons are assumed by both the speaker and the hearer. But, at the discourse level, Habermas examines the conditions that could allow the possibility of such an intersubjective redemption of validity claims. "In *communicative action*, we proceed naïvely, as it were, whereas in *discourse* we exchange reasons to assess validity claims that have become problematic."[73] That is why it is an idealization that goes beyond the actual practice of communicative action, and yet becomes a regulative idea of the exercise of communication as it is the conditions of its possibility. As he puts it, "discourses are islands in the sea of practice, that is, improbable forms of communication; the everyday appeal to validity-claims points, however, to their possibility. Only to this extent are idealizations *also* built into everyday practice."[74] He continues, "but I do wish to hold fast to

[71] Habermas, *Justification*, 58.
[72] Habermas, *Postmetaphysical*, 74.
[73] Habermas, *Between Naturalism*, 16.
[74] Habermans, "A Reply to my Critics," 235.

the strict distinction between communicative action in the naïve attitude and reflexively achieved understanding in regard to hypothetical validity-claims."[75]

Thus there is correlation between discourse and communication in everyday practice, as the former is made possible by the latter, and the latter brings the "element of unconditionality" into the former. However, there still is a fundamental difference because in discourse, validity claims raised in a speech act are explicitly yet hypothetically discussed, while in the everyday communication, validity-claims are naively assumed. As McCarthy observes, "whereas the validity claims that unavoidably (even if only implicitly) raised with every speech act are more or less naively accepted in ordinary interaction, their validity is regarded as hypothetical and explicitly thematized in discourse."[76] He concludes, "thus discourse represents a certain break with the normal context of interaction."[77] That is why discourse is an idealization as it assumes a situation such that the consensus is reached only through rational argumentation. That is the reason why, for Habermas, discourses are "reflexive forms of communication."[78]

Habermas experiences this discursive reflexivity in the written word. As he argues, "rational discourse borrows this reflexivity from the written word, that is to say, from the published article or the scholarly treatise, because discourse is designed to include everyone concerned and to create a third platform on which all pertinent contributions are heard. It is

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[75] Ibid.
[76] McCarthy, *The Critical Theory*, 291.
[77] Ibid.
[78] Habermas, *Theory of Communicative Action*, vol. 2, 74. Here he writes, "because communicative action demands an orientation to validity claims, it points from the start to the possibility of settling disagreements by adducing reasons. From this can develop institutionalized forms of argumentative speech, in which validity claims normally raised naïvely, and immediately affirmed or denied, can be thematic as controversial validity claims and discussed hypothetically." See also his "Justice and Solidarity: On the Discussion Concerning Stage 6" in Thomas Wren, ed., *The Moral Domain: Essays on the Ongoing Discussion between Philosophy and Social Sciences*. (Cambridge: MIT Press, 1990), 245.

supposed to ensure that the unforced force of the better argument prevails."[79] This statement raises two important points. First, it indicates the goal of the discourse –creating a platform where all pertinent contributions are heard and to ensure that the better argument prevails— second, it hints to one of the conditions for the possibility of the discourse, that is, the inclusion. Normally, Habermas singles out four "most important features of the process of argumentation." In addition to the inclusion stated as "(i) that nobody who could make a relevant contribution may be excluded," other features are "(ii) that all participants are granted an equal opportunity to make contributions; (iii) the participants mean what they say; and (iv) that communication must be freed from external and coercion so that the 'yes' or 'no' stances that participants adopt on criticizable validity claims are motived solely by the rational force of the better reason."[80]

At this level of general presuppositions for formal argumentation, "discourse" is an umbrella of many forms of discourses. Not only are there theoretical, practical, or hermeneutical discourses, but also there are moral, legal, ethical, or pragmatic discourses.[81] All these forms of discourse, however, do not require the same rigor in argumentation. For Habermas, only the

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[79] Habermas, *Between Naturalism*, 16. See also McCarthy, *The Critical Theory*, 291-2.

[80] Habermas, *The Inclusion of the Other: Studies in Political Theory*. Ed. Ciaran Cronin (Cambridge: MIT Press, 2000), 44. These features or presuppositions of argumentative discourse are recurrent in Habermas's work, in one form or another, but the idea is the same. See for instance, his "Reply to Symposium Participants, Benjamin N. Cardozo School of Law" in *Cardozo L. Rev*., 1996, pp. 1506, 1519; or his "Short Reply" in *Ratio Juris*, Vol. 12, No. 4, 1999, p. 448. Now, according to Robert Alexy, "the idea of discourse isn't neutral. It includes universality and the autonomy of argumentation as well as the conception of impartiality which rests upon them. The idea of discourse is therefore an essentially liberal idea." See his "Discourse Theory and Human Rights" in *Ratio Juris*, Vol. 9, No. 3, 1996,pp. 212, 216. For the same idea that Habermas's theory is liberal, see Andrea Baumeister, "Habermas: Discourse and Cultural Diversity" in *Political Studies*, Vol. 51, 2003, p. 743; or Bonnie Honig, "Dead Rights, Live Futures: A Reply to Habermas's Constitutional Democracy" in *Political Theory*, vol. 29, No 6, 2001, p. 793. Michel Rosenfeld also underlines that the communicative action is not neutral. See his "Can Rights, Democracy and Justice Be Reconciled through Discourse Theory? Reflection on Habermas's Proceduralist Paradigm of Law" in *Cardozo L. Rev*., Vol. 17, 1996. It is perhaps why Niclas Luhmann wonders whether the discursive argumentation can include the "many who simple do not want; who cannot want; who suffer from depression; who assess their prospects negatively; who want to be left alone; who have to struggle for their physical survival to such a degree that there is no time or energy left for anything else." See his "Quod omnes Tangit: Remarks on Jürgen Habermas's Legal Theory" in *Cardozo L. Rev*., Vol. 17, pp. 1996, 896-7.

[81] See Gunther Teubner, "*De collisione Discursuum*: Communicative Rationality in Law, Morality, and Politics" in *Cardozo L. Rev*., Vol. 17, 1996, p. 903. William Outhwaite adds other forms of discourses. See *Habermas: A Critical Introduction* (Stanford: Stanford University Press, 1994), p. 42.

theoretical and the practical (moral) discourses satisfy the context-transcending condition of discursive argumentation. Cooke notes that "Habermas singles out claims to propositional truth and normative rightness as validity claims that are conceptually linked to the idea of *universal* agreement on the *universal* validity of what is agreed."[82] As far as we are concerned, it is the normative justification that interests us, because it is through it that Habermas reconstructs the system of rights—which is the central theme of this chapter. As Peter Bal asserts, from the Habermasian perspective, human rights presuppose the practical discourse.[83] Habermas classically conceived this form of discourse as discourse ethics (D), mainly understood as "a defense of the rationality of moral argumentation."[84] However, as he reformulates it in *Between Facts and Norms*, he wants it to be so abstract that it can cover different levels of normative justification of action norms. As he asserts; "despite its normative content, it lies at the level of abstraction that it is still neutral with respect to morality and law, for it refers to action norms in general."[85] As such, it has to be universal, formal and deontological, as well as cognitive,[86] as it is supposed to provide the procedural structure for all forms of normative justification. In other words, the discourse principle has to remain open[87] and not be only limited to a certain domain. In his own terms, "to conceive (D) with sufficient abstraction, it is important that we not limit a fortiori the kind of issues and contributions and the sorts of reasons that 'count' in each case."[88]

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[82] Cooke, *Language*, p. 31. See also McCarthy, *The Critical Theory*, where he notes that "claims to truth and rightness, if radically challenged, can be redeemed only through argumentative discourse leading to a rationally motivated consensus." p. 325.
[83] Peter Bal, "Discourse Ethics and Human Rights in Criminal Procedure" in Mathieu Deflem, Ed. *Habermas, Modernity and Law* (London: Sage Publications, 1996), 77.
[84] Joseph Heath, *Communicative Action and Rational Choice* (Cambridge: MIT Press, 2001), 175.
[85] Habermas, *Between Facts and Norms*, 107.
[86] See William Rehg, *Insight and Solidarity: A Study in Discourse Ethics of Jürgen Habermas* (Berkeley: University of California Press, 1994), 30-1. Also Andrew Edgar, *The Philosophy of Habermas* (Chesham: Acumen, 2005), 160.
[87] Habermas, "A Reply," 231.
[88] Habermas, *Between Facts and Norms*, 108.

Hence, Habermas formulates it as "D: Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse."[89] At this level, (D) is differentiated from morality expressed now under the universalization principle, enunciated as "(U) *All* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone*'s interest (and these consequences are preferred to those of known alternative possibilities for regulation)."[90] And when (U) is applied to concrete cases, it takes the form of the principle of appropriateness.[91] At the same time, (D) can accommodate other forms of discourse, such as the democratic principle, which is crucial in the reconstruction of the system of rights. As William Rehg remarks, "earlier, Habermas had presented this [(D)] as the leading principle of his moral theory; now he repositions *D* so that it overarches both law and morality in a manner prejudicial to neither." He continues, "in the context of moral judgment formation, *D* takes the more specific shape of the universalization principle…in the context of the institutionalized action systems of law, it assumes the shapes of a 'democratic principle' that unfolds as a system of basic rights."[92]

In other words, (D) generates the system of rights through the democratic principle, and this is what we were looking for; that is, the meaning of discourse theory and how from it, we get to the system of rights. The question now at hand is to know the identity of that system of rights reconstructed through (D).

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[89]Ibid., 107.
[90] Habermas, *Moral Consciousness*, 65. See also *Justification*, 32.
[91] Habermas, *Between Facts and Norms*, 109. See also his "Law and Morality" in M. McMurrin, ed., *The Tanner Lectures on Human Values*, vol. VIII, 1988, 277. Alexy thinks that this principle of appropriateness is vague. See his "Jürgen Habermas's Theory of Legal Discourse" in *Cardozo L. Rev*., Vol. 17, 1996, 1032.
[92] Rehg, "Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jürgen Habermas" in *Cardozo L. Rev.*, Vol. 17, 1996, 1150.

4.2. Habermas's System of Rights and Human Rights as Ideology

a). Constructing and Defining Rights

Habermas's consideration of rights does not start by defining them; rather, he focuses on their horizontal dimension. He states, "I take my starting point the rights citizens must accord one another if they want to legitimately regulate their common life by means of positive law."[93] This starting point springs from the reciprocal recognition of citizens living together. That is why "this formulation already indicates that the system of rights as a whole is shot through with that internal tension between facticity and validity manifest in the ambivalent mode of legal validity."[94] While this excerpt does not define what right is for Habermas, it however sets the tone of Habermas's understanding of rights, which are in constant connection with morality and law. But most importantly, Habermas insists on the essential relationship between human rights and democracy in what he calls private and popular autonomy. For him, "democracy and human rights form the universalist core of the constitutional state that emerged from the American and French Revolutions in different variants."[95] As Ingeborg Maus rightly captures it, "Habermas's entire line of argument therefore is aimed at explaining the internal link between human rights and popular sovereignty in a system of rights which is based on the equal value and mutual enabling of private and public autonomy."[96]

Hence, in his reconstruction, Habermas views human rights as those designating individual (or subjective, or liberty) rights and they are meant to protect private autonomy.[97] They correspond to the first generation of the current human rights corpus, and Habermas

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[93] Habermas, *Between Facts and Norms*, 82.
[94] Ibid.
[95] Habermas, "Popular Sovereignty as Procedure" in James Bohman & William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: MIT Press, 1997), 37.
[96] Ingeborg Maus, "Liberties and Popular Sovereignty: On Jürgen Habermas's Reconstruction of the System of Rights" in *Cardozo L. Rev*., Vol. 17, 1996, 833-4.
[97] Habermas, *Between Facts and Norms*, 453.

originates them in the liberal tradition starting with John Locke. They represent "the classical human rights" that "guarantee the life and private liberty –that is, scope for the pursuit of personal-life-plans—of citizens."[98] Most of the time when he talks about human rights, Habermas means these rights although he disagrees with their liberal interpretation, mainly on two main points. On the one hand, this tradition relies on natural law, entitling rights to a person by the fact of being a human being. Yet, according to Habermas, the postmetaphysical thinking can no longer follow such a path of thought; it does not accept an external authority to reason. "Consequently, the understanding of human rights must jettison the metaphysical assumption of an individual who exists prior to all socialization and, as it were, comes into the world already equipped with innate rights."[99] On the other hand, the liberal view isolates individuals and opposes them against the state, since "such rights were supposed to provide inherently legitimate barriers that prevented the sovereign will of the people from encroaching on inviolable spheres of individual freedom."[100] Habermas repudiates this view, arguing that, "*at a conceptual level*, rights do not immediately refer to atomistic and estranged individuals who are possessively set against one another."[101] Furthermore, "individual freedom is not exhausted by the right to a utilitarian 'pursuit of happiness' and hence cannot be reduced to the authorization to the private pursuit of temporal and spiritual goods."[102] These objections allow Habermas to state three characteristics of human rights: they are (i) socially constructed; hence (ii) they are intersubjective and (iii) they are justified through the discourse principle which leads to the democratic principle.

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[98] Habermas, "Remarks on Legitimation through Human Rights," 116. See also *Between Facts and Norms*, 454.
[99] Habermas, "Remarks on Legitimation through Human Rights," 126.
[100] Ibid., 116.
[101] Habermas, *Between Facts and Norms*, 88.
[102] Habermas, *Between Naturalism*, 272-3.

Having dismissed any kind of "metaphysical" foundation for a doctrine of rights, Habermas stresses that "rights are a social construction that one must not hypostatize into facts;"[103] they "are not pregiven moral truths to be discovered, but rather constructions."[104] Habermas is here emphasizing that human rights are not prepolitical rights grounded on "a fictive state of nature,"[105] as the liberal view suggests. They rather "presuppose collaboration among subjects who recognize one another, in their reciprocally related rights and duties, as free and equal citizens."[106] That is why, for Habermas, they are intersubjective and this is a fundamental point as it connects to the underlying basis of communicative action.

According to him, "the theory of rights is not necessarily connected with an individualistic contraction of the conception of rights. If one starts with an intersubjective concept of rights, the real source of error is easily identified," because "*public discussions must first clarify* the aspects under which differences between experiences and living situations of (specific groups of) women and men become relevant for an equal opportunity to take advantage of individual liberties."[107] From this perspective, Habermas shows that the individualistic interpretation of human rights is not constitutive of a theory of rights. Citing Raiser, he argues that "a right, after all, is neither a gun nor a one-man show. It is a relationship and a social practice, and in both those essential aspects it is seemingly an expression of connectedness,"[108] and the liberal "individualistic reading" makes "unrecognizable" this "intersubjective character

[103] Habermas, *Between Facts and Norms*, 226.
[104] Habermas, "Remarks on Legitimation through Human Rights," 122.
[105] Habermas, *Between Facts and Norms*, 100.
[106] Ibid., 88.
[107] Ibid., 425. This intersubjective dimension of human rights is essential for Habermas's understanding of rights and it runs through many of his writings. See for instance his "Paradigms of Law" in *Cardozo L. Rev*., Vol., 17, 1996, 784; or "Reply to Symposium," in the same *Cardozo L. Rev*., Vol. 17, 1996, 1511, or again *The Inclusion*, 242.
[108] Habermas, *Between Facts and Norms*, 88.

of rights."[109] It is because of this connectedness and intersubjective character –and not the metaphysical foundation of human rights—that the discourse principle is of paramount importance.

I have already shown that Habermas states the discourse principle (D) as: "just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses."[110] The discourse principle meets the intersubjective dimension of rights, because they are reconstructed through a public discussion, where everybody can participate and make a contribution. Habermas attaches a great importance to the participation of "the affected parties" in the deliberation about any social construction, so that "they articulate the standards of comparison and justify the relevant aspects."[111] For him, "individual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for the consideration of their newly interpreted needs."[112] Now, since (D) finds its content in the theory of argumentation,[113] whose presuppositions are that it (i) has to be open and inclusive, (ii) everyone has to have an equal right to make a contribution; (iii) every participant is bound by truthfulness; and (iv) there must not be external coercion to agree to the best argument,[114] (D) reinforces the Habermasian idea that rights are constructed through the mutual recognition between citizens. At the same time, this understanding presupposes the complementarity between private and public autonomy.

[109] Ibid.
[110] Ibid., 107.
[111] Ibid. 425.
[112] Ibid., 450.
[113] Habermas, "Justice and Solidarity," 245.
[114] Habermas, *Between Naturalism*, 82.

Contrary to the classical liberal reading of rights from Locke that gives priority to private autonomy, Hebermas prefers the Kantian autonomy that implies, in the footsteps of Rousseau, both private and public autonomy. "Kant sees," Habermas says, "that the 'single human right' must differentiate itself into *a system of rights* through which both 'the freedom of every member of society as a human being' as well as 'the equality of each member with every other as a subject' assume a positive shape."[115] This Kantian "single human rights, i.e., right to equal liberties" designates the core of what Habermas understands by human rights, since "the classical liberal rights –to personal dignity; to life, liberty, and bodily integrity; to freedom of movement, freedom in the choice of one's vocation, property, the inviolability of one's home, and so on— are interpretation of, and ways of working out, what we might call a 'general right to individual liberties'."[116] The interpretation and the working out of this "general right" are done in the social context where citizens recognize one another as co-associates. "In this way, the morally grounded primordial human right to equal liberties is intertwined in the social contract with the principle of popular sovereignty."[117] That is how and why the private and popular autonomy, individual and political rights are co-original, because individual rights that secure the private autonomy can only have their full meaning in the exercise of political autonomy, "through the communicative form of discursive processes of opinion and will-formation."[118]

The co-originality of human rights and democracy, private and popular sovereignty is the core of Habermas's conception of human rights as elaborated in the system of rights.[119] But

[115] Habermas, *Between Facts*, 93.
[116] Ibid., 125-6.
[117] Ibid., 94.
[118] Ibid., 103.
[119] Ibid., 473, 477, etc., This co-originality of private and popular autonomy, human rights and democracy, is really the hinge of Habermas's system of rights and he repeats it in many places. In addition to the above references, see also his *Divided West*. Trans. Ciaran Cronin (Cambridge, Malden: Polity Press, 2007), p. 140; *Times of Transition*. Ed. Ciaran Cronin (Malden: Polity Press, 2006), p. 114; "Private and Public Autonomy, Human Rights and Popular

before considering it, a question remains pending concerning these reconstructed rights: what is their normative content? In other words, what is the nature of these rights? To this question, Habermas responds without hesitation that human rights are essentially juridical. According to him, "the concept of human rights does not have its origin in morality, but rather bears the imprint of the modern concept of individual liberties, hence of a specifically juridical concept. Human rights are *juridical in their nature*."[120] Elsewhere, he asserts that "human rights, too, which are inscribed in citizens' practice of democratic self-determination, must then be conceived from the start as rights in the juridical sense, their moral content notwithstanding."[121]

Thus, being juridical in their very nature and as *individual* or *subjective* rights, human rights are constitutive of modern law and therefore they have to be enacted into positive law through a legislative process. Although, as constitutional norms, they have the privilege of constituting the legitimating framework of the legal order and can even be justified merely from a moral point of view, human rights do not lose their "juridical character" because "legal norms…preserve their legal form, regardless of the kinds of reasons on the basis of which their claim to legitimacy can be justified."[122] Therefore, they "belong structurally to a positive and coercive legal order which founds actionable individual legal claims,"[123] and they share "the fate of all positive law; they, too, can be changed or be suspended, for example, following a change of regimes."[124] If human rights are considered to be moral rights, it is because they "have that far managed to achieve an unambiguous positive form only within the national legal orders of

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Sovereignty" in Obrad Savić, Ed. *The Politics of Human Rights* (London: Verso, 1999); or Jürgen Habermas "Constitutional Democracy: A Paradoxical Union of Contradictory Principles" in *Political Theory*, Vol. 29, No. 6, 2001, p. 767.

[120] Habermas, *The Inclusion*, p. 190.

[121] Habermas, *Between Facts and Norms*, 105.

[122] Habermas, *The Inclusion*., 191

[123] Ibid., 192.

[124] Ibid., 190.

democratic states," and "they remain only a weak force in international law and still await institutionalization within the framework of a cosmopolitan order"[125]

In conclusion, Habermas reconstructs human rights from the classical liberal understanding of right through a re-reading of Kantian "single human right" and the Rousseauian principle of popular sovereignty, based on his discourse principle. The result is that human rights are inherently juridical and socially constructed, with intersubjective character. This reconstruction constitutes the basis for his system of rights.

b). The System of Rights

Habermas's re-reading of Kant leads him to "the Kantian principle of law, which holds that *each* person has a right to individual liberties...[and] the liberty of each person is supposed to be compatible with equal liberty for all in an accordance with a universal law."[126] For Habermas, however, this Kantian understanding still leans on morality, in the sense that "the form of general law legitimates the distribution of liberties, because it implies that a given law has passed the universalization test and been found worthy in the court of reason."[127] Habermas argues that law should not be subordinated to morality as Kant does in this context, in order to preserve the co-originality of the private and popular sovereignty. As Habermas contends, "the idea of self-legislation *by citizens*, that is, requires that those subject to law as its addressees can at the same time understand themselves as authors of law, …[and] we cannot meet this requirement simply by conceiving the right to equal liberties as a morally grounded right that the political legislator merely has to enact."[128] In other words, as already mentioned, rights enacted into law are not simple moral facts pregiven politically. They are rather social constructions, and that is why they

[125].Ibid., 192.
[126] Habermas, *Between Facts and Norms*, 120
[127]. Ibid.
[128] Ibid.

cannot be imposed on the legislator. For this reason, "the idea of self-legislation by citizens…should not be reduced to the *moral* self-regulation of *individual* persons. Autonomy must be conceived more abstractly, and in a strictly neutral way."[129] As Rasmussen observes, Habermas avoids deducing the popular sovereignty from the private autonomy.[130]

To achieve this abstract level of autonomy, Habermas resorts to the discourse principle, because as we saw, it is neutral vis-à-vis both morality and law. He applies (D) to the general right to liberties, that is, private autonomy, and in order "to confer legitimating force to the legislative process," the discourse principle "assumes the shape of a principle of democracy."[131] Thus, (D) mediates the relationship between private and public autonomy without subordination between them. For Habermas, the democratic principle results from the "interpenetration" of the legal form and the discourse principle, and he understands "this interpenetration as *a logical genesis of rights.*"[132] This move is a key element for comprehending the system of rights that Habermas elaborates, as it conceives the principle of democracy "as the heart of a *system* of rights."[133] Indeed, if the system of rights is supposed to "contain precisely the rights the citizens must confer on one another if they want to legitimately regulate their interactions and life contexts by means of positive law,"[134] then the democratic principle is definitely central because it embodies the structure through which the addressees of the law see themselves as author of the law they obey. They do not follow the law for only its coercive force, but also because they have good reasons to justify it. Without this political autonomy through which the addressees of the law assume its authorship, a legitimate law would be impossible. That is why the discourse

[129] Ibid., 121.
[130] Rasmussen, "How is Valid Law Possible?:A Review of Factizität und Geltung by Jürgen Habermas" in *Philosophy and Social Criticism*, Vol. 20, No. 4, 1994, p. 30.
[131] Ibid., 121.
[132] Ibid.
[133] Ibid.
[134] Ibid., 122.

principle and the legal form are the ingredients needed to construct the system of rights, because the discourse principle allows the assessment of the validity of the norms, whereas the legal form "stabilizes behavioral expectations."[135]

Five categories of "basic rights" constitute the content of this system of rights, and they can be subdivided into three classes

(i). This class includes three categories that "guarantee…the private autonomy of legal subjects"[136] and they are: (1) "basic rights that result from the politically autonomous elaboration of the right to the greatest possible measure of equal individual liberties;" (2) "basic rights that result from the politically autonomous elaboration of the status of a member in a voluntary association of consociates under law," and (3) "basic rights that result immediately from the actionability of rights and from the politically autonomous elaboration of individual legal protection."[137] Ingram summarizes these three categories as "1. subjective rights (permissions) to act freely, without constraint; 2. citizenship rights to political membership; 3. rights to have one's rights adjudicated according to due process."[138]

Some observations about this first class are necessary. To start with, although they all form a same class, these three categories seem to enjoy an unequal status, because Habermas says that (2) and (3) are necessary corollaries of (1). In other words, even if one recognizes the importance of political membership and legal protection as basic *per se*, (2) and (3) seem to be a means for (1), such that they obtain their *raison d'être* as long as (1) is secured. This subordination also occurs strongly about the fifth category of basic rights. Moreover, in spite of

[135] Ibid., 122.
[136] Ibid., 123.
[137] Ibid., 122.
[138] Ingram, *Habermas*, 169.

guaranteeing "private autonomy", Habermas makes clear that these basic rights are not "the liberal rights against the state." Rather, they "result simply from the application of the discourse principle to the medium of law as such, that is, to the conditions for the legal form of a horizontal association of free and equal persons."[139] Put otherwise, they are the outcome of reciprocal recognition of consociates, "in their role of addressees of laws."[140]

(ii). Hence, the fourth category of basic rights—constituting the second class—which grants to the bearers of the first class of rights the authorship of their legal order, is stipulated as "basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their political autonomy and through which they generate legitimate law."[141] Ingram calls it "political rights to participate in legislating rights."[142] This category grants the political autonomy to the legal subjects whose private autonomy is protected by the first category. It "is reflexively applied to the constitutional interpretation and the further political development or elaboration of the basic rights abstractly identified in (1) through (4). For political rights ground the status of free and equal active citizens."[143] In terms of the discourse principle, this fourth category assumes the discourse principle in the form the principle of democracy, whereas the first three categories are the translation of "the discourse principle into the medium of law as such."[144] For Habermas, these four categories of rights are "absolutely justified," because they affirm the co-originality of private and public autonomy, human rights and popular sovereignty, and they are reconstructed through the medium of the discourse principle.

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[139] Habermas, *Between Facts and Norms*, 122.
[140] Ibid., 123.
[141] Ibid.
[142] Ingram, *Habermas*, 169.
[143] Habermas, *Between Facts*, 123.
[144] Ibid., 122.

(iii). Habermas's system of rights is completed by a fifth and last category of rights—third class—less important than the others, for it is implied by the first four categories, so that the citizens may "interpret and develop their private and civic autonomy simultaneously."[145] In other words, the last category is defined relative to the rights guaranteeing private and political autonomy, and it "can be justified only in relative terms." These rights are stated as "basic rights to provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4)."[146] Ingram terms them as "social rights to the background conditions requisite for effectively exercising rights 1-4."[147] This category is not only subordinated to the other four, but it is also formulated in a way that it seems to enjoy a lower status. One might even ask in which sense the rights of the last category are basic, since they totally depend on those supposed to be "absolutely justifiable." As John Tweedy and Alan Hunt underscore, "within his discourse-based account, civil and political rights are seen to secure the public sphere and allow for collective will formation. Social rights, in contrast, are revealed to be deeply paradoxical."[148]

These are the categories of basics rights of the Habermasian system of rights, reconstructed from a discourse-theory point of view. As already mentioned, they constitute the core of the democratic constitutional state; that is why they represent the abstract form of legal rights as found in modern democratic constitutions. The question now is to see the relationship between this system of rights and the international human rights, since the challenges at the heart of this dissertation are addressed to the contemporary human rights movement. Only after

[145]Ibid., 123.
[146] Ibid.
[147] Ingram, *Habermas*, 169.
[148] John Tweedy and Alan Hunt, "The Future of the Welfare State and Social Rights: Reflections on Habermas" in *Journal of Law and Society*, Vol. 21, No 3, 1994, 307.

examining Habermas's account of the universal human rights and its relationship to his system of rights will one be able to assess whether one can respond to these challenges to human rights from the Habermasian conception of human rights.

c). Habermas and the International Human Rights

While Habermas's system of rights constitutes the core of the constitution of the democratic state, he refers to international human rights when he talks about international law and/or globalization. In such contexts, he calls upon the United Nations Charter or UDHR and presents them as part of the evolution of international law. Reflecting on the Kantian project and the possibility of the "constitutionalization of international law," he remarks that UN Charter made an innovative move by bringing together the securing of peace and protecting human rights. He says, "the charter of the League itself does not draw a connection between world peace and a global constitution based on human rights. The development of international law remains the means to the end of averting war." He adds, "all this changes with the UN Charter, which, in the second clause of the preamble, reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person'."[149] He then mentions the Article 1 of the same Charter, which "links the political goal of global peace and international security with the promotion of 'respect for human rights and for fundamental freedom for all without distinction as to race, sex, language or religion' throughout the world." And he concludes, "The Universal Declaration of Human Rights of December 10, 1948, which explicitly refers back to the statements from the preamble to the Charter, underscores this correlation."[150] He even goes through the evolution of

[149] Habermas, *Divided West*, 161-2.
[150] Ibid., 162.

the Bill of Rights through different Covenants and other relevant international instruments related to UDHR.[151]

Habermas also evokes international human rights in the same line of international law as a source of legitimacy in the post-national constellations and globalization context. He observes that "in the transition from the nation-states to a cosmopolitan order, it is hard to say which poses the greater danger: the disappearing world of sovereign subjects of international law [nation-states], who lost their innocence long ago, or the ambiguous mish-mash of supranational institutions and conferences, which can grant a dubious legitimation but which depend as always on the good will of powerful states and alliances." Human rights "in this volatile situation" are the "sole recognized basis of legitimation for the politics of the international community." He uses "human rights" to refer to "the United Nations Declaration of Human Rights."[152] Hence, when he talks about international human rights, Habermas views them as an outcome of the evolution and innovation of international law after WWII and the globalization phenomenon. He confers to them the role of providing a basis for building a cosmopolitan community.

Nevertheless, sometimes, he seems to doubt the ability of the international human rights to play that founding role of the international community by offering the "sole recognized basis of legitimation for the politics of the international community."[153] For instance, he notes that "'human rights', i.e. legal norms with an exclusively moral content, make up the entire normative framework for a cosmopolitan community."[154] However, he hastens to add, "this fact doesn't' predict whether the UN Declaration on Human Rights, whose wording was agreed on

[151] Ibid., 162-6. See also *The Inclusion*, 179-80, *Between Naturalism*, 323, *The Crisis of European Union: A Response*. Trans. Ciaran Cronin (Malden: Polity Press, 2012), 50, or his *Europe: The Faltering Projec*t. Trans. Ciaran Cronin (Malden: Polity Press, 2009), 120.
[152] Habermas, "Remarks on Legitimation through Human Rights," 119.
[153] *Postnational*,108.
[154] Ibid.

by the comparatively small number of founding members of the United Nations in 1946, could approach a unanimous interpretation and application in today's multicultural world."[155] In other words, Habermas perceives the challenge of multiculturalism to the universal validity of international human rights. Furthermore, he thinks that the cosmopolitan community cannot achieve the "civic solidarity" usual to a nation-state level, although he "sees no structural obstacles to expanding national civic solidarity and welfare-state policies to the scale of a postnational federation."[156] The impossibility of this worldwide "civic solidarity" is due to the fact that "civic solidarity is rooted in particular collective identities," whereas "cosmopolitan solidarity has to support itself on the moral universalism of human rights alone."[157] In other words, in a multicultural world, it is not obvious to reach a consensus on "the validity, content, and ranking of human rights."[158] Another reason for him to doubt about the efficacy of the international human rights regime is the lack of "an executive power" to implement them. In his words, "the weak link in the global protection of human rights remains the absence of an executive power that could enforce the General Declaration of Human Rights, if necessarily by curtailing the sovereign power of nation-states."[159] That is why Habermas pleads for the juridification of international law so that it can be evenly applied.

Despite these doubts, however, Habermas still believes that human rights constitute a solid "basis for legitimation" to the cosmopolitan community. It is in this regard that he suggests some reforms so that human rights might be implemented on a global scope. According to him, there should be a multilevel global system—basically constituted of three levels: supranational, transnational and national—through which "the classical function of the state as the guarantor of

[155] Ibid.
[156] Ibid.
[157] Ibid.
[158] Habermas, "Remarks on Legitimation through Human Rights," 119.
[159] Habermas, *The Inclusion*, 182.

security, law, and freedom would be transferred to a *supranational* world organization specialized in securing peace and implementing human rights worldwide."[160] It is at this supranational level that human rights would intervene as they are linked to peace and security. For Habermas, the UN looks to be a good starting point, but it would need a reform that confers on it an executive power. Indeed, "for actionable rights to issue from the United Nations Declaration of Human Rights, it is not enough to simply have international courts; such courts will first be able to function adequately only when the age of individual sovereign states has come to an end through a United Nations that *can not only pass but act on and enforce its resolutions.*"[161] From this quotation, it is clear that Habermas is advocating for the UN to embody the so-much-desired executive power over individual states for protecting human rights.

As one follows Habermas through his reasoning about international human rights, he/she might think that the author gives the same consideration to all the rights anchored in the international instruments. But there is a hierarchy in the different categories of rights, and international concern for human rights is not expanded to all generations of human rights. In Habermas's understanding, even the proposed "supranational world organization" would not have to implement "all" human rights; "it would not shoulder the immense burden of a global domestic policy designed to overcome the extreme disparities in wealth within the stratified world society, reverse ecological imbalances, avert collective threats, on the one hand, while endeavoring to promote an intercultural discourse on, and recognition of, the equal rights of the major world civilizations, on the other…*These problems differ in kind from violations of*

[160] Habermas, *Between Naturalism*, 333.
[161] Habermas, *Between Facts and Norms*, 456. Perhaps that is why Thomas Mertens thinks that Habermas's cosmopolitanism abolishes the plurality of states. See his "Cosmopolitanism and Citizenship: Kant against Habermas" in *European Journal of Philosophy*, Vol. 4, No 3, 1996, 338, although Habermas himself still allocates a role to play in his reformulation of the Kantian project of a world organization without a world state. See *Between Naturalism*, 323.

international peace and human rights."[162] Obviously, here "human rights" designates less than the large spectrum of rights encapsulated in the different international instruments. The question now is to identify the category of rights that are to constitute the basis and concern for the cosmopolitan society.

According to some historians, international human rights are made of different generations. Douglas Elwood, after many others, notes that the recent history of human rights is at least made of three generations.[163] The first generation encompasses the freedom-oriented rights which are embodied in the articles 2-21 of the UDHR. Their keyword is *liberty* and they were promoted by the English, American and French Revolutions. They are called negative rights because they are *rights from*. The second generation concerns the rights contained in the articles 22-27. They are need-based rights and that is why they are also named positive rights because they are *rights to*. The key-word here is *equality* and they are the fruit of the social revolution. The third generation is the result of the decline of the nation-state and are rights to self-determination and self-development as contained in the articles 28-29, mostly developed from the Third World. Today, however, "with the globalization of the economy and communications and the emergence of developing post-colonial states, new rights have been added to the human rights corpus. These include rights to healthy environment, to sustainable development, to culture, to immigration and to political asylum."[164] We have here a fourth generation and it is not impossible that we may have a fifth, since all this long history shows that human rights are an ongoing process.

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[162] Habermas, *Between Naturalism*, 333. Emphasis added
[163]Douglas Elwood, *Human Rights: A Christian Perspective* (Quenzon City: New Day Publishers, 1990), 7-10.
[164] Ishay, *The History of Human Rights*, 13.

In this long history, while Habermas recognizes the importance of UDHR and other human rights instruments and their role in a globalized world, he seems to favor the first generation of human rights–although with nuances[165]—as absolutely justifiable and with a justificatory duty for other generations. For instance, he maintains that the right to social justice is founded on the interconnectedness of the universal right to equal freedom and the universal right to equality, as part of the evolution of individual rights. In his words, "the interpenetration of the principle of legal freedom with the universal right to equality grounded the expectation that social justice could be concomitantly established by defining spheres of individual liberty."[166] For him, social justice plays a diaconal role towards individual rights. That is why "from a normative point of view, both materialization and the new category of social entitlements are *justified in a relative sense,* namely, in relation to an absolutely justified equal distribution of individual liberties."[167] Put into other words, social entitlements cannot be justified by and for themselves, because "the distributive aspect of equal legal status and equal treatment…is simply what *results* from the universalistic character of a law intended to guarantee the freedom and integrity of each."[168] Thus, from a normative perspective, social entitlements are justified through the individual and political rights, which are liberal in essence.[169] Even in a multicultural world where human rights are subject to different interpretations, Habermas persists to assert the priority of individual rights, arguing that "from a normative standpoint, according 'priority' to social and cultural basic rights does not make sense for the simple reason that such rights only serve to secure the 'fair value' (Rawls) of liberal and

[165] Habermas himself takes into account liberty, equality and post-state-nation context in his human rights understanding. However, he puts a stronger accent on liberal civic and political rights to the detriment of the others.
[166]Habermas, *Between Facts and Norms*, 401.
[167] Ibid., 403.
[168] Ibid., 418.
[169] For a critique of this subordination of social and economic rights to liberal rights, see Günter Frankenberg, "Why Care?—The Trouble with Social Rights" in *Cardozo L. Rev*., Vol. 17, 1996, 1365-90.

political basic rights, i.e., the factual presuppositions for the equal opportunity to exercise individual rights."[170]

Thus, according to Habermas, social, economic and cultural rights are given an instrumental role of securing liberal and political basic rights. Nonetheless, although here Habermas puts social and cultural rights at the same level, he later justifies cultural rights from the individual and political perspective, in order to show that they are as basic as individual and civic rights. He says, "one misses the point of cultural rights by incorporating them into an extended model of the welfare state. Unlike social rights, cultural rights must be justified in terms of their role in facilitating the equal inclusion of all citizens."[171] Once justified from this political background, cultural rights acquire the same priority over social rights, and "it makes sense to derive [them] from the principle of inviolability of human dignity", because "the equal protection of the integrity of the person, to which all citizens have a claim, includes the guarantee of equal access to the patterns of communication, social relations, traditions, and relations of recognition that are required or desired for developing, reproducing, and renewing their personal identities."[172] This understanding of cultural rights stands on the private and political autonomy that constitute the core of Habermas's system of rights, because for him, "the normative key is autonomy and not well-being."[173]

From this reading, it is clear that Habermas favors the first generation of human rights, as absolutely justifiable and offering the basis for justification to social rights. That is why for the

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[170] Habermas, "Remarks on Legitimation through Human Rights," 125.
[171] Habermas, *Between Naturalism*, 295. See also his "Equal Treatment of Cultures and the Limits of Postmodern Liberalism" in *The Journal of Political Philosophy*, Vol. 13, No 1, 2005, 17-8, 22; "Multiculturalism and Liberal State" in *Stanford Law Review*, Vol. 47, No 5, 1995, 850; or "Religious Tolerance: The Pacemakers for Cultural Rights" in *Philosophy*, Vol. 79, No 307, 2004, 16.
[172] Habermas, *Between Naturalism*, 296.
[173] Habermas, *Between Facts and Norms*, 418.

cultural rights to enjoy a certain higher standard compared to social and economic rights, they have to be justified by their role in individuation and political participation of citizens. Thus, one can only conclude with Ingram that "first-generation (liberal, civil, and political) rights are privileged over second and third-generation (social and cultural) rights in such a way that only the former appear to be core human rights that come under legal protection."[174]

This *hierarchization* of human rights and the prioritization of individual rights—those securing both private and political autonomy—over other categories of rights, raise some questions. To subordinate some rights under others is to undermine their inherent normative justification and their inner value. As Alessandro Ferrara rightly observes, "the rights listed in the Declaration are not ranked in a hierarchy of importance,"[175] that is, the first generation is not more important than other generations, and they are not to be subordinated to one another. Instead, they are to be taken together in order to enhance and protect human dignity. In this consideration, Ingram is right to respond to Habermas that "many rights –albeit, not necessarily all those specified by the UN Declaration of human Rights (which includes, for instance, the right to "leisure" and "rest")—have an intrinsic value, and one—contrary to Habermas—that exists quite apart from our metaphysical condition as potentially rational speakers."[176] This is the opposite of Habermas's position which asserts that only individual rights have intrinsic value. In his own terms, "the human rights that guarantee everyone a comprehensive legal protection and an equal opportunity to pursue her private life-plans clearly have an intrinsic value. They are not

[174] Ingram, "Of Sweatshops and Subsistence: Habermas on Human Rights" in *Ethics & Global Politics,* vol. 2, No 3, 2009, 207.
[175] Alessandro Ferrara, "Two notions of Humanity and the Judgment Argument for Human Rights" in *Political Theory*, vol. 31, No. 3, 2003, 397.
[176] Ingram, "Between Political Liberalism and Postnational Cosmopolitanism: Toward an Alternative Theory of Human Rights" in *Political Theory*, vol. 31, No. 3, 2003, 373.

reducible to their instrumental value for democratic will-formation."[177] Contrary to this view, subjective rights –which are only a part of UDHR—should not enjoy any priority; rather, "the priority is that of basic rights over less basic rights *within* each category of rights."[178]

As noted earlier, for Habermas, "the key point is autonomy and not well-being." Suppose this were true, a question arises as to what extent a person living in a precarious situation is autonomous, both subjectively and politically. We saw that the political autonomy is built on the discourse principle in its form of democratic principle, which calls for participation of free and equal citizens in public deliberation. Such participation requires a certain level of education and the capacity to gather information that is beyond the simple communicative competence imbedded in the use of language. Moreover, Habermas insists on the fact that "rights can be 'enjoyed' only insofar as one *exercises* them."[179] However, to exercise them one needs *first* a certain level of well-being. In other words, there is a need of a certain "well-being" for a person to even understand the meaning of autonomy in order to exercise it. As Henry Shue notes, "any person who is already deprived of subsistence and is helpless to provide it for himself or herself will from that time never enjoy any human right, unless some persons fulfill the duty to aid the helpless one…If the person has been deprived of adequate subsistence since birth, death will come almost certainly early and very certainly before any human right is ever known."[180]

Concerning Habermas's justification of cultural rights, one reads the assumption of the Western society confronted with immigrant communities that, sometimes –if not always— challenge the Western ethos. Therefore, cultural rights are understood in an individualistic framework. This conception, however, does not account for the cultural rights as rights of a

[177] Habermas, "Remarks on Legitimation through Human Rights," 117.
[178] Ibid., 374
[179] Habermas, *Between Facts and Norms*, 419.
[180] Shue, *Basic Rights*, p. 131.

given culture to exist as such. Yet, it is this right to cultural existence that challenges the human rights movement in a multicultural world, because it claims the right for a group of people to exist as they wish, even when the individual rights are threatened. Hence, this understanding hardly touches the structural dimension of human rights. It is not first about the protection of the culture for the sake of the individual identity, but rather the right to a cultural identity itself. In this sense, it becomes difficult –if not impossible—to justify cultural rights from Habermas's system of rights.

Another area of concern is his insistence that human rights are essentially juridical. According to Habermas, although with a moral content, human rights (i.e. individual rights) are essentially juridical and socially constructed, since they are the result of reciprocal recognition between citizens who accord one another these rights, so that they can live together. It is also under the same justification that they acquire a legal status because they have to be enforced as positive law if they are to yield any efficiency. Consequently, only legal persons enjoy these rights and human rights become limited to the persons living in a political community. In his own terms, "spatiotemporally localized legal community protects the integrity of its members only insofar as they acquire the status of bearers of individual rights."[181] In other words, these rights serve to differentiate members and non-members of a legal community, the former being protected by rights whereas the latter are left to themselves. Habermas himself asserts that "the establishment of a legal code calls for rights that regulate membership in a determinate association of citizens, thus allowing one to differentiate members and nonmembers, citizens and

[181] Habermas, *Between Facts and Norms*, 452. He states the same idea in his "Remarks on Legitimation through Human Rights," saying that "a legal community, which has a spatio-temporal location, protects the integrity of its members only insofar as they acquire the artificial status of bearers of individual rights." 114.

aliens. In communities organized as national states, such rights assume the form of rights that define membership in a state."[182]

This understanding seems to contradict the very goal of the international human rights movement which proclaims the rights for every person independently of one's political belonging. In its very first Article, the UDHR asserts that "all human beings are born free and equal in dignity and rights."And in its Article 2, it states:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, *no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs*,[183] whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

These two articles show that human rights are to be enjoyed by every person, without consideration of one's origin or one's political status as a citizen of "a determined legal community." Such a claim is less juridical than moral.

Habermas opposes the conception of human rights as moral rights because "rights can be 'enjoyed' only by being *exercised,*"[184] and he presumes that they can be exercised only as legal norms in a politically delimited community. For him, "moral rights are derived from reciprocal duties," and "the moral universe, which is unlimited in social space and historical time, includes all natural persons with all the complexities of their life histories."[185] To realize such moral rights, "one can imagine the global expansion of human rights in such a way that all existing states are transformed –and not just in name only—into constitutional democracies, while each individual receives the right to nationality of his or her choice." Unfortunately, "we are obviously a long way from achieving this goal. An alternative route would emerge if each

[182] Ibid., 128.
[183] Emphasis added
[184] Habermas, *The Inclusion*, 54.
[185] Habermas, "Remarks on Legitimation through Human Rights," 114.

individual attained the effective enjoyment of human rights immediately, as a world citizen…But even the goal of an actually institutionalized cosmopolitan legal order lies in the distant future."[186] I think that it is this *pessimistic realism* that constrains Habermas to limit rights to individual rights because, at least, these ones can be implemented by some constitutional democracies. But then, the tension between his understanding of human rights and the goal of international human rights increases. Indeed, for the General Assembly that proclaimed the UDHR, human rights were set "as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society…shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance."[187] In this sense, as a common standard, international human rights are not primarily a juridical code, but rather a moral call to all and everyone, individualities as well as institutions to strive for its implementation. Following Ingram's observation, "human rights designate goals or standards against which we judge *shortfalls in basic goods* that any fully civilized society ought to provide its citizens. This *exclusively moral* understanding of human rights thus designates an aspiration."[188] Their constitutionalization is but *one* and not *the only* way of implementing them.

One of Habermas's arguments for the juridical nature of human rights is that they share "the fate of all positive law; they too, can be changed or be suspended, for example, following a change of regimes."[189] While it is true that they can be suspended and even changed for political

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[186] Ibid., 118-9.
[187] Preamble of UDHR.
[188] Ingram, "Of Sweatshops," 194. Luiz Repa argues that Habermas's view on the universalistic dimension of human rights and the democratic conditionality for their implementation leads to a tension between his cosmopolitanism and democracy, and may create a contradiction in the cooriginality between human rights and democracy. See his "The Human Rights between Morals and Politics: On Jürgen Habermas's Cosmopolitanism" in *Florianopolis*, Vol. 13, No. 1, 2014, p. 158.
[189] Habermas, *The Inclusion*, 190.

reasons by a given regime, the very regime will be condemned by the international community in the name of human rights, and the local actors will advocate for their own rights through human rights discourse. To be sure, some rights are much more efficient when they are incorporated into a legal code as constitutional norms, but their constitutionalization does not exhaust their inherent value. Thus, in lieu of saying that human rights are essentially juridical, I would argue that human rights are essentially moral rights which gain very much in efficiency by being constitutionalized, but whose constitutionalization does not exhaust their far-reaching meaning.[190] And as Ingram observes, "by focusing almost exclusively on the juridical notion of human rights as legal claims…[Habermas] cannot fully capture what is most distinctive about a DT [discourse theory] of human rights, namely the progressive genesis of human rights in a collective process of enlightenment."[191]

In some sense, Habermas himself agrees with this view, making his position, maybe not problematic, but rather evolving. In one of his recent publications on human rights,[192] he appeals to human dignity to ground them. He endeavors to "present some legal reasons in support of the claim that 'human dignity' is not only a classificatory expression, as it were, which lumps a multiplicity of different phenomena together, but the moral 'source' from which all of the basic rights derive their sustenance."[193] Human dignity constitutes the source of consensus in the international arena and "changing historical conditions have merely made us aware of something that was inscribed in human rights implicitly from the outset—*the normative substance of the equal dignity of every human being which human rights only spell out.*"[194] A question arises here: if human rights only spell out the normative substance of the equal dignity of every human

[190] Sen strongly emphasizes this point. See his *The Idea of Justice*, 143-4; 357-66.
[191] Ingram, "Of Sweatshops," 194.
[192] "The Concept of Human Dignity and the Realistic Utopia of Human Rights" in *The Crisis of European Union*.
[193] Habermas, *The Crisis*, 75.
[194] Ibid., 76-7. Emphasis added.

being, how can they still be "socially constructed" and only protect those living in a given political community? This question is even radicalized by the fact that "human dignity, which is one and the same everywhere and for everyone, grounds the *indivisibility* of all categories of human rights."[195] In the original paper presented at Stony Brook, he had added: "only in collaboration with one another basic rights can fulfill the moral promise to respect the human dignity of every person equally."[196] Two important points are underlined here. First, Habermas affirms the universality of human dignity, beyond any constraints of political borders. Second, he abolishes the hierarchization of the different categories of human rights, for only as undivided can they protect and enhance human dignity. In other words, once human rights are related and grounded on human dignity, they are no longer in competition. With this indivisibility of different categories of human rights through human dignity, the hierarchy between basic rights vanishes because it is only when taken together that they can "fulfill the moral promise to respect human dignity of every person equally."

From this perspective, it becomes difficult to understand how rights that spring from human dignity can be social constructions that citizens accord one another, because they live together, ignoring anyone else outside the determined political community. For if human dignity is one and the same everywhere and for everyone, and the human rights stemming from it are shared by all human beings, how can they still be limited to a certain given legal community? This clearly concurs with the conclusion that human rights are moral claims. However, Habermas insists that human rights cannot be assimilated to moral rights. Rather, they have a moral content with a legal form. As he puts it, "notwithstanding their exclusively moral *content*,

[195] Ibid., 80.
[196] Habermas, *The Concept of Human Dignity and the Realistic Utopia of Human Rights*. A Lecture given at Stony Brook, September 30, 2009, 7-8.

they have the *form* of positive, enforceable subjective rights which guarantee specific liberties and claims." He continues, "they are designated to be *spelled out in concrete terms* through democratic legislation, to be *specified* from case to case in adjudication and to be *enforced* with public sanction." And he concludes that "thus human rights circumscribe precisely that and only that part of morality which can be translated into the medium of coercive law and become political reality in the robust shape of effective civil rights."[197] Although he still understands human rights legalistically and acknowledges that they can be justified morally, I would still, however, argue that human rights go beyond that part morality that can be translated into coercive law in the line of Sen, because all rights do not need legal mechanism to be implemented or even claimed.

Habermas refutes that this position of conceiving human rights on basis of human dignity revises his "original introduction of the system of rights" in *Between Facts and Norms* and in *Time of Transition*,[198] arguing that they complete each other. While it might be true that this is a complement, it does not emphasize as did his system of rights that human rights are essentially juridical, to the point that they share the same fate with the positive law. Their moral content is context-transcendent as is the source from which they stem: human dignity. For the same reason, I do not see how human rights would be restricted to citizens of a given legal community in exclusion of the non-members, for all human beings have human rights in virtue of the human dignity which is "one and the same everywhere."[199]

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[197] Habermas, *The Crisis*, 82.
[198] Ibid., footnote 18, 82-3.
[199] Although Habermas successfully refutes the neo-liberal monadic individualism, because for him, the process of individualization passes through socialization, it is not the same case for the political community. He seems to grant it an absolute autonomy that discriminates against anyone who is alien to it. In a sense, what Karl Marx accused of "the so-called rights of man" to create an "egoistic man, man separated from other men and from the community" is transferred to the legal community which does not care about non-members. Karl Marx, *On the Jewish Question* in Lawrence H. Simon (Ed.) *Selected Writing* (Indianapolis, Cambridge: Hackett Publishing Company,1994), 15-16.

In conclusion for this subsection, I suggest that Habermas's conception of human rights is quite complex. He seems to have a dual understanding of them. On the one hand, there is the system of rights made of basic rights that secure private and popular autonomy, as well as the basic rights to social, economic and cultural rights that are justified relative to the former. This system of rights, specifically those protecting private and popular autonomy are the core of the constitutional democratic state. On the other hand, he refers to the international human rights in the context of the evolution and the constitutionalization of international law. While at first glance, he seems to privilege the first generation of liberal rights, some recent works affirm the indivisibility of the different categories of human rights, because it is only when they are taken together that they can secure the respect for human dignity from which they evolve. The problem is that the relationship between the two conceptions is not clear—if it is there. This is further complicated by the fact that the system of rights is reconstructed from his discourse theory, while international human rights are founded on the moral concept of human dignity.[200] With these two parallel conceptions of human rights, can we address the challenges raised at the normative level of viewing human rights as another imperialist ideology? That is the topic of the following subsection.

d). Habermas and Human Rights as Imperialist Ideology

The first chapter established the argument put forward to justify that human rights are playing the imperialist ideology role in the contemporary world. Critics advance four main reasons. First, they compare the contemporary human rights movement to the civilizing mission that was used to cover the Western colonizing enterprise of the rest of the world. The critics argue that, like the Western colonization that was carried under the positive idea of the civilizing

[200] Ingram sees Habermas's juridical conception of human rights as ending up in a contradiction with his endorsement of international human rights "as well as his own account of the complementarity of moral rights." See Ingram, "Of Sweatshops," 207.

mission, human rights is another way that the West has found to perpetuate its influence on the rest of the world. In the second place, they claim that the so-called civilizing mission was founded on racial prejudices of the West superiority over the rest of the world. That superiority prejudice legitimated the duty to bring civilization to the inferior races, in order to bring them to the level of civilization. In the same way, the human rights project carries out the same aim of the West to bring salvation to the savages who do not know and do not have human rights. That is the meaning of the savage-victim-savior metaphor. Thirdly, the civilizing mission was supported by the liberal belief in the progress of civilization based on the hierarchical anthropology. The critics contend that the human rights movement is also a liberal ambition to spread Western values in the non-Western world. Fourthly, under the push of liberalism, this whole project of the civilizing mission was secured by international law as its legal scheme, which embodied the racial prejudices and the hierarchical anthropology, and therefore conferred the legality to it. On this level, critics show that human rights have been incorporated in international law that is mostly liberal, and therefore, human rights law is a continuation of the universalization of Eurocentrism. These arguments to prove that human rights are another imperialist ideology touch the moral core of the human rights movement, in that as ideology, human rights are accused of travesty as they pretend to be what they are really not. Therefore, they constitute a challenge to the justification of human rights, and the question is whether they can be addressed from Habermas's understanding of human rights.

I have already underscored that Habermas construes his system of rights from his discourse theory and posits it as the core of the constitutional democratic state. On the other hand, he recognizes the international human rights as an innovation of international law and a legitimating basis for a globalized world community. In that sense, Habermas's response to these

challenges is not easy to construct. From the reconstructed system of rights perspective, the latter is designated for domestic constitutional democracy, because it contains "the rights citizens must accord one another if they want to legitimately regulate their common life by means of positive law."[201] The constitution puts them into effect.[202] In his own words, "the project of realizing the system of rights [is]—a project specifically designed for the conditions of our society, and hence for a particular, historically emergent society."[203] It is also the opinion of Jeffrey Flynn who observes that "*Between Facts and Norms*… deals explicitly with the system of rights within the democratic constitutional state."[204] Now, since Habermas is concerned with a legal theory for a political community, the system of rights cannot offer away forward to address the challenges raised above.

Moreover, his system of rights is reconstructed from a discourse theory which fits the postmetaphysical thinking—to use his own words—of Western modern society. Setting the context for his theory in *Between Facts and Norms*, he says: "I start from the modern situation of a predominantly secular society in which normative orders must be maintained without metasocial guarantees."[205] And when he comes to the co-originality of private and public autonomy, he notes that "from a normative point of view [it] can be explained with the help of a parsimonious discourse principle that merely expresses the meaning of postconventional

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[201] Habermas, *Between Facts and Norms*, 82.
[202] Habermas, *The Inclusion*, 203.
[203] Habermas, *Between Facts and Norms*, 445.
[204] Jeffrey Flynn, "Habermas on Human Rights: Law, Morality, and Intercultural Dialogue" in *Social Theory and Practice*, Vol. 29, No. 3, 2003, pp. 431, 437. See also Pablo de Greiff, "Habermas on Nationalism and Cosmopolitanism" in *Ratio Juris*, Vol. 15, No. 4, 2002, p. 422; Regina Kreide, "Preventing Humanitarian Intervention? John Rawls and Jürgen Habermas on Just Global Order" in *German Law Journal*, Vol. 10, No. 1, 2009, p. 98; William Smith & Robert Fine, "Kantian Cosmopolitanism Today: John Rawls and Jürgen Habermas on Immanuel Kant's *Foedus Facificum*" in *The King's College Law Journal*, Vol. 15, 2004, p. 78. Farid Abdel-Nour thinks that Habermas has given up his universalist aim by restricting the justification of human rights to a domestic political community. See his "Farewell To Justification: Habermas, Human Rights, and Universalist morality" in *Philosophy and Social Criticism*, Vol. 30, No. 1, 2004, p. 74.
[205] Habermas, *Between Facts and Norms*, p. 26.

requirements of justification."[206] In other words, the discourse principle is designated for modern societies which can no longer rely on the traditional or religious/metaphysical sources for justification for action norms. In that sense, it cannot be generalized because the world is still composed of societies whose political institutions are based on either traditional or religious authority. This being the case, we are left with Habermas's consideration of international human rights.

Concerning the international human rights, it has already been underlined that Habermas sees them in the line of the evolution and the transformation of international law, following the horrendous crimes of WWII. In that regard, human rights participated in the transformation of the state of nature between states that had characterized international law until the beginning of its moralization through the League of Nations, fruits of the WWI and the Kellog-Briand Pact. At this time, though, Habermas observes that international law is still bound to war; "the development of international law remains a means to the end of averting war."[207] It is only, he claims, with the creation of the United Nations that a new step is taken in the development of international law, as now peace and security are linked to the protection of human rights. In other words, the subordination of international law to the threat of war is superseded. As he asserts, all this international law geared by the fact of war "changes with the UN Charter, which, in the second clause of the preamble, reaffirms 'faith in fundamental human rights, in the dignity and worth of the human person,' and in Article 1, Paras. 1 and 3, links the political goals of global peace and international security with the promotion of 'respect for human rights and for fundamental freedoms for all without distinction of race, sex, language or religion' throughout

[206] Ibid., 107.
[207] Habermas, *Divided West*, 161.

the world."[208] UDHR and different Covenants and Conventions on human rights came to concretize that same correlation of peace-security with the respect for human rights. For Habermas, this fact signed the move toward a cosmopolitan society since from now on, both states and individuals are subjects of international law. In other words, the innovation brought by the international human rights is that they transform the "international law as a law of *states* into a cosmopolitan law as a law of i*ndividuals*"[209] by granting "individual citizens recognition as immediate subjects of international law."[210]

This is, for Habermas, the first innovation in the development of international law. The second that I now mention briefly—since I will come back to it broadly below—is the limitation of the non-intervention principle to the case of self-defense only. And the third innovation is the inclusivity of membership in the UN General Assembly. Every state is recognized as a member regardless of its political regime. "In contrast with the structure of a League of Nations composed of a vanguard of states that already possess liberal constitutions, the United Nations was designated to be inclusive from the beginning." He continues, "Granted, all member states must accept the obligations imposed by the principles of the Charter and the human rights declarations; but from the first day states such as Soviet Union and China were among members of the Security Council accorded veto power." He concludes, "today, the world organization, which has expanded to 193 members, comprises, in addition to liberal regimes, authoritarian and sometimes even despotic and criminal regime."[211] Of course, Habermas recognizes that there can be contradictions, especially when one of those criminal regimes chairs the human rights

[208] Ibid., 161-2.
[209] Ibid., 124.
[210] Ibid., 163.
[211] Ibid., 165.

committee. Nevertheless, that is the price to be paid for obtaining such a large membership inclusivity.

Moreover, while Habermas believes in the universality of human rights because they exclusively have a moral content, he also acknowledges that they have to be differently interpreted according to their context of application. As he puts it, "each national constitution represents a historically different way of construing *the same*—theoretically reconstructible—basic rights, and each positive legal order implement *the same* basic rights in a different form of life."[212] Habermas is also very much opposed to the possible ideological use of human rights, which leads to liberal hegemony through the spreading of the liberal ideas and free market. Commenting on the Iraq invasion by the American-English coalition, Habermas writes that "England and America were content with the normative goal of promulgating their own liberal order internationally, if necessary with force."[213] Criticizing the neoconservative politics, he thinks that "from the perspective of a liberal *post-histoire* à la Fukuyuma," the relevant question is: "what could possibly be better for people than the worldwide spread of liberal states and the globalization of free markets?"[214] According to Habermas, this kind of imposition of the so-called universal values is simply a universalization of ethnocentrism, and is at the service of imperialism. Taking the American example, he states that "even an ultra-modern power like the US relapses into the pseudo-universalism of the ancient empires when it substitutes morality and

[212] Habermas, "Reply to Symposium," 1497-8.
[213] Habermas, *The Divided West*, 30. Following the definitions and distinction between liberalism and neoliberalism, it is to be mentioned that the target of the Habermas's critiques when talking about liberal hegemony is neoliberalism rather than liberalism in general. For such distinctions, see for instance, Jack Demaine & Penny Smith, "Liberalism, Neoliberalism, Social Democracy: Thin Communitarian Perspectives on Political Philosophy and Education" in *British Journal of* Sociology *and Education*, Vol. 31, No 4, 2010, pp. 509-514; Nicholas Gane, "Trajectories of Liberalism and Neoliberalism" in *Theory, Culture & Society*, Vol. 32, No 1, 2015, pp. 133-144; Paramita Roy, "Neoliberalism, Liberalism and Development Practice: A Theoretical Exploration in the Context of the Changing Role of State" in *The Echo*, Vol. 1, No 4, 2013; pp. 238-246; and Bob Jessop, "Liberalism, Neoliberalism, and Urban Governance: A State-Theoretical Perspective" in *Antipode*, 2002, 452-472.
[214] Ibid., 31.

ethics for positive law in issues of international justice. From Bush's perspective, 'our' values are universally valid values that all other nations should accept in their best interests. This pseudo-universalism is a kind of universalized ethnocentrism."[215] Not only does international law become imperial,[216] but also justifying it through the spread of democracy and human rights becomes an ideology. Once again taking the Bush's Iraq invasion, Habermas asserts that "the normative viewpoints offered as pretexts for a justification, such as exporting democracy and human rights, have in the meantime degenerated into sheer ideology."[217]

All these examples show that Habermas is against any imperialist use of human rights to impose one liberal vision of the world. In the words of Neil Walker, Habermas rejects "a kind of hegemonic liberalism based upon unipolar American-dominated world order."[218] In that sense, Habermas's position is different from those who identify the human rights movement with the United States.[219] Habermas does not even believe in the myth of the democratic peace. It is true that he acknowledges that the idea that democratic states do not resort to war in their foreign policy is not completely false, and he attributes the merit to the citizenry that is alert and asks for justification for any war to be conducted. In such a case, "the deployment of military force is no longer exclusively determined by an essentially particularistic raison d'état but also by the desire to foster the international spread of nonauthoritarian states and governments."[220] This does not, however, mean that democratic states are more peaceful than others. In his rereading of the

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[215] Ibid., 103.
[216] Habermas repeatedly comes back to this case, saying for instance that "once the superpower exploits the instruments of international legal multilateralism to promote its own interests, this development acquires thoroughly ambivalent significance. What from one angle appears to be progress on the path to the constitutionalization of international law, from another appears to be the successful imposition of imperial law." On the next page he adds, "once the globalization of a particular ethos has replaced the law of the international community, whatever is then dressed up as international law is in fact imperial law." Ibid., 180, 181.
[217] Habermas, *Europe*, 96.
[218] Neil Walker, *Making a World of Difference: Habermas, Cosmopolitanism and Consitutionalization of International Law*. European University Institute, Working Papers, Law, No 17, 2005, 2.
[219] Mutua, *Human Rights*, 36.
[220] Habermas, *The Inclusion*, 173.

Kantian presuppositions for perpetual peace—democratic republics, global trade and public sphere—Habermas observes that they "have proved with hindsight to rest on questionable assumptions."[221] One of them is that, "although it is true that republics have generally behaved peacefully toward other republics, in other contexts they have been as energetic in their military pursuits as authoritarian states."[222] This point of view espouses the Jennifer Mitzen argument that "it is not clear that the democratic peace is necessary to solve the problem of war. For example, it is not the case that liberal states maintain a zone of peace while nonliberal states inhabit a realist world. Stable interstate peace has evolved among states of various regimes types."[223] Again, at this level also, Habermas does not necessarily equate the global order with the neoliberal one.

From these points, it is clear that Habermas's position on international human rights is not pushing for an imperialistic use of human rights. But the question now is, can we address the challenge of human rights as ideology from this Habermasian view of human rights? The critique is not directed toward a particular country using ideologically human rights for its own goal or interest. In other words, does his conception of human rights as a step forward in the development of international law get out of the liberal spectrum of getting imposed on the non-liberal world? The answer seems not to be readily positive. Firstly and to start with, Habermas's critique of the hegemonic liberalism is based on a particular use of international law, while the critics of human rights as imperial ideology point out the similarity between the role played by the civilizing mission and the one being played by human rights. In response to that, Habermas would need either to show that the human rights movement is not liberal in its origin, or if it is liberal in its origin, then show that in its practice it goes beyond its liberal birth place. That is

[221] Habermas, *The Divided*, 145.
[222] Ibid.
[223] Jennifer Mitzen, "Reading Habermas in Anarchy: Multilateral Diplomacy and Public Sphere" in *American Political Science Rev.*, Vol. 99, No 3, 2005, 406.

what seems not to be present in his work. Secondly, in some of his comments on the system of rights, he seems to universalize something that was conceived for a domestic democratic state. The system of rights is reconstructed from a discourse principle that is conceived for secularized societies, yet the world is also composed of nonsecularized societies in which the practice of international human rights should also apply. Thirdly, sometimes he gives a sociological explanation of human rights as a response to the modern challenges as if all societies confronted with modernity have to respond the same way that Europe did to its own. The following lines will substantiate these three arguments.

(i). Concerning the liberal origin of international human rights and its incorporation in the international law, itself of liberal origin, Habermas recognizes it. Recall that international human rights intervene as a stage in the development of international law which was accustomed to be geared by the fact of war. In this history of international law, Habermas acknowledges that it began with nationalist liberals in the colonial context, with only Western liberal (colonial) powers recognized as the only subjects of international law. He observes that "the internationalists were not insensitive to the brutal aspects of colonialism but they also took the view that the European had been burdened with the role of bringing civilization to all corners of the earth. From the perspective of the superiority of the white West, it appeared perfectly natural that the colonial powers should regulate with their own colonies, by legal means."[224] And he adds, "the existing differences in levels of cultures, and the resulting *mission civilisatrice*, supposedly explained why the universalism of international legal principles was compatible with the exclusionary logic inherent in the colonial project."[225] There are two important points from this statement. First, it confirms what the critics claim that international law is liberal in its

[224] Habermas, *The Divided*, 155.
[225] Ibid.

conception; secondly, Habermas joins the critics of international law of its colonial origin, and therefore its discriminatory character. It is true that Habermas notes that one of the innovations of post-WWII international law is the inclusiveness of the UN Charter. In this sense, it goes beyond both the Eurocentric origin of international law and its liberal development of the League of Nations. However, even with the UN Charter and the human rights instruments that emanated from it, one cannot deny the liberal influence. Indeed, membership is conditioned by accepting the non-aggressiveness principle and the respect of human rights, and Habermas notes that liberal rights are the core of all human rights declarations. As he declares, "from a historical perspective, these 'liberal' (in narrow sense) basic rights in fact make up the core of human rights declarations."[226] If the core of human rights is liberal, it would be hard to convince the critics of human rights movements that bringing them into the nonliberal world is not a hidden project of propagating liberal culture itself.

Habermas does not question this liberal origin of international law and even his project of its constitutionalization builds on it, making it more West-centric. Habermas rightly observes that human rights come as the response to the crimes and massacres that struck the Western world during WWII—a fact that the critics take as an example showing that human rights are not primarily concerned with all human beings, for other crimes and atrocities were committed to non-Western people through colonialism and slavery, yet they did not prompt the same response! Now, for him, the constitutionalization of international law which incorporates human rights is simply the liberal project that is to be extended beyond the state. In other words, the constitutionalization of international law has to follow the liberal pattern—raising only the problem of legitimation, since the opinion- and will-formation through which the legislative

[226] Habermas, *Between Facts and Norms*, 174.

process acquires its legitimacy is absent at the supranational level. Except that, "supranational constitutions rest at any rate on basic rights, legal principles, and criminal codes which are the product of prior learning processes and have been tried and tested within democratic nation-states."[227] He concludes, "thus, their normative substance evolved from constitutions of the republican type. This holds not only for the UN Charter and the Universal Declaration of Human Rights, but even for the treaties underlying GATT and the WTO."[228] In other words, the constitutionalization of international law adopts the liberal form. As he puts it, "the liberal type of constitution that limits the power of the state without constituting it… provides a conceptual model for a constitutionalization of international law in the form of a politically constituted world society without a world government."[229]

Habermas simply confirms what the critics put forward that international law in general and international human rights in particular are essentially liberal. For that reason, they are not culturally neutral, and to claim their universality in order to impose them on other cultures sounds like a cultural imperialism. Furthermore, although he praises the formal equality of UN members, Habermas contends that there is a normative gradation on the top of which is liberal, followed by semi-authoritarian and despotic states, acknowledging Rawls for having pointed it out. Add to that the fact that Habermas is convinced that only a democratic constitutional state exhausts the substance of human rights, then there is no illusion that one can address satisfactorily the challenges raised by the critics of human rights, because they target the basis on which Habermas's enterprise of constitutionalizing international law is founded: the liberal model, and Habermas does not respond to it. It is true that he perceives "the need for

[227] Habermas, *The Divided*, 140.
[228] Ibid.
[229] Habermas, *Between Naturalism*, 316.

intercultural communication and interpretation, between civilizations shaped by one or more of the major world religions" about the innovation occurring in the international law.[230] However, apart from the fact that even this perception of the need is discriminatory—why only civilizations of the major world religions? Does it mean that other civilizations have nothing pertinent to contribute to the conversation?—he does not elaborate to show how such communication and interpretation would alter the quest of the critics. Therefore, I maintain that from this perspective, it would be hard to address the challenge that the human rights movement is being used as an imperialist ideology.

(ii). From another angle, Habermas extends his system of rights that was first conceived for the domestic constitution democracy, to the global arena. Considering the tension between the universality of human rights—classical liberal rights—and their form of positive law, he notes that "the discrepancy between, on the one hand, the human-rights content of classical liberties and, on the other, their form of positive law, which initially limits them to a nation-state, is just what makes one aware that the discursively grounded 'system of rights' points beyond the constitutional state in the singular toward the globalization of rights."[231] This awareness is linked to Habermas's plea to reform the UN system so that it may have some executive power. According to him, "for actionable rights to issue from the United Nation Declaration of Human Rights, it is not enough simply to have international courts; such courts will first be able to function adequately only when the age of individual sovereign states has come to end through a United Nations that *can not only pass but also act on and enforce its resolutions*."[232] In other words, the globalization of rights that Habermas is advocating would follow his system of rights

[230] Habermas, *Europe*, 109-10.
[231] Habermas, *Between Facts and Norms*, 456.
[232] Ibid.

model, which is embodied in the constitutional democracy, and so even in a multicultural world. He seems to think that the system of rights is so universal that it should not be challenged by the global fact of pluralism. He says, "the claim of the system of rights to represent universal human rights becomes especially relevant whenever the growing interdependencies of today's world make an issue of the controversial selective readings of these rights by different cultures."[233] He adds, "this contest of interpretations makes sense only on the premise that it is necessary to find a single correct reading that claims to *exhaust* the universalistic content of these rights in the present context."[234] The first question that comes to mind is to know why the system of rights would have such a claim to represent the universal human rights, while it is designated for a particular kind of society. Indeed, as it has been underlined, this model developed in the West is based on a mode of justification that assumes the modern pluralist and secularized society. Why then would it represent the universal human rights? After all, as Rawls rightly observes, discourse principle is another comprehensive doctrine[235] and the world is populated with many of those. Therefore to claim universality of rights constructed from only one side, would not satisfy the critics of human rights movement who accuse it of being just another means to propagate liberal culture.

This leads to the second question linked to the belief that different interpretations are only possible on the premise that there can be a correct reading that exhaust the universalistic content of these rights. This assumption seems to be that the system of rights might be that reading. But if one takes seriously the critique, he/she cannot posit the universal content of human rights

[233] Habermas, "Reply to Symposium," 1498.
[234] Ibid.
[235] John Rawls, "Reply to Habermas" in PL. Rawls writes, "Habermas's position, on the other hand, is a comprehensive doctrine that covers many things far beyond political philosophy. Indeed, the aim of his theory of communicative action is to give a general account of meaning, reference, and truth or validity both for theoretical reason and for the several forms of practical reason." PL, 376.

before submitting them to a multicultural test, which might even start by calling into question their source, that is, the discourse principle itself. True, from the discourse principle, right has priority over the ethical good. However, is the discourse principle the best among all the comprehensive doctrines to edict which rights are universal? The question is important especially when one recalls that Habermas takes international human rights as a stage in the development of international law, and does not apply the discourse principle to them to see whether they would be vindicated—unless one assumes the fact that was highlighted; that is, for Habermas, the content of the supranational constitutions developed from the Western democratic constitutional states. If this is the case, it would still lend support to the critics' argument that international human rights are just exporting liberal culture. Even Amy Bartholomew who believes that the discourse principle offers a better basis for a multicultural discussion on international human rights does not convince, since she uses it to disqualify other perspectives but does not apply it to the international human rights to see how many would pass the test.[236] Again, this shows that the Habermasian understanding of human rights does not offer the best way to address the challenge raised by considering human rights as an imperialist ideology.

(iii). Finally, there is the sociological argument that human rights are a response that the West invented to deal with the crisis of legitimation caused by modernity. Habermas claims that "the Western mode of legitimation [is] an answer to general challenges that are no longer just for Western civilization." [237] For sure, he acknowledges that the Western answer "is not the only one or even the best one." He even concedes that "the current debate [about prioritizing some rights over others] provides us with an opportunity to become aware of our own blind spots."[238] This

[236] Amy Bartholomew, "Human Rights and Post-Imperialism: Argument for a Deliberative Legitimation of Human Rights" in *Buffalo Human Rights Law Rev*., Vol. 9, 2003, pp. 25-73.
[237] Habermas, "Remarks on Legitimation through Human Rights," 128.
[238] Ibid.

approach, however, assumes human rights to be essentially European, and Habermas acknowledges it. He says, "the conception of human rights was the answer to a problem that once confronted Europeans –when they had to overcome the political consequences of confessional fragmentation."[239] Habermas is convinced that "the normative substance of those rights which emerged in the West will withstand the usual accusation that it is merely a reflection of Western traditions."[240] And the reason is that "they express a more or less compelling response to the very same problems that Europe has faced since the eighteenth century, and which other regions or cultures cannot escape facing today."[241] Other cultures are thus obliged to embrace human rights because the same problem that confronted Europe "now confronts [them] in a similar fashion."[242] They are "exposed to the challenges of social modernity, just as Europe was in its day, when it in some sense 'discovered' or 'invented' human rights and constitutional democracy."[243]

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[239] Ibid.

[240]Habermas, "A Short Reply," 452.

[241][241] Ibid. It has to be noted though, that Habermas, although holding this conviction, is against any imposition of these rights by gunpoint. As he puts it, "precisely the universalistic core of democracy and human rights forbids their unilateral imposition at gunpoint. Their universal validity claim which binds the West to its 'basic political values,' that is, to the procedure of democratic self-determination and the vocabulary of human rights, must not be confused with the imperialist claim that the political form of life and the culture of a particular democracy –even the oldest one – is exemplary for all societies." These comments being made in the context of the Iraqi invasion, Habermas continues saying "when thousands of Shiites in Nasiriya demonstrate against both Saddam and the American Occupation, they express the fact that non-Western cultures must approach the universalistic content of human rights with their own resources and in their own interpretation, one that establishes a convincing connection to local experiences and interests." See *The Divided*, 34-5. Habermas seems here to subject the universal validity of human rights to the reappropriation in local context, which seems a fair way of looking at human rights in a multicultural world. But such a view seems to be, if not in contradiction, at least in tension with some of his other positions on the same question, such as "only when human rights have found their proper 'place' in a global democratic constitutional order, analogous to that of the basic rights in *our* national constitutions, will we be able to assume that the addressees of these rights can also regard themselves as their authors at the global level." see *Time of Transitions*, 28. Emphasis added. In this last quotation he elevates the model of "our national constitutions" beyond other political experiences through which he was calling for appropriation of human rights. Moreover, he wants that this model to be adopted at the global level. In this sense, Habermas seems to take with the left hand the concession he had given with the right one.

[242] Habermas, "Remarks on Legitimation through Human Rights," 128.

[243] Ibid., 120.

Habermas provides the critics of international human rights with an unwanted help. Indeed, if human rights were just a historical/sociological response to a contextual European problem, why would they have to be imposed on other cultures, pretexting that the latter are facing the same problem? At the most, this generosity should keep a modest profile until those in need make an open demand, and they would choose what works better for them. Furthermore, while there is a globalization of problems, responses need not be necessarily similar, and there is no assurance that the way the West responded to the challenges of social modernity would fit into other cultures, especially that there are multiple modernities as Habermas himself recognizes it.[244] It even contradicts what he believes in when he criticizes the neoliberal propaganda. According to him, "the many cultural faces of the pluralist global society, or *multiple modernities*, do not fit well with a completely deregulated and politically neutralized world market society. For this would rob the non-Western cultures that are shaped by other world religions of their freedom to assimilate the achievements of modernity with their own resources."[245] If this is true for the neoliberal economy, why cannot it also work for human rights understood as a Western response to the challenges of modernity? That is, why do other cultures have to take the ready-made answers to the challenges of social modernity without resorting to their cultural resources? Is it not also to rob the non-Western cultures their freedom to adopt and

[244] Habermas, *Between Facts and Norms*, 115.

[245] Ibid., 351-2. This view is also in tension with what Habermas holds about Asian societies and human rights. Indeed, for Habermas, human rights as individual rights constitute the basis for the modern law, which was incremental for the modern capitalistic economy. For that reason, according to Habermas, "Asiatic societies cannot participate in capitalistic modernization without taking advantage of the achievement of an individualistic legal order. One cannot desire the one and reject the other. From the perspective of Asian countries, the question is not whether human rights, as part of individualistic legal order, are compatible with the transmission of one's culture. Rather the question is whether the traditional forms of political and societal integration can be reasserted against—or must instead be adapted to—the hard-to-resist imperatives of an economic modernization that has won approval on the whole." See his "Remarks on Legitimation through Human Rights," 124. From this point of view, Habermas dismisses the whole cultural underpinning of human rights and presents the neoliberal capitalistic economy as inevitable despite its alienating side. Moreover, human rights are justified instrumentally as they are presented as the foundation of the legal order necessary for the thriving of the neoliberal capitalism. If this reading is correct, then it is in a rough tension with the fact of multiple modernities and the Habermas's plea to take into account the pluralist faces of the global society.

adapt human rights according to their understanding of modernity and their cultural backgrounds?

If the reading I have done of it is plausible, it is another element showing that Habermas's understanding of human rights does not offer a sure path to respond to the theoretical challenge to the human rights movement as a cultural imperialist adventure. It remains to examine whether we can use his theory of humanitarian intervention to respond to its assimilation to neocolonialism.

4.3. Habermas and Humanitarian Intervention as Neocolonialism

a). Habermas's Justification of Humanitarian Intervention

Habermas talks about humanitarian intervention in many places of his works, but his own position on it varries from supporting it and at the same time criticizing it. For instance, on the one hand, he hails that the intervention carried out by the UN since 1989 ushered in a new era of cosmopolitan law, saying that "the decisions and strategies of the world organization, and especially the interventions of force carrying out the UN mandates since 1989, indicate the direction along which the international law…is gradually being transformed into a cosmopolitan law."[246] On the other hand, however, Habermas is worried that "interventions in support of internal democratization are…irreconcilable with a conception of democratic self-determination that grounds of national independence for the sake of collective self-realization of a cultural form of life."[247] This shows that Habermas perceives the ambiguity incrusted in the doctrine of humanitarian intervention even at its normative justification. Perhaps that is why Habermas has adopted different positions toward the different interventions, sometimes supporting them, other times opposing them. As Ingram remarks,

[246] Habermas, *The Inclusion*, 150
[247]. Ibid.

> By the 1990s Habermas was advocating that the UN change its original mandate from that of peacekeeper to defender of human rights. This idea found expression in a number of controversial positions he adopted with respect to the use of military force in stanching human rights violations. On the one hand, grievous human rights violations led him to support the 1991 UN-sanctioned Persian Gulf War, which was provoked by the Iraq's invasion of Kuwait, as well as the 1999 NATO-led intervention against Yugoslavia over its violent military escapade in Kosovo. On the other hand, he objected—again on human rights grounds—to the conduct of these interventions, which caused heavy civilians casualties. In 2003 he criticized the U.S. invasion of Iraq by bypassing UN approval and violating international conventions governing warfare.[248]

In this context, although it is not easy to see exactly what Habermas's position on humanitarian intervention is, it seems that he justifies from two grounds: normatively from the Kantian project, and legally from the evolution of international law, but he becomes wary about the way those interventions are carried out. Therefore, I organize Habermas's position around these three points.

(i). In his evaluation of his position on the Kosovo war, Habermas writes that "three weeks into the controversial NATO military action, I took a stance on the conflict…Aspects of the operation that had been problematic from the beginning –the paper-thin legitimacy according to international law, the disproportionate use of military force and the unclear political objectives –were thrown into even sharper relief by the subsequent course of events and the facts which have since come to light."[249] And he concludes, "nevertheless, I still defend the Kantian perspective of a transition from international to cosmopolitan law from which I sought to justify the intervention principle at the time."[250] The Kantian perspective that Habermas invokes here is the fact that international law is no longer limited to states only; rather, individuals are also subject of international law. Indeed, according to the classical international law, only nation-states are the subjects of international law, and they consider each other equal in their reciprocal recognition, independently of their economic, political, geographical or demographic factors. They are sovereign both internally –as they exercise control over their territories—and externally

[248] Ingram, *Habermas*, 11.
[249] Habermas, *Time*, 17.
[250] Ibid.

–as they sign and execute treaties. In that sense, they do not accept any authority above them. For this reason, they have the absolute right to go to war. As Kant remarks, "nations can press for their rights only by waging war and never in a trial before an independent tribunal."[251]

This fact of states exercising their right through war because there is no independent tribunal, highlights the discrepancy between international law and state law. In the latter, political power is regulated through the mechanism of law; but in international law, there is only political power, because "war and its favorable consequence, victory, cannot determine the right."[252] That is why for Habermas, the "interdependence of 'political power' and 'law' is absent at the international level, where an asymmetrical relation between power and law persists because international legal regulations reflects the underlying power constellations between states without normatively transforming them."[253] In other words, what lacks in the classical international law is the normative transformation of its political power, for "the concept of the right of nations as a right to go to war is meaningless."[254] For that reason, Kant posits an international community not built on the so-called belligerency rights of states, but rather on the hospitality inscribed in the cosmopolitan right as foundation of a perpetual peace among peoples, and that is what Habermas sees as transition from classical international to cosmopolitan law. For "because a (narrow or wider) community widely prevails among the Earth's peoples, a transgression of rights in *one* place in the world is *felt everywhere*; consequently, the idea of cosmopolitan right is not fantastic and exaggerated, but rather an amendment to the unwritten code of national and international rights, necessary to the public rights of men in general."[255]

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[251] Immanuel Kant, *Perpetual Peace and Other Essays*. Trans. Ted Humphrey (Indianapolis: Hacket Publishing Company, 1983), 116
[252]. Ibid.
[253] Habermas, *The Divided,* 121.
[254] Kant, *Perpetual Peace*, 117.
[255] Ibid., 119.

Kant infers that "only such amendment allows us to flatter ourselves with the thought that we are making continual progress towards perpetual peace."[256] Put into other words, the condition of peace is based on the establishment of rights both nationally and internationally, and for Kant, it is the extension of the republican model to the international level that creates a law-governed relationship between states. It institutes a "civil constitution" between states because it is based on rights.

Habermas notes that "the reference to a 'civil constitution' here is crucial: international law, which regulates interactions among states, must be superseded by the constitution of a community of states."[257] Once this step is accomplished, the international community as a cosmopolitan condition is no longer constituted by states only, but also by citizens whose rights are protected even beyond their national borders. By institutionalizing civil rights at the international level, classical international law "as law of states" is transformed "into the cosmopolitan law as a law of individuals. The latter are no longer legal subjects merely as citizens of their respective states, but also as members of a 'cosmopolitan commonwealth under a single head.' The civil rights of individual persons are now supposed to penetrate international relations too." [258]

From this perspective, Habermas can then justify humanitarian intervention as a military intervention to protect the victims of human rights violations, for international human rights are also the matter of international concern, and they challenge the classical principle of state sovereignty, "since human rights would have to be implemented in many cases despite the

[256] Ibid.
[257] Habermas, *The Divided*, 122.
[258] Ibid., 124.

opposition of national governments."[259] Under the cosmopolitan law, states are no longer the final authority when human rights are violated, and their sovereignty is legitimated by the respect of these rights.

(ii). Habermas sees the implementation of this Kantian project in the development of modern international law, especially with the creation of the UN through a Charter that linked peace and security to the protection and respect of human rights. As I have already indicated, until then international law was still bound to the fact of war, trying to avert it. But with the UN Charter and the UDHR with all the subsequent human rights instruments, "all this changes… the international community commits itself to the global implementation of constitutional principles that had previously been realized only with nation-states."[260] In other words, this was the realization of Kant's dream of elevating the civil condition internal to republics to the international level so that there can be interdependence between political power and law in the states' relations. Consequently, not only are states legitimated by their respect of human rights, but also, thanks to the cosmopolitan law, the international community has the responsibility to protect the human rights of every individual, since under the cosmopolitan right, "a transgression of rights in one place in the world is felt everywhere." For that reason, "the international community violates its legal obligation to protect human rights worldwide if it simply sits back and watches mass murders and mass rapes, ethnic cleansing and expulsion, or a policy of deliberately exposing people to starvation and disease without intervening."[261]

The consequence of this evolution of international law from a law of states to a law of individuals is that it undermines the sacrosanct principle of non-intervention that was the

[259] Habermas, *The Inclusion*, 182.
[260] Habermas, *The Divided*, 165.
[261] Habermas, *Between Naturalism*, 339.

cornerstone of state sovereignty. By the very fact of being recognized as a member of the international community, the classical international law granted the state the control monopoly over its territory. There was no external state or any other body to question its dealings with its citizens. With the constitutionalization of international law through the UN Charter and the different human rights instruments, the use of violence is limited to the case of self-defense and "the principle of non-intervention does not hold for members who violate the general prohibition on the use of violence."[262] War is no longer a legitimate instrument for foreign policy. Any expansionist project is prohibited. This is the limitation in the external dimension of state sovereignty. With regard to the internal sovereignty, states are no longer free to decimate their citizens or commit other crimes against humanity with impunity, as Nuremberg and Tokyo trials show, and as the recent International Tribunals –International Criminal Court (ICC), International Criminal Tribunal for Yugoslavia (IPTY), International Criminal Tribunal for Rwanda (IPTP) – or the arrest of Pinochet testify. "Internal state sovereignty is no longer restricted to simply maintaining law and order but also includes the effective protection of the civil rights of citizens."[263] All these elements show that "the erosion of the principle of nonintervention in recent decades has been due primarily to the politics of human rights."[264]

With this normative foundation for his justification of humanitarian intervention, Habermas can now address the critiques raised by the realist school, which advocates for the classical international law based on political power. Taking Carl Schmitt as the representative of this school, Habermas notes that "his rejection of intervention grounded in appeal to human rights can already be accounted for by his belligerent conception of international relations,

[262] Habermas, *The Divided*, 163.
[263] Habermas, *Between Naturalism,* 320.
[264] Habermas, *The Inclusion*, 147.

indeed of politics in general."[265] In this school of thought, states should be left alone in their assertion of power as they pursue their own interests without involving morality. For Schmitt invoking humanity is a way of demonizing the enemy, while a state as incarnation of a collective will has to engage into war for its survival. War, for a state, is its condition of existence. As Habermas remarks, "according to this doctrine, independent nation-states in the international state of nature should act freely in accordance with their own interests because the security and survival of the collectivity are non-negotiable values for its members and because, from the point of view of an observer, conflicts between actors are still best regulated by the imperatives of instrumental rationality."[266]

Habermas reminds the realists that the world has grown so interconnected that states are no longer that sovereign to be able to manage all the crises alone. As he says, "nation-states have in fact lost a considerable amount of their controlling and steering capabilities in the functional domains in which they could make more or less independent decisions until the most major phase of globalization."[267] He adds, "this holds for all of the classical functions of the state, from safeguarding peace and physical security to guaranteeing freedom, the rule of law, and democratic legitimation."[268] This is to say that, even without talking about humanitarian intervention, states are no longer absolutely sovereign to ensure by their own their survival. But more importantly, for the case of humanitarian intervention, Habermas remarks that it is carried out because the states in question have failed to ensure their proper function. In Habermas's words, "it is simply not the case that the postnational constellation can be characterized as one in which nation-states bristling with power are tied to the apron strings of the world community. On

[265] Ibid.
[266] Habermas, *Time,* 25.
[267] Habermas, *Europe,* 110.
[268] Ibid.

the contrary, it is the erosion of state authority, either in the form of civil wars or ethnic conflicts within collapsing states or states held together by authoritarian means, which brings intervention onto the scene."[269] One would say that, according to Habermas, humanitarian intervention is called upon by the collapse of the internal sovereignty that the realists defend.

Furthermore, Habermas does not give weight to the ideological accusation, because "the momentous, risky, and costly intervention"[270] cannot simply be explained by self-interests of the intervening countries. Another argument against "realism" is that states have lost innocence after the horrors endured during the last century. "The trails of blood left behind by the subjects of international law during the catastrophic history of the twentieth century have rendered the presumption of innocence in reference to classical international law absurd."[271] Hence, "the founding of the UN as well as its declaration of rights, the threat to punish wars of aggression and crimes against humanity –implying at least a partial abrogation of the principle of non-intervention –all were necessary and correct answers to the morally significant experiences of this century, to totalitarian political ragings and the Holocaust."[272] From this point of view, the transition from classical international law to a cosmopolitan one was a proper response to the loss of innocence of the states as they are responsible for most of the grave crimes committed against humanity and violations of human rights. To the question of judging humanitarian intervention morally, Habermas advocates for a UN reform so that human rights be strongly institutionalized in order to distinguish morality from law. In that case, "the institutionalization of legal procedures…will protect the juridically-tamed manner of dealing with violations of

[269] Habermas, "Bestiality and Humanity: A War on the Border between Legality and Morality" in *Constellations,* Vol. 6, No 3, 1999, 268.
[270] Habermas, *Time*, 25.
[271] Habermas, "Bestiality," 268.
[272] Ibid.

human rights from both the dedifferentiation of the law and an unmediated moral discrimination against 'enemies'."[273]

(iii). This quest for the institutionalization of human rights so that their violations might be legally adjudicated raises the question of executive power at the supranational level, which leads Habermas to changing stances when it comes to the practice of humanitarian intervention itself. In his analysis of the second innovations brought about by the cosmopolitan law, he remarks that, although the UN Charter prohibits the use of violence and abolishes the right to non-intervention for members who breach the nonviolence principle except for self-defense, it does not creates a police above the states so that it can execute its orders. He acknowledges that "the Charter makes provisions for sanctions in case of violations and, if necessary, the use of military force in the conduct of police operations."[274] He even notes that "Article 42 of the Charter marks the second and decisive step in the direction of a constitutionalization of international law…Article 43 even authorizes it to take command of the forces and logistical support that member state are obliged to make available to it."[275] However, "this provision is inoperative, so there has never been a UN supreme command."[276] The consequence is that "today the United Nations is not yet in a position to compel a non-compliant member state to guarantee democracy and the rule of law to its own citizens. And the highly selective enforcement of the UN's human rights policy is subject to the constraints of political realities."[277] It has to accommodate the major powers' interests which usually shoulder the intervention. As he puts it,

[273] Ibid.
[274] Habermas, *The Divided*, 163.
[275] Ibid.
[276] Ibid.
[277] Ibid., 28.

"the Charter pays for the willingness of the major powers to cooperate by granting them veto rights that pose a major obstacle to the effectiveness of the Security Council."[278]

As the UN humanitarian interventions are carried out under such conditions, not only does Habermas notice the veto-right problem for the functioning of the Security Council, he also perceives the selectivity in choosing where to intervene. "One needs only recall the highly selective and shortsighted decisions of a non-representative and far from impartial Security Council, or the half-hearted and incompetent implementation of interventions which have been authorized –and their catastrophic failure."[279] He even mentions the cases of simply ignoring the international law for the self-interests of the major power, which threatens to portray the moral credibility of international human rights as an imperialist ideology. For "when human rights policy becomes a mere fig leaf and vehicle for imposing major power interests, when the superpower flouts the UN Charter and arrogates to itself a right of intervention, and when it conducts an invasion in violation of humanitarian international law and justifies this in the name of universal values, this reinforces the suspicion that the programme of human rights *consists in* its imperialist misuse."[280]

The examination of the actual practice of humanitarian intervention on the backdrop of its normative justification led Habermas to support the NATO intervention in Kosovo for moral reasons,[281] not without critique though. For "even 19 undoubtedly democratic states, as long as they authorize their own intervention, remain partisan. They are exercising a power of interpretation and decision-making which, if things were properly conducted, could only be

[278] Ibid. 163.
[279] Habermas, *The Crisis*, 96. See also *The Divided*, 20, 28, 170-1; *The Inclusion*, 180; *Between Naturalism*, 341.
[280] Habermas, *The Crisis*, 97.
[281] Habermas, *The Divided*, 29, 86.

exercised by independent institutions. To that extent, they are acting paternalistically."[282] They might have good moral reasons, but "moral norms which appeal to our better judgment may not be enforced like established legal norms."[283] That is why "NATO's self-authorization should not be allowed to become the general rule."[284] As to the invasion of Iraq, Habermas is completely against it as it not only breaches the principles of international law, but also lacks the moral ground. It was just a hegemonic neoliberal project that did not have any normative foundation, but rather could only be understood as imperialist strategy.[285]

In summary, Habermas sees in the transition from classical international law to the cosmopolitan law as it has been developing after the WWII, the normative ground to justify humanitarian intervention. As Carlos Yordán observes, Habermas suggests two standards for humanitarian intervention. "First, these interventions must follow established international decision-making procedures to make sure that a country's interests do not dominate the international response….Second, cosmopolitan interests, and not national interests, should inform these operations."[286] However, when he examines the actual practices, there is a gap between the normative justification and the way humanitarian intervention is carried out. That is why Habermas calls for reforms that institutionalize human rights so that they can be legally enforced and with a real executive power of the UN to enforce its own resolutions when it comes to intervening against states. The question, at this point, is whether this Habermasian justification responds to the challenge raised by those who view humanitarian intervention as a neocolonialism.

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[282] Habermas, *Time*, 29.
[283] Ibid.
[284] Habermas "Bestiality," 271. See also *The Divided*, 92.
[285] Habermas, *The Divided*, 179-85.
[286] Carlos Yordán, "Towards Deliberative Peace: A Habermasian Critique of Contemporary Peace Operations" in Journal of International Relations and Development, Vol. 12, No 1, 2009, 68.

b). Habermas and Humanitarian Intervention as Neocolonialism

One recalls that, from the second chapter, neocolonialism generally refers to the maintenance of colonial power through a local bourgeoisie. Nevertheless, the critics of humanitarian intervention identify it with the neocolonialism to mean the colonial methods and imperialistic strategies and language used to spread liberal culture and gain economic and political influence. Their critiques are grounded on both normative reasons and the practice itself of humanitarian intervention.

From the moral point of view, humanitarian intervention emphasizes the helplessness of the victim, shadowing the emancipatory power of human rights. Furthermore, it is only concerned with political rights, neglecting the other categories of rights. The result is that humanitarian intervention targets crimes that are generally non-Western crimes. Another normative argument is that humanitarian intervention deconstructs the traditional understanding of state sovereignty, which threatens the existence of many non-Western states, especially those created after the colonial era, since their survival was based on the assumption of equality of states and respect for their sovereignty. The consequence is that strong states –generally Western ones—get a lee-way to intervene in the weaker ones; which then creates an international order based on domination. Finally, by the international community, humanitarian intervention discourse designates the liberal states of the West, considered as stable and well-ordered, with the mission to stabilize the non-liberal troubled world. This opposition reminds the civilizing mission which was founded on the asymmetrical relation between civilized-uncivilized; or the Mill's argument that a civilized nation cannot stand a barbarous one in the same neighborhood. Those are the reasons given by the critics to justify why humanitarian intervention is another form of neocolonialism.

Concerning the practice, humanitarian intervention constitutes a problem because it is never only a moral issue; it also—and decisively—involves political and strategic motives. This gives reason to the critics for suspecting human rights as being used ideologically to hide self-interests when they are invoked to justify a humanitarian intervention. Another important element that besmirches humanitarian intervention is about the agent who determines that a situation is an egregious violation of human rights. From the experience of humanitarian intervention cases, it is the Western strong states that decide, through their international institutions, where to intervene and it has been always in the non-Western ones. In addition, they proceed selectively, using a double standard mechanism. When it is a major power or one of its allies, they can openly violate human rights without fearing any humanitarian involvement. Another stain on the humanitarian intervention practice is the labelling process, through which the liberal-Western states name the victims without their consent, and stigmatize the non-Western states as tyranny or rogue/failing states, while they find better terms for their own misconducts. Can Habermasian justification of humanitarian intervention offer a venue to respond to these normative and empirical arguments?

To start with the concerns raised from the practice of humanitarian intervention, Habermas shares the worries with the critics about the possible ideological use of human rights, especially when a superpower takes the universal values to cover its own interests.[287] He also recognizes the selectivity and the double standard applied in the intervention. As it has already been shown, he links this problem to the fact that the UN does not have a real executive power, and therefore has to adapt its actions to political realities. For instance, "Russia need not fear an

[287] Habermas, *The Crisis*, 97.

armed intervention in Chechnya because it is equipped with veto power,"[288] the same case applies to the other permanent members of the Security Council. That is why for Habermas, the solution is the respect for international law, specifically now that it is taking the turn to becoming cosmopolitan law. As he asserts, "all the more important, therefore, is the core mission of peacekeeping for which the UN was originally founded, that is, enforcing the prohibition against wars of aggression which, in the aftermath of World War II, led to the elimination of the *ius ad bellum* and set new restrictions on the sovereignty of individual states."[289] He concludes, "with this, classical international law took at least a first decisive step along the road of a cosmopolitan rule of law."[290] In other words, the solution to this selectivity in implementing the protection of human rights lies in the enforcement of cosmopolitan law. I now consider whether this solution satisfies the normative questions raised by the critics of humanitarian intervention.

At the present level of practice, it is not clear whether the critics would agree with Habermas's support to NATO's intervention in Kosovo. Indeed, Habermas acknowledges that in the Kosovo case, NATO was imposing a liberal order. He notes that "after the failed negotiations at Rambouillet, they are conducting the threatened punishment strikes against Yugoslavia with the declared goal of implementing a liberal solution for the autonomy of Kosovo with Serbia."[291] If that was the situation, was not his support a push for a liberal imperialism as a liberal order being imposed on another country? That is at least the opinion of Yordán who contends that Habermas believed that not only was the NATO's intervention a turning point in the progress toward cosmopolitan law, but also an expansion of "the frontiers of the Western liberal-

[288] Habermas, *The Divided*, 28.
[289] Ibid.
[290] Ibid.
[291] Habermas, *Time*, 21.

democratic order."[292] He argues that "this is supported by the fact that NATO's members are democracies and that the organization's action can only be taken if all members unanimously endorse them."[293] Yordán's point is corroborated by the fact that Habermas supports that, in case of the absence of a UN leadership for humanitarian intervention, the neighboring democratic states should take the responsibility to intervene. As he says, "when there is no other way, democratic neighboring states must be permitted to intervene in emergency in accordance with customary international law."[294] Although Habermas does not make it a rule, but rather cautions that "in such cases the incompleteness of the cosmopolitan conditions demands exceptional sensitivity,"[295] why are only the democratic states granted this right to intervene? By this, he posits democracy as the criterion for participating in the intervention, and not the simple fact of neighborhood. It would mean that, if there is an emergency in a certain part of the world where the neighboring countries are not democratic, they would have to fetch beyond the neighboring countries in order to find the democratic ones so that they can intervene. From this perspective, the critics might side with Yordán that "Habermas's cosmopolitan ethics favours too strongly the Western liberal order."[296]

As to the labelling process, here also Habermas's position might not deal properly with the critics of humanitarian intervention. Indeed, he endorses the gradation in legitimacy among states. According to him, "there exists a gradation in legitimacy between liberal, semi-authoritarian and despotic member states, in spite of the formal equality enjoyed by all members."[297] He gives credit to Rawls for having raised this problem and seems to confirm the

[292] Yordán, "Towards Deliberative Peace," 68.
[293] Ibid.
[294] Habermas, *Time*, 29.
[295] Ibid.
[296] Yordán, "Towards Deliberative Peace," 77.
[297] Habermas, *The Divided*, 107.

legitimacy superiority "enjoyed by democratic countries." That is the reason why, although this fact "hardly lends itself to formalization… customs and practices could develop that take account of it." It is in this sense also that he calls for "the need to reform the veto rights of the permanent members of the Security Council."[298] The observation from this position is that this gradation is done from the liberal perspective, and no country judges itself authoritarian or despotic. Moreover, he assumes the superiority of democratic legitimacy and is pushing for its formalization to the point of even reforming the veto right. These points lead to the next question whether his normative justification of humanitarian intervention quenches the worries of its critics.

As I have stated, Habermas shows that internal sovereignty has already been challenged by globalization that has undermined the states' capacity to perform all their classical roles that justified their internal sovereignty. Moreover, he showed that the post-WW II international law based on UN Charter, conditions the principle of non-intervention by the prohibitions against aggressive war and the respect of human rights. From this normative point of view, Habermas's justification seems to offer a way to respond to the critics of humanitarian intervention as a violation of the non-intervention principle, because it is already eroding through the growing interdependencies between states. Nonetheless, Habermas founds his normative justification of humanitarian intervention on the emergence of cosmopolitan law which is conceptualized from the experience of the constitutional state as it developed in the West. Even his three levels of reformulation of the Kantian project start from the liberal model of legitimation, and he limits the question of human rights to the supranational level where "the international community assumes institutional form in a world organization that has the ability to act in carefully circumscribed

[298] Ibid., 108.

policy field without itself."[299] From this point of view, it is not sure whether the cosmopolitan justification would not fall into the same accusation of promoting neocolonialism since it is promoting only the liberal order. Yordán, for instance, notes that "liberalism is an ideology that informs both emancipatory and imperial aspirations." However, "peace-building missions have taken a role of neo-colonial character as international civilian administrators have assumed control over these war-torn societies."[300]

Even if we were to adopt Habermas's model, it is not clear whether the monopolization of the humanitarian intervention by major powers would change, for the world organization would still depend on states to protect human rights. For, according to Habermas, "the world organization must be buttressed by power centers organized at the state level if it is to constitute the main pillar of a legal pacifism backed up by power."[301] States still play a role in "the cosmopolitan human rights regime that is capable of protecting individual citizens, if necessary even against their own government."[302] Now, it is an empirical fact that states are not equal. That is why the nation-states born of decolonization counted on the formal equality and the principle of non-intervention to survive. How then does the cosmopolitan law ensure them existence once these two pillars are undermined? How does it resolve the political realities that hamper the actual Security Council, which founds the fears of the critics of humanitarian intervention? At this point, one remembers Habermas's observation that humanitarian intervention occurs because the state itself is scrambling due to civil war or other human rights violations. True, and the critics also acknowledge that there are instances of human violations that shock the conscience of

[299] Habermas, *Between Naturalism*, 322. He envisions two other levels, the transnational level made of regional or continental bodies capable of defending their interest at the global level and the nation-states level where these decisions are to be applied. The latter would need, however, to go through a learning process about their self-understanding and a new role to play under the cosmopolitan law. Ibid., 322-7.
[300] Yordán, "Towards Deliberative Peace," 77.
[301] Habermas, *Between Naturalism*, 323.
[302] Ibid.

humanity. But the question of avoiding neocolonialism would be to have a neutral body that is not controlled by some states only, and it is not clear whether the cosmopolitan law addresses this worry satisfactorily. Habermas would respond that nation-states have to go through a learning process that consists in "internalizing the norms of world organization and acquiring the ability to pursue one's interests by prudently merging into transnational networks."[303] This might be helpful, but transnational networks would also be marked by the weaknesses or strength of the composing states, and therefore they would not be shielded from neocolonialism.

Furthermore, as the cosmopolitan law is thought from the liberal point of view, it would also be difficult to address the claim that humanitarian intervention is carried by the West taken as the international community. Indeed, it has already been underscored that humanitarian intervention would be justified from the liberal mode of legitimation that developed in the West, and therefore, the endorsement would be taxed to be Western. As he states, "the liberal type of constitution that limits the power of the state without constituting it… provides a conceptual model for a constitutionalization of international law in the form of a politically constituted world society without a world government."[304] It is from this liberal type that humanitarian intervention would be justified, and this is supported by the fact that Habermas's discussion on the question of humanitarian intervention is very much focused on Europe and the United States. Moreover, the world organization that embodies the institutionalization of the international community does not specify the criteria for membership. Is it another one or does the actual UN fulfill that function? If it is another one fitting the liberal model, either Habermas would assume that states have already followed the democratic constitutional model, or he needs to justify why non-liberal states would accept the cosmopolitan law to justify humanitarian intervention.

[303] Ibid.,326.
[304] Ibid., 316.

Finally, it is not easy to respond to the claim that humanitarian intervention is only concerned with civil-political rights, without paying attention to the economic factors that may be the source of the need of intervention. Habermas leaves these questions to the transnational level,[305] which is not concerned with human rights, and the cosmopolitan law is only concerned with civil rights. Therefore, it is clear that Habermas's justification of humanitarian intervention would not offer a path to address this concern.

In conclusion, while there are some points from Habermas's justification of humanitarian intervention that might offer a way to respond to the challenge raised by its critics as a neocolonialism—such as the fact that globalization has affected the internal sovereignty— many other arguments go unanswered, because his normative ground is what the critics put into question, that is, the liberal cosmopolitan law that founds Habermas's normative justification of humanitarian justification.

Conclusion

Habermas deploys a complex argument for human rights that he reconstructs from his discourse theory. While his system of rights is to constitute the core of the constitutional democracy, he also pays attention to the international human rights for a global society, especially when he is preoccupied by carrying forward the Kantian project of building a cosmopolitan law in which both states and individual citizens are subjects of international law. My interest in his theory of human rights was to look for responses to the challenges raised against human rights from both theoretical and practical grounds. Theoretically, they accuse of human rights to be another imperialist ideology, while human rights practice through humanitarian intervention is viewed as neocolonialism. If my reading of Habermas is plausible,

[305] Ibid., 323-4.

it turns out that it would not be easy to respond to those two challenges from his perspective, according the reasons that I have developed.

Having considered the two major sources of contemporary political and social theory with only limited success, in the next chapter, I draw from them and other theories and try to suggest a response to these challenges. The result cannot be presumed until the task is complete.

Chap. 5. Conceiving Human Rights from Local Practices

> It is men and women working 'out there' who spread and protect human rights
>
> Mathews Davies

5.0. Introduction

It might be relevant to recapitulate our journey so far. My project is to respond to the theoretical and practical challenges posed to the contemporary human rights movement by claiming that it is an imperialist ideology propagating a liberal culture, while its implementation through humanitarian intervention is seen as a new colonialism. It is in that regard that the first and second chapters focused on the elaboration of these points, raising the arguments put forward in a rather neutral way, since I exposed them without taking a position, except underlying that they are so strong that they undermine the legitimacy of human rights discourse and practice and, therefore, have to be taken seriously by any philosophical inquiry on human rights. In searching for a philosophical response to them, I resorted to Rawls's and Habermas's conceptions of human rights[1] in chapter three and four, and confronted them to these challenges.

[1] Limiting my choices to Rawls and Habermas does not mean that there are no other theories of human rights—for indeed they are many, one of those and no less appreciated is the capability approach developed by Amartya Sen and Martha Nausbaum. See for eg. Amartya Sen, *The Idea of Justice* (Cambridge: Belknap Press of Harvard University Press, 2009), especially, chap. 17; and his *Development as Freedom* (N.Y: Anchor Books;1999); Martha C. Nussbaum, *Women and Human Development: The Capability Approach* (Cambridge: Cambridge University Press, 2000), especially pp. 96-101. I chose the two authors because it is my conviction that they are the most influential thinkers in political and social theory in contemporary thoughts. It is another question whether those other theories satisfy the challenges presented here, and on this point I concur to their critique by Charles Beitz in his *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), especially chaps. 3-4, notwithstanding the question raised by Mark Navin in his book review of Beitz, "The Authority of Human Rights Practice" in *Jurisprudence*, Vol. 2, No. 1, 2011, p. 246.

The result is less than satisfactory and that is why the object of the present chapter is to look for another philosophical response.

Methodologically, the chapter builds on the practices of human rights in local instances, where different actors are involved as they invoke human rights in their daily struggles against injustices and oppression. That is why it draws from social anthropology, international relations and international law literature concerned with the translation and domestication of international norms into local contexts, with my case focusing on human rights. In this sense, I am not primarily concerned with the universality of human rights; rather, I assume their origin to be Western. For, although many scholars such as Lauren contend[2] that human rights find origin in different cultures, it can hardly be argued that the contemporary human rights movement does not find its origin in the Western political and social philosophy influenced by the technological and cultural, and social changes.[3] As the UNESCO commission already observed at the moment of drafting the UDHR, despite this apparent long history of human rights that can be traced in all traditions, "the history of declarations of human rights…is short and its beginnings are to be found in the West in the British Bill of Rights and the American and French Declarations of

[2] Lauren, ibid., p. 11. See also. Ishay, ibid., pp. 15-61, Jacques Maritain, Ed., *Human Rights: Comments and Interpretation* (New York: Columbia University Press, 1949), p. 260, and Jozeph Runzo et ali., ed. *Human Rights and Responsibilities in the World Religions* (Oxford: Onworld, 2008). From an African point of view, see Francis M. Deng, "A cultural Approach to Human Rights among the Dinka" and Kwasi Wiredu does the same from Akan culture: "An Akan Perspective on Human Rights" in Abdullahi A. An-Na'im & Francis M. Deng, ed., *Human Rights in Africa: Cross-cultural Perspective* (Washington, D.C.: The Brooking Institution, 1990). For a historical evolution of the idea of human rights, from natural rights to modern human rights, see Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta: Scholars Press, 1997), Brian Tierney, "Historical Roots of Modern Rights: Before and After" in Bruce P. Frohnen and Kenneth L. Grasso, ed., *Rethinking Rights: Historical, Political, and Philosophical Perspectives* (Columbia and Londond: University of Missouri Press, 2009; Virpi Märkinen and Petter Korkman, ed., *Transformations in Medieval and Early-Modern Rights Discourse* (Dordrecht: Springer, 2006); Lynn Hunt, *Inventing Human Rights: A History* (New York & London: W.W. Norton & Company, 2007); Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000). As to Samuel Moyn, he seems to think that human rights movement is a result of the exhaustion of ideologies, that is why he presents it as a last utopia. See his *The Last Utopia: Human Rights in History* (Cambridge: The Belknap Press of Harvard University Press, 2010).

[3] Ishay, Ibid., 5.

Rights formulated in the seventeenth and eighteenth century."[4] And this is the history that led to the actual human rights regime. In other words, while it is true that one can find ethical justifications of human rights in different traditions, it is right to say that "our modern conception of rights, wherever in the world it may be voiced, is predominantly European in origin."[5]

Another argument for claiming human rights as non-Western is based on the actors who framed it, be they states or the commissioners who drafted the UDHR.[6] For instance, Susan Waltz argues that "a wide range of participants outside the Western bloc made significant contributions to the construction of the most elemental international standard of human rights."[7] To respond to this claim, apart from the fact that by the time of drafting the UDHR many of the contemporary states were still under colonial rule, even the non-Western individuals present on different committees were intellectually and academically formed in the Western culture, and the South American countries were very much influenced by the liberal culture.[8] Even the so-called second and third generations of human rights were inspired by philosophies developed in the West and were responding to Western political and social conditions. Hence, as Abdullahi Ahmed An-Na'im states, "the 'representatives' of non-Western countries may have been more representative of Western cultural perspectives than their own."[9] For these reasons, the conception of human rights I build on local practices does not presuppose that human rights are universal. Rather, it assumes that the origin of the human rights movement is Western. The

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[4] Maritain, ibid., 260.
[5] Ishay, ibid., 5.
[6] For a thorough analysis, see Morsink, *The Universal Declaration of Human Rights;* Glendon, ibid.
[7] Susan Waltz, "Universalizing Human Rights: the Role of Small States in the Construction of the Universal Declaration of Human Rights" in *Human Rights Quarterly*, Vol. 23, No. 1, 2001, 50.
[8] See Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998), 119.
[9] An-Na'im, "Problems of Universal…" p. 346. This is a commonplace view, especially from the Third World scholars. As one examples among many, see Boaventura de Sousa Santos, "Toward a Multicultural Conception of Human Rights" in Berta Esperanza Hernandez-Truyol (Ed.), *Moral Imperialism: A Critical Anthology* (N.Y/London: N. Y. University Press, 2002), 45-5.

conception I am looking for will have to answer the question how such a particular view of human rights can be applied in other cultural settings without endorsing an imperialist ideology or lending support to the imperialistic use of human rights. That is the goal of this chapter, which will then be able to respond to the theoretical and practical challenges posed to the human rights discourse.

Thus, this chapter will have four main parts. Since the approach I will be developing goes in the same line of what Charles Beitz has called a "practical conception" of human rights—because I am also looking for a conception that draws from the practice of human rights at local level—in the first point, I expose and discuss Beitz's conception of human rights. The second points elaborates the conception of human rights from the local practices, whereas in the third section, I confront this new conception to the theoretical challenge in order to show how satisfactory it stands the ground. Finally, in the fourth and last section, I check weather from this new conception, there is a possibility of justifying humanitarian intervention and if yes, under which conditions.

5.1. Human Rights as an Emerging Global Practice

a). Common Skepticisms about Human Rights

Charles Beitz is among the thinkers who interpret human rights from a political perspective following the role they play in the global public discourse. As he acknowledges it, his book *The Idea of Human Rights* "is a contribution to the political theory of human rights," which represent "the articulation in the public morality of world politics of the idea that each person is a subject of global concern."[10] Beitz seems to believe that human rights have become the moral language of the global society, although it does not follow that the idea of human

[10] Beitz, *The Idea*, 1.

rights is "any more clear what kind of objects human rights are supposed to be, why we should believe that people have them, or what follows from this belief for political practice."[11] That is why his enterprise to consider anew human rights is based on several forms of skepticism vis-à-vis human rights. The first skepticism is about the enforcement of human rights as they stand today. As Beitz notes, "some philosophers believe it is part of the idea of a right that there should be some mechanism in place for its effective enforcement."[12] Yet, some of the rights stated in the major treaties do not have effective enforcement. Hence, the second form of skepticism is deduced from the former as it seems clear that some rights cannot be satisfied in the existing conditions or in a near future. Further forms of skepticism arise from the question of human rights universality. Are they applicable to everyone and can everybody claim them? This form of skepticism raises the question of human rights validity across different cultural and moral spectra. Finally, there is the fifth form of skepticism stemming from the historical fact that human rights treaties are mostly a fruit of Western great powers.

Beitz believes that it is not enough to refute and dismiss these forms of skepticism facilely. Hence before he builds his own theory of human as a global practice, he discusses these different forms of skepticism arising from the different theories of human rights, showing their merits and their shortcomings, and his approach of human rights as practice is supposed to be "a constructive explanation of the subject matter that causes the force of skepticism doubts to weaken."[13] As a consequence, his practical approach aims at two particular families of theory—what he calls the naturalistic and agreements theories—calling "into question the familiar conceptions –the idea of human rights as entitlements that belong to people 'by nature' or

[11] Ibid., xi.
[12] Ibid., 3.
[13] Ibid., 6-7.

'simply in virtue of their humanity' and the distinct idea of human rights as objects of agreements among diverse moral and political cultures."[14]

b). Critiques of the Common Theories of Human Rights

Beitz's own theory as well as those he criticizes try to address multiple problems linked to the interpretation and justification of human rights such as their nature, their normative scope, their universality, their capacity to guide action or their validity when they encounter the ethical pluralism that is characteristic of international human rights. After devoting two chapters (3-4) to these naturalistic and agreement theories, Beitz concludes that they "distorts our perception of the human rights of international doctrine." According to him "we do better to approach human rights practically, not as the application of an independent philosophical idea to the international realm, but as a political doctrine constructed to play a certain role in global political life."[15] Now, how do these two theories distort our philosophical understanding of human rights?

From a naturalistic perspective, "human rights 'are rights possessed by all humans (at all times and all places), simply in virtue of their humanity'."[16] Beitz analyses these natural rights under four banners. Sometimes, they are viewed as independent of social moral conventions and positive law; while other times they are conceived as pre-institutional. Or, they are supposed to be "possessed by all persons 'at all times and in all places';" or they "belong to persons 'as such'."[17] Beitz is convinced that the naturalistic views "are more restrictive as to the content and basis of human rights than they might at first appear."[18] Concerning the first feature, he concedes that human rights can be considered as natural rights when they are considered as standards for positive law, but they differ from natural rights because the former cannot have only one

[14] Ibid., 10.
[15] Ibid., 48-9.
[16] Ibid., 49.
[17] Ibid., 52-3.
[18] Ibid., 53.

justificatory source as the latter do. In other words, human rights share with the natural rights their critical capability, in the sense of being context-independent. However, they diverge on the fact that natural rights seem to have one foundational moral source of justification, while human rights accepts a pluralistic justification. Concerning the second feature of natural rights as pre-institutional, the naturalistic conception reduces the core of international human rights which is based on the fact that the individual is already in society. For that reason international human rights cannot be assimilated to natural rights. This provides a way to the third element of natural rights which asserts the validity of human rights "at all times and in all places." Beitz argues that international human rights cannot be valid the same way "in all places and at all times" because, not only human rights are historically situated, but also they adapt to the changes affecting societies, and these changes affect also the content of human rights.

As to the fourth feature of considering the person "as such", Beitz distinguishes two sides: the demand side and the supply side. The demand side is related to the notions of personhood and capabilities theory. Both perspectives are "grounded on one or a few values we might call 'basic human interest'," and share "the belief that the nature and content of human rights at the most fundamental level can be apprehended without any reference to the role of human rights in global political life."[19] Nevertheless, Beitz thinks that these views offer a shaky basis for accounting for the nature of international human rights. The first limitation he identifies is that these views neglect the actual human rights practice in the international arena. Secondly, in not taking into account the present international practice, Beitz argues that they fail to address some of the important concerns of human rights protection, one of them being the contribution of external action in protecting human rights when the domestic agent does not fulfill its duty. Thirdly, because they derive the list of human rights from their philosophical theory, there is a

[19] Ibid., 64-5.

risk that the normative content of their list is shorter that the international human rights. Fourthly, the naturalistic theories assumes a certain normative superiority vis-à-vis the international human rights, for "when there are discrepancies between international doctrine and the most persuasive naturalistic theory, then the theorist must hold that there is at least *prima facie* reason to reform international doctrine."[20] These objections allow the author to assert the basic distinction between naturalistic theory and international human rights: the former have one source of justification, while the latter have various justifications. Hence this question affirming his new direction as different from naturalistic one: "Why should we insist that international human rights conform to a received philosophical conception rather than interpret them, as they present themselves, as a distinct normative system constructed to play a certain special role in global political life?"[21]

Turning to the supply side, which is about the "agent(s) for whom human rights are supposed to provides reasons for action,"[22] Beitz discusses Hart's distinction of "general" and specific rights. This conception of "human rights as general rights" based on freedom, does not convince Beitz for the same reason of assuming one source of human rights. In Beitz's words, "the underlying view about the grounds of general rights might seem to rule out without argument the possibility that we can have general rights based on other considerations than the value of freedom."[23] Moreover, this conception takes for granted that "any right that can properly be said to belong to human beings 'as such' must be natural…The reasons to contribute to its

[20] Ibid., 67.
[21] Ibid., 68.
[22] Ibid.
[23] Ibid.,71.

satisfaction derive from considerations of humanity independently of people's social relations. But it is not at all obvious that we are compelled to make such an assumption."[24]

In conclusion, Beitz reaffirms the point that international human rights are an emerging practice with plurality of justifications and this was intended as such by the framers. Specifically, they avoided to conflate them with natural rights so that they do not become self-justificatory. As he puts it, "it was intended from the outset to afford common grounds for political action to persons situated in cultures with differing moral traditions and political values. It was explicitly agreed by the framers, as a general matter, that international doctrine should not embrace its own justification, and in particular that it should not presuppose that human rights are 'natural'."[25]

Concerning the agreement theories, Beitz argues that they are the fruit of reflection of the legal and social diversity that surround human rights. Taking into account that diversity, "these theories conceptualize human rights as standards that are or might be objects of agreement among members of cultures whose moral and political values are in various respect dissimilar."[26] Beitz responds to such views by showing that international human rights were not conceived as "a culturally or politically ecumenical or syncretistic position."[27] He indicates that the proponents of agreement theories struggle to establish values that can be cross-culturally accepted as human rights, and those that are to be discarded. Beitz identifies two approaches in the agreement theories. First, there are those who advance a *common core* and an *overlapping consensus*. By *common core* of human rights, Beitz refers to Michael Walzer's notion of "the

[24] Ibid.
[25] Ibid., 72. Adam Etinson notes that Beitz discusses weak versions of naturalistic theory, which, according to him, weakens Beitz's argument, although Etinson himself does not mention an example of stronger cases of naturalistic theory. He even contends that Beitz's theory becomes naturalistic at the end, but he does not elaborate on this claim. See his "To Be or not to Be: Charles Beitz on the Philosophy of Human Rights," a book review in *Res Publica*, Vol. 16, 2010, 444, 447.
[26] Ibid., 73.
[27] Ibid., 74.

moral minimum," constituting "a set of standards to which all societies can be held."[28] For Beitz, this version of the agreement theory suffers the characteristic limitation of this philosophical category of theories, because it would end up excluding some important human rights norms enshrined in the international instruments. As to the notion of *overlapping consensus*[29] which may seem much broader than the *common core*, it relies, on the one hand, on human rights as norms for a globalized world distinct from other moral, religious, philosophical and cultural values. On the other hand, based on the purpose of these global norms, the overlapping consensus version assumes that it would be reasonable for different comprehensive doctrines—to use Ralws's vocabulary—to endorse them from their respective perspectives. But, according to Beitz, this view is also restrictive and, therefore, it is not obvious whether it "would be more successful than a common-core view in accommodating such evidently controversial rights as those to freedom of religious practice, democratic political institutions, or the legal equality of women."[30] Beitz is also afraid that reducing human rights to what cultures can agree on would deprive human rights of their critical force. As for those who base their critique of the effectiveness of human rights on the cultural agreement, Beitz opposes them with an empirical observation that the actual ineffectiveness of human rights is not due to the lack of agreement about the present international doctrine of human rights. It is, rather, caused by the absence of political will, which should find "a different explanation."[31]

The second version of agreement theories is what Beitz calls *progressive convergence*, designating the conceptions held by authors like Charles Taylor's *unforced consensus*, An-Na'im's *evolutionary interpretation* and Joshua Cohen's *justificatory minimalism*. This approach

[28] Ibid., 75.
[29] Beitz takes care to point out that, although borrowed from Rawls, Rawls himself never used "the overlapping consensus" to justify human rights. Ibid., 76-7.
[30] Ibid., 77.
[31] Ibid., 82.

envisions "an intercultural agreement as arising, not from the actual content of existing moral cultures, but instead from the contents of these cultures as they msight develop or evolve under pressures for adaptive reinterpretation."[32] For Beitz, the progressive convergence aims at showing that certain elements of international human rights play a justificatory role for different comprehensive doctrines; that is, human rights can be reached from the different worldviews even when, presently, human rights are not yet found in them. After a thorough discussion of pros and cons of this approach, Beitz is not convinced by it. He argues that it is a based on "a hypothesis of moral progress" that is difficult to verify whether it becomes true. In such a situation, the only way remaining for the progressive convergence is the hope for the success of the international human rights regime as worldviews would evolve as a response to social changes. "But such a basis for hope would not satisfy the aspiration that…human rights should be recognizable as common concern among all the world's cultures." Therefore, "the straightforward interpretation of that thought is one we might better simply give up."[33]

Unsatisfied with the existing philosophical theories on the nature and meaning of human rights, Beitz prefers a fresh start.

c). The Two Level-Model

Beitz understands human rights mostly as those norms contained in the *Bill of Rights* and the *core* documents of international human rights, although he also mentions the treatises regarding human rights at the regional level.[34] He describes human rights as a normative practice of global scope, concerned with the protection of individuals "against the consequences of

[32] Ibid., 88.
[33] Ibid., 95.
[34] The Bill of Rights is composed of the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), whereas what Beitz calls the Core are the four main Conventions on human rights: the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Rights of the Child (CRC).

certain actions and omissions of their governance."[35] This description already highlights three important elements. First, the nature and scope of human rights, again not from a theoretical point of view, but rather from their function. They are a normative practice on a global scale. Second, the description identifies the object of human rights: they are meant to protect *individuals*. In asserting the individuals as the center of international human rights, Beitz follows the liberal heritage and contends that group rights are conceivable only as much as the group benefits the individuals. In the contrary case, groups as such cannot be the subject of human rights. In his own words, "if there is such a thing as 'group interest' which is non-individualistic, in the sense that its importance cannot be seen as deriving from the interests of individual members of the group, then, if we were to accept the two-level model, we could not say that such an interest could be protected by a human right."[36] Put otherwise, groups rights are conceived as serving an individualistic interest. Finally, Beitz's description of human rights as a normative global practice designates the government, through its action or omission, as the source of the dangers that human rights conjure. I later return to these elements; for now, I focus on the main argument of his conception of human rights as a global normative practice.

Beitz notes that this practice plays a discursive and political role, because it regulates normatively the behavior of states, and at the same time, it offers ways to criticize the violations of these norms. That is why Beitz's endeavor is to derive the concept of human rights from the role they play in this practice. Hence, his approach is practical, because it constructs the idea of human rights by taking them as they are in their international instruments, instead of conceiving a theory that claims authority over the existent international human rights treaties. This practice is characterized by two main features. First, the fact that the norms are widely recognized does

[35] Ibid., 14.
[36] Ibid., 113.

not mean that there is an agreement on their content. Put otherwise, the practice is not a result of the agreement about the content or the practical implication of these norms. Rather, the practice is constituted "by acceptance of a distinctive class of norms as sources of reasons."[37] This feature underlines the discursive role of human rights in the global practice. Secondly and as a consequence of the first feature, Beitz characterizes the practice as *emergent,* to mean that, contrary to mature social practices which gather consensus about the action to take within the community when there is failure, there is no agreement about the components of human rights. As emergent, human rights practice is still evolving in terms of defining and fixing its nature, content and scope. Hence, its salient features are the "normative breadth, the heterogeneity of the institutional requirements of its constitutive norms, the dynamic character of the practice's normative content, and the variety of paradigms of political action that might be understood as justified in response to infringements."[38]

Nevertheless, although emergent, Beitz argues that his practical approach is more than just a notice of the existence of the practice. It also bears "a certain authority in guiding our thinking about the nature of human rights."[39] More importantly, the emergent practice relies on the idea that states are the primary agent responsible for respecting, protecting and fulfilling human rights for their people, and if or when they fail, an external action, either to remedy or to prevent, might be justified. This is a key element for Beitz's practical approach because his two-level model dubbed "a fresh start" is built on this central role played by states in the practice of human rights.

Beitz's fresh start takes inspiration from Rawls's conception of human rights presented in *The Law of People*. According to Beitz, human rights for Rawls are part of the public reason for

[37] Ibid., 9.
[38] Ibid., 44.
[39] Ibid., 10.

the well-ordered Peoples, that is, the liberal-democratic and decent peoples, with states as a political model. For that reason, human rights have four characteristics. First, they are "a special class of urgent rights" whose violation calls for condemnation from the well-ordered Peoples. Second, they constitute a list of what Rawls calls "human rights proper" that is shorter than the rights anchored in the international doctrine. Third, the world society includes other states labelled "outlaw states" in addition to the liberal and decent ones. Fourth, human rights show their political importance by playing a "'special role' in the public reason of the Society of Peoples."[40] These four elements underscore the discursive and political role of human rights in the global practice. In that sense, Beitz's practical conception of human rights follows Rawls. However, despite the advantage of this view, Beitz finds that Rawls's "understanding of the functions of human rights is narrower than what is found in present international practice."[41] That is why Beitz sets for a new conception and new model of human rights as a global practice, that is, a practical conception which is different from both the naturalistic and agreements theories.

As already stated, the practical approach construes the conception of human rights by looking at the doctrine and the practice of human rights as they are contained in the international politics. It does not have to go outside the international practice to define the nature and the content of human rights, but rather considers what is called *human rights* in the international instruments as its sole source. It does not rely on a transcendental source of rights from which human rights would be deduced or evaluated, nor does it assume human rights to be common to all moral universes or reachable from all worldviews. On the contrary, the practical approach considers "the functional role of human rights in international discourse as basic: it constrains

[40] Ibid., 98.
[41] Ibid., 101.

our conception of a human right from the start."[42] This is definitely a departure from the naturalistic and agreement theories, at least methodologically. Human rights practice is conceived as *sui generis* for understanding its nature and content. Instead of looking outside its practice, one looks at the practice in its discursive role, and constructs a conception.

This methodological difference, added to the other differentiations developed so far, allows Beitz to build his practical conception that he calls a "two-level model," which is founded on the "division of labor between states as the bearers of the primary responsibilities to respect and protect human rights and the international community and those acting as its agents as the guarantors of these responsibilities."[43] In other words, for Beitz, an international practice of human rights involves primarily states, and then the international community. That is why his model is a two-level one, because it assigns responsibilities to these two actors in the international human rights practice. Thus, founded on the definition of human rights as "requirements whose object is to protect urgent individual interests against predictable dangers ('standard threats') to which they are vulnerable under typical circumstances of life in a modern world order of states,"[44] the first-level of the model asserts that "human rights apply in the first instance to the political institutions of states, including their constitutions, laws, and public policies," while the second-level restates that "human rights are matters of international concern,"[45] that is, the international community has a role to play when states fail their responsibilities with regard to human rights. For Beitz, the first-level model implies three requirements: first, it means that states have to respect human rights in their official business; second, states have the obligation to protect human rights against threats from non-states agents

[42] Ibid., 103.
[43] Ibid.
[44] Ibid., 109.
[45] Ibid.

that are under their jurisdiction; third, they have the duty to aid the victims who are deprived unwillingly of human rights. As to the second level, the international community plays a vicarious role; it is called to act only when the primary responsible agents, that is, states, fail their duties to respect and protect human rights for the individuals living under their jurisdiction. For that reason, (a) the international community is required to supervise states' performance in the protection of human rights; (b) when a state falls short from fulfilling its responsibility because of lack of means, other states and non-states actors "with means to act effectively have *pro tanto* reasons" to help such a state; and (c) if a state refuses to act according to human rights standards, external actors—states and non-states—who are willing and able, "have *pro tanto* reasons to interfere" in such a state in order to protect human rights.[46] In other words, Beitz follows Rawls in affirming that non-respecting human rights is a good reason for intervention in order to protect human rights. For Beitz, however, this external interference is not limited to humanitarian intervention as defined in chapter two as a military intervention. He rather understands it in a broader sense—as does Rawls also—including diplomatic and economic means, and the armed intervention would be required in some cases.

Beitz anticipates some possible objections to his conception, one of them being that such a conception does not convincingly show in which sense human rights are rights, since it only assigns a *pro tanto* reason to unspecified external actors; and yet, if human rights are universal, they have to be linked to a clear universal obligation. To this objection, Beitz responds that his two-level model interprets the discursive practice of human rights as it stands in contemporary doctrine, and that there are no clear criteria of when and how external action is to be carried out in case of the failure of states' institutions to protect human rights. From that perspective, human rights are rather "aspirational" in their application, but that does not deter their discursive role.

[46] Ibid., 109.

Like the manifesto rights, they still guide our action-thinking in the absence of clear duties assigned to designated persons. Another objection is related to the place that he gives to states acting individually or collaboratively to protect human rights. Beitz acknowledges that it is not always clear that states are the best candidates for protecting human rights, nor is it obvious whether they perform better when they do. However, it is a fact that all human rights treaties rely on states as the primary responsible agent for implementing them. In that sense, he follows the step of international law informing human rights law. The last objection he considers is the role he attributes to human rights for justifying the interference. Beitz answers that this "interfering-justifying role of human rights" conveys the international concern for human rights. And indeed, if human rights do not supply justifying reasons for interfering into an individual state that fails its responsibility to respect, protect and fulfill human rights, then the second-level of his model would not have its place, and the understanding of human rights as a global practice would not hold. Hence, for Beitz, human rights as "matter of international concern" is interpreted through "the interference-justifying role" they play in this global discursive practice.[47]

d). Beitz and the Challenges to Human Rights

I observed in the introduction to this chapter that the idea of human rights I am tracing follows Beitz's footsteps since the goal is to look at the practice and construct a conception of human rights. Now that I have exposed his practical conception of human rights, it befits to examine whether we can respond satisfactorily the challenges I am philosophically addressing. However, before engaging in that examination, there are some remarks about his practical conception, which has a lot of merit, but also raises several questions. One of its advantages is the insistence that human rights practice accepts different sources of justification. This opens up a real possibility of understanding human rights practice in different cultural settings. The second

[47] Ibid., 123.

merit is the highlighting of the fact that the mechanism of implementing human rights is not merely juridical. The latter is just one among other ways which can even be outside a state's controlled channels. On this point too, Beitz disentangles human rights from the legalistic conception, which emphasizes the juridical side of human rights to the detriment of other means of implementation. The third advantage is methodological. Looking at the practice itself in order to grasp the nature and content of human rights is an innovative way to approach human rights, opening the venue for talking about the human rights doctrine as a whole, instead of imposing a preconceived philosophical theory which, at the end, cannot account for all human rights as they presently exist internationally, and therefore has to declare some rights to be "more rights" or "proper rights" than others.

However, despise these positive points of the practical conception of human rights, it also raises some questions. To begin with, Beitz plays down the fact of human rights historicity. He seems to assume that because it is a global practice, human rights do not carry the Western imprint especially that, for him, the framers did not wish them to be self-justifying. According to him, "the drafters represented not only different countries, but also different religious and philosophical traditions and political positions."[48] I have already demonstrated that, not only did not the different commissioners represent all traditions (what was quite impossible), but also most of them were educated in the Western culture. In other words, although coming from different areas and views, they represented the same tradition, i.e, Western. Moreover, to represent different background does not exclude having the same underlying source of inspiration. Johannes Morsink shows, for instance, that, although the UN representatives dropped any transcendent source, "nonetheless the debate on Article 1 does show that they looked upon

[48] Ibid., 20.

most of the rights in the Declaration as grounded in human nature."[49] According to the same author, the conflictual debate about the weight of new rights was due to the doubts that they be deduced directly "from human nature."[50]

In sum, I agree with Beitz that human rights can (and should) have a variety of sources of justifications,[51] but this does not erase the Western fingerprint on them, and their liberal flavor. Beitz expresses this liberal dimension in his individualistic conception of human rights which creates conflict with the group rights. As he admits it himself, group rights are justified only relative to the protection and fulfillment of individual's human rights. Otherwise, there could not be such a thing as group interest protected by a human right. However, today, thanks to the international human rights movement, we have a *UN Declaration on the Rights for Indigenous Peoples* considered as group, although the *Declaration* also adds the individual: "Indigenous peoples have the right to the full enjoyment, *as a collective or as individuals*, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."[52] Beitz might respond to this critique arguing that his approach focuses on the doctrine enshrined in the Bill of Rights and the Core conventions; a fair point that might even be an answer to the worry of human rights inflation.[53] While a good answer, it would rather underline another limit to Beitz's description of the practice itself. Indeed, although a Declaration such as this on Indigenous Peoples' rights is not legally binding, it constitutes a moral source of inspiration and action-guiding for those who are involved in advancing the cause of Indigenous peoples. Put otherwise, limiting human rights

[49] Johannes Morsink, "The Philosophy of the Universal Declaration" in *Human Rights Quarterly*, Vol.6, No. 3, 1984, 333.
[50] Ibid., 334.
[51] Allen Buchanan also develops a pluralistic justification methodology. See *The Heart of Human Rights*, pp. 43, 67.
[52] UN, 2007, article 1. Emphasis added.
[53] See Brian Orend, *Human Rights: Concept and Context* (New York: Broadview Press, 2002).

practice to the legally binding instruments only is to cut off many other human rights means that are equally effective.

This observation leads to the way Beitz describes the whole human rights phenomenon as a normative global practice. Looking at human rights practice as it stands today, Beitz leaves aside many important actors and instruments that are on the forefront of the human rights battle. With the slowness of the international mechanism for protecting human rights, regional bodies for human rights have become the main mechanism for fulfilling human rights promise. The best example is the European Union which has championed the enforcement of human rights, making it a condition for each member beyond national borders.[54] Beitz mentions them once in a while[55] but he does not assign them a place in his model. Perhaps they are included in the second level of his model, but he does mention it. And here also arises another question, related to this second level. He speaks of international community or "appropriately placed outside agents"[56] who might have *pro tanto* reason to intervene when a particular state fails its mission to respect and protect human rights. However, he does not suggest a mechanism of designating those appropriately nor does he refer explicitly to the UN bodies or other international mechanisms such as the different committees related to the different instruments. Perhaps the regional bodies could fit into these "appropriately placed outside agents" but it would have been clearer to name them.

More importantly though, Beitz's two-level model does not accommodate the key players in the practices of human rights, that is, the non-states actors, both individuals and NGOs. Yet,

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[54] As one example of EU enforcing human rights beyond borders of and against states members see Daniel Kanstroom, *Aftermath: Deportation Law and the New American Diaspora* (New York, Oxford: Oxford University Press. 2012.), 218-20. For the influence of regional organizations for the improvement of human rights, see Mathews Davies, *Realizing Rights: How Regional Organisations Socialize Human Rights* (London/N.Y: Routledge, 2015).
[55] See Beitz, *The Idea*., 14.
[56] Ibid., 117.

they are present at each level of the making of human rights treaties.[57] They are at the origin of the whole human rights movement, from its inception, through its drafting, signing and ratification to the monitoring of implementation. Beitz himself recognizes it when he shows that the transnational human movement was borne out of the actions of different international organizations such as *La fédération internationale des droits de l'homme* or *l'académie diplomatique internationale.*[58] Nevertheless, Beitz's model does not assign them a visible role.

One might want to salvage Beitz by reminding that his second-level model includes non-states actors into those who may have *pro tanto* reason to intervene in a case of a state's failure vis-à-vis human rights. This is true until one recalls that Beitz insists that state is the primary agent of satisfying human rights requirements. That is why at the first-level, he does not include non-states actors, both individuals and organizations, although he acknowledges that domestic processes of contestation and agitations "are of substantial and probably increasing significance as mechanisms for implementing human rights." He however excludes them because "they do not fit within the conventional categories of compulsion and inducement," therefore "they are not accurately understood as external efforts to intervene or impose in a recalcitrant local culture."[59] In other words, the only non-states that are accepted are external and even here, with a conception so much centered on the state, one wonders whether by non-states actors Beitz is thinking of activists or INGOs; these also do not fit into the "conventional categories of

[57] I will come back to this broadly later.

[58] Beitz, *The Idea*, 15. Several scholars underline the important role played by non-states actors—activists and NGOs—in the fulfillment of human rights promise. See for instance, William Korey, *NGOs and the Universal Declaration of Human Rights: "A Curious Grapevine"* (N.Y: St Martin's Press, 1998); Christof Heyns and Frans Viljoen, "The Impact of the United Nations Human Rights Treaties on the Domestic Level" in *Human Rights Quarterly*, Vol. 23, No. 4, 2001, 518; Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: Chicago University Press, 2005), 65; her "Human Rights Monitoring and the Question of Indicators" in Mark Goodale (Ed.), *Human Rights at the Crossroads* (Oxford: Oxford University Press, 2013); Abdullahi A. An-Na'im and Jeffrey Hammond, "Cultural Transformation and Human Rights in African Societies" in Abdullahi An-Na'im (Ed.), *Cultural Transformation and Human Rights in Africa* (London/N.Y: Zed Book, 2002), 16; Hans Joas, *Sacredness of the Person: A New Genealogy of Human Rights* (Washington: Georgetown University Press, 2013), 25.

[59] Beitz, ibid., 38.

compulsion and inducement." He might rather be thinking of inter-states organizations or coalitions. Actually this is the case because he asserts that "states are the principal guarantors of the human rights performance of other states, both through their collaborative activities in international organizations and by unilateral action."[60] In other words, his model does not incorporate activists and NGOs, because it is state-centered. This point gives a way to the last question I now evoke.

That Beitz's practical conception relies so heavily on states as primary responsible for respecting human rights with such a confidence only because human rights treaties make them so, is a little bit puzzling. Indeed, scholars such as Micheline Ishay underline the paradox that human rights treaties make states responsible for protecting human rights while states are the main violators of rights, and therefore the same treaties are actually supposed to protect individuals from states.[61] Other scholars like Amartya Sen consider states as an impediment to, rather than a proponent of, the advancement of the human rights cause.[62] As for Kerri Woods,[63] he notes how the state-centered conception is problematic especially when confronted with failed states. To whom do these failed states' peoples turn for the protection of their rights? To other states, one would guess. But then how will other states be able to intervene in such a context without being accused of neocolonialism?

Beitz seems not to take into consideration these facts about states in their relationship to human rights. Again the reason is that human rights treaties make states the first responsible for human rights. But this is only for the Covenants and Conventions as they are supposed to be

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[60] Ibid., 122. This state-centric conception is not new for Beitz, because in his seminal work on international relations, he argued that states were not the only actors of international relations, but he insisted that they were the only subject of international morality. See his *Political Theory,* pp. 37 vs. 65.
[61] Ishay, ibid., 8.
[62] Sen, *The Idea*, 143; 364-6.
[63] Kerri Woods, book review of Beitz's *The Idea of Human Rights*. In *The Philosophical Quarterly*, Vol. 61, No. 244, 2011, p. 665.

legally binding. Therefore, states are made the primary responsible for human rights because they make treaties, and not because of their capability or willingness to bear the beacon of human rights. Hence I have already observed that the human rights movement includes more than just the legal binding instruments, such as different declarations. Considering declarations, since all the subsequent human rights instrument are rooted in the UDHR, states lose their prominent role as the modern nation-state is completely ignored. The UDHR resorts to general terms such as: "all", "everyone", "all peoples", "no one" and so on, as responsible for the fulfillment of these rights. This fact leads Morsink to remark that the drafters were more cosmopolitanists rather than internationalists, the UDHR being "resoundingly silent on the role of the modern nation-states, a fact that speaks against the prevailing internationalist interpretation of the documents."[64] That the UDHR became a source of legal documents and has itself gained a legal status without being based on states' agreement illustrates that states are only one among many actors that are called upon to advance the cause of human rights.

Another reason for which Beitz founds his model on states is the international fact that the global world is politically organized into states. While this is true, it does not follow that in a world politically organized differently rather than through states, human rights would disappear. Beitz might respond that such a political reconfiguration would require a reconceptualization of human rights. That might be a good answer but then it weakens his practical conception, which would call for another one that can sustain the justification of human rights through the global political transformations. In fact, his assumption that states are the primary agent responsible for human rights becomes problematic when one looks at the entire practice of human rights including states and states organizations and coalitions, as well as non-states actors such as

[64] Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009, 149. His chap. 4 is about the cosmopolitanism of human rights.

activists and NGOs, both international and local. Indeed, one discovers that states are the least interested in the human rights project *per se*. Without the actions of these non-states actors, few—if any—treaties would be drafted, signed and ratified, let alone implemented. They are the ones who draft the instruments, who lobby states to sponsor the texts, and they will be the one who will pressure states to ratify them after they have ceremoniously signed them,[65] and they will spend their whole life making sure those texts are implemented by states.[66] Even the international concern expressed through the interference-justifying role of human rights would not function without the tremendous works of NGOs, both locally and internationally.[67]

All these remarks concur to the conclusion that states are not the only subject of international morality, at least with regards to the global human rights practice, and they should motivate us for another practical conception of human rights that takes into account all these parameters. However, I am not concerned with a conception of human rights *per se*, but rather, a conception that could respond satisfactorily to the challenges elaborated in the first two chapters. Despite these questions arising from Beitz's practical approach, it remains to be seen whether it can address them, a task if well performed would alleviate our burden of looking for another conception of human rights.

Beitz discusses the political and cultural critiques of human rights and its practice as pathologies to the human rights doctrine, making a parallelism between these critiques and the

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[65] See among others, Korey, ibid., Merry, *Human Rights and Gender Violence*, chap. 1.

[66] See for instance Heather Smith-Cannoy, *Insincere Commitment: Human Rights Treaties, Abusive States and Citizen Activism* (Washington, DC: Georgetown University, 2012); see also Christine Wotipka and Kiyoteru Tsutsui, "Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965-2001" in *Sociological Forum*, Vol. 23, No. 4, 2008.

[67] See for instance, Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change" in *International Organization*, Vol. 52, No. 4, 1998; Martha Finnemore, "International Organization as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organisation and Science Policy" in *International Organisation,* Vol. 47, No. 4, 1993; Thomas Risse, Stephen Ropp and Kathryn Sikkink (Eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

critique of nineteenth century international law.[68] The same way the latter was used to advance the civilizing mission, the same is said about human rights, which were supposed to correct these pathologies, and yet its practice becomes pathological. He argues that the critiques have an empirical and normative claim. The empirical one is related to the objection that human rights are Western in origin and that determines their natures and their content. Beitz supports the usual reply that not all human rights are Western, because human rights related to physical security, material goods or essential freedoms are not particular to the West. If one takes these claims abstractly and at their empiric value, one would agree with Beitz. However, when political and cultural critics insist on the Western origin of human rights as having impact on the nature and content, they convey the fact that these abstract claims carry a Western interpretation. In that sense, what was a simple empirical claim raises to the status of a normative one; for if we claim that they are not just Western, it means they are found in other cultural universes. Yet, there is conflict, for instance between the human rights to physical security and the way it is culturally understood. The physical security is to be protected by the articles 6 of the ICCPR, which affirms the right to life. It is aspirational as to the death penalty, but at its fifth part, this article states that death penalty cannot be imposed to a pregnant woman or a child; that is, a person of less than 18 years. Childhood and adulthood are defined differently across cultures. The generalization of adulthood at 18 years old is definitely a Western notion. Another article related to the physical security is the article 7 of ICCPR, related to physical integrity, protecting the individual against torture or cruel treatment. In its first article, CAT states,

> for the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or

[68] Beitz, *The Idea*, 201-9.

> with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

One might think that this is so obvious, but several scholars contend that, even in the West, the notion of cruelty is linked to the change of attitude toward pain,[69] the attitude toward one's body, the change of the political role played by cruel punishment and other social changes that impacted moral behavior. As Hunt observes, "legally sanctioned torture did not end just because the judges gave up on it or because Enlightenment writers eventually opposed it."[70] That was not the case. "Torture ended because the traditional framework of pain and personhood fell apart, to be replaced, bit by bit, by a new framework, in which individuals owned their bodies, had rights to their separateness and to bodily inviolability, and recognized in other people the same passions, sentiments, and sympathies as in themselves."[71] This is to say that, even the human rights that are not particularly Western considered abstractly, their epistemological and moral backgrounds are Western and bear on how they are understood and applied. That is why and when they enter into conflict with other cultures which, obviously, have their own understanding and moral content of physical security different from this one. For example, John Gitlitz[72] reports a case of Peruvian peasants who had to confront their practices for punishing criminals in their community with the introduction of human rights. While they did not consider as cruel the treatment of the suspected persons, although it was physically harmful, the community had to learn a new language of human rights that brings a new way of looking at

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[69] Talad Asad, "On Torture, or Cruel, Inhuman and Degrading Treatment" in Richard Wilson (Ed.), *Human Rights, Culture and Context* (London/Chicago: Pluto Press, 1997), 115; 117.
[70] Hunt, ibid., 111-2.
[71] Ibid. The whole chapter two is on this evolution toward the abolition of torture. See also Joas, ibid., chapter 2.
[72] John Gitlitz, "Peasant Justice and Respect for Human Rights: Perù" in Adamantis and Peter Schwab (Eds*.), Human Rights: New Perspectives, New Realities* (London: Lynne Rienner Publishers, 2000), 53-68. On the same theme of conflict in interpreting torture, see Mark Goodale, "The Power of Right(s): Tracking Empires of Law and New Modes of Social Resistance in Bolivia (and elsewhere)" in Mark Goodale and Sally Engle Merry, (Eds.), *The Practice of Human Rights: Tracking the Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007). In the same volume on the same subject see, Shannon Speed, "Exercising Rights and Reconfiguring Resistance in the Zapatista Juntas de Buen Gobierno" and Jean Jackson, "Rights to Indigenous Culture in Colombia."

physical treatment. All were not happy about the new language, but others appreciated this new way of dealing with crimes. As to the human rights to material goods, it is hardly contestable that the underlying philosophy beneath the economic and social rights are the right to private property and the right to privacy, and the rights designed to correct the pathologies of a modern society based on capitalism and technology.[73] This underlines the individualistic tone of the international human rights instruments. This being the case, these are definitely Western; one cannot easily discard these claims.

The point of this development is to show that what Beitz considers to be a simple "inflated" empirical claim, the claim that the Western origin of human rights has impact on their nature and content, carries a certain normative weight. This bridges the normative dimension of these critiques recognized by Beitz, that is, the "moral imperialism" that can characterize the application of human rights, if not as a whole, at least part of it. As he draws a parallelism between nineteenth century international law and today's human rights, Beitz acknowledges that such a critique should be taken seriously. However, he does not think that it affects the human rights doctrine as a whole, and even for the affected part, it is only in terms of over-reaching instead of imparting their nature and content. Like the nineteenth century international law which did not fail because of a bad philosophical foundation but rather because it did not fit into the cultural institutions of the colonies, some human rights might suffer the same problem. But, Beitz argues, that is a practical rather than philosophical problem.

[73] See for instance ICESCR, art. 6-12. There is no place for communal ownership, such as found in some traditional settings. In this sense, Beitz is correct that human rights consider the world politics to be organized into states. But we have to bear in mind that this state model is also a result of colonialism and not necessarily a free choice or is it a result of historical evolution. For an example of this different understanding of property, see the study of Abdul Aziz Said, "Human Rights in Islamic Perspectives" in Pollis and Schwab, *Human Rights: Cultural and Ideological Perspectives*, 90-1.

I disagree on this reading of the role of international law in the furthering of colonialism, and therefore disagree also on the conclusions drawn from its parallelism with human rights. As I showed in the first chapter, the international law came to give a legal scheme to the colonial project that was morally justified as a civilizing mission in order to mask its moral evil side. The civilizing mission was used ideologically to oppress abroad, and to give moral coverage at home, and international law helped to integrate the enterprise in the legal scheme. In this sense, serving colonial project was the philosophical basis that besmirched the international law. It is in that sense that the political and cultural critiques of human rights go beyond the simple over-reaching problem, that is, applying human rights to unfit cultural institutions. The claim is that, before being applied, human rights are conceived as an ideology to justify the imperialistic goal of the West to dominate culturally the rest of the world. In that sense, their moral authority is undermined by this conception and it reverberats to their practice. That, I believe, is a philosophical problem because it attacks the nature and the content of human rights, and Beitz seems not to respond to it satisfactorily.

It remains the question of humanitarian intervention, which Beitz touches also slightly as part of the pathologies. He mentions the imperialistic use of human rights to advance the great powers' interest, and the selectivity in the place where to intervene. Concerning the first one, it is not clear where he stands on it, but he seems to endorse the possibility of unilateral intervention, if only it could be corrected so that it does not serve its own interest. As he puts it, "it is not hard to imagine an international regime combining a mechanism for approval of unilateral protective efforts with a capacity to apply incentives to encourage fidelity to the efforts' purpose."[74] As to the selectivity problem, he also recognizes that it can discredit the moral authority of human rights as a public practice as well as the existing enforcement mechanisms. But for Beitz, this is

[74] Beitz, *The Idea*, 207.

just an "empirical conjecture" and even if it turns out to be true, "inconsistency is not inherent in the idea and practice of human rights; it is an artifact of the global distribution of political power and the weakness of global institutions capable of regulating its effects."[75]

Such a treatment of humanitarian intervention and its selective enforcement would not convince those who view it as a neocolonialism. As the second chapter of this dissertation elaborated, the practice of humanitarian intervention through unilateral intervention is one of the breaches of the feeble international law, which gives leeway to greater powers to impose their will under the whip. Beitz seems to think that it is not hard to imagine a mechanism that curbs states' thirst of self-interest, but he does not suggest how it would look like. Moreover, he knows that, as Rawls notes,[76] states care more about their interests than the protection of human rights. It is then surprising that Beitz is not worried by this fact. Concerning the argument that inconsistency in enforcement does not affect the idea and practice of human rights, it is because Beitz does not take into account the ideological use of human rights and the experience of neocolonialism. For the claim of those who accuse humanitarian intervention as neocolonialism, they do not consider as a conjecture the fact that selectivity undermines the authority of human rights and its practice. They affirm that it does so since it justifies a neocolonial practice and it affects the idea of human rights because they are robbed of their emancipatory power. In Mamndani's words, "the language of humanitarian intervention has cut its ties with the language of citizen's rights. To the extent that the global humanitarian order claims to stand for rights, these are the residual rights of the human and not full range of rights of the citizen."[77] This is a strong claim that Beitz's response does not address and therefore we are forced to look for another conception of human rights that might address these challenges in a satisfactory manner.

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[75] Ibid., 208-9.
[76] Rawls, *The Law of Peoples*, 27-8
[77] Mamdani, *Saviors*, 274.

5.2. A Normative Account of Human Rights from Local Practices

a). Departure from Beitz

The reserves about Beitz's practical conception and the fact that it cannot address properly the theoretical and practical challenges raised by the political and cultural critiques of human rights compel us to look for another conception. However, this other conception remains practical and as such, follows Beitz's methodology. It assumes the same definition of a practical approach to human rights, looking at the practice as it is, and trying to understand its nature and content. In other words, the practical conception from local practices also takes "the international human rights as a normative practice to be grasped sui generis and consider how the idea of human rights functions within it,"[78] and from that, deduce its meaning. For as Goodale says, "to study what human rights do is to study what human rights are."[79] Moreover, I agree with Beitz that, looking at human rights practices at its different levels reveals a normative and a political dimensions. Human rights offer "a moral touchstone or a common reference point in deliberation about political action and social criticism."[80] These are the discursive and political aspects that Beitz highlights and that I share. I also hold that the human rights practice is an emerging practice, accepting several sources of justification.

However, the commonalities between Beitz's practical conception and the conception based on local practices end here. Indeed, while he emphasizes the fact that human rights practice is a global one, the conception I am looking for assumes that human rights practice as such involves many levels, whose ultimate effects are to be felt at the local level where human

[78] Beitz, *The Idea*., 12.
[79] Goodale, "Introduction to 'Anthropology and Human Rights in a New Key'" in *American Anthropologist*, Vol. 108, No. 1, 4.
[80] Beitz, *The Idea*., 44.

rights are claimed. For as much as it is true that "the effectiveness of human rights regime is a matter of its success in improving respect for human rights,"[81] there is no better place to measure such effectiveness than the local level where human rights apply. Beitz insists on the fact that international human rights have decentralized the concern for the individual from the state to the international arena. This is definitely true, but it has to be nuanced. Although we seem to have some international mechanisms for checking states' performance with regard to human rights, such as the different committees related to different human rights instruments and even the possibility of complaining against states by the individual,[82] there are no international police to punish the bad performers. There is not even a mechanism to force a state to submit to the process itself. This is the paradox we above mentioned of entrusting the lamb to the wolf. States are the worst violators of human rights, and yet the international human rights treaties would rely on them for their protection. Since the humanitarian intervention—as armed intervention—is only allowed in extreme circumstances—with all the ambiguities related to it as presented in the second chapter of this work—states remain with only diplomatic and economic pressures. But "linking human rights practices to money, trade, or prestige is not a sufficient condition for effectiveness."[83] To make the case worse, even diplomatic and economic pressure is rarely undertaken by a country without the tireless work of local activism in collaboration with transnational activists and NGOs, which then exert pressure on their particular governments to intervene in case of human rights violations.[84] Otherwise, governments are not ready to enforce

[81] Ibid., 81.
[82] See Smith-Cannoy, Ibid.
[83] Thomas Risse and Kathryn Sikkink, "The Socialisation of International Human Rights Norms into Domestic Practice: Introduction" in Thomas Risse, Stephan Ropp, and Kathryn Sikkink, (Eds.), ibid., 38.
[84] For a coverage of different ways of how states integrate human rights in their domestics politics, see the chapters in Thomas Risse, Stephan Ropp, and Kathryn Sikkink, (Eds.), by Hans Peter Schmitz, "Transnational Activism and Political Change in Kenya and Uganda"; David Black, "The Long and Winding Roads: International Norms and Domestic Political Change in South Africa"; Sieglinde Gränzer, "Changing Discourse: International Advocacy Network in Tunisia and Morocco"; Anja Jetschke, "Linking the Unlinkable? International Norms and Nationalism in

measures that protect human rights, especially against their allies. As Beth Simmons writes, "despite the fact that governments toward the end of the twentieth century have accepted a higher degree of peer accountability than ever before, they are still largely reluctant to enforce international human rights agreements in all but the most egregious cases, and only when it serves their broader political purposes."[85] Once more, this is a reason why the local site is the place to focus on when looking for a conception of human rights founded on their practice.

Another element of my disagreement with Beitz is the content of the doctrine itself. It has been shown that for him, the doctrine is constituted by the Bill of Rights and the Core Conventions. Basically, he limits it to the legally binding human rights instruments. In contrast with him, the conception from local practices takes the human movements as a whole, that is, the legal and the moral documents: treaties and declarations regarding human rights. The reason is that, while declarations are not legally binding for states as they are not parties to them, they are not less a source of inspiration for those who believe in the cause of such declarations, and therefore are as action-guiding as treaties are. Moreover, even discursively, they can be held to states inasmuch as they have a certain moral concern. Eventually, such declarations become or generate a legal binding instrument.

More importantly, the practical conception from local practices decentralizes human rights practice and distributes the burdens to the different actors involved at different levels of responsibility. From global politics, states are the primary ones responsible for the protection of human rights; but from the effectiveness point of view, which is the cornerstone of the human

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Indonesia and the Philippines"; Stephen Ropp and Kathryn Sikkink, "International Norms and Domestic Politics in Chile and Guatemala"; Daniel Thomas, "The Helsinki Accord and Political Change in Eastern Europe"; Thomas Risse and Stephen Ropp, "International Human Rights Norms and Domestic Change: Conclusions." And of course Keck and Sikkink, ibid. see also John Dale, "Transnational Legal Conflict Between Peasants and Corporations in Burma: Human Rights and Discursive Ambivalence under the US Alien Tort Claims Act" in Goodale and Merry, ibid. See also Laura Nader, "Introduction: Register of Power" in Goodale and Merry, (Eds.), ibid.

[85] Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), 113-4..

rights project, one has to look at the local level. In between these layers, there is a constellation of actors that intervene to hold states and the international community accountable, or simply to protect human rights without state's intervention. Furthermore, I question whether the centrality of the state in Beitz's model is due to his definition of human rights, or if it is the way around; for his definition identifies the government as the source of the threats against which human rights have to protect; it can be by action or omission of the government. However, when one looks at the local practices, human rights are invoked in different settings which do not necessarily involve states. For instance, human rights are called upon to challenge cultural practices that are judged harmful to human dignity.[86] These are not state's actions or omissions, and sometimes, depending on the legal traditions, states do not have a choice. Simmons, for example, observes that treaties meet great resistance in "common law than in civil law system."[87] Another reason to decentralize the state in the human rights practice is the fact that even the world politics is passing into a "postnational constellation" era, as Habermas would say. This has two main consequences. First, the threats to human rights might come from outside the state's jurisdiction that a state alone will be unable to deal with it. In this case, there is a need of non-states intervention to help alleviate the situation. Second, the Westphalian model of the modern nation-state is waning away as a big player in international politics, clearing the way to big regional blocs.[88] Today, regional blocs can constrain states about what they can or cannot do, to

[86] Merry, *Human Rights and Gender Violence*; also her "Legal Pluralism and Transnational Culture: The KA HO'OKOLOKONUI KANAKA MAOLI TRIBUNAL, HAWA'I, 1993" in in Richard A. Wilson, Ed. *Human Rights, Culture and Context* (London: Pluto Press, 1997); Florence Butengwa, "Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community-Level Action" in An-Na'im (Ed.), *Cultural Transformation*; in the same volume, see Celestine Nyamu-Musembi, "Are Local Norms and Practices Fences or Pathways? The example of Women's Property Rights"; and Hussaina Abdullah, "Religion Revivalism, Human Rights Activism and the Struggle for Women's Rights in Nigeria". See also Sari Wastell, "Being Swazi, Being Human: Custom, Constitutionalism and Human Rights in African Policy" in Goodale and Merry, ibid.

[87] Simmons, ibid., 72.

[88] See Habermas, *The Crisis of the European Union*, 53-71.

the point that human rights effectiveness is benefiting from this, especially in a region which values human rights norms, such as the European Union.[89] That is why a conception of human rights from local practices takes them into account. Now, since the goal of the practical approach is to extract a conception of human rights by looking at the role played by human rights both discursively and politically, taking into account these actors and shifting the focus to the local locus as the ultimate place for the effectiveness of the human rights project—of course in conjunction with other levels—it is my conviction that the nature and content of human rights will change accordingly. But before embarking to grasping that conception, some other points need to be enlightened, among them, the contours of local and local practices.

Most of the time, local is opposed to the global in an unhealthy dichotomy,[90] and it might have a geographical connotation. From a world politics perspective, local would mean an individual state, while the global would refer to the international institutions. There can even be an ideological use of it, whereby global refers generally to the West, while local evokes the primitive; the real; the uncontaminated by modernity. As Merry notes, "*local* tends to stand for lack of mobility, wealth, education, and cosmopolitanism as well as recalcitrant particularity, whereas *global* encompasses the ability to move across borders, to adopt universal moral frameworks, and to share in the affluence, education, and cosmopolitan awareness of elites from other parts of the world."[91] Without entering into these disputes, *local* in this study does not assume such a tension, although I maintain that *it* implies a certain notion of space, with geographical connotation, but also with metaphorical signification. Thus, *local* means the interval under the state's official activities related to human rights, in which non-states actors

[89] See Davies, ibid.
[90] For a critique of local/global dichotomy, see Goodale, "Introduction: Locating Rights, Envisioning Law between the Global and the Local" in Goodale and Merry, ibid.
[91] Merry, "Transnational Human Rights and Local Activism: Mapping the Middle" in *American Anthropologist*, Vol. 108, No.1, 2006, p. 39.

operate to make their impact effective. Geographically speaking, it can be a region or many regions of a country; it can also be a sub-region unit in which human rights are being implemented. In any case, by *local* I mean the amorphous interlude beneath the state's official space, in which human rights are translated, contested and incorporated in the value system of the locus, and become discursive and action-guiding, as they also get new meanings. By the same token, *local practices* mean all the activities, discursive and political, undertaken at the local level thus understood, in the human rights practice. As we shall now see, *the local* becomes a crossroad of ideas, actions and actors from different levels yet with the same goal: to make effective the emancipatory power of human rights where it is the most needed. To use Goodale's words, it becomes "a node of articulation"[92] of all of them. This development leads to the analysis of the different levels involved in the human rights practice.

b). The Actors

It has already been said that the practice based on local practices involves several actors representing several levels of intervention. On the bottom level, there are the beneficiaries. These can be an individual or group of individuals claiming a certain human right. This is not only the bottom in logical terms, but also the justifying reason of the whole practice. Without the need at the bottom, a human rights practice would not have a purpose. That is why **the beneficiaries** are the measure of the success of the human rights regime, inasmuch as the latter is confirmed by the success in protecting human rights. An important note though; the beneficiaries are not passive receivers. Rather, they own their own story, raise their concern for human rights, claim them in a discursive and political resistance against whatever source of threat it may be. In An-Na'im's terms, "the beneficiaries of human rights standards themselves assume the primary responsibility for protecting their own rights, whether against the state, or by inducing it to support them

[92] Ibid., p. 18.

against some external actors or conditions causing the human rights violations."[93] Human rights function as a means of resistance against any threat, and they empower their users both discursively and politically by being a source of normative reasons and action-guiding in choosing a determining action to undertake and strategies to follow.

The second level is constituted by the **local non-states actors**. These are different in nature, from different backgrounds, usually focusing on a particular area of human rights. Some might be concerned with women rights, while others labor for child rights; some might be concerned with political liberties, while others busy themselves with socio-economic and cultural rights, and even ecological ones, depending on their interests or their expertise. However, despite their diversity, they share the position of the middle between the beneficiaries and the state's officials. They translate the human rights idea to the local beneficiaries who might not know them, and serve as intermediaries between the beneficiaries and other members of the web. As Merry remarks, "those occupying the middle are no longer the village headmen of colonial indirect rule but activists providing service and advocacy to local communities."[94] They can be individual activists or be members of local NGOs. Through them, human rights get translated both literally and metaphorically, to make them available to the beneficiaries and relevant to the local situations. At the same time, though, they are more than just being in the middle between states and the beneficiaries, because they also are in contact with other members of the web, and that also defines their identity. In addition, while they are usually educated and travel a lot to attend trans- and international meetings, they are mostly committed to the cause of human rights

[93] An-Na'im, "Expanding Legal Protection of Human Rights in African Contexts" in Abdullahi An-Na'im (Ed.), *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2003), 6. Although from an institutional point of view, Thomas Pogge subscribes to this point. See his *World Poverty and Human Rights* (Malden: Polity, 2008), 69.
[94] Merry, "Transnational Human Rights," 42.

in their local contexts which exposes them to life-threatening danger.[95] Furthermore, some of these NGOs are granted a role—although not an active one—in the structure of international law as observers. Although it may sound anodyne, it gives them the opportunity to lobby about the human rights agenda, and they can also file information to the different commissions and committees, which will be taken seriously by some of the members. I have already mentioned how important is their work, even after the signature of a treaty, for states to ratify and comply with it.[96]

This is the decisive category in the human rights practice, because they are the ones who usually claim a share of the public sphere to the state's officials who would like to monopolize the discourse about the political health of the country, and contest the official version of the human rights situation. They are capable of mounting pressure from both within by educating local communities about human rights, creating human rights consciousness, and without, by collecting and disseminating information about human rights to the external actors who can then pressure the actual country. Hence, "because domestic human rights NGOs are a crucial link in the network, where these groups are absent…, international human rights work is severely hampered."[97] It is not only the international human rights efforts; even the national one is incapacitated, especially in situation of human rights violations. That is why the primordial

[95] It is a common fact to either imprison human rights activists or simply eliminate them physically. That is why the notion of local I am using here is independent of the dichotomy of North/South, because even in societies that are more open today, some people had to struggle in order to gain their space of expression. But, since according to Merleau-Ponty, philosophy is about to reflect on one's experience, my current example is about a Burundian human right activist called Pierre Claver Mbonimpa, very much engaged for detainees' rights, stemming from his own example in prison. After witnessing how horrible were the conditions of inmates in the Burundian penitential system, he created a local NGO dedicated to the advocacy for detainees. He has received many awards, but also has been in prison many times. Last summer, he was short and almost died. After more than three months in a hospital in Europe, now he can barely speak because one of the bullet touched the vocal cords. During those three months of convalescence, those who were not able to eliminate him physically, succeeded to kill his son-in-law and one of his sons in less than three weeks of interval. While no official investigation was conducted, the opinion is that he is harassed by the Burundian government because of his engagement for human rights and denouncing their states' violations.

[96] See Mery, *Human Rights and Gender Violence*, and Simith-Cannoy, *Insincere Commitment*, among others.

[97] Keck and Sikkink, ibid., 117.

enemy of states violators of human rights is not the international community, but rather local non-state actors, be they individual activists or NGOs.

The third category is constituted by the **states and some mixed institutions**, such as the Independent National Commissions of Human Rights (INCHR). The place of the state in the human rights regime is quite clear and highly appreciated. It owns this primacy to the global world politics organized into states and the role they play in putting into place human rights instruments. In that sense, from the international law perspective, states are the only moral subjects recognized. However, this is only a formal view which cannot satisfy a human rights practice aiming especially at effectiveness in the protection of human rights. That is why for a conception of human based on the local practices, the state is integrated into a web of actors who exert pressure on it in order to yield the expected fruit. This, nonetheless, does not mean that the state is not important in the human rights enterprise. Its role is still preponderant inasmuch it is still the only political institution habilitated to sign treaties. And since the human rights practice involves legal mechanisms to the point that for Buchanan international human rights law is at the heart of the human rights regime,[98] the states has an irreplaceable role to play. However, I maintain that human rights effectiveness would not happen by only the state's will without the other actors. That is why, because treaties make states have the primary responsibility for human rights protection and yet, on the ground, they are ineffective, instead of making it central, human rights practice has to reframe the state's role in the human rights enterprise, without relegating it to the periphery.

Another reason is the fact that states are the worst violators of human rights. In that sense, some rights are addressed to the states as a way of conjuring states from violating them. Furthermore, there are claims that can only be discharged by states. For instance, as the

[98] Buchanan, *The Heart of Human Rights*.

monopoly of violence, the state is in charge of granting security to its citizenry, who are to hold states responsible for that. In addition, although most of the time through transitional pressure, states have more means than other actors to interfere with an individual state that fails to respect human rights, through diplomatic and economic channels; and because they possess the military power, they are the ones who can intervene militarily to protect human rights. In other words, the state is an important actor in the human right practice, although effective only in combination with the rest of actors, because states can also play a hampering role for advancing the human rights cause.

This third category also comprises mixed institutions supposed to play a role between the states and the local non-states actors. The so-called Independent National Human Rights Commissions are mixed because they have to gain the favor of both the government and the civil society, a task that is not always easy to fulfill, especially that they are usually dependent financially on the governments, and yet are supposed to convey the grievances of the civil society. The result of their works is not easy to evaluate, but in some instances they contribute to the cause of human rights.[99] That is why I include them in this third category.

In today's human rights practice, Regional Organizations play a major role in inducing the effectiveness of human rights in their country members. The example mentioned most of the time is the European Union, but the influence of such institutions on their members with regards to human rights has become common in the other parts of the world.[100] Furthermore, these

[99] For an account of these INHRC on Africa, see Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa* (N.Y/London: Human Rights Watch, 2001); for a general overview, see Julie Mertus, *Human Rights Matters: Local Politics and National Human Rights Institutions* (Stanford: Stanford University Press, 2009); see also Catherine Shanahan Renshaw, "National Human Rights Institutions and Civil Society Organizations: New Dynamics of Engagement at Domestic, Regional and Institutional Levels" in *Global Governance*, Vol. 18, 2012.

[100] Davies's *Realising Rights* looks at cases from Eastern Asian countries, the Americas and the European Union. For a focus on Asia, see Sidney Jones, "Regional Institutions for Protecting Human Rights in Asia" in *Proceedings of the Annual Meeting* (American Society of International Law), Vol. 89, 1995; Amitav Acharya, "How Ideas

Regional Bodies are more and more getting involved militarily to protect human rights in their Region.[101] The question, however, related to these kinds of institutions is that they are not uniformly constituted and they vary in size, goals, and influence. Moreover, to be efficient agents in protecting human rights, they need to adhere to human rights norms, otherwise they can be opposed to them in the same manner that they are internally.[102] Despite these limitations, regional institutions cannot be ignored in today's human rights practice. Hence, by them, I mean all these organizations created by and made of states beyond the individual state and below the international institutions. As such, they are not specifically designed for human rights protection, but they end up including the respect for human rights in their principles, and even creating regional instruments and institutions for implementing that goal.

There is a fifth category of actors involved in the human rights practice which assumes a seminal role in the implementation of international human rights norms: it consists of the **international non-states actors**. There are the different international activists and INGOs dedicated to the human rights cause. Similarly to the local non-states actors, these international non-states activists come from different vantages, they work in different fields and are motivated by different ideals. Sometimes, those from the Western sphere are reproached of working to advance the same imperialist cause as the country of origin. For instance, with regard to East

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Spread: Whose Norms Matters? Norm Localization and Institutional Change in Asia Regionalism" in *International Organisation*, Vol. 58, No. 2, 2004. For an African case see, Mwiza Jo Nkhata, "The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflection on the Human Rights Mandate of the Tribunal of the Southern African Development Community" in *African Journal of International and Comparative* Law, Vol. 20, No. 1, 2012; Isaac Terwase Sampson, "The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention" in *Journal of Conflict and Security Law*, Vol. 16, No. 3, 2011.

[101] The Kosovo case comes to mind, but other cases such Haiti, East Timor, Sierra Leone, Burkina-Faso, etc. also fall into the same category, although they are disputed as intervention for protecting human rights. See my chapter two.

[102] One thinks of the famous debate on the Asian values. As examples, among others, of such debate see Xiaorong Li, "Asian Values and the Universality of Human Rights" in Martha Meijer,Ed., *Dealing with Human Rights: Asian and Western Views on the Value of Human Rights* (Utrecht: Greber Publisher, 2001); Joane Bauer and Daniel Bell Eds. *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

African NGOs, Mutua remarks that INGOs are more focused on political and liberal rights, such as democracy and good governance, which might not be the priority of the local situation but rather the same agenda of propagating the liberalism. And since local NGOs took inspiration from their Western model, they both serve the same master. In his own words, "the parent international nongovernmental human rights organizations (INGOs), such as AI, HRW, and ICJ, the models that inspired domestic NGOs elsewhere in the world, are firmly rooted in liberal thought and philosophy."[103] In other words, while this view is a little bit reductive, since the domestic civil society is engaged in various works beyond the political rights arena,[104] it alerts us to the obstacles to overcome as we search for a practical conception of human rights based on local practices, because one cannot ignore international non-states actors in today's human rights practice. They constitute what Keck and Sikkink, among others, call the transitional activism.[105]

The last not least actor in this web of actors involved in the human rights practice is the **international community**. Although controversial because it is usually taken to be mostly Western by the neocolonial critics, for the sake of the argument, the international community here means international institutions created by and formed of states beyond the regional organizations. These are important partner in the practices of human rights, and I suspect Beitz was thinking of them as he formulated the second level of his model, although it can also include the regional organizations. The importance of their role come from the fact they are, actually, the authors of the international human rights law and, in that sense, should assume their responsibility in its implementation. However, being composed of states, these institutions end

[103] Mutua, "Human Rights NGOs in East Africa: Defining the Challenges" in Makua Mutua (Ed.), *Human Rights NGOs in East Africa: Political and Normative Tension* (Philadelphia: University of Pennsylvania Press, 2009), 20-1.
[104] For activism in economic and social rights in Africa, see Lucie White and Jeremy Perelman (Ed.), *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford: Stanford University Press, 2011). For a broader perspective, see Katharine Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012).
[105] Keck and Sikkink, ibid.

up suffering from the same shortcomings that affect their members, constituting a battlefield for political interests. Nonetheless, the institutions specifically designed for human rights—such as the diverse committees or commissions related to different human rights instruments, the UN Council on Human Rights—in spite of being under political pressure from states, have become unavoidable in the present human rights practice.

These are the main categories I identify in the practice of human rights today. Taking them into account and analyzing how they work, challenge the way we understand human rights through their function in the whole process. Hence, the next section focuses on how these actors work to generate the protection of human rights, before looking at the conception such a practice gives rise to.

c). Domestication through Translation

The different actors identified above work to the effectiveness of human rights in diverse capacities. However, while the states put into legal form human rights ideals by signing treaties, and that the latter makes states the first responsible for respecting human rights, as the second model of Beitz shows, it is a credit to individuals or NGOs that those instruments yield its expected result. Hence, not only do activists and NGOs, both local and international, contribute to the drafting and the ratification of these instruments, but they also play the core role in their implementation. Without their work, it is my conviction that human rights would not be protected since states are often suspected for violating them and act under pressure. Therefore, the local advocacy cannot be avoided. This is especially true in places in dire need of human rights. As An-Na'im observes, "human rights are protected in developing countries by local NGOs, with the active support of their local constituencies, and through activities to their own

governments and public opinion."[106] But this is not particular to the developing countries. For instance, studies show how minority migrants used human rights discourse to challenge Japanese culture and resist the discrimination they were subjected to. Focusing on Koreans living in Japan, Kiyoteru Tsutsui and Hwa Ji Shin observe that human rights gave them a common ground as they claimed their rights against the Japanese government. In their words, "resident Koreans used international political forums to pressure the Japanese government and leveraged the provisions of the human rights in domestic debates, thus successfully changing the government's approach from treating Koreans as noncitizens undeserving of rights to providing them with universal human rights that anybody living in Japan deserves."[107] This is what leads Amy Gurowitz to remark that international norms such as human rights norms create an impact only when they are made significant in a local context. As she states, "international norm can matters only when they are used domestically and when they work their way into the political process."[108] These examples corroborate the primordial role played by local non-states actors for

[106] An-Na'im, "Human Rights in the Arab World: A Regional Perspective" in *Human Rights Quarterly*, Vol. 23, No. 3, 2001, 702. In another essay focusing on Islam, he writes that "it is primarily the task of internal actors, supported by external allies, to promote and sustain the necessary degree of official commitment and popular support for changing Shari'a laws." See his "State Responsibility under International Human Rights Law to Change Religious and Customary Law" in Rebecca Cook (Ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994), 184. See also his "The Cultural Mediation of Human Rights: The Al-Arqam case in Malaysia" in Bauer and Bell (Eds.), ibid.

[107]Tsutsui Kiyoteru and Hwa Ji Shin, "Global Norms, Local Activism and Social Movement Outcomes: Global Human Rights and Resident Koreans in Japan" in *Social Problems*, Vol. 35, No. 3, 2008, p. 397. From another perspective than human rights about impacts of international norms in Japan, see Andrew Cortell and James Davis, "When Norms Clash: International Norms, Domestic Practices, and Japan Internationalization of the GATT/WTO" in *Review of International Studies*, Vol. 31, No. 1, 2005.

[108] Amy Gurowitz, "Mobilizing International Norms: Domestics Actors, Immigrants, and the Japanese State" in *World Politics*, Vol. 51, No. 3, 1999, 416. Many scholars emphasis this role of local-non states actors. Among other see Kim Dae Jung, "'Is Culture Destiny?' The Myth of Asia's Anti-Democratic Values: A Response to Lee Kuan Yew;" Willem van Genugtern, "Human Rights are not for Sale: On Universality and Conditionality"; Martha Meijer, "The Human Dimension: Human Rights Impact Assessment as an Instrument" all in Martha Meijer, Ed.*Dealing with Human Rights: Asian and Western Views on the Value of Human Rights* (Utrecht: Greber Publisher, 2001). See also, Anja Mihr and Hans Peter Schmitz, "Human Rights Education (HRE) and Transnational Activism" in *Human Rights Quarterly*, Vol. 29, No. 4, 2007. And on the impact of international norms to local contexts, see Cortell and Davis, "How do International Institutions Matter? The Domestic Impact of International Rules and Norms" in *International Studies Quarterly*, Vol. 40, No 4, 1996; Finnemore, "Review: Norms, Culture and World Politics: Insights from Sociology's Institutionalism" in *International Organisation*, Vol.50, No. 2, 1996;

making human rights instruments, not only available to the local communities or individuals, but also to make sure that they are effectively implemented. The question remains however as to how they work.

As a general view, the first stage of non-states actors is to produce international norms, by generating ideas, helping in the drafting and lobbying for their adoption so that they acquire international recognition, moral or/and legal. That is why, some scholars remark that "many international norms, such as those pertaining to human rights, have their origins in national discourse,"[109] because they grow from local experiences and the desire to propagate them by believing that they might help in similar circumstances elsewhere.[110] Once these texts are adopted, these non-states actors move to the second stage which is their implementation. They bring them home, translate them both literally and metaphorically to make them understandable relative to the local situations. They translate them literally because most of these texts are produced in foreign languages to so many diverse contexts in which they have to be applied. Hence, these people of the middle—as Merry calls them—[111] looks for images and other cultural vehicles of meanings to translate the ideas of these international norms. They "are intermediaries who translate global ideas into local situations and retranslate local ideas into global frameworks."[112] This first moment of the process is usually called "vernacularization"; that is, the movement of making available in the local language these international norms, without which, the latter would remain foreign to the local situations. At the same time, this translation is metaphorical because it is about translating these ideas in meaningful terms presented to these

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Tom Zwart, "Using Local Culture to Further the Implementation of Human Rights: The Receptor Approach" in *Human Rights Quarterly*, Vol. 34, No. 2, 2012.

[109] Andrew Cortell and James Davis, "Understanding the Domestic Impact of International Norms: A Research Agenda" in *International Studies Review*, Vol. 2, No. 1, 2000, 73. See also Finnemore and Sikkink, ibid., 893.

[110] The convention against genocide is an example of a project of one man—Raphael Lemkin—who coined the term and convinced governments to adopt an international instrument that proscribes it. See Korey, chap. 9.

[111] See her "Transnational Human Rights", ibid.

[112] Merry, *Human Rights and Gender Violence*, ibid., 134.

local cultures. That is why, the vernacularization process is also a transformative experience for these international norms. As Daniel Goldstein observes, "vernacularization…describes a process of reception and transformation, a dialectic in which transnational conceptions are made meaningful within—rejected on the basis of local realities."[113] That is why, as I show below, human rights acquire new meanings through this translation and assumes a role that the focus on states would miss.

On the other hand, these intermediaries translate local concerns into an international framework, especially when they have to ask for support from international actors—both states and non-states. As their concern is the effectiveness of human rights in these particular situations, the local non-states actors translate domestic cases into the language of human rights, and adopt strategies to remedy these cases. Thus, one item of their work is to hold accountable the origin of human rights violations, be it national or international. They are familiar with the venues and the vocabulary to address the issues of human rights. That is why, while the most common interlocutor is the state, they normally go after the violator of human rights as such, and that is the reason why, also, they use different means depending on the nature of cases.[114] When they fail to curb the violation by their own force, these non-states actors contact other actors both national and international. When the case is of a state's violation of human rights, they can work with regional bodies, the international community and transnational activists to lobby in order to put pressure on the individual state. However, even at this level, without the work of the international non-states actors, foreign states would not act, especially against their allies.

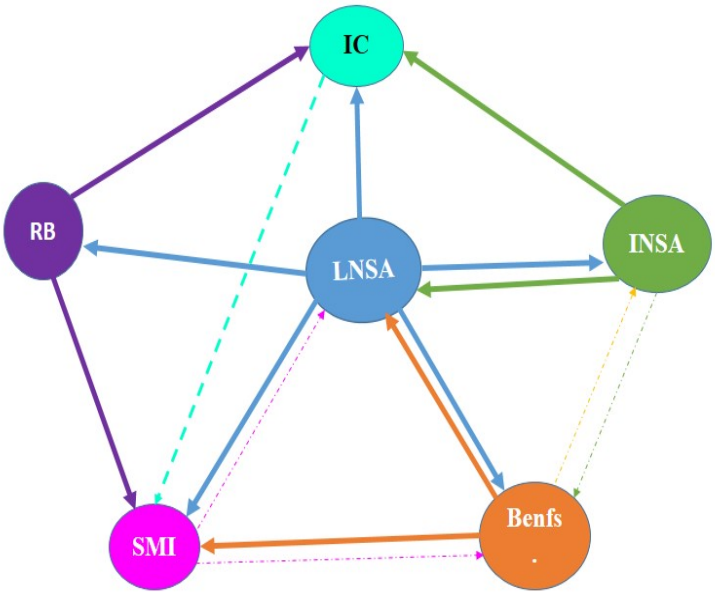
[113] Daniel Goldstein, "Whose Vernacular? Translating Human Rights in Local Contexts" in Mark Goodale (Ed.), *Human Rights at the Crossroad*, ibid., 112. See also Richard Wilson, "Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law" in Goodale and Merry, (Eds.), 357-60; Goodale, "Ethical Theory as Social Practice" in *American Anthropologist*, Vol. 108, No. 1, 2006, 27; Merry, *Human Rights and Gender Violence*, 219-20; her "Transnational Human Rights," 39 and her "Legal Pluralism", 29.

[114] In her study of constituting economic and social rights, Young identifies three venues: interpretation, enforcement and contestation. See her *Constituting Economic and Social Rights*, ibid. See also Perelman and Young, "Freeing Mohamed Zakari" in White and Perelman (Eds.), ibid.

Furthermore, it is only because there are respondents at the local level that even the international pressure yields fruit. In other words, when the violator is the state, it is through the combination of pressure from within and without, with priority for pressure from within, that states finally adhere to human rights norms; it is through pressure from within that they engage in effective protection of human rights.[115] It is in that sense that local practices are the keystone of today's human rights practice and therefore a practical conception of human rights has to attribute to it a prominent place.

Schematically, I present this diagram in which the initials stand for:

IC: International Community; RB: Regional Bodies; SMI: States and Mixed Institutions; Benfs: Beneficiaries; INSA: International Non-States Actors and LNSA: Local Non-states Actors.



[115] For analytical cases of the importance of local activism in connection with transnational network, see Keck and Sikkink, ibid; and Risse, Ropp and Sikkink, (Eds.), ibid.

The plain arrows show a direct relationship between actors. The long broken arrows mean that the impact is not direct or obvious, while the dot-dash arrows show a slight influence. In the middle of the practice process are the local non-states actors who are in contact with all other actors. The relationship is constant between the beneficiaries and the LNSA, through translation and advocacy in order to put pressure on governmental institutions. When this action does not effect a result, they call upon regional bodies, INSA and the international community itself, which can then intervene in a particular case. That is what I call domestication –of human rights in the present case. It is more than the vernacularization, because it implies both the production and the implementation of international human rights norms, and several actors are involved. In that process of producing and implementing human rights norms, the central actor is not the state, although the latter plays a legal role of formally creating the human rights legal norms. The main actors are beneficiaries and the non-states. They are the ones who make human rights effective in their particular contexts, sometimes in collaboration with actors. More specifically, domestication takes seriously the translating work and the advocacy involved in the local practices in order to make human rights effective in/to these particular contexts. Because this process is transformative, it affects the meaning of human rights, their role and their recipient, which in turn, affects their nature and their content. That is the focus of the next section.

d). Toward a Multilayer Conception of Human Rights

Having described the practice and identified the actors involved, it becomes possible to identify the function of human rights norms and from that, to conceptualize them. Looked at from the local practices, human rights represent a means of resistance against oppression or any other threat to basic interests of an individual or group of individuals. As Goodale states, “human rights discourse nurtures a new kind of diversity, and this, in turn, establishes the conditions for

new forms of social resistance to very old forms of inequalities and oppression."[116] One can generalize this resistance power contained in human rights discourse and unleash its unlimited outreach. In that sense, human rights become a resistance to any form of oppression and inequalities, past, present and future. But then the question arises at to what is particular to contemporary human rights, since every culture has always had channels to address such social evils. The response to this question is that, if contemporary human rights are adopted by different cultures despite their own normative systems, it is because they offer a better language to translate their grievances and transform them into a human rights claim that their local context could not afford them previously.[117] That is where the translation work of human rights is fundamental. Through the collective work of beneficiaries and LNSA, a new normative vocabulary is introduced and a human rights consciousness is developed. Human rights are no longer alien to them, but rather appropriated through their local means, and these actors claim them as their proper author. As Gregg asserts, members of the community are regarded "as potential co-constructors" of human rights.[118] This does not mean that human rights espouse the cultural views of the local community. Rather, "human rights ideas are appealing because they provide a radically different frame for thinking about the relations about power and inequality in society."[119]

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[116] Goodale, "The Power of Right(s)", 160. See also Balakrishnan Rajagopal, "Counter-Hegemonic International Law: Rethinking Human Rights and Development as Third World Strategy" in *Third World Quarterly*, Issue 5, 2006, 150; also his "From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions" in *Harvard International Law Journal*, Vol. 41, No. 2, 2000, 150, and especially his *International Law from Below: Development, Social Movement and Third World Resistance* (Cambridge: Cambridge University Press, 2003. See also Upendra Baxi, *The future of Human Rights*, 2nd Ed. (Oxford: Oxford University Press, 2006), 26.

[117] See Benjamin Gregg, "Translating Human Rights into Muslim Vernaculars" in *Comparative Sociology*, Vol. 7, 2008, 470.

[118] Gregg, "Advancing Human Rights in Post-Authoritarian Communities through Education" in *Journal of Human Rights Practice*, Vol. 7, No. 2, 2015, 206.

[119] Merry, *Human Rights and Gender Violence*, 180. The entire chap. 6 is about how localizing human rights creates human rights consciousness.

From that perspective, human rights provide a normative foundation for a discursive critique of the situation in which injustices and inequalities arise, and a basis for a political action to redress them. As Gregg states it rightly, "granting oneself human rights will surely challenge the political and cultural environment to some extend in all cases."[120] These discursive and political roles are not necessarily processed smoothly—as shown by the tension between the state and the LNSA. Indeed, as the human rights struggle targets injustices and inequalities embedded in cultural practices, political institutions and economic interests, a human rights function will oppose those who promote them and those who hold onto their power. By offering a new discourse which challenges these establishments, human rights empower those who assimilate and appropriate them in their local situation; and those who hold on these privileges are forced to reinvent their justification, since old ones are challenged. What Simmons says about treaties can be generalized to the entire human rights practice. She argues that "like other formal institutions, *treaties are causally meaningful to the extent that they empower individuals, groups, or parts of the state with different rights preferences that were not empowered to the same extent in the absence of treaties*."[121] Simmons's point is supported by the conviction that external pressure on a state is unreliable, and therefore, *"the politics of change is likely to occur at the domestic level."*[122] In the same way, human rights discourse empowers all the parts of the local situations in which it intervenes, because it brings new elements that were not present before.

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[120] Gregg, "Individuals as Authors of Human Rights: Not only Addressees" in *Theory and Society*, Vol. 39, No. 6, 2010, p. 638. See also Goodale, "Toward a Critical Anthropology of Human Rights" in *Current Anthropology*, Vol. 47, No. 3, 2006, 495; Norani Othman, "Grounding Human Rights in Non-Western Culture: Shari'a and the Citizenship Rights of Women in a Modern Islamic State" in Bauer and Bell, ibid., 174.

[121] Simmons, ibid.,125. See also James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 19, but for him the empowerment is for individuals; a reason why I prefer Simmons's description of empowerment that goes beyond the individual to include all those that were not empowered before, be they individual, groups or parts of states.

[122] Simmons, ibid., 126. Baxi would say that "the local…remains the crucial site of struggle for the enunciation, implementation, and enjoyment and exercise of human rights." Ibid., 158.

Again, we retrieve here the transformative function of human rights, through which a human rights culture is created at the grassroots level, because as Zehra Arat observes, "the expansion, full recognition, and the protection of rights demands the transformation of cultural norms and their material foundations."[123] I would say that not all cultural norms have to change, but some have to negotiate with this new normative source. At the same time, through translation which is always an exercise of interpretation, human rights norms are also scrutinized and recognized—or rejected, not necessarily as universally invalid, but rather as not significant to this particular situation. They acquire new meanings as they are interpreted and integrated in these new contexts following the function they assume. In their case about a Ghanaian man liberated because of human rights activism, Perelman and Young note that, three years later, a participant remembered that event, less as a legal victory than a creation on meaning. They write, "for her, the case was a moment of meaning-creation that was grounded in community norms."[124] This moment of "meaning-creation" takes place because human rights have been made meaningful to these particular situations through their translation and incorporation and enjoyment. That is how they bring their emancipatory power where it is needed. By offering a new venue to express grievance, the victims are no longer silenced by the institutional structures, but rather the latter are challenged in their legitimacy. The victims are empowered to raise their voice to defend what they deem vital interests, and the other side has to justify its opposing view. Human rights avail these tools to local actors who are no longer "voiceless victims to be rescued by altruist external political actors," and make them "agents with some power selectively to choose tools that will help them achieve their rights goals."[125]

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[123] Zehra Arat, "Women's Rights in Islam: Revisiting Quranic Rights" in Pollis and Schwab (Ed.), *Human Rights: New Perspectives, New Realities*, 71.
[124] Perelman and Young, ibid., 139.
[125] Simmons, ibid., 126.

The conception of human rights from local practices has to capture all these elements involved, the actors and their different levels of actions, and capture this emancipatory nature of human rights. Hence, in a multilayer conception, *human rights are standards empowering individuals or groups of individuals, the latter conceived as social beings and organized in political entities, in order to resist, through different levels of influence, any source of threat endangering their basic interests.*[126] Some consequences follow from this conception. First and foremost, the purpose of human rights is not to serve the foreign policy; rather, human rights' purpose is the emancipation of those who are suffering from an unjust infringement to their basic interests. Their use in international relations is a consequence of this purpose, and is considered as one means—not necessarily the most effective—to influence states' behavior with regard to the implementation of human rights. Hence, human rights empower those whose basic interests are threatened to raise a claim against the violator. That is why, secondly, the main subject of human rights are not states, but rather the individuals or groups of individuals susceptible to these threats, and they are the ones who are in charge of protecting their basic interests by reminding all of those involved, their respective responsibility for the promotion and protection of these human rights.[127] This, of course, raises the question of those incapacitated from claiming their rights—either because of age, such as infants, or because of natural disabilities or diseases. To answer this question, it is important to recall that international human rights developed because of different actors moved by different ideals, coming from different backgrounds but sharing the same goal: to make human rights effective in particular situations. Furthermore, it

[126] This conception of human rights responds to some of the bad effects of human rights movements that David Kennedy inventories, although others remain as checkpoint to the human rights practice as whole. See his *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004), chap. 1.

[127] This seems to join Griffin's definition of human rights as protecting normative agency, ibid., 2. They differ, though, because the multilayer conception accepts a pluralist justification, and human rights are not derived from one single theory. It is rather practical in that it deduces human rights' meaning from their function in the local practices.

works through collaboration of many actors playing at different stages. These two elements show that not only does this conception not reduce human rights to individuals, but it also implies a proxy responsibility, as it is built on advocacy. The LNSA are already doing this in their task of translating human rights and making connections with international actors. Thus, in the same way, those at the local level who care about the basic of the incapacitated individual are empowered by human rights discourse to resist any threat to his or her basic interests. This leads to a third consequence: the multilayer concept is all but individualistic; and that is why individuals as well as individuals as group can be empowered by these standards.

Fourthly, basic interests protected by human rights will vary according to situations to which they apply, depending on their urgency. As Beitz observes, "to recognize an interest as urgent, we must be able to understand why it would be reasonable to regard its satisfaction as important within some range of normal lives but we need not believe that all persons value the interests or care about its satisfaction in their own case."[128] In other words, in one context there might be a need of political resistance, while in another there is an economic one, without annihilating each other's validity. That one context focuses on a certain set of human rights at a particular time, pertaining to a particular historical context and social circumstances, does not mean that they do not or should not value others. It actually is the contrary. The multilayer conception satisfies the promotion and protection of human rights only if all the actors involved believe in the normativity of the entire human rights corpus, although its application depends on the urgency of the threat against basic interests of individuals or groups.

Fifthly, the source of threats to basic interests against which human rights empower the victims are not caused by states only, nor are they necessarily under a state's control.[129] It can be

[128] Beitz, *The Idea*, 110.
[129] See Andrew Clapham, *Human Rights Obligations of Non-States Actors* (Oxford: Oxford University Press, 2006).

cultural practices, political institutions as well as non-state agents. They can also be from within as they could also be from without. Finally, this multilevel model adopts three levels of influence, each one with a complex combination of actors and strategies that lead to the effectiveness of human rights at the particular situations that appeal to them. The first level is the national one. It comprises the beneficiaries, the LNSA and the governmental and mixed institutions. These are the main actors involved in the promotion and protection of human rights. They can work together when the threat is not from one of them; or two against the one constituting the threat. If this level fails to yield the expected result, then those engaged in human rights resistance raise the case to the regional level, seeking more human rights power to help diffuse or stop the threat. This level is composed of Regional bodies, LNSA belonging to the country members and INSA who operate at that regional level. If the regional level does not provide the necessary influence, then the case moves to the international level, which is constituted of International organizations, INSA and LNSA belonging to some state members who might have a major role to play. Their action can be directed immediately to the cause of the threat, or through the intermediary of regional bodies. At every level, however, the beneficiaries have to be taken into consideration, not as helpless victims, but rather in order to form a stronger resistance with them against the identified threat. The aim should not be to protect human rights *for*, but rather *with,* them, and they should take the first initiative. Borrowing from Rawls's vocabulary, these levels work following a lexical order; that is, the resistance through human rights should start from the national level, before passing to regional and then international levels.

In any case, the analysis of today's human rights practice shows that a genuine human rights struggle never succeeds and has a lasting impact without an effective involvement of those

primarily affected by it. The multilayer conception has only drawn from this fact a new practical conception of human rights. This does not, far from it, represent a last word on the nature and content of human rights. Nor does it resolve all disagreements about the subject, and it was not its ambition—moreover, I agreed at the outset with Beitz that human rights practice is an emerging one and therefore still evolving. Rather, the reason to look for another conception was to find a philosophical account of human rights that could respond satisfactorily to the theoretical and practical challenges posed by considering human rights as an imperialist ideology and its practice through humanitarian intervention as a neocolonialism. At the same time, it has to ensure that human rights are not used imperialistically. Now that we have this multilayer conception of human rights, it is time to see whether it fares better than other philosophical accounts as encountered in chapters three and four.

5.3. The Multilayer Conception and Human Rights as an Imperialist Ideology

The first chapter of this dissertation elaborated on this theoretical challenge launched by those criticizing human rights as an imperialist ideology. The argument showed that, in the past, the civilizing mission justified the expansion of the Western World over the rest of the world under the disguise of bringing progress to uncivilized cultures. Yet it concealed the fact that, through domination and exploitation, the West used colonialism to attend to its internal problems—political, economic and demographic. The same is being done, the critics argue, with human rights used to perpetuate liberal culture over the rest of world. That critique was epitomized by Mutua's SVS metaphor, which leads to undermining human rights normativity, since, if it is an imperialist ideology serving an imperialist domination, it is a lie and liar, and its purpose is evil. Can the multilayer conception address this fundamental critique than those so far examined?

a). Advantages of the New Conception

Before one endeavors to discuss these arguments, methodologically, there are some important points that the multilayer conception brings onto the scene. Firstly, because it focuses on the local actors, this new practical conception of human rights shifts the discussion about the justification of human rights. Indeed, the critique of human rights as imperialist ideology is directed toward the Western powers, arguing that they are using them to foster their influence over the rest of the world. For instance, Mutua observes that "increasingly, the human rights movement has come to openly be identified with the United States, whose chief executive now invokes human rights virtually every time he addresses a non-European nation."[130] The practical conception of human rights based on local practices shows that this is not the real purpose of human rights enterprise; because they are meant for local victims who find in them an empowering normative source to resist any source of oppression. Hence, the discursivity is shifted from contention between West and non-West, to those in the local context who reject human rights, usually the elite benefiting from political system or cultural legitimacy, and the LNSA and beneficiaries who found in the human rights discourse a new source for resisting inequalities and injustices. Indeed, since "local leaders in many parts of the world resist the human rights claim of subordinated groups by asserting that this claim is an alien, Western import not suited to local normative systems,"[131] they will have to justify these local normative claims that are being challenged by those local actors who appropriated human rights discourse to unearth the inequalities and injustices sustained by these local normative systems. In other words, the challenge to human rights becomes irrelevant because the discussion will turn to the legitimacy of these systems that caused the calling for human rights norms in the first place. If the alleged injustices are not present, then the invocation of human rights will be nullified; but if

[130] Mutua, *Human Rights*, 6.
[131] Merry, "Transnational Human Rights," p. 38.

human rights discourse offers a language that better translates an existent situation, those challenging it will have to engage in a reason-giving process with those who claim the contrary. Sure enough, the multilayer conception does not ensure the outcome of the justification, but the shift of the debate itself is already a positive indication that this new conception suggests another way of approaching this theoretical challenge.

Secondly and relative to the first one, the critique of human rights as an imperialist ideology claims that like the civilizing mission, human rights also repose on the civilized-uncivilized binary, whereby the civilized are the Western nations, while the rest represent the uncivilized. This is sustained by the belief in racial superiority with the "ontological duty" to bring help to inferior races.[132] The multilayer conception deconstructs this basis because, in its presuppositions, the practice does not suppose external messengers coming to rescue endangered species lost in an uncivilized world. Once more, if the local situation does not include cases of oppression and injustices to be resisted, then human rights discourse will not be invoked. But if these situations exist, the debate and the political action will not oppose external civilizers against backward uncivilized, but rather those involved in the same situation, using the same vocabulary and symbols to describe and judge the same situation, although they might disagree in their respective description and judgment. That is why I emphasize that the three levels need all the time to take into account the local actors, especially the beneficiaries and LNSA. Once more, this seems to be a breakthrough on the path to addressing this theoretical challenge.

Thirdly and as a consequence of what precedes, this new conception releases the tension between the Western and the non-Western, because the practice of human rights based on local practices is not adopted only for the non-Western world. It concerns all situations of injustices of oppression, injustice and inequalities against which human rights empower local actors with a

[132] See chap. 1, the Jules Ferry's political metaphysics.

new means, which were not available before, to resist these evils wherever they might be, be it in the Western or non-Western world. The accent is put on the empowerment of local actors for their self-emancipation. As Jack Mahoney would says, "all human cultures without exception are subject to constant scrutiny, evaluation and challenge by a doctrine of human rights, and none is ethically sacrosanct or immune from such critique."[133] It is this critical power of human rights that delivers them from being constrained into one or another culture.

Fourthly, the main actors in the practice of human rights as imperialist ideology are Western powers, international institutions and the INGOs.[134] These are the "saviors" to use Mutua's words. The multilayer conception integrates these actors in a larger web of interactions, and their actions are not to count more than that of local actors. It suffices to recall that the different levels involved in the practice work in a lexical order, in the Rawlsian sense. Hence, because the main part has to be played by the beneficiaries in protecting human rights, the priority shifts and therefore Western powers, INGOs and international institutions, can no longer be considered as the sole actors. If they intervene, it is in response to a local call for increasing the resistance, *together with*, and not in *replacement of*, local actors.

This new conception also presents a fifth advantage that it does not require a specific form of political institutions, nor does it rely on one source of justification. Local actors are the ones determining the kind of institutions that they deem befitting them for a political order that respects and protects their basic interests. Moreover, because it accommodates plural sources of justification, and human rights are appropriated through translation, human rights are not adopted because they are or are not liberal. Rather, they are adopted because of their function in the present context, while their justification is left open.

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[133] Jack Mahoney, *The Challenge of Human Rights: Origin, Development and Significance* (Malden: Blackwell Publishing, 2007), 110-1.
[134] Mutua, *Human Rights*, 35-36.

A sixth methodological advantage is the fact that the practical view of human rights based on local practices does not conceive human rights from the polemical vantage of universality-relativism—although I shall touch on this question of universality later. It assumes, from the beginning, the historical facticity of human rights: they are Western in many ways; but that is not an impediment for them to be applied to other cultural contexts, as the local practices attest, as long as they are not imposed, but rather freely chosen. Like many concepts or items that have origin in one place but are appreciated in settings different from their origin because of their function, human rights also are adopted in different contexts because of their empowering and emancipatory role. For instance, as Arvind Sharma remarks, "international numerals… are really an adaption of Arabic numerals by the West, and the Arabs took them over from India…. To the extent that these numerals might be considered universal, their Indian origin is an interesting fact but has little to do with their present function."[135] The same can be said for human rights; their function takes a full attention, notwithstanding their Western origin. Once this historicity is accepted and one focuses on its function, the question of the origin of human rights loses its importance for their nature and content. Finally, the political and cultural critique of human rights as an imperialist ideology focuses only on the role played by states and the institutions created by states as well as INGOs, at the expense of the local actors, who are the touchstone of the multilayer conception. As such, it misses an important element in the understanding of the function, and therefore the meaning of human rights, which might challenge the claim itself that the whole human rights movement is simply another imperialist ideology.

Some objections can already be raised based on this very fundamental element of the multilayer conception of human rights, the local actors, especially the LNSA. One of them is that the LNSA depends on financial support that can jeopardize their independence in the promotion

[135] Sharma, ibid., p. 21.

and protection of human rights. In a specific context such as the East African region, Mutua claims that most of the local NGOs followed the agenda of the Western NGOs which support them both morally and financially. The consequence, he believes, is that they end up being local channels of these INGOs, instead of focusing on problems that are relevant to the local situation.[136] In his own words, "most of human rights groups in East Africa have rather blindly copied the model of AI and HRW with respect to the question of their mandates, although the majority of East Africans live a meager existence defined by the most blatant, brutal, and unimaginable denials of the most basic economic social, and cultural rights."[137] The point here is that NGOs in East Africa focus on political and civil rights, instead of focusing on economic, social and cultural rights. Merry also raises the same worry about the status of these intermediaries and the danger threating them of succumbing to the power they get from their translating work. "Their ultimate loyalties are ambiguous and they may be double agents."[138] Moreover, their role of translation "is influenced by who is funding them; their ethnic, gender, or other social commitments; and institutional framework that create opportunities for wealth and power. They may have greater interest in the source than the target of the transaction and vice versa."[139] The tension may even be heightened when they depend on the same source of financial support as their respective states, as it is the case in the Third World. In that situation, they can be accused of threatening national interests—and therefore be presented as the "enemy of the Nation", especially when they use those resources to denounce the state's human rights violations; or they can be considered betrayal of the tradition and the "local ilk"[140] of Western

[136] Mutua, "Human Rights NGOs in East Africa", 31.
[137] Ibid., 23.
[138] Merry, "Transnational Human Rights," 40.
[139] Ibid.
[140] Mutua, *Human Rights*, 8.

imperialists. All these points seem to undermine their moral integrity, and therefore the integrity of the human rights conception drawn from local practices.

While the demonizing of LNSA is part of their daily life, and therefore does not really affect their moral integrity as it is part of political strategies of the governmental officials to discredit them, the possible danger of succumbing to power and abusing the trust invested in LNSA is an empirical claim which cannot validate the whole practice. Only if it were shown that all LNSA systematically fall into the trap, the moral integrity of the practice would be undermined. As to the financial dependency that limits the ability of some LNSA to focus on the most urgent needs commended by the situation, it has already been underscored with Beitz that a practical conception does not resolve all disagreements, but rather offers a new framework to clarify them. In that sense, the problem of the disagreement is about which rights should have priority, and that is left to the free choice of a particular LNSA. Moreover, in the multilayer conception, LNSA designates a whole web of actors engaged at different fronts, because of different reasons, animated by different ideals, and certainly constrained by financial circumstances, and yet all using human rights to resist every source of inequalities, injustices and oppression, with the purpose of making human rights effective. From what precedes, it follows that these cases do not undermine the normative stance of the practical conception of human rights in a multilayer form. Hence we can proceed with a confrontion with the theoretical critique.

b). Reconsidering the Narrative

According to Mutua, "human right is a grand narrative of an epochal contest that pits savages against victims and saviors."[141] The crux of his characterization of human rights as an imperialist ideology is his Savage-Victim-Savior metaphor, in which, as expressed in this

[141] Mutua, "Terrorism and Human rights", 5.

quotation, savages are contrasted with victims and saviors. Before looking at the metaphor itself, it is worthwhile reconsidering this grand narrative as he describes it and attributes to it a normative value. According to him, the human rights corpus is Eurocentric and it continues the colonial project, assuming superior and inferior positions. This is the first component of this grand narrative. From the multilayer conception, while it admits the Western origin of human rights, it does not follow necessarily that they are a continuation of the colonial project. A recall that this practical conception takes the human rights corpus as it developed after WWII and onward. Analyzing it, it is all but being based on a superiority-inferiority relationship. Moreover, it is inclusive contrary to the colonial discourse that was clearly dividing humanity into categories, assigning one group the tutorial duty to advance the civilization of the others. On the contrary, all the documents of the human rights corpus insist on the inclusion, banning exclusion based on sex, religion, race, political opinion, or any other motives.[142] Not only is the human project inclusive, but it also is egalitarian. It does not confer privilege to any particular group or civilization.[143] Moreover, the corpus aims at ensuring these rights for everyone, and entrusts the duty to everybody to advance such a cause.[144] It would be, therefore, an overstatement to conclude that the human rights corpus as it presents itself is written in the same script as the colonial project which was justified by the civilizing mission, and supported overtly by racial prejudices. The human rights project is not born from the Western jingoism of incarnating the

[142] See for instance ICCPR, art. 2.1., stating: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, *without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*." Emphasis added. This is only one example among many.

[143] Again, among many examples, see UDHR, art. 1, asserting "All human beings are born free and equal in dignity and rights."

[144] The UDHR's Preamble states, "**THE GENERAL ASSEMBLY proclaims THIS UNIVERSAL DECLARATION OF HUMAN RIGHTS** as a common standard of achievement *for all peoples and all nations*, to the end that *every individual and every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance…"

best virtues that have to be exported. It is rather an attempt to deal with the Western's own failure to live up its own values. Once more, it does not share the same civilizing missionary zeal of the colonial project. Hence, taking into account the historicity of the human rights project from the start, instead of quarrelling about their universality, reorients the debate about human rights as an imperialist ideology.

Perhaps Mutua and other critics who contend that human rights perpetuate the colonial project think of the human rights developed during the modern period. On this subject, Baxi's distinction between modern and contemporary paradigms of human rights is helpful. According to him, the modern, that is, the Enlightenment paradigm was mainly liberal and based on exclusion, because only white adult male, possessing reason and will, was the subject of rights. But the contemporary doctrine of human rights, that is, the one ushered in after WWII, is inclusive and emancipatory. In his own words, "in the 'modern' paradigm of rights the logics of *exclusion* are pre-eminent whereas in the 'contemporary' paradigm the logics of *inclusion* are paramount."[145] And indeed, because of these logics of exclusion, "the foremost historical role performed by these was to accomplish the *justification of the unjustifiable*: namely, *colonialism and imperialism*."[146] Furthermore, according to the same author, the modern paradigm kept a whole range of humanity invisible, both socially and politically, while the contemporary doctrine emphasizes the self-determination of all peoples. He also underlines the fact that the modern right doctrine was statist and Eurocentric, while "the processes of formulation of contemporary human rights are increasingly inclusive and often marked by intense negotiation between the practitioners of human rights activism and of human repression."[147] All of these elements lend

[145] Baxi, ibid., 42.
[146] Ibid., 44.
[147] Ibid., 47.

credibility to the thesis that the critique of human rights as continuation of the colonial project fits the "modern" paradigm of rights rather than the contemporary human rights doctrine.

The second component that undergirds the human rights narrative, according to Mutua, is that it does not allow a cross-cultural examination because it promotes Eurocentric ideals under the neutral cloak of a universal language. In his own words, "the subtext of human rights is a grand narrative hidden in the seemingly neutral and universal language of the corpus."[148] The practical conception of human rights based on local practices is not based on the universality of human rights and does not posit on the first hand their neutrality. Indeed, human rights discourse is not neutral, in that it is historically situated, and stands for some values and opposes some practices. As standards empowering victims to resist any threat to their basic interests, human rights discourse takes a position. In that sense, the human rights corpus does not resist cross-cultural examination, because it enters cultures through translation, using local symbols and stories. At the same time, though, culture does not occupy the judge stance, because it is also challenged by the new norms incorporated in its normative system as a new medium for conveying grievances. In that sense, the question of cross-cultural examination does not apply, since the practical conception does not presuppose the universality of human rights for affirming their normativity. Rather, it looks at their function in different local practices and induces their meaning. Thus, this practical conception relates differently to the human rights narrative.

The claim of the impossibility of cross-cultural examination led to the third underlying limitation of the human rights project; that is, its problem of cultural legitimacy. The cultural legitimacy theme has been developed by An-Na'im, which he defines as "the quality or state of being in conformity with recognized principles or accepted rules and standards of a given

[148] Mutua, *Human Rights*, 12-3.

culture."[149] His idea is that human rights would command internal compliance if/when they receive an internal legitimation from the existing normative system of a given culture. That is supposed to occur through a cross-cultural as well as an internal cultural dialogue. The problem of this position is that human rights might lose their critical edge, which is actually why human rights language is adopted. For instance, as Merry observes, "in the area of violence against women, human rights ideas are powerful precisely because they offer a radical break from the view that violence is natural and inevitable in intimate relations between men and women."[150] In other words, when one looks at local practices, human rights are not adopted because they represent a culturally accepted norms. Rather, they get accepted through the contestation of the existing normative system, a contestation that confronts those defending the cultural system and those who, using human rights language, judge it oppressive. In that sense, from a practical conception based on human rights practices at the local level, the problem of cultural legitimation does not apply because human rights are culturally legitimated by being adopted because of their functional importance to those who use them. The same explanation fits into the fourth flaw that, according to Mutua, infects human rights corpus because it is founded on the assumption that raising one cultural normative system as universal over the rest becomes a power issue. Otherwise, why should these norms that are Western be declared universal? Since the multilayer conception does not posit universality of human rights as a *sine qua none* condition for their normativity, it debunks the objection. Once more, from the practical conception, human

[149] An-Na'im, "Problems", 332.

[150] Merry, *Human Rights and Gender Violence*, 180. See also Beitz's critique: *The Idea*, 81-3. As to Adamantis Pollis, she observes that the An-Na'im project is biased because the intercultural dialogue is supposed to take place only in the non-Western. As she states, An-Na'im's "call for dialogue… is somewhat one-sided in that he expects changes to take place primarily in non-Western cultures." That why she calls for an extension of this dialogue so that "the liberal doctrine of human rights should be as subjected to discourse and dialogue, as are non-Western values." See her "A New Universalism" in Pollis and Schwab, (Ed.), ibid., 24. In my view, An-Na'im focuses on the changes in non-Western cultures because, although he acknowledges their Western origin, he posits human rights universality from the beginning. Hence he is looking for a pragmatic strategy to implement them, without redefining their nature and content.

rights are not invoked because they are liberal and from Europe. They are convoked because they translate better what those calling upon them are living. They could have come from another origin, and still be adopted. Their origin is, in this sense, purely contingent on the reason why they are used in these local contexts. It is only the efficacy of their language that gives them credence.

Finally, there is the racial underpinning that permeates the human rights practice. As Mutua puts it, "in the human rights narrative, savages and victims are generally nonwhite and non-Western, while saviors are white." Its ideological role allows the transformation of the racial relationship into an imperialist narrative and a psychological soteriology "in which whites who are privileged globally as a people—who have historically visited untold suffering and savage atrocities against nonwhites—redeem themselves by 'defending' and 'civilizing' 'lower,' 'unfortunate,' and 'inferior' peoples."[151] From the multilayer conception, those engaged in the human rights contestation are from the same cultural background and therefore there cannot be racial prejudice because the contestation takes place at the local level. If a local situation opposes whites against non-whites, it is only particular to that one context, and not generalizable as a pattern of the whole human rights practice, since in other instances, it opposes whites and non-whites among themselves. To repeat Mahoney's observation, human rights discourse challenges all cultures. Once again, if one conceives human rights from local practices, it becomes difficult to read a racial subtext that might be surreptitiously undergirding the whole human rights practice.

However, while this narrative seems to not hold when confronted by the multilayer conception of human rights, its empirical basis might be a fact; namely, the continuation of the imperial project under the United States of America's banner, which has replaced the former

[151] Mutua, *Human Rights*, 14.

European empires, France and the United Kingdom. "The domination of the globe exercised by European powers for the last several centuries has been assumed by the United States."[152] In that domination enterprise, human rights displays its ideological role of legitimation and concealing. It legitimates the American discourse and at the same time hides its proper motivations. That is why, "increasingly, the human rights movement has come to openly be identified with the United States, whose chief executive now invokes human rights virtually every time he addresses a non-European nation."[153] This is the heart of the issue.

To respond to it, one is to observe that, first, normatively and empirically speaking, from the practical conception of human rights, the United States is not the leading actor in human practice. US is only one among many actors. Therefore, their attitude toward human rights should not impart the normativity of the human practice as a whole, as it is not a pattern of all actors involved in the practice as such. Secondly, however, pragmatically, being the primary military and economic power in today's world politics, its use of human rights gets more attention, but this does neither affect the normativity of human rights conception, nor its content and its purpose. Moreover, for being standards that empower those whose basic interests are threatened, human rights discourse also offers a tool to resist the United States' ideological manipulation of human rights. That is why, as Rajagopal notes, although human rights language can be hegemonicly used, it also has the counter-hegemonic side that allows it to resist hegemony. "Social movements of indigenous peoples and other relied on human rights discourse to challenge repression, displacement, and violation of their rights."[154] For instance, the hegemonic use of human rights discourse did not help the US to win the case against

[152] Ibid., 6.
[153] Ibid.
[154] Rajagopal, "Counter-Hegemonic International Law", 152.

Nicaragua.[155] This is an indication that the abuse of human rights discourse by one of the actors does not empty its emancipatory power; and therefore cannot discredit its nature and its purpose. Thirdly, the key element of the multilayer conception of human rights is the LNSA and it is essentially a non-statist model. It follows, therefore, that human rights practice in the US should not be limited to the actions carried out by a US government official, but also and especially the role of LNSA inside the US. If it were demonstrated—what is unlikely!—that all, or at least the majority of US LNSA support the imperialistic use of human rights, then the claim would be well founded. Nonetheless—and this is the fifth point—even if it were to be proven that US foreign policy promotes human rights, this would not affect the normativity of a conception of human rights based on local practices. Indeed, although it does not conceive human rights as imperatives for foreign policy—to use Kelly's words—it does not/should not determine the content of the foreign policy of states. Therefore, these, or some of these states, can adopt human rights as one of their interests, and therefore put human rights among the requirements of their international cooperation,[156] while others might be pushing for economic development, military might or diplomatic influence. However, the multilayer conception of human rights does not conceive human rights doctrine as first for foreign policy, but foreign policy can be useful for its purpose. In the case of a hegemonic use, human rights discourse turns its resisting power against this new threat.

Thus, even from this perspective, the practical conception from local practices seems to suggest another narrative of the human rights project; and if this holds, then it provides a basis for looking at the metaphor itself.

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[155] *Nicaragua v. United States*, in Lori F. Damrosch et al., *International Law: Cases and Materials*, Firth Edition (St. Paul: West, 2009), 95-96.

[156] This is the case with Rawls's Law of Peoples.

c). Deconstructing the Metaphor

As I have already alluded to it, Mutua's critique uses the savages-victims-saviors metaphor, whose terms are metaphors on their own. Hence, the first metaphor is the savages. Now, from a statist model, the state is the key player in the human rights enterprise as it is in charge of respecting, protecting and fulfilling human rights. At the same time, as it has been repeatedly shown, a state can be the dreadful violator of these rights which are under its responsibility. Hence for Mutua, the savage in the human rights corpus is a state that threatens human rights. In his own terms, "underlying the development of human rights is the belief that the state is a predator that must be contained. Otherwise it will devour and imperil human freedom. From this conventional international human rights law perspective, the state is the classic savage."[157] In other words, the savage metaphor aims at the state in the enterprise of human rights. However, Mutua seems to think that, actually, the ferity element expressed against a state is just a pretext to attack the culture that sustains the state. "The state should be unmasked as being a mere proxy for the real savage. That leaves the historically accumulated wisdom, the culture of a society as the only other plausible place to locate the savage."[158] In other words, through the state, the human rights discourse targets the culture as the real savage.

The deconstruction of this metaphor is threefold, as I move to a response from the multilayer conception. First, there seems to be inconsistency in Mutua's argument. On the one hand, he rightly shows that human rights are Western because they were codified before most of the non-Western states existed. That being the case, then the state as the classical savage targeted by the human rights corpus is not a non-Western state, but rather a Western, and this is correct, because human rights originated from the horror of WWII which took place in the Western world. On the other hand, though, he seems to claim that human rights discourse targets non-

[157] Mutua, *Human Rights*, 22.
[158] Ibid.

Western states, which were not yet existent at the moment of the codification of these instruments. In other words, if there is a state targeted by the human rights instruments it is the Western state and not the non-Western. Secondly, he claims that state as such is construction which expresses a culture, and therefore targeting it is to aim at the culture as the real savage. The argument goes in the same way as the precedent: by the time the human rights project is launched, the background culture behind the state that is targeted is the Western culture. Therefore, the critique of culture linked to human rights would be the Western culture and not the non-Western one. Thirdly, even the states that resulted from the decolonization followed the Western model, to the point that most of the postcolonial states are not an embodiment of their cultures. Mutua himself recognizes that non-Western states should not be given credibility since "many, if not the majority, do not even speak for their peoples or cultures."[159] Once again, if human rights is targeting a state and the culture behind the contemporary state, it is the Western state and culture.

This should suffice to show that the metaphor does not convey the claim that the human rights doctrine is a continuation of imperialist ideology, because the latter located the savage outside the Western world, while if what precedes is valid, the savagery is inside the Western culture. But to add to this a perspective from the practical conception of human rights based on local practices, it has been noted several times that the human rights purpose does not target a particular source of threat, but rather they empower victims to resist any source of threat to their basic interests. It is not against Western or non-Western culture, but against any threat wherever it might come from. The threat can be a states or non-states agent, and human rights empower those threatened in order to resist.

[159] Ibid., 34.

Although these arguments seem convincing at the theoretical level, Mutua presents examples that might be more compelling. The first one is the campaign against some cultural practices using CEDAW by some INGOs, such as female circumcision (usually labelled as Female Genital Mutilation—FGM—in human rights activism) and dowry as focusing on non-Western cultures to stigmatize them. He writes, "images of practices such as 'female genital mutilation,' dowry burnings, and honor killings have come to frame the discourse, and in that vein stigmatize non-Western cultures."[160] The second example is the insistence on liberal democracy as the model of political institutions to be emulated by all non-Western cultures, even conditioning the financial aid. "When it rejects non-Western political culture as undemocratic, the human rights corpus raises the specter of political savagery."[161] When the Western states and INGOs push for these issues using human rights, Mutua believes that it is a clear sign that the human rights project has "picked up where European colonial missionaries left off. Savagery in this circumstance acquires a race—the black, the dark, or non-Western race."[162]

These examples present a strong case and are able to resurrect the racial side of human rights that had appeared to be satisfactorily dealt with. However, as strong cases as they might look like at the first glance, the practical conception of human rights based on local practices takes another direction on these issues. Concerning the case of CEDAW, the credibility of the CEDAW cannot be questioned on the basis that it is was a Western enterprise only. Without going through its drafting process, it was adopted in 1979 by the UN General Assembly whose majority, by that period, was composed of non-Western states. As Antonio Cassese observes, the periods "around the middle 1970s, sees the prevalence of the Third World and their launching of a new doctrine of human rights that eventually gains the upper hand and aims at supplanting the

[160] Ibid., 24.
[161] Ibid.
[162] Ibid., 26.

views previously upheld by the General Assembly." [163] That is why the Third World preferred the General Assembly rather than forum the Security Council that was/is still dominated by the Western powers.[164] Once the normativity of this convention is removed, then it is clear that the issue is about its use by a certain category of actors.

Now, from the multilayer conception of human rights, the use of such an international convention belongs to LNSA who engage in a reason-giving exchange with their supporters about those practices. From this perspective, the racial stain of the practice loses its justification. On the other part, however, the practical conception sides with Mutua if it becomes clear that the INGOs are bringing in issues that have not been translated into the local context in order to create the consciousness of the dark side of the practice. If a particular community has a cultural practice that the beneficiaries and the LNSA do not judge to be a threat to their basic interest, it should not be a concern of international human rights activism. Rather, it can be a starting point of conversation between international activism and the local actors in order to create consciousness about the evil side of the practice. Until then, it has to be left to these local actors. The whole point of the multilayer conception is that the human rights struggle has to be carried out firstly by the beneficiaries, if one is not instituting an unhealthy paternalism. Moreover, without the collaboration of these local actors, there is no possible effectiveness to be expected.[165]

As to the Western critique of non-Western governments as undemocratic and making it a condition for foreign aid, there are two ways to respond to this use of human rights. On the one hand, these examples are empirical and do not exhaust the normativity of human rights practice,

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[163] Antonio Cassese, "The General Assembly: Historical Perspective 1945-1989" in Philip Alston, (Ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992), 29.
[164] See Rajagopal, *International Law*, 73ff.
[165] See Keck and Sikkink, ibid., 68; 117.

especially that they do not document the way human rights are used in other parts of the world. For instance, the European Union imposes the respect for human rights to all its new members, and these are not "black, the dark, or non-Western race." On the other hand, as I have already mentioned, the human rights' main goal is not to play the foreign policy in international relations, but international relations can serve the human rights' purpose. In that sense, a country can decide to put into its foreign policy human rights and democratic governance as part of its interests, as another can busy itself with expanding its economic power or military cooperation. These states' interests do not affect the purpose of human rights and therefore, human rights normativity remains intact. If local beneficiaries do not think that such a model of governance is part of their basic interests, human rights play their role of empowering them to resist it. Since states care more about their interests than advancing certain moral goals, one should not expect to get a financial aid after refusing its conditionality. Once more, this is an empirical example; otherwise in an ideal theory that presupposes equality of states and their economic sufficiency, this case would not occur.

All in all, the first term of the metaphor, which is itself a metaphor, does not support that human rights are an imperialist ideology, if one understands the human rights from local practices. The second term of the SVS metaphor, is the victim. This is also another metaphor. Mutua rightly observes that the victim is central to human rights project. He states, "without the victim there is no savage or savior, and the entire human rights enterprise collapses."[166] The problem is not only that there is the centrality; there is also/especially the way the victim is presented as helpless, poor, powerless and without any capability remaining. The victim is

[166] Mutua, *Human Rights*, 27.

presented "as a helpless innocent who has been abused directly by the state, its agents, or pursuant to an offensive cultural or political practice."[167]

The human rights project understood from local practices does not need the savage to exist. However, Mutua is on target to notice that the human rights doctrine emerges from the WWII which made victims, and the human rights project has a goal to prevent those atrocities to happen again. In a way, that makes the difference between the "modern" and "contemporary" paradigm of rights. According to Baxi, the modern paradigm did not link human rights to the suffering. Rather, hiding suffering was part of the whole modern human rights enterprise, while the contemporary paradigm takes into account these experience of suffering and cruelty seriously, and therefore makes a goal to resist them. In his words, "making human suffering invisible was the hallmark of 'modern' human rights formation. Suffering was made invisible because large masses of colonized peoples were not regarded as sufficiently human or even as potentially human."[168] This is an important observation, because the human is recovered from recognizing his/her suffering. The colonial project did not take it into account suffering, for it was not designed for the victims, since these ones were not even allowed the visibility. In contrast to that, "the post-Holocaust and post-Hiroshima/Nagasaki *angst* registers a normative horror at human violation. The 'contemporary' human rights discursivity is rooted in the illegitimacy of all forms of the politics of cruelty."[169] The contemporary human rights doctrine was born from the attempt to refuse the banality of human suffering.

In that sense, Mutua is right to observe that a human rights project takes seriously the victim, and the practical conception based on local practices subscribes to this understanding. However, it does not present a victim as helpless and human rights are not a saving power

[167] Ibid. See also Merry, "Introduction: Conditions of Vulnerability" in Goodale and Merry, (Ed.), ibid., 198-9.
[168] Baxi, ibid., 48.
[169] Ibid., 49.

brought by an external savior. From the nature and purpose of human rights understood from the multilayer conception's point of view, human rights empower the victims to emancipate themselves from the sources of harm. It might be a state, as it might be a non-state agent as well. Moreover, the state is integrated in a network of actors concerned with making this resistance effective. Thus, by making local actors the keystone of human rights practice, the multilayer conception eschews the presentation of victims in "a degree of neediness and passivity that fails to capture the dimensions of agency available to victims."[170] Rather, it makes victims a subject of human rights, and by that, "a subject of his or her fate, a political actor in his or her own rights, capable of harnessing unusual energies and determination to the pursuit of survival."[171] From this perspective, even the second metaphor does not offer a support that human rights is an imperialist ideology.

If the response developed until now from the multilayer conception to the two first SVS metaphors stands, then its third term, itself another metaphor, should not require a long argument. Indeed, as Mutua acknowledges it, without the victim there is no savior. However, I have conceded that the contemporary paradigm of human rights also takes into account the victim. Hence, although the practical conception from the local practices does not present the victim in a helpless situation, it is still important to look at this third metaphor.

For Mutua, the savior metaphor encompasses the characteristics of missionary zeal and Eurocentricism, through which the Eurocentric values and norms are propagated by zealous saviors in the non-Western world. These missionaries are the United Nations, the Western states and Western Institutions, as well as INGOs. The savior metaphor constitutes the summit of the ideological side of the human rights project, for these saviors pretend to save the victims using

[170] Merry, "Introduction," 202-3.
[171] Mégret, ibid., 585.

human rights while they are spreading Western norms under the guise of universality. And "inherent to any universalizing creed is an unyielding faith in the superiority of at least the belief of the proselytizer over those potential converts, if not over the person of the convert."[172] In other words, the savior metaphor resides in the universalization of Western norms by the zealous United Nations, Western Powers and International Institutions which are pro-Western.

It is true that the United Nations reaffirmed its faith in the fundamental human rights[173] and enshrined in its purpose equal rights and self-determination of all peoples.[174] It might also be true that Western countries and international institutions insist on human rights in their foreign policy,[175] and INGOs might be advocating a certain category of rights than others. However, from the multilayer conception of human rights, they are not the initiators or the cornerstones of the human rights practice. The victims as beneficiaries of human rights effectiveness are the ones who use human rights instruments to resist. That is the first point to be mentioned. Secondly, these norms are not posited as universal, and are not adopted because of that. Rather, it is because of their function in the resistance against any threat to basic interests that they are incorporated into different cultural normative systems. Thirdly, these three agents are integrated into a web of actors and they contribute according to the call received from local actors who are not seen as helpless, but rather resisters. Fourthly, the practice conceptualized through the multilayer model operates on the lexical order, that is, the international community intervenes only when the subaltern levels call upon them. In that sense, they cannot be saviors because the victims are not in need of their saving power—that they actually do not have! At the best, they are cooperative to a larger practice involving many actors, some more effective than others

[172] Mutua, *Human Rights*, 32.
[173] See *UN Charter*, Preamble
[174] *UN Charter*, Article 1.2.
[175] Rajagopal, *International Law from Below*, chap. 5-6.

depending on cases and contexts. They cannot universalize any cultural norms, because they are not the primary actors in the practice, and the local actors who resort to human rights to express their grievance do not do so because they want to universalize them. Some did not even know or care about until their situation required it. Hence, they are less preoccupied by human rights universality than their capacity to resist what threatens their basic interests. If this argumentation is convincing, it follows that human rights do not function as an imperialist ideology because they do not act to legitimate a hidden interest of an absent agent. Rather, they offer a new means to those resisting against injustices, oppression and inequalities.

Once the metaphor itself is deconstructed, it remains to be seen what its content becomes. Indeed, for Mutua, the content of the metaphor is that human rights project has the goal of propagating liberal culture by universalizing its norms, because the human rights doctrine is rooted in a liberal culture. As he writes, "the postwar elaboration and codification of human right norms has been the process of the universalization of liberalism and its outgrowth, Western political democracy,"[176] which led to "a holy trinity: liberalism, democracy and human rights."[177] This is to say that human rights are mainly civic and political.

Before answering this claim from the multilayer conception, this is certainly reductive because the doctrine of human rights contains more than just civic and political rights. The UDHR itself contains many generations of rights, but in addition to it, there are economic, social and political rights, child's rights, women's rights, to mention but a few, and these are not particularly civic and political. Furthermore, while human rights historicity as Western is granted, it does not follow that the West is ideologically unified. The proof is the ideological

[176] Mutua, *Human Rights*, 44.
[177] Ibid.

tensions that characterized the debates about the different human rights instruments.[178] Therefore, one cannot qualify the whole human rights corpus as liberal. As to those rights of liberal origin such as civil and political rights, when they are adopted outside a liberal culture, the multilayer conception contends that liberal justification is one among many reasons those who adopt human rights may have. In essence, it admits a pluralist justification. Therefore, if a particular situation adopts liberal civil and political rights, its justification will come from the contestation between those for and those against such rights. Mutua's take on this point is only understandable on the backdrop of his savior metaphor, because then, these rights are being imposed imperialistically. But once one shifts the attention to the local actors who adopt them, it becomes obvious that to challenge their choice will require a reason-giving process, through which the partakers engage in a respectful argumentation. Put otherwise, once the metaphor is deconstructed, its content also becomes debatable.

d). Reopening the Debate and A Response to the Imperialist Crusaders

If the multilayer conception of human rights allows another subtext of human rights narrative and if, from human rights practice from local practices, the metaphor itself does not convey the practice as such, it is a legitimate question to ask whether one can continue to maintain that the human rights corpus is a vehicle of an imperialist ideology. At the same time, the goal of this dissertation is not only to attempt a response to the critique of human rights as an imperialist ideology, but also to ensure that human rights are not justified from their possible imperialistic use. Hence, this section deals with these aspects of the question.

The first argument—to call human rights practice an imperialist ideology—is the fact that it operates like the civilizing mission which covered morally the exploitive and dominative

[178] Concerning UDHR, see for instance Glendon, ibid., Morsink, *Origin*, ibid., and John P. Humphrey, *Human Rights & the United Nations,* ibid.

ambitions of the Western powers over the rest of the world. Following the above discussion however, the two concepts had different origins and different purposes. While both originate in the Western world, the civilizing mission that animated the imperialism and colonialism at the end of the nineteenth and the beginning of the twentieth centuries was motivated by political, economic and demographic problems. As Arendt observes, "imperialism and its idea of unlimited expansion seemed to offer a permanent remedy to a permanent evil."[179] On the other hand, the contemporary human rights doctrine comes from the aftermath of WWII as an attempt to remedy these evils. In this sense, both the purpose and the addressee of the civilizing mission and human rights are different. For the civilizing mission, the purpose was to elevate inferior races and backward civilizations to an upper class of civilization by the superior race, while human rights purpose is to ban these evils first where they happened: the Western world. Human rights are not first conceived for "them" the uncivilized by "us" the civilized. They are an attempt to uproot the thorn of *uncivilization* within every culture, starting with the one that was claimed to bear the beacon of civilization by the civilizing mission.

An objection can be raised here since the contemporary paradigm of human rights is based on inclusion, proclaiming those rights to be for all peoples and every person,[180] and yet it is being argued that they are a response to particular circumstances. Why do they need to be exported to other cultures which did not suffer the same evil? One might respond to this objection by resorting to Kant's observation that "because a (narrower or wider) community widely prevails among the Earth's people, a transgression of rights in *one* place in the world is felt *everywhere.*"[181] However, from the multilayer conception, it would be enough to show that,

[179] Arendt, ibid., 150.
[180] See for instance, UDHR; Morsink, *Inherent Human Rights*, chap. 4.
[181] Kant, *Perpetual Peace*, 119. Martin Luther King Jr. echoes the same idea in his Letter from Birmingham City Jail, saying that "injustice anywhere is a threat to justice everywhere. We are caught in an escapable network of

although the human rights corpus extends beyond its origin's audience, their effectiveness depends on their acceptance and adoption by the local actors. In a way, since it does not rely on a presupposed universality of human rights, the conception of human rights from local practices prevents the exportation of human rights by insisting on the role played by local actors in the human rights practice, independently of its historical and/or ideological origin, because it focuses on the human rights function in different cultural settings. From this perspective, the debate is reopened at local levels where human rights are disputed and challenged, and not between those who are accused of imposing human rights, but rather those who use human rights to resist and those who resist them for their own political agenda.[182]

Human rights practice was also called an imperialist ideology because it promotes the racial assumptions of the White having an ontological duty to civilize the non-White races. This was especially exemplified by the SVS metaphor. Following the discussion of the metaphor and how the multilayer conception emphasizes the local actors, the claim that the human rights corpus is playing an imperialistic role because of its racial biases becomes hard to justify, and when it is invoked, it is confronted to those who adopt human rights as a resistance discourse, which does not have space for racial prejudices, unless the local situation is itself racially structured. But here it cannot be imputed to human rights as such, as human rights can be used to resist racial injustices in these same particular circumstances.

Another difference between human rights and the civilizing mission as an imperialist ideology was the belief in the civilization progress. The civilizing mission was built on the firm

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mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly." In his *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.*, Ed. By James M. Washington (N.Y: Harper One, 1986), 290.

[182] An-Na'im, "Introduction" in An-Na'im, (Ed.), *Cultural Transformation*, 2. In the Asian context with regard to the work of local NGOs, Korey quotes a human rights journal writing, "with Asian speaking out so clearly, [authoritarian governments] will now find that a more difficult defense to adopt." Korey, ibid., 285.

conviction of improving the natives' conditions. For that reason, colonialism—despite its evil side—was justified as a necessary sacrifice to be paid in order to access civilization. And of course, such a conviction was rooted on the hierarchical anthropology, with clear natural duties and attributes distributed naturally to each category. Human rights doctrine does not have those categories; it rather presents itself as a common enterprise to achieve a common goal. In the text, one cannot decipher a justification of a category of humanity as superior to others. Empirically, however, with international institutions and the big Western powers dominating them, critics would be justified to raise their concern when human rights are used by these actors to cover up their own interest and aggrandize their political influence on the rest. Even at this level, however, the multilayer conception reopens the debate by showing that those actors are only one layer of actors involved in human rights practice, and therefore their misuse of human rights cannot invalidate the whole practice as imperialistic. Moreover, human rights practice offers resources to resist those kinds of states' behavior that tarnish human rights practice as such.

The last area of contestation open by the confrontation of human rights as imperialist ideology with the multilayer conception of human rights is the role of international law. During the colonial era, international law offered a legal scheme in order to legally legitimate the imperialist project. It was rooted in the civilizing mission and it sustained its legal existence. In the same way, human rights have been incorporated into an international human rights law which serves Western powers to disseminate their liberal ideology, especially through the international institutions. As Mutua asserts, "even the international law of human rights, arguably the most benign of all the areas of international law, seeks the universalization of Eurocentrism."[183] The

[183] Mutua, "Critical Race Theory", 850. Rajagopal would say that that human rights discourse plays a hegemonic role, although he concedes that it plays a counter-hegemonic role too. See his "Counter-Hegemonic International Law," 153. As to Anghie, he illustrates the ambiguous role of human rights law by the fact it infringes state sovereignty; which allows Western powers to interfere in the Third World States. He says, "Human rights law was

multilayer conception opens up the debate about this claim from different perspectives. First, while positive international law used imperialistically was state-centered and only limited to the Western conception of state, the multilayer conception of international human rights law is decentered from the state and it is open to different forms of political institutions. Secondly, the imperialistic international law did not take into account the consent of non-Western governments, while the international human rights law relies on all states for signing and ratifying these texts, independently of their origin. Thirdly, all states have equal freedom to introduce declarations or reservations, and even withdraw from these human rights treaties; which was not the case with the imperialistic international law. Indeed, the colonialized territories where not recognized by international law, and therefore could not have a say about it. Fourthly and most importantly, non-states actors and beneficiaries participate in the production and practice of international human rights law from their local situations,[184] which was not the case with the imperialist international law. Moreover, it has already been demonstrated that human rights doctrine contains more than just liberal rights. In that sense, it is not obvious whether the fact of adopting a legal form through the international human rights law, human rights corpus is actually continuing the imperialist ideology, although one can be tempted to assert so after looking at the way some international institutions use human rights to advance liberal goals—both economic and political.[185] The multilayer conception acknowledges such a claim but points out that international actors are but one, and not even the first one of those engaged in human rights practice with the goal of making them effective. In addition, human

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controversial, however, precisely because it legalized the intrusion of international law in the internal affairs of a state: it could be used to justify further intervention by the West in the Third World." See his "The Evolution of International Law…," 749.

[184] See Korey, ibid., esp. Chap. 12 ; Rajagopal, *International Law from Below*, chap. 8.

[185] See among other, Ann Orford, ibid.

rights still offer a better means to resist their own abuse, by providing a language to local actors that express these grievances.

From what has been said so far, even in the case of the multilayer conception might not satisfactorily answer all the questions posed by the critique of human rights as an imperialistic ideology, it reopens the debate about the claim, by shifting a critique of human rights from the binary White-non-White, Western-non-Western, to the local contexts in which they are translated and adopted by those who want to challenge the sources of a threat to their basic interests. With the same token, such a practical conception of human rights from local practices unclogs human rights debate from cultural battle in order to make it a challenges to all cultures—to use Mahoney's words. As such, it also opens a window to address those who champion the imperialistic use of human rights.

According to this view, human rights are of a Western origin and are essentially liberal; therefore it is a moral duty for liberal states to make sure they are enforced worldwide. For Donnelly, they set new standards of civilization, as did once the civilizing mission, and share the same model of legitimation. He asserts, "despite the fatal tainting of the language of 'civilization' by abuses carried out under (and by the exponents of) the classic standard of civilization, internationally recognized human rights share a similar legitimating logic."[186] That legitimating logic gives then the yesteryear missionaries of the civilizing mission the same duty to stand for civilization. That is why the "European human rights initiatives have been missionary in the best sense of the term, seeking to spread the benefits of (universal) values enjoyed at home."[187] The salvation vocation of the liberal culture is expressed in its clearest terms and its apostles are identified. Europe gains back its natural duty to enlighten the dark

[186] Jack Donnelly, "Human Rights: A New Standard of Civilization?", 15.
[187] Ibid.

corners of the earth. Those who invented "universal values" and are enjoying them at home cannot sit idly while knowing of parts of the world that do not have the same chance. Hence, "fear and historic guilt, arising from the moral blindness and abuses of missionaries operating under earlier standards of civilization, should not immobilize us in the face of abuses of power by murderous dictators hiding behind the legal norm of sovereignty or a claim to radical cultural difference."[188] Human rights have to be adopted by will or imposed by whip, as was the civilizing mission. With such a tone, human rights imperialism is promoted in the open!

This is a view of human rights that comforts the Third World critics of human rights as an imperialist ideology, because human rights practice follows the same logic of legitimation as the civilizing mission, and the yesterday's missionaries are reminded of their natural duty of proclaiming this new gospel, regardless of international law and in total disrespect of other cultural understandings. The conception of human rights based on local practices rejects this missionary zeal in the human rights practice, because the latter is founded on local actors who take human rights discourse as their own to resist any threat to their basic interests. Moreover, this conception affirms the equal value of all human rights, although all are not practiced at the same time in every context. In this sense, human rights are not just liberal; rather, human rights doctrine includes rights of different ideological origins. In addition and more fundamentally, contemporary human rights do not share the same logic of legitimation as did the civilizing mission. The purpose of human rights is not to oppress and exploit the non-Western world; the human rights project does not exclude non-White people because they are of inferior status; human rights corpus does not entrust Europe as its guardian. If anything, human rights remind the Westerners their responsibility for what befell to the world in the twentieth century, and if they are sensitive to the respect of human rights, it should be less for exporting the fruit of

[188] Ibid.

enjoying them at home rather than the fear of witnessing their history in other parts of the world. The multilayer conception of human rights relies on the local actors to be the champions of the protection of their rights, and that is why there is no place for their imperialistic use. If the Western countries insist on the respect for human in their foreign policy, it is considered as representing just one way of promoting human rights; it is not the only one. Furthermore, those who accept and adopt human rights discourse do it for various reasons, more than just because they are liberal. In Rawls's vocabulary, liberalism is as comprehensive as other sources of justification, be they religious, metaphysical or philosophical. If one adopts the practical conception of human rights based on local practices, there is no possibility of imposing human rights, for such an imposition will be resisted with the human rights discourse itself, as human rights are an empowerment for individuals or groups of individuals politically situated so that they can resist any source of threat to their basic interests.

Once more, even if this practical conception might not respond satisfactorily to all the worries posed by the critique of human rights as imperialist ideology, and the imperialistic use of human rights, I believe it opens up another way of approaching these issues that is more promising for the effectiveness of human rights which, as Beitz rightly observes, "is a matter of its success in improving respect for human rights."[189] The remaining question is whether the same openness is available to the critique of humanitarian intervention as neocolonialism; that is the subject of the following section.

5.4. Multilayer Conception and Humanitarian Intervention as Neocolonialism

Again as my second chapter established, the bone of contention in the humanitarian intervention is limited to the use of force by a singular or a group of states in order to protect human rights without the consent of the targeted state. Thus, humanitarian intervention is

[189] Beitz, *The Idea*, 81.

narrower than the external intervention which can take different forms, such as diplomatic or economic. Furthermore, because it is mostly concerned with military intervention, the main actors involved are states as they have the monopoly of violence. That is why violence challenges the multilayer conception which essentially includes many actors with a main focus on the local actors in the practice of human rights. In other words, humanitarian intervention is state-centered while the conception of human rights from local practices is decentered from the state. Can it suggest another way of approaching humanitarian intervention?

a). Moral Ground

To start with, it is worth recalling that even those who criticize humanitarian intervention agree that there might be situations which call for a moral duty to intervene. For example, Ayoob, although a strong opponent of humanitarian intervention, acknowledges that in face of tragedies and genocide "a moral case can certainly be made regarding the need for humanitarian intervention and the violation of sovereignty that such intervention may necessarily entail."[190] The question, therefore, is not the absence of a moral case for intervention; it is rather that the practice of that intervention in the name of human rights undermines the very moral case that was supposed to legitimate it, especially when one follows the justifications that it is given. Now, the first delegitimating factor of humanitarian intervention is that it relies on powerless victims in need of an external savior, whereby the victim is not a subject of rights but rather an object of pity. Such portrayal of a victim takes away the emancipatory power of human rights. According to Mamdani, such a discourse "seeks to turn victims into so many proxies." [191]

From the multilayer perspective, the critique is already taken care of as discussed in the second metaphor of victim (5.3). Fundamentally conceived as empowering victims to resist any

[190] Ayoob, "Humanitarian Intervention and State Sovereignty," 94.
[191] Mamdani, "The Responsibility to Protect or Right to Punish?" 60.

threat to their basic interests, human rights can no longer be accused of presenting victims as helpless. Victims are rather standing for their rights and that is the purpose of the human rights project. Such a conception is the antipode of views that victims "have no rights to fight for."[192] Not only do they have rights but they are the first responsible to fight for them; others can only come to strengthen their fight, and not fight in place or on behalf of them. The question, however, remains concerning how a humanitarian intervention can be justified from this perspective, without endorsing a neocolonialism.

Before responding to it, there are other factors that undermine the legitimacy of humanitarian intervention, such as its impartial application. Only states labelled "rogue" or "failed" suffer a humanitarian intervention, which ends up focusing on the newly formed states which are still unstable, and most of the time from the non-Western world. Again Mamdani remarks that "looked at closely and critically, what we are witnessing is not a global but a partial transition. The transition from the old system of sovereignty to a new humanitarian order is confined to entities defined as 'failed' or 'rogue' states."[193] This is one of the clearer indications that humanitarian intervention is another colonialism, because the world is again divided between those stable states with the mission to stabilize the rest that are morally corrupt and politically unstable.

Still another element that undermines the moral soundness of the humanitarian intervention is the emphasis of political and civil rights as worthy of international protection while others receive little attention, if not completely neglected. For instance, Tesón argues that "qualitatively, only the violation of basic civil and political rights warrant humanitarian

[192] Tesón, *Humanitarian Intervention*, 76.
[193] Mamdani, *Saviors*, 274.

intervention."[194] Not only does such an attitude put human rights at different scales, but it also shields economic crimes from international concern. For the critics of humanitarian intervention, it is a source of focusing only on the crimes of non-Western states, and passing under total silence those crimes committed against them.[195]

Since these critiques are drawn from the actual practice of human rights, they are hard to dispute. Rather, to respond to these concerns, I suggest another justification of humanitarian intervention from the multilayer conception, and from that, see whether these fears would dissipate. To start with, the practical conception from local practices admits cases where a humanitarian intervention can be morally justified. This is not particular to it, since even those who oppose it agree on this point. The question, to restate it, is how such an intervention can be conducted without being seen as a neocolonialism. Hence, from the multilayer conception, the first condition is that any external intervention has to be called upon by local actors, the victims themselves. Consequently, humanitarian intervention comes as a contribution to a resistance carried out by local actors. Second, its aim is not to protect them, but rather to strengthen them in their resistance to protect their rights. In Mégret's words, it is about "help 'to help themselves'."[196] Although resistance here can take several meanings, I remain in the paradigm of the state disposing the monopoly of violence. Therefore, the resistance of local actors here is rather non-violent, even if UDHR understands that one might have recourse to rebellion as a last resort to protect one's rights.[197] Once these two pre-requirements are fulfilled, the intervention itself should be taken by groups of states and follow the principle of subsidiarity. As Hebert Petzold defines it, "the principle of subsidiarity is generally understood to mean that in a

[194] Tesón, *Humanitarian Intervention,* 117.
[195] Mamdani, "The Responsibility to Protect," 66, note 6.
[196] Mégret, ibid., 591.
[197] It is stated in its Preamble that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

community of societal 'pluralism' the larger social unit should assume responsibility for functions only insofar as the smaller unit is unable to do so."[198] In our model, three actors are legally entitled to use military force: states, regional bodies and international institutions such as the UN through the Security Council. Hence, applied to the multilayer conception, the principle of subsidiarity means that, since humanitarian intervention is invoked because the targeted state is either involved in the atrocities, or unable or unwilling to stop them, the next responsible body to undertake such an intervention should be the regional bodies, starting with the smallest in which the state in question is a member. If this first level of intervention fails, then the next level steps in, and so on until the situation is abated.

The subsidiarity principle does not, however, preclude the contribution of other actors to the success of such humanitarian intervention. Rather, since in addition to the political willingness, humanitarian intervention is also about capability, other actors more able might support this regional intervention so that it brings the intended result. From the international law perspective, chapter VIII of the UN Charter concerning the role of regional organizations should be more and more taken as the key text in terms of protecting human rights, instead of Chapter VII which puts so much trust in the Security Council.

The advantage of this practice of humanitarian intervention is that it is realistic in the sense that it takes into account states' interests that are usually accused to be behind humanitarian intervention. Indeed, usually the regional organizations are mostly economic or security organizations, and the protection of human rights becomes somewhat instrumental, rather than a moral goal. However, most of the time, these organizations include human rights among their principles and therefore becomes the moral reason for intervening. For instance,

[198] Herbert Petzold, "The Convention and the Principle of Subsidiarity" in R.St.J. Macdonald, F. Matscher and Herbert Petzold (Eds.), *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993), 41.

ECOWAS (Economic Community of Western African States) that was first developed as an economic organization of Western African countries has evolved into a regional organization that protects human rights and is proactive to defend democracy and good governance as they contribute to its initial goal.[199] Furthermore, as these organizations are, most of the time, formed according to cultural affinity, economic interests, historical common background and geographic proximity, their meddling into the internal affairs of their members will unlikely be interpreted as a neocolonialism, since the latter characterizes rather the Western interference into the non-Western countries.

A problem might arise when the regional organization itself is not interested in the protection of human rights, but the multilayer conception avoids that impasse because its very meaning is to include many actors with different leverage at different levels. Moreover, it is state-decentered because a state can only protect human rights because it is under pressure; otherwise it will be for its rational interests. Therefore, because local actors are the binder of a human rights practice even when it comes to humanitarian intervention, their call to regional organizations has to be accompanied with the interconnection with regional and international non-states actors so that they can put pressure to their local governments to act.

Would such a practice of humanitarian intervention dissipate the doubts expressed by the critics about its moral legitimacy? While at this stage it needs more development for concluding this question, at least this way of approaching it would require more justification for saying that humanitarian intervention is partial because it symbolizes the powers targeting non-Western states. Indeed, since it would be regionally decided, it would become difficult to attribute that responsibility to external agents. It would also exclude the labelling of some states as 'rogue' and 'unstable' waiting for the help of the stable ones to be fixed. As to the question that humanitarian

[199] Sampson, ibid.

intervention focuses on non-Western crimes because it is only concerned with civil and political rights, this humanitarian intervention justified through the multilayer conception recognizes the equal qualitative value of all human rights, although not all would require a coercive intervention. Once more, the problem is about the tares that undermine the legitimacy of the practice when the cases have been judged worth of a military intervention. In this sense, the multilayer conception seems to redeem the moral ground for humanitarian intervention. However, does it satisfy all other worries?

b). Agency

The critics of humanitarian intervention also highlight the ambiguity surrounding humanitarian intervention decision-making. Who are in charge of evaluating the situation and make decision about a situation that is a moral case for a humanitarian intervention, and who carries it out? As Frank asks, "who decides whether a situation has risen to the level of such crisis? Who defines the crisis is truly one of extreme necessity? Who decides whether the force deployed is appropriate and commensurate with the necessity? Who decides whether the motive of the intervener is humanitarian, as distinct from self-aggrandizing?"[200] Legally speaking, one would think of the UNSC, but we saw that there is no case unanimously agreed upon by scholars that the UNSC authorized a humanitarian intervention for the protection of human rights. Furthermore, this body relies on the willing and able states to intervene which, in most of the cases, are Western powers. Finally, the history of humanitarian intervention shows a pattern that Western states intervened in weak states that are mostly non-Western. The human rights era has not been able to extirpate such a view, since the debate on humanitarian intervention has also opposed Western liberal democracies against non-Western states reluctant to follow such a practice. According to Pitts, "debate around humanitarian intervention often occupy the

[200] Franck, ibid., 148.

perspective of those powerful states that regard themselves as liberal and democratic, asking what 'we' liberal democrats should do about the problems *out there*."[201]

A humanitarian intervention acted according to the multilayer conception seems to defuse that tension between the Western liberal democracies and non-Western powers. Indeed, as it functions on the subsidiarity principle, the Western states would be solicited only in a larger international coalition and even this eventuality would be activated only if the regional initiatives have failed. By its very nature, the humanitarian intervention proposed by the practical conception of human rights forbids any unilateral intervention, without the mandate of any suprastatal institution. This is to avoid any imperialist whims that might reestablish colonialism. As to the question of who decides whether a situation is of extreme necessity, the agency is restored to the local actors who are in constant contact with those massive violations, in collaboration with other actors. Even at this level, decision-making would imply many voices so that the interests of the victims be represented by themselves and be included in the designing of the solution. Concerning the decision about the forces needed for such an extreme necessity case, it would depend on the regional body, before it appeals to a larger coalition. It seems to me that such a process would quench the pattern of humanitarian intervention as a task of Western liberal democracies against non-Western, because it is regionally decided and involves local and regional actors, sometimes with the help of other partners, but only when requested, and not as the police of the world.

It would also reorient the debate about the international community. Indeed, the critics of humanitarian intervention as neocolonialism found their claim on the fact that it has been always carried in the name of the international community. Ideally, the latter is supposed to be the community of all states. Some authors even include regional organizations, civil society and the

[201] Pitts, "Intervention and sovereign equality", 133.

private sector.[202] However, as I have already underlined, the practice of humanitarian intervention shows another reality and some proponents of it advocate for only Western liberal democracies to endorse it as their responsibility. That is the reason why for critics, the international community is synonymous to the West and is opposed to the Third World. In Orford's words, "the Third World has long been imagined as the double or other of the 'the West', now the international community."[203] With such background, any humanitarian intervention carried out by the international community into the non-Western is understood to be the West intervening into the Third World, a scenario that is reminiscent of the colonial enterprise.

The multilayer conception admits the international community but only reduced to the international institutions created by states, but the latter is not the main agent in the execution of the humanitarian intervention. Although ideally, those institutions function through the inter-cooperation of all states; empirically, they can be manipulated by the powerful states for their self-interest. That is why the humanitarian intervention suggested here integrates the international community into a web of actors and is to be directly involved only if the subaltern initiatives have been exhausted. From that perspective, humanitarian intervention is not supposed to be carried out in the name of the so-called international community, as Ayoob argues.[204] Rather, it would be carried out in name of the victims who command it and should be enacted by the closest possible level.

Such a practice of humanitarian intervention would also curb the suspicion that victims are only proxies and not the real motives of humanitarian intervention. Indeed, instead of external actors defining what is happening to the victims, whether it is a genocide or counter-

[202] Payandeh, ibid., 478.
[203] Orford, ibid., 153, 161.
[204] Ayoob, "Humanitarian Intervention", 85.

insurgency, in order to intervene, the victims define themselves the evil they are combatting and the external agents contribute to help them "help themselves"—to use Mégret's words. They are the first initiator of the resistance against the violation of their rights and the external actors only participate in the resistance. Victims are not voiceless, and external actors should listen to them instead of imposing a discourse on them. Moreover, while there might be national interests involved in such a humanitarian intervention—I believe there cannot be a totally disinterested action from a state—these interests are avowed and not hidden. The regional organizations pressure their members because they jeopardize their common interests and that is why they can have recourse to military intervention in one of their members. In that sense, the state's interests do not overshadow the victims' voice; rather they presuppose it.

Decentralizing humanitarian intervention from the international organization to closer regional organizations would force those opposing humanitarian intervention as a neocolonialism to find another narrative, because the latter is based on the fact that the international community is mostly conceived as the West. For instance, China rejected the humanitarian intervention principle, arguing that "the Chinese are very familiar with such 'humanitarian intervention' in their past and see it as a tool that was often used by advanced countries to conquer so-called 'barbarous ones' and to impose 'civilized standards'."[205] In other words, humanitarian intervention is not opposed in principle, but because it recalls a bad memory due to those who would carry it out. When regional organizations take responsibility for their military intervention, such a historical rhetoric would lose its power and new arguments would have to be found if a humanitarian intervention is to be opposed. It might even play a positive role in gaining support for humanitarian intervention from states that usually reject it, on that ground that they would be involved in the decision-making and in its execution.

[205] Welch, "Taking Consequences Seriously: Objections to Humanitarian Intervention" in Welch, ed., ibid., 66.

Scholars such as Ayoob and Mamdani mention the fact that the states usually requiring humanitarian intervention are still in a formation stage, as most of them are postcolonial states. For these scholars, those moments of violence are part of their maturing process, which might be hampered by the humanitarian intervention. That is why those states "are apprehensive of the new international activism and the developing norm of humanitarian intervention that could potentially threaten their status."[206] While not sharing this claim that postcolonial states have to go through egregious human rights violations for their stability, I can understand the fear of newly independent states that humanitarian intervention might open a door to a new form of colonialism, when it is carried out by the yesterday colonial masters. However, when it is planned and executed at the regional level, this fear would disappear, except if the case occurs in an area where there have been colonial antecedents—in such a case, the next level steps in. But in the normal case of regional organizations formed by states which were all under colonization, their participation in a humanitarian intervention might strengthen their formation as they assume their destiny and participate in fixing their own problem without involving their former colonizers. ECOWAS is again a good example in this, since it has been avant-garde in adopting instruments allowing it to deal with crises that might occur and threaten human rights. Sampson shows that the Western African Organization has reached a high level of dealing with its local problems in a manner more "encompassing and therefore conceive of diverse preventive, reactive and reconstructive peace and security objectives."[207] The organization does not wait until acts that shock humanity happen; rather "its mechanisms legitimize intervention in any conflict that has the potential to threaten the existence or stability of any democratic government

[206] Ayoob, "Third World Perspectives on Humanitarian Intervention and International Administration", 100.
[207] Sampson, ibid., 536.

in the region."[208] And it has done so in many instances, "such as Sao Tome and Principe (2003), Guinea Bissau (2009) and Guinea Conakry (2008-2010)" and Ivory-Cost in 2010 when there erupted post-electoral violence.[209] Had they been undertaken by the international community, these actions would have occasioned an outcry from those who suspect humanitarian intervention of neocolonialism when carried out by the international community.

One can rightly make on observation that these are not thought to be cases of humanitarian intervention as narrowly defined by this study, which limits it to a military intervention for protecting human rights; for these interventions were conducted as peace interventions. While such an objection is appropriate, one would also highlight that to restore a democratic government is a human right in human rights doctrine, with other civil and political rights related to it. Furthermore, such interventions can also be interpreted as preventive interventions since it is in such circumstances that human rights are gravely violated.

Hence, a humanitarian intervention carried out at the regional level gives better chance to answering the question of authors and decision-makers of humanitarian intervention. This is, however, only one aspect of the questions raised by humanitarian intervention, and the next section takes up some others.

c). Normative Consequence

Humanitarian intervention is also denounced because of its selective application, where situations almost similar receive different treatment. This is no longer a conflict between the great powers and the Third World states; rather it is between states in the same conditions, and yet the international community chooses to ignore it, while agitating its power for another. For Ayoob, that creates an acute problem "when these 'representatives' of the 'international

[208] Ibid., 538.
[209] Ibid.

community' choose targets for intervention selectively while ignoring human rights violations of equal or greater magnitude elsewhere."[210] The examples abound from Rwanda to Iraq through Palestine. That leads to doubting the intention of those who decide it. Again, Ayoob observes that "the decision in 1991 to create a safe haven for the Kurds in Iraq but not in Turkey, where human rights of Kurds were being violated with equal severity, cast grave doubt on the sincerity of the intervening powers."[211]

These are facts that can hardly be ignored in considering an alternative justification for humanitarian intervention. While the latter arises from a moral ground, its implementation depends on pragmatic deliberation, because contexts and actors vary immensely. The political will needs to be accompanied with an availability of means to carry it out in a successful way. In that sense, one might understand that some cases might require more preparedness than others, and others might simply not be carried out because there is no prospect of success. But what scholars such as Ayoob denounce is the selectivity in cases of a real possibility of success, in which some are enforced and others are neglected because of political interests and diplomatic ties.

This is a hard case also for a humanitarian intervention performed on the subsidiarity principle, for even in an organization it is always possible to find countries closer to each other than others, or countries in cold diplomatic relations such that the regional organizations do not come up with a decision to intervene. Nonetheless, because the practice itself is not limited to a sole actor, those are the moments when a higher level has to take over the case. At the least, this practice of a humanitarian intervention would remove the suspicion that countries are acting for hidden agenda, in that the regional organizations' members would be motivated by mutual

[210] Ayoob, "Humanitarian Intervention and International Society", 225.
[211] Ibid.

interests, and therefore the decision would be expected to be taken together. In addition, because those organizations are usually formed of limited numbers of countries, the cases of intervention would be fewer than if only one international organization was in charge, and therefore that would minimize the occasion of selectivity.

The consequence of the selectivity is the double standard in applying humanitarian intervention, through which some countries are treated favorably while others are harshly dealt with; some countries enjoy stronger diplomatic relations with the same Western powers which votes resolutions against human rights violations, without a following action. Some scholars call it "interventionism of choice" in which the "so-called Western humanitarian intervention and regime change in some countries, while the same Western democracies maintain excellent relations with other tyrannical regimes."[212] The humanitarian intervention implemented through the subsidiarity principle would avoid such criticism for two reasons. First, the accusation aims at the Western powers, which select where to intervene depending on their interests. From the subsidiarity principle, unless the humanitarian intervention is happening in the West, the latter would not play a leading role. Second, since the authors of the military intervention would be the states members deliberating together about a case, and adopting the appropriate measures, that process would minimize the occasion whereby double standards apply. Most importantly, local actors of the concerned states would be assuming a deciding role, and the contribution of other actors in the decision making also would allow more transparency and give hope for overcoming this double standard criticism.

Through the same mechanism, the problem of labelling would take another direction. As Mamdani argues, the naming of the crime is important for legal reasons, for some crimes such as genocide rise to international responsibility, while the "war and counter-insurgency do not… for

[212] Ellen Brun and Jacques Hersh, "Faux Internationalism and Really Existing Imperialism," 45-6.

they are understood as part of the exercise of sovereignty of states."[213] However, for the victims, it does not make a big difference. Taking the example of Darfur and Iraq which received different attention internationally, Mamdani observes that "if you were an Iraqi or a Darfuri, there was little to choose between the brutality of the violence unleashed in either instance."[214] As a result, the combination of selectivity, double standards and labeling produce partiality in assessing and implementing humanitarian intervention. For not only does the labelling exclude some cases from humanitarian intervention, but at the same time it excuses its authors. Again from Mamdani's observation, labelling "isolates and demonizes the perpetrators of one kind of mass violence, and at the same time confers impunity on perpetrators of other forms of mass violence."[215]

From a humanitarian intervention conceived and carried out by a regional organization, the labelling and partiality in assessment take another direction for a number of reasons. First, as already said, it is assumed that there would not be many crises occurring at the same time in the same organization that they have to decide whether one deserves more than the other a military intervention. If it happens, then the upper level would step in because it would mean that at the first level, the organization itself is not viable. Second, as it is conceived from the victims' point of view, it would not have to wait for genocide and crimes against humanity to occur in order to have reason to intervene. Third, its implementation is pragmatically conceived and justified on utilitarian grounds; that is, states might not be more interested by human rights *per se* rather than the threat that such gross human rights violations might inflict to the purpose of the organization—most of the time, economic interests. That is the case with ECOWAS whose "utilitarian character of its mechanisms' response to peculiar regional security challenges is

[213] Mamdani, "Responsibility to Protect", 59.
[214] Ibid., 57.
[215] Ibid., 59.

amply demonstrated by the Community's consistent intervention in conflict situations brought about by 'unconstitutional changes of government'."[216] Thus, while the international community is concerned with naming the crimes for legal reasons, in order to act or not, it leads to a partial assessment and selectivity in implementation of humanitarian intervention, and sometimes it comes late. From the victims' point of view, the regional context offers an advantage as the legal context is already into place since human rights violations endanger its purpose. Moreover, as the repercussion of those disturbances usually affects neighboring countries, these would be more interested than others to see the crisis resolved for their own interest. That is why a humanitarian intervention based on the subsidiarity principle might be more timely than the one organized by the international community.

The most challenging case brought to humanitarian intervention is the threat to the principle of state sovereignty. The opponents of coercive intervention believe that the classical understanding of state sovereignty as absolute abstention from external interference into internal state's affairs, was the founding basis for the decolonization movement. According to Bricmont, the non-intervention principle was "the paper shield that the Third World believed could protect it from the West at the time of decolonization."[217] Removing that paper shield means reopening a door to the former colonizers, since so far, sovereignty "had acted as a restraint on the former's interventionary instincts."[218] In other words, sovereignty understood through the non-intervention principle functions as a stronghold of weak states against the strong ones. For that reason, Ayoob is worried that removing such a barrier would cause havoc internationally as well as internally. Internationally, Ayoob claims that the way humanitarian intervention is practiced "may end up detracting from the most essential instrument, the principle of sovereignty that has

[216] Sampson, ibid., 538.
[217] Bricmont, ibid., 99.
[218] Ayoob, "Humanitarian Intervention", 83.

been used for the maintenance of international order during the past four centuries."[219] Internally, if internal sovereignty is disturbed, it would engender internal disorder, which in turn, would affect human rights and international peace. In other words, humanitarian intervention might produce the contrary of the expected result.

While I believe that a humanitarian intervention based on the principle of subsidiarity answers satisfactorily the first claim, it is not the case with the last two consequences. In this first case, since the actors would be states in regional contexts, the West would not have a prominent role to play, and therefore the fear of opening a floodgate to a neocolonialism would be dissipated. However, concerning the role played by state sovereignty in the stability of the international community, this is a strong claim that has some historical foundation, at least in the West. Ideally, humanitarian intervention in general is not a threat to state sovereignty since it is invoked because a state has failed in its mission of protecting the basic interests of its citizenry. In that sense, humanitarian intervention does not abolish domestic order, since it is called in to deal with an internal disorder. That is why, instead, since humanitarian intervention aims at restoring internal stability, it can be argued that it also contributes to the reestablishment of state sovereignty. Furthermore, it does not abolish the state sovereignty because after all, it is carried out by states. The same argument then holds for the claim that humanitarian intervention might destabilize the international order, for if there is internal order in states, there will not be need of humanitarian intervention, and therefore, the international order will not be disturbed. But if international order depends on the domestic stability of states, then it will be disturbed when there are egregious human rights violations in a given state. Humanitarian intervention is not the cause of this domestic upheaval; it only comes as a remedy to this state of affairs—whether it is efficacious remains an open question.

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[219] Ibid.

Chandler brings in another argument, though, about the danger of intervention language vis-à-vis the state sovereignty, especially as it is spelled out in the R2P emerging norm. According to him, as in this context state sovereignty means accountability to one's population internally, and to the international community, externally, "this shift in 'accountability' clearly has major implications for sovereignty because a power which is 'accountable' to another external body clearly lacks sovereign authority."[220] Without discussing thoroughly this argument—since authority can admit degree—it suffices here to show how a humanitarian intervention based on the subsidiarity principle eschew that problem. First, in this model, the international community does not assume a tutorial role. On the contrary, states retain their independence and intervene in protecting human rights because they are concerned with their own interests. Second, the conception, deliberation and execution of humanitarian intervention are located at the regional level, in which states members enjoy a formal equality. Such a process does not presuppose the abolition of state sovereignty nor does it occasion its death. Actually, humanitarian intervention might improve internal sovereignty as it participates in the restoration of internal stability, without subduing the state to a supra-power to which it has to be accountable.

Those are some the questions raised by the critics of humanitarian intervention, which lead them to qualify it as neocolonialism. The remaining question now is whether the model suggested from the multilayer conception of human rights, would not be accused of the same stain.

d). Taking up the Challenge

The neocolonialism claim is formulated from two directions. On the one hand, the critics of humanitarian intervention detect a similarity between the way it is conducted and classical

[220] Chandler, "The Responsibility to Protect", 65.

imperialism. As Faeron and Laitin illustrate, "as with classical imperialism, we increasingly see the strongest states taking over, in part or whole, the governance of territories where Western-style politics, economics, and administration are underdeveloped."[221] Furthermore, humanitarian intervention is also justified by the protection of "vulnerable groups" from their leaders, the same way the colonization was advocated. As Mamdani notes, "when it came to lands not yet colonized, such as South Asia and a large part of Africa, they highlighted local atrocities and pledged to protect victims against rulers."[222] This aspect of the critique is based on the fact that so far the so-called humanitarian intervention has been carried by big powers, a scenario that cannot lack to recall the colonial period. However, the parallelism between humanitarian intervention and colonial imperialism is worsened by certain justifications that conceive it in the same terms as those used to justify colonization, whereby the Westerns-civilized brought civilization to the barbarian non-Western. Indeed, proponents of humanitarian intervention such as Tesón argue that tyrants are today's version of uncivilized culture, and Orwin sets Western against non-Western when it comes to humanitarian intervention. As he puts it, "humanitarianism is a distinctly Western development. With rare exceptions, humanitarian intervention is an encounter between Western or Westernized nations and non-Western ones, between lands where liberal democracy and technology have triumphed and lands where they have not."[223] Add to this speeches of political figures such as former British Prime Minister Tony Blair, that humanitarian intervention is a vehicle to spread Western ideology,[224] those opposing humanitarian intervention have strong reasons to suspect humanitarian intervention as it is

[221] Fearon and Laitin, ibid., 12.
[222] Mamdani, *Saviors*, 276.
[223] Orwin, ibid, 203.
[224] Blair, Speech in Chicago, ibid.

practiced as a neocolonialism; that is, a remake of the colonial undertaking. But would it be the case with the humanitarian intervention practiced on the principle of subsidiarity?

As I have shown several times, such a humanitarian intervention would not involve Western powers in the first place, unless it takes place in the Western region. Otherwise, it would not oppose the Western against non-Western states, as the states members of the closest regional organization would be in charge of conceiving and executing it. In that case, it would not be true that the strong powers take over the weak ones in the Western colonial style, because the motivation would be less to occupy the country for particular interests rather than to stabilize the country for its own interest and for the benefit of the whole region. This would then be different from spreading Western ideologies as Blair had hoped. At the same time, though, it is inevitable that strong countries might contribute more than weaker ones for practical reasons, but I do not think it would stain the legitimacy of such a humanitarian intervention.

Concerning the protection of the victims from their rulers as the purpose of both humanitarian intervention and colonialism, it is hard to find another reason for using military force in another country unless there are compelling reasons of threatened lives either by the state or its unwillingness to protect them. However, the motivation behind the two enterprises would be different. While the colonization used humanitarian motives to hide its political and economic goals, because it was not factually true that all non-Western territories contained more atrocities before colonization than those that the colonial system would inflict on local populations, humanitarian intervention based on the subsidiarity principle would be activated because victims have asked for it, and it would be decided and executed by regional actors for common benefits. In that sense, there would be more transparency in the process, and it would not be used ideologically.

Following this discussion, it seems that such a humanitarian intervention would not be accused of resuming another colonialism. Nonetheless, the critics show another neocolonial face of humanitarian intervention, in the sense that it does not deal with socio-economic conditions that give rise to its necessity. As it is most of the time carried out in the recently independent states, these are postcolonial states left by the former colonial masters to protect their interests. Such institutions are maintained through heavy security systems that oppress the populations. Hence, for some scholars, instead of rushing to military intervention, they should deal with the root causes of economic and social injustices engendered by the international system. In Orford's words, "intellectuals and activists concerned about democratic and human rights issues should lobby their government's representatives and directors to oppose support for this model of economic liberalization and marketization,"[225] because that is what causes the need for humanitarian intervention; and in a way, humanitarian intervention sustains such conditions of postcolonial neocolonialism.

These are hard questions for the humanitarian intervention case inasmuch as, since it is narrowly restricted to military intervention, it is supposed to be punctual and of short duration. In that sense, these critics are right to highlight that it does not deal with root causes, especially the effect of global capitalism. Furthermore, the solution seems to be an institutional reform of the postcolonial state so that it becomes a representative institution of the people, instead of being protectors of colonial interests. Such projects cannot be an object of humanitarian intervention, lest it becomes another paternalistic mode of governance. Rather, as the model is founded on the call of local actors, it is their responsibility to fight for such a substantive change in their political system. In that perspective, Orford is correct to encourage intellectuals and activists to lobby and fight for such changes to happen. As to the humanitarian intervention *per se*, since it ideally

[225] Orford, ibid., 121.

responds to an actual situation of a human rights violation, if its main actors are those states themselves trying to resolve internal crises in a member state which threaten human rights and their common interests, it seems that claiming that it perpetuates a postcolonial neocolonialism would be hard to justify. It is an *ad hoc* response to the aftermath of the postcolonial state, but it is not its cause, and it cannot be its solution. Moreover, the account of humanitarian intervention proposed here claims to be normative; therefore it cannot be confined to the mistakes of the current practices which undermine its legitimacy. Consequently, it aims at a certain generality that goes beyond the postcolonial context, since the presupposition is that human rights challenge every culture, and therefore there is potentiality of humanitarian intervention to occur everywhere. Taken at such a level of generality, it could be justified as non-neocolonial in that neo-colonialism implies the continuing unbalanced colonizers-colonized relationships. But a humanitarian intervention based on the subsidiarity principle abolishes these tensions since the regional organizations on which is based, are usually contextually based and state members are geographically—and even historically—close. That is why, even from this point of view, humanitarian intervention founded on the principle of subsidiarity might be a better option for the protection of human rights when the national local actors call for it. This can occur without reenacting a neocolonialism, because the threat is too big to be contained by their own efforts, and the state is unable or unwilling to step in for different reasons (it might be because it is the perpetrator or in complicity with the perpetrator).

Conclusion

This chapter is suggested as an alternative to the philosophical accounts encountered in my third and fourth chapters, in order to respond to the theoretical and practical challenges posed by the cultural and political critique of human rights and humanitarian intervention. The

suggested alternative is a multilayer conception of human rights, inspired by, yet going beyond Beitz's practical conception of human rights. The effort was then to confront it with those challenges. If the arguments deployed up to here make sense, then they suggest another way of addressing critiques without subjecting human rights to imperialistic use. They also show that the human rights project can be normatively defended without falling into cultural prejudices, and another type of humanitarian intervention can be suggested without consecrating a neocolonialism. As a new theoretical justification of human rights, the multilayer conception would certainly gain from confronting it with other different theories. It is doubtless that such a confrontation would yield interesting debate about its strength and its weaknesses. Nevertheless, the project of this dissertation is modest: to take seriously the cultural and political critiques of human rights because they get to the core of the whole project, and the risk of using human rights imperialistically. Hence, if the multilayer conception has sketched a reasonable account in such direction—as I hope and believe it does—then the project itself is worthy the efforts.

Chap. 6. As a Way of Concluding: Revisiting Old Questions

6.1. Recapitulation

The idea of this project takes birth in the encounter with the critique of the human rights project as an imperialistic ideology and of its implementation through humanitarian intervention as a neocolonialism. To that end, I developed it as a reevaluation and discussion of these critiques and, at the same time, a response to the real risk of the imperialistic use of human rights. That is why it had to delve into philosophy in order to articulate that response philosophically in dialogue with philosophers who have developed an account of human rights.

Thus, the project is structured around three main parts. The first part comprises the two first chapters which elaborate the two critiques—in a rather neutral way—toward the human rights project as a whole. Indeed, while the understanding of human rights as an imperialistic ideology attacks its normative foundation, viewing humanitarian intervention as a neocolonialism undermines the moral basis of the implementation of the human rights goal. Hence, the first chapter elaborated in detail this theoretical challenge, starting by defining the two components of the critique, that is, ideology and imperialism, since one cannot comprehend how this human rights project is another imperialist ideology unless she/he understands what the latter means. Hence, following Ricoeur's study, ideology possesses a positive and a negative side. The positive one is its legitimating role of authority, while the negative side characterizes its concealing of reality. Thus, saying that human rights are an ideology is to assert that they play this double role of legitimating and concealing, offering a moral support to a hidden evil agenda. As to imperialism, the dissertation focuses on the high imperialism which corresponds to the time of colonialism, that is, the period between 1880s and 1914, during which Europe occupied most of the rest of the world. The reason why I limit the focus to this period is the fact that the

critics compare human rights with the imperialist ideology operating during this period. The question now is: what was that imperialistic ideology?

The first chapter establishes that the ideology behind the European expansion of the end of the nineteenth and the beginning of the twentieth centuries was the *"mission civilisatrice"*, that is, the civilizing mission. It was an ideology because it justified positively the European negative endeavor of conquering, occupying and plundering the rest of the world, in order to solve its internal political, economic and demographical crises. Founded on racial prejudices of racial superiority and comforted by sciences, the civilizing mission was heralded as a duty of a superior race—the white—to bring civilization to the inferior ones—the dark races, who are uncivilized and savages. It was legally legitimated by the nascent international law, while philosophically and morally, it was justified by the liberal belief in the myth of progress.

Human rights critics claim that the human rights movement assumes the same structure and follows the same pattern, except that it has changed the flag-bearer. While Europe carried out the civilizing mission, a new form of civilization through human rights is championed by the United States, yet with the same goal of spreading liberal culture on the rest of the world, since the human rights corpus is a compendium of liberal ideas and values. It is built in the SVS metaphor, in which savages are non-Western cultures in which victims are presented helpless in need of a savior coming from the West. The critics contend that human rights discourse uses the same language of civilized against uncivilized, with a moral duty of the civilized ones to rescue the victims of uncivilized cultures by bringing them human rights. Human rights as a new imperialist ideology has also integrated a legal form, that is, the international human rights law, which provides it with a legal scheme to enforce itself through a legal mechanism. This was also a helpful device for the civilizing mission for colonizing the rest of the world. Moreover, like the

civilizing mission, the human rights movement also has its liberal proselytizers in the Western powers, international institutions and international NGOs, always ready for expeditions for the heathen lands.

In conclusion, human rights discourse is only a new tool for the West to culturally and politically dominate the rest of the world. That is how and why it is an ideology in the double meaning of the term. It justifies positively the negative practice of domination. This critique is theoretically serious because it undermines the normativity of the human rights enterprise, both in its scope and content. On the one hand, human rights can no longer pretend to be universal since they are just liberal, therefore particular to a certain culture. Their universalization is an imposition. On the other hand, by hiding and yet justifying an evil act, the human rights project is a lie and liar; and therefore itself is evil. These facts show that the cultural and political critiques of human rights as an imperialist ideology are serious and a philosophical account of human rights cannot ignore them.

The second chapter develops the challenge based on the implementation of human rights through humanitarian intervention. For the critics of this practice, humanitarian intervention, understood as a military intervention without the consent of the targeted state, is a colonialism in its contemporary form. The chapter substantiates this claim by retrieving the historical background of this practice. Since most of scholars who justify humanitarian intervention ground it into the just war theory, the chapter rereads some authoritative voices in the field—Thomas Aquinas, Vitoria, Suarez, Walzer—in order to examine whether there is a precedent of such practice. The result is that it is not easy to found humanitarian intervention on the just war theory in general. Authors such as Vitoria and Suarez identify some instances for humanitarian intervention, but it grants rights to Christians rulers to intervene in non-Christian territories,

which rather fits into the critics' claim that humanitarian intervention is a neocolonial practice. As to Walzer, he upholds the non-intervention principle, but accepts situations that "shock the conscience of human kind" that would require a humanitarian intervention. Nonetheless, when one examines the reasons and how such humanitarian intervention would proceed, it is clear that even Walzer's account would not escape from the suspicion that humanitarian intervention is another form of colonialism. It is the same finding when one considers international law. Be it before or during the human rights era, scholars do not agree that humanitarian intervention is an established practice legally founded. When it is justified—such as by Grotius—or carried out, it supports Western intervention in non-Western countries. Even the newly coined concept of *Responsibility to Protect*, R2P, is not shielded from the same suspicion.

Opponents of humanitarian intervention also understand that there can be situations that are morally shocking; therefore the call for a humanitarian intervention. However, looking at the practice, its authors and the reasons offered, the critics cannot help but see it as a neocolonialism. That latter means both an establishment of a local political bourgeoisie that protects the interest of former colonialists, and the repetition of the colonial project. According to these critics, human rights are just a pretext so that the West can reconquer the non-Western world. It always occurs in non-Western states, carried out by Western powers, with a declared intention of imposing liberal institutions that sustain Western values. It is done selectively, resorting to labelling those they dislike but protecting their allies. They use international institutions and manipulate international law in order to topple the non-liberal-democratic governments so that they can impose their own rule and rulers. That is why, for the opponents of this practice, it is just another neocolonialism because it reassures the Western domination over the rest of the world, economically, politically and culturally. That was the outcome of classical colonialism,

such is the goal of the neocolonialism under the cloak of humanitarian intervention, contend the critics.

This challenge to human rights practice added to the theoretical challenge hampers the entire human rights project for, as Shue rightly observes, if there is no mechanism to ensure that people can be protected "against the single most serious threat to their lives—their own states,"[1] it becomes difficult to see its relevance. Thus, a philosophical inquiry concerned with human rights has to be able to respond to them. It is in that optic that the second part of this dissertation, composed of chapters three and four, is a quest for a philosophical response to these challenges through two main figures of contemporary philosophy.

The third chapter looks at Rawls's account of human rights and confronts it to these challenges. Conceived as necessary conditions for any reasonable system of cooperation and drawn from his political liberalism theory free from any comprehensive doctrines, Rawls integrates human rights into the list of the features of the Law of Peoples that is to guide the liberal foreign policy. Subscribing to the evolution of international law, Rawls assigns two major roles to human rights: to restrict the reasons that justify a war and redesign the contours of a state's sovereignty. That is why, for Rawls, gross violations of human rights are a legitimate motive for a humanitarian intervention.

The Rawlsian account does not, however, deal with the challenges satisfactorily for, being an offspring of the political liberalism, itself culturally situated, the critics could argue that the Law of Peoples seems to be another enterprise to spread a liberal culture, as it is framed in liberal values and ideas, and then only extended to other communities. Moreover, as Rawls favors liberal culture over others, critics can suspect Rawls of putting liberal civilization as the

[1] Shue, "Limiting Sovereignty," 21.

end of all other cultures. Now, since human rights are part of this Law of Peoples, which is inherently liberal and elaborated by only liberal peoples, it is difficult to convince the critics how human rights are different from the imperialist ideology of spreading liberal culture, especially from the fact that Rawls limits his human rights to the liberal rights—although not all of them.

Concerning the critique of humanitarian intervention as a neocolonialism, Rawls asserts that only well-ordered peoples, that is, liberal and decent peoples, are to carry out the humanitarian intervention in the non-liberal world. In addition, they are the ones who determine where and when to intervene without consulting those labelled as "outlaw states." From this perspective, it would be, once more, difficult to convince the critics whether such a justification and practice of humanitarian intervention is not a neocolonialism, since not only do the well-ordered peoples follow a liberal-inspired law, but they also aim at furthering their particular interests. Moreover, a humanitarian intervention performed on the Rawlsian model allows the institutional change, as it wants other states to join the society of well-ordered peoples. This assertion would reinforce the critics' belief that humanitarian intervention is just another form of colonialism.

The fourth chapter turns to Habermas, another major figure with another philosophical perspective—critical theory. His view of human rights is complex as it appears in different works and from different sources. However, two main articulations seem to be outstanding. On the one hand, he develops a theory of human rights based on his discourse theory, and on the other hand, he talks about human rights as he deals with the constitutionalization of international law. The two are not necessary the same. From his discourse theory, he constructs a system of rights containing rights that citizens must accord to each other in a society regulated by positive law. That is why such a system fits into a constitutional democracy which secures both private

and popular autonomy, and provides the means to exercise those rights. While the private autonomy focuses on the classical liberal rights, the popular autonomy ensures the authorship of these rights by the addressees of the law. It is worthy observing that, in this system, the social rights are conceived instrumentally with regard to rights protecting private and popular sovereignty.

As to his consideration of human rights in the context of international law, Habermas assumes the existing human rights corpus and looks at its function as a source of legitimation of a globalized society. Now, even when he considers the international human rights corpus, he gives priority to the first generation of human rights, while social rights play an instrumental role of securing these negative liberties. That is why, despite his acknowledgement that, with the concept of dignity, all human rights are connected, he asserts that human rights are juridical in nature, since they can only be enjoyed when exercised, and they can be exercised only when they are incorporated into a positive law form.

From his system of rights, it is not easy to address the critique of human rights as imperialist ideology, because it is designated for a democratic political community, and its extension to other cultural settings would be an imposition. Furthermore, it is construed on the background of modern Western societies which no longer accept a metaphysical foundation for the social order. Yet, this fact is far from being common in the world today. Therefore, his system of rights cannot be a starting point for addressing the theoretical challenge. As to his consideration of international human rights, Habermas is clearly against their imperialistic use. Nonetheless, he recognizes the liberal origin of the international human rights regime, and yet does not address the problem of imposing it on the rest of the world, which is the target of human rights critics. In addition, he claims that, as human rights came as a Western response to the

crisis of modernity, they should be adopted by other cultures as they face the same problems. Yet, modernity itself is multifaceted, and there is no guarantee that a solution particular to a given cultural setting would fit in other cultures.

As for humanitarian intervention, Habermas justifies it through the evolution of international law, which was classically built on the fact of war, and now is concerned with peace and security ensured by the protection of human rights. However, Habermas notes the risk of imperialistic use of human rights through humanitarian intervention, as the UN in charge of that mission of securing peace and security through human rights does not have an executive power to enforce its decisions. On this point, Habermas agrees with the critics of humanitarian intervention. On another side, though, he supported some intervention such as Kosovo and the imposition of a liberal order. Furthermore, he endorses the hierarchization of states, accrediting a higher legitimacy to liberal democracies, and his justification of humanitarian intervention is founded on an international law that follows the pattern of the constitutional democracy.

Hence chapter four concludes that, from the Habermasian account of human rights, it is not easy to respond to the theoretical and practical challenges posed to human rights by the critics. Therefore chapter five is an attempt to constructing a conception of human rights that can address them more satisfactorily than do the other accounts. Following Beitz's insight of a practical conception that looks at human rights in their international function, my conception suggested here goes beyond Beitz as it draws the understanding of human rights from local practices which integrates states in a larger web of actors involved in shaping the practice and meaning of human rights. These actors are the beneficiaries of human rights activities; local non-states actors, state and state-sponsored institutions, regional organizations, international non-states actors and the international community. The interaction among these actors produces a

multilayer model of human rights in which the local non-states actors (LNSA) and the beneficiaries are key players. They assume the role of protecting their basic interests in their local context, using the international human rights discourse. I call this encounter between a local situation of human rights violation and the international human rights discourse, *domestication through translation*, because human rights have to be translated both literarily and metaphorically to make them relevant to the local struggles for human dignity. On the other hand, the local concerns have to be framed into the language of human rights so that they can generate an interest from foreign actors. Through that process of domestication, the human rights discourse offers new language to channel local grievances, while human rights acquire new meanings. That is why from the multilevel model, *human rights are conceived as standards empowering individuals or groups of individuals socially organized into political entities, in order to resist through different levels of influence, any source of threat that endangers their basic interests.*

This multilayer conception of human rights presents some advantages. First, instead of emphasizing the role of state, it focuses on the emancipatory power of human rights. Second and consequently, the first purpose of human rights is not foreign policy, and their first subject is individuals or groups of individuals whose basic interests are threatened. Third, it is not individualistic. Fourth, because it is founded on the domestication of human rights, the protected basic interests protected depend on the context and the urgency. Fifth, human rights thus understood empower against every threat and not only those emanating from the state. That is why, sixthly, it operates at three levels-national, regional and international working in a lexical order in a Rawlsian sense—with a complex combination of actors and strategies for the effectiveness of human rights.

Confronted to the theoretical challenge, this new conception offers, I believe, a better way of addressing it. First, it shifts the discursivity of human rights from the conflictual binary West-non-West worlds to the contexts in which human rights are challenged by those who reject them and defended by those who appeal to them as means of resistance. Second, the same context of contestation disqualifies the civilized-uncivilized opposition, because those involved in the discursivity are from the same cultural background. Third, by presenting the LNSA and beneficiaries as the main actors of human rights, the multilayer conception offers an alternative of the critics of human rights as imperialistic ideology who contend that the human rights enterprise is carried by Western powers, International institutions and INGOs. Moreover, this practical conception based on local practices does not require a specific form of political institutions and it does not rely on one source of justification, because it is inherently pluralistic. In this way, the multilayer conception allows the reconsideration of critics' narrative about human rights, taking into account the historicity of human rights and distinguishing the human rights project from the civilizing mission. It also allows the deconstruction of the SVS metaphor, since it is constructed on the binaries that the multilayer conception avoids. Finally, it responds to the proponents of imperialistic use of human rights by insisting on the irreplaceable role of local actors, and by showing that those who use human rights in their daily struggles are primarily less concerned by their liberal nature than their efficacy in the struggle. Furthermore, it allows a pluralistic mode of justification.

Concerning the critique of humanitarian intervention, the practical conception based on local practices shows that victims are no longer proxy, but rather subjects of their own resistance against human rights violations, in which external actors intervene only in solidarity with local actors. That is why a humanitarian intervention is justified through the subsidiarity principle,

which requires that a higher level of power should not get involved in matters that can be handled at a lower level. Applied to the case of humanitarian intervention, the victims of human rights violations have to take the lead in protecting their rights, and only call upon external actors when for solidarity or when they are afraid to lose the battle. Hence, the external actors must not replace the LNSA and the beneficiaries. In that sense, from the international law perspective, the multilayer conception advocates for an increased role of regional bodies—those created and made of states—in enforcing humanitarian intervention. I believe that this fifth chapter argues convincingly that a humanitarian intervention carried out following this subsidiarity principle would not fall under the critique of being a neocolonialism.

Such was the project of this dissertation: to respond to the theoretical and practical challenges raised by critiques of human rights as an imperialist ideology and humanitarian intervention as a neocolonialism. However, these challenges are, most of the time, linked to the tension between relativism and universalism, which raises the normative question of human rights universality. I touch on these two issues briefly to see whether the multilayer conception sheds new light on them.

6.2. Beyond the Universalism-Relativism Dualism

The tension between universality and relativism of human rights is as old as the contemporary human rights regime, and some of their critics have been labelled relativists. One might recall the famous statement of the American Anthropological Association (AAA) questioning how the nascent idea of a Universal Declaration of Human Rights could be considered universal without being an imposition of Western values.[2] At the same time, as many were questioning the possibility of human rights universality, others were defending how those

[2] AAA, ibid. See also, among many others, Pollis and Schwab, "Human Rights: A Western Construct with Limited Applicability" in Pollis and Schwab, eds., *Human Rights: Cultural and Ideological Perspectives*. Ibid.

very Western values were indeed universal.[3] Since then, much of the debate about the justification of human rights has been about showing how they are not parochially Western.[4] In other words, the tension between relativity and universality of human rights is not about the universality of human rights *per se*; rather, it opposes those who affirm that human rights, notwithstanding their Western origin, are universal, against those who challenge this claim by emphasizing that international human rights as currently enshrined in international texts are specifically Western and, therefore, cannot be extended to other cultural settings. The question at stake now is the multilayer conception's position on this issue.

To start with, the practical conception of human rights based on local practices does not posit the universality of human rights at the outset. Rather, it assumes the historicity of human rights corpus as it is marked by its time, circumstances of emergence, and the reasons for its justification. In that context, the multilayer conception of human rights takes seriously the historical fact that the contemporary human rights has a Western origin. However, this fact does not imply an epistemological stand on the validity of human rights, because such a position can only result from an articulated account of human rights. And as we saw, the multilayer conception draws its account of human rights from local practices. That is why the entire relativism-universalism debate loses its relevance. The main question is not whether human rights are universal, since such a question can only be dealt with after one defines what human rights are, and one knows what/how they are after looking and analyzing the role they play in local circumstances. Along the way, one discovers that universality is not a requirement for human rights to perform their function as they are adopted by local actors to resist the threat to

[3] See Donnelly, "Human Rights and Asian Values," ibid. In other writings, he rather talks about relative universality, universality that integrates some relativity in its inception. See his *Universal Human Rights in Theory and Practice*. 3rd Ed. (Ithaca & London: Cornell University Press, 2013), chap. 6.
[4] See, for instance, Rawls, LP, 68.

their basic interests, without first asking whether or not they are universal. From this perspective, to borrow Wilson's words, the multilayer conception of human rights "takes us beyond the polarized approaches of universalists or relativists, and transcends the legalistic and statist approaches common in the human field itself."[5]

Indeed, interested as it is in the local practices of human rights discourse in struggles against human rights violation, the multilayer model is looking for the emergence of meaning(s) of human rights from their practice. It does not disqualify them beforehand, arguing that they are not universal, nor does it attribute to them universality in order to see them operating. In other words, human rights are not effective because they are universal, nor do they fail because they are culturally relative. Philosophically speaking, the practical conception of human rights from local practices brings us to the birth of the meaning and signification of human rights, instead of imposing them one. In that sense, I concur with Merry that "the universalist/relativist debate distracts us from understanding human rights in practice: from examining local political struggles which mobilise rights language in a particular situation."[6] That being the case, it is not only a distraction from the understanding of human rights; it is also a distraction from the practical purpose which dictated their conception. Human rights were conceived to orient actions; therefore its meaning has to embody that end. Any debate that splays from this purpose loses the focus altogether.

Hence, the multilayer conception of human rights brings us beneath the universalism/relativism dualism and retrieves the emancipatory power of human rights before it can raise the question of their universality. As to the question of relativity, it is discarded by the affirmation of human rights historicity, since such an assertion entails being context-bound and

[5] Richard Wilson, "Human Rights, Culture and Context: An Introduction" in Wilson (Ed.), ibid.
[6] Merry, "Legal Pluralism," ibid., 45.

therefore limited. That is why the next section looks at the question of universality of human rights from this conception of human rights based on local practices.

6.3. Human Rights Universality Revisited

Donnelly has devoted much of his work on the defense of the universality of human rights, as most of the time human rights are understood in the liberal tradition. After exploring the dictionary definition of universality, he identifies three kinds of human rights universality. (a) the legal universality founded on the fact that all states have ratified human rights instruments; (b) the overlapping consensus universality which is based on Rawls's concept of overlapping consensus (Donnelly seems to believe that different cultural backgrounds have embraced human rights); and (c) the functional universality based on the view that human rights are a response to the modern society dominated by the market and the modern states which bring threats to human dignity.[7] However, all these modes of universality have been criticized. The legal universality has been challenged by the fact that the states ratifying these treaties, some lack legitimacy or they do it either under international pressure or for political/economic interests. Concerning the overlapping consensus universality, it is not factually true that "the moral equality of all human beings is strongly endorsed by most leading comprehensive doctrines in all regions of the world."[8] Finally, the functional universality is not convincing because the multiplicity of modernity requires a multiplicity of responses rather than only one designed through human rights. In the face of this problematic question of human rights universality, what can be the contribution of the multilevel conception to this debate?

From the practical conception of human rights based on their local practices, human rights universality can be considered from two perspectives. On the one hand, universality is

[7] Donnelly, *Universal Human Rights*, 94-7.
[8] Ibid., 96.

about the dissemination of human rights beyond their Western place of birth. I call this the practical universality. On the other hand, human rights acquire new meanings through local practice, to talk about human rights universality is to reflect on their normative validity. As Gerhard Ernst observes, this kind of universality is to address their moral validity.[9] This section now focuses on these two aspects of human rights universality.

The practical universality is different from Donnelly's legal universality as well as the empirical universality; that is, the mere presence of human rights everywhere. While the empirical universality would look at the factual presence of human rights everywhere, the legal universality settles for the ratification of human rights by states. The practical universality, on the other hand, looks at how human rights are being used in local struggles. In that sense, human rights are not considered universal, not even that they are universalizable beforehand, since their historicity seals their particularity. Instead, the process itself is seen as a way of universalizing them without imposition, as local actors adopt human rights discourse for expressing their concerns and grievances. As such, the practical universality cannot be decided *a priori*; rather it is an ongoing process through which a human rights project delivers its promises in different cultural settings with hope that it continues to offer an emancipatory tool to those in a situation of resistance.

Seen from that point of view, the practical universality is not theoretical; it is vindicated through action and they are invoked for action. As François Jullien asserts, "the universalizing character of human rights is in the order, not of knowledge (of the theoretical), but in the order of

[9] Gerhard Ernst, "Universal Human Rights and Moral Diversity" in Gerhard Ernst and Jan-Christoph Heilinger (Ed.), *The Philosophy of Human Rights: Contemporary Controversies* (Berlin/Boston: De Gruyter, 2012), 231.

the operative (or of the practice)."[10] This is exactly the thrust of the practical universality: it is this capacity of human rights to be summoned in situations where human dignity is under threat, and through which their extension occurs. They are not first adopted because they are truer than other values and norms; rather, they offer a better means of resistance. They are seen less as a credo to which every culture has to adhere, rather than a tool that strengthens resistance against oppression anywhere. Thus, their extension *"est de l'ordre non de la vérité, mais du recours."*[11]

It seems to me that it is such a kind of universality that is expressed in UDHR, as it sets the human rights as standards for guiding an action oriented toward securing "their universal and effective recognition and observance" for all individuals and in every territory.[12] The UDHR's drafters did not first focus on the epistemological validity of human rights, but they did take for granted their practical universality. The latter is given as a goal to achieve, and that is why they hoped that "every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms."[13] It is in those terms that human rights universality was viewed and it is only through such an effort that they envisioned its realization. From this perspective, the practical universality promoted by the multilayer conception of human rights seems to fit into the purpose of UDHR itself.

That being the said, does it mean that, from the multilayer conception, human rights lose any possibility of asserting their universality, since the practical one is an ongoing process

[10] François Julien, "Quel absolu pour les droits de l'homme?" in Jean-Loup Amselle et al., *Diversité culturelle and universalité droits de l'homme* (Nantes: Editions Cecile Defaut, 2010), 112.
[11] Ibid., their extension "is of the order, not of the truth, but of the recourse" (the translation is mine).
[12] UDHR's Preamble.
[13] Ibid.

without a predictable end? In other words, what is the status of their normative validity from this perspective?

To answer this question, it is important to observe that the sought universality has to be constructed from human rights practice in local contexts. Put in other words, the question is to discover how they can be universal after looking at their practice. What does it allow them to be used in so diverse contexts? What is common to all those situations in which human rights are convoked that can then be universalized? This theorization does not affect, nor is it a requirement for the practice of human rights. Rather, it is a consequence of the latter; it is an afterward reflection following the practice. Finding *that* common element would be discovering the universalizable piece of human rights, which might then help in the thinking of their universality.

Recall that, according to the multilayer conception, human rights are means for resistance; they are "a practical instrument"[14] in the hands of the oppressed for their emancipation. This definition is drawn from the analysis of their function in local struggles. Now, what is common to all these diverse situations is the negative experience that calls for resistance using human rights discourse, both discursively and politically. For that reason, human rights come in as a negative response to this negative experience; they are a refusal of it.[15] Hence, the universalizable element of human rights conceived from local practices is that absolute refusal to any threat to human dignity. As such, human rights universality can then be reformulated as another expression of a universal and a non-institutionalized negation –a *NO*—

[14] Hauke Brunkhorst, *Critical Theory of Legal Revolution* (New York: Bloomsbury, 2014), 381.
[15] Talking about universality of human rights, Joseph Yacoub argues that it is embodied in the emancipatory potential of human rights. As he puts it *"cette phrase est révolutionnaire, car elle permet à tout un chacun de se mettre debout. Il suffit de demander aux peuples opprimés, aux exclus et les Intouchables d'Inde ce qu'Ils en pensent.*" (This sentence is revolutionary, because it allows everybody to stand up. Suffice to ask the oppressed peoples, the excluded and Untouchable of India what they think of it [translation is mine]. See his *L'humanisme réinventé* (Paris: Editions du Cerf, 2012), 153. See also similar idea in Brunkhorst, ibid., 380.

which challenges every institution. This universality has to be outside the institutional structures so that it keeps its critical power and does not itself become oppressive. That is why to preserve its emancipatory power which is the foundation of their universality, any human rights discourse has to remain open to criticism and be self-critical. Hence, human rights universality resides in their negative role of refusing any compromise with any threat to human dignity. As Julien rightly asserts, "*les Droits de l'homme réussissent à dire* exemplairement *cette universalité du refus.*"[16] That is it: when one looks at human rights from local practices, their universality is the universality of refusal, "*universalité du refus*." They are the negation of the negativity; that is why they are positive in their effect. The result of their universality is the positive of the negative, to paraphrase Hegel, and is always expressed through negation. As such, human rights universality joins the common task of any universal, as Julien would argue, a task of breaking and entering into any kind of closed totality in order to bring a new inspiration.[17] And that is the function of human rights universality viewed from local practices.

6.4. Ending Note

Since none is a good judge for oneself, I probably cannot see all the imperfections of the human rights account presented here. I simply acknowledge that confronting it to other philosophical conceptions of human rights, for instance those presented in chapters three and four, would prove its proper value instead of being only a response. However, since such a project is beyond the goal of this dissertation, I have only presented it as an attempt to responding to the theoretical and practical challenges raised against the contemporary human rights project by those who view it as an imperialist ideology carried out through a

[16] Julien, ibid., 109.
[17] Ibid., 108. In his own words, he says, « *cette fonction négative de la notion… rejoint la fonction la plus générale qui fait, à mes yeux, la vocation de l'universel : celle de rouvrir une brèche dans toute totalité clôturante, satisfaite, et d'y relancer l'aspiration.* »

neocolonialism disguised under the so-called humanitarian intervention. As to the last two points developed in this conclusion, they are an illustration of the potential of this conception when confronted to the old questions raised by the human rights discourse. Nonetheless, the credibility of such an illustration as well as of the whole project cannot be granted until it has gone through the critical eye of the reader. Nevertheless, I again emphasize that the concept of domestication through translation leads to a multilevel model through which human rights are conceived as standards empowering resistance.

Bibliography

Abdel-Nour, Farid. "From Arm's Length to Intrusion: Rawls's 'Law of Peoples' and the Challenge of Stability" in *The Journal of Politics*, Vol. 61, No. 2, 1999, pp. 313-330.

_____"Farewell To Justification: Habermas, Human Rights, and Universalist morality" in *Philosophy and Social Criticism*, Vol. 30, No. 1, 2004, pp. 73-96.

Abdullah, Hussaina. "Religion Revivalism, Human Rights Activism and the Struggle for Women's Rights in Nigeria" in Abdullahi An-Na'im, Ed. *Cultural Transformation and Human Rights in Africa* (London/N.Y: Zed Book, 2002).

Abiew, Francis K. *The Evolution of the Doctrine and Practice of Humanitarian Intervention*. (The Hague: Kluwer Law International, 1999).

Acte général de la Conférence de Berlin (1885).
On http://www.congoforum.be/upldocs/Acte%20de%20Berlin%201885.pdf

Acharya, Amitav. "How Ideas Spread: Whose Norms Matters? Norm Localization and Institutional Change in Asia Regionalism" in *International Organisation*, Vol. 58, No. 2, 2004, pp. 239-275.

African Union. *Constitutive Act of African Union*.

Aldrich, Robert. "Introduction: Imperial Overview" in Robert Aldrich, Ed., *The Age of Empires*. (London: Thames & Hudson Ltd, 2007).

Alexy, Robert. "Discourse Theory and Human Rights" in *Ratio Juris*, Vol. 9, No. 3, 1996, pp. 209-235.

_____."Jürgen Habermas's Theory of Legal Discourse" in *Cardozo L. Rev*., Vol. 17, 1996, pp. 1027-1034.

Altman, Andrew and Wellman, Christopher H. "From Humanitarian Intervention to Assassination: Human Rights and Political Violence" in *Ethics*, Vol. 118, No. 2, 2008, pp. 228-257.

American Anthropological Association. "Statement on Human Rights" in *American Anthropologist*, Vol. 49; No. 4, 1947, pp. 539-543.

Anghie, Antony. *Imperialism, Sovereignty, and the Making of International Law*. (Cambridge: Cambridge University Press, 2005).

_____."The Evolution of International Law: Colonial and Postcolonial Realities" in *Third World Quarterly*, Vol. 27, No. 5, 2006, pp. 739-753.

An-Na'im, Abdullahi A. "Toward a Cross-Cultural Approach to Defining International Standards of HumaRights: The Meaning of Cruel, Inhuman or Degrading Treatment or Punishment" in Abdullahi Ahmed An-Na'im, Ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. (Philadelphia: University of Pennsylvania Press, 1992).

_____."Problems of Universal Cultural Legitimacy for Human Rights" in Abdullahi Ahmed An-Na'im and Francis M. Deng, Eds., *Human Rights in Africa: Cross-Cultural Perspectives*. (Washington: The Brookings Institutions, 1990).

_____."State Responsibility under International Human Rights Law to Change Religious and Customary Law" in Rebecca Cook (Ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994).

_____."The Cultural Mediation of Human Rights: The Al-Arqam case in Malaysia" in Bauer, Joane and Bell, Daniel, Eds. *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

_____."Human Rights in the Arab World: A Regional Perspective" in *Human Rights Quarterly*, Vol. 23, No. 3, 2001, pp. 701-732.

_____. "Introduction" in Abdullahi An-Na'im, Ed.*Cultural Transformation and Human Rights in Africa* (London/N.Y: Zed Book, 2002).

_____."Expanding Legal Protection of Human Rights in African Contexts" in Abdullahi An-Na'im (Ed.), *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2003).

An-Na'im, Abdullahi A. and Hammond, Jeffrey. "Cultural Transformation and Human Rights in African Societies" in Abdullahi An-Na'im, Ed. *Cultural Transformation and Human Rights in Africa* (London/N.Y: Zed Book, 2002).

Annan, Kofi. "Two Concepts of Sovereignty" in *The Economist*, 18 Sep. 1999.

Aquinas, Thomas. *On Law, Morality and Politics*, 2nd Ed., Trans. by Richard J. Regan. (Indianapolis/Cambridge: Hackett Publishing Company, Inc., 2002).

_____.*On Politics and Ethics*, Ed. by Paul E. Sigmund. (NY, London: Norton & Company, 1988).

Arat, Zehra F. Kabasakal. "Human Rights Ideology and Dimension of Power: A Radical Approach to the State, Property, and Discrimination" in *Human Rights Quarterly*, Vol. 30., No. 4., 2008, pp. 906-932.

_____."Women's Rights in Islam: Revisiting Quranic Rights" in Adamantis Pollis and Peter Schwab, Eds. *Human Rights: New Perspectives, New Realities* (London: Lynne Rienner Publishers, 2000).

Arbour, Louise. "The Responsibility to Protect as Duty of Care in International Law and Practice" in *Review of International Studies*, Vol. 34, No. 3, 2008, pp. 445-458.

Arendt, Hannah. *The Origins of Totalitarianism*. (New York: The World Publishing Company, 1958).

Asad, Talad. "On Torture, or Cruel, Inhuman and Degrading Treatment" in Richard Wilson, Ed.*Human Rights, Culture and Context* (London/Chicago: Pluto Press, 1997).

Audart, Catherine. "Peace or Justice? Some Remarks on Rawls's Law of Peoples" in *Revue Internationale de Philosophie*, Vol. 60, No. 237 (3), 2006, pp. 301-326.

Austen, Ralph A. Ed. *Modern Imperialism: Western Overseas Expansion and Its Aftermath 1776-1965*. (Lexington, MA: D.C. Heath & Co., 1969).

Avila, Mitchell. "Defending A Law of Peoples: Political Liberalism and Decent Peoples" in *the Journal of Ethics,* Vol. 11, No. 1, 2007, pp. 87-124.

_____."Human Rights and Toleration in Rawls" in *Human Rights Review*, Vol. 12, No. 1, 2011, pp. 1-14.

Ayoob, Mohammed. "Humanitarian Intervention and International Society" in *Global Governance*, Vol. 7, No 3, 2001

_____."Humanitarian Intervention and State Sovereignty" in *International Journal of Human Rights*, Vol. 6, No. 1, 2002, pp. 81-102.

_____."Third World Perspectives on Humanitarian Intervention and International Administration" in *Global Governance*, Vol. 10, No 1, 2004, pp. 99-118.

Bagnoli, Carla. "Humanitarian Intervention as a Perfect Duty: A Kantian Argument" in Terry Nardin and Melissa S. Williams, Eds. *Humanitarian Intervention*. (NY and London: New York University Press, 2006).

Bain, William. "Vitoria: The law of war, saving the innocent, and the image of God" in Stefano Recchia and Jennifer M. Welch, Eds. *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill.* (New York: Cambridge University Press, 2013).

Bal, Peter. "Discourse Ethics and Human Rights in Criminal Procedure" in Mathieu Deflem, Ed. *Habermas, Modernity and Law* (London: Sage Publications, 1996).

Bannon, Alicia L. "The Responsibility to Protect and the Question of Unilateralism" in *The Yale Law Journal*, Vol. 115, No. 5, 2006, pp. 1157-1165.

Barry, Brian. *The Liberal Theory of Justice: A Critical Examination of the Principal doctrines in* A Theory of Justice *by John Rawls*. (Oxford: Clarendon Press, 1973).

Bartholomew, Amy. "Human Rights and Post-Imperialism: Argument for a Deliberative Legitimation of Human Rights" in *Buffalo Human Rights Law Rev*., Vol. 9, 2003, pp. 25-73.

Bauer, Joane and Bell, Daniel, Eds. *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

Baumeister, Andrea. "Habermas: Discourse and Cultural Diversity" in *Political Studies*, Vol. 51, 2003, pp. 740-758.

Baxi, Upendra. *The future of Human Rights*, 2nd Ed. (Oxford: Oxford University Press, 2006).

Baynes, Kenneth. "Toward a Political Conception of Human Rights" in *Philosophy and Social Criticism*, Vol. 35, No. 4, 2009, pp.371-390.

Beitz, Charles. *Political Theory and International Relations*. (Princeton: Princeton University Press, 1999).

_____. "Rawls's Law of Peoples" in *Ethics*, Vol. 110, No. 4, 2000, pp. 669-696.

_____. "Human Rights as a Common Concern" in *The American Political Science Review*, Vol. 95, No. 2, 2001, pp. 269-282.

_____. "Human Rights and the law of peoples" in Deen K. Chatterjee ed., *The Ethics of Assistance: Morality and the Distant Needy* (Cambridge: Cambridge University Press, 2004).

_____. *The idea of Human Rights*. (Oxford: Oxford University Press, 2009).

Bellamy, Alex. "Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq" in *Ethics and International Affairs*, Vol. 19, No. 2, 2005, pp. 31-54.

_____."Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit" in *Ethics and International Affairs*, Vol. 20, No. 2, 2006, pp. 143-169.

_____."The Responsibility to Protect and the Problem of Military Intervention" in *International Affairs*, Vol. 84, No 4, 2008, pp. 615-639.

_____."Realizing the Responsibility to Protect" in *International Studies Perspectives*, Vol. 10, 2009, pp. 111-128.

_____."The Responsibility to Protect –Five Years On" in *Ethics and International Affairs*, Vol. 24, No 2, 2010, pp. 143-169.

_____."Libya and the Responsibility to Protect: The Exception and the Norm" in *Ethics and International Affairs*, Vol. 25, No. 3, 2011, 263-269.

Benhabib, Seyla. *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).

_____.*Dignity in Adversity: Human Rights in Troubled Times* (Malden, Cambridge: Polity Press, 2011).

Benjamin, Barry M. "Unilateral Humanitarian Intervention: Legalizing the Use of Force to Prevent Human Rights Atrocities" in *Fordham International Law Journal*, Vol. 16, No 1, 1993, pp. 120-158.

Berman, Nathaniel. "Intervention in a 'Divided World': Axes of Legitimacy" in *The European Journal of International Law*, Vol. 17, No. 4, 2006, pp. 743-769.

Bernstein, Alyssa. *Human Rights Reconceived: A Defense of Rawls's Law of Peoples*. A PhD Dissertation at Harvard, 2000.

_____."A Human Rights to Democracy? Legitimacy and Intervention" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Bessis, Sophie. *Western Supremacy: The Triumph of an idea*? Trans. by Patrick Camiller. (New York: Zed Books, 2003).

Bew, John. "'From an Umpire to a Competitor': Castlereagh, Canning and the Issue of International Intervention in the Wake of Napoleonic Wars" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Bills, David. "International Human Rights and Humanitarian Intervention: The Ramification of the United Nations' Security Council" in *Texas International Law Journal*, Vol. 31, No. 107, 1996, pp. 107-130.

Black, David. "The Long and Winding Roads: International Norms and Domestic Political Change in South Africa"in Thomas Risse, Stephen Roppand Kathryn Sikkink, Eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

Blair, Tony. *Speech* Delivered in Chicago on April 22, 1999

Bowden, Brett. *The Empire of Civilization: the Evolution of Imperial Idea*. (Chicago: The University of Chicago Press, 2009).

Boyle, Joseph. "Traditional Just War Theory and Humanitarian Intervention" in Terry Nardin and Melissa S. Williams, Eds. *Humanitarian Intervention*. (NY and London: New York University Press, 2006).

Bricmont, Jean. *Humanitarian Imperialism: Using Human Rights to Sell War*. Trans. by Diana Johnstone. (New York: Monthly Review Press, 2006).

Brock, Gillian. "Recent Work on Rawls's Law of Peoples: Critics versus Defenders" in *American Philosophical Quarterly*, Vol. 47, No. 1, 2010, pp. 85-101.

Brown, Chris. "The Construction of a 'Realistic Utopia': John Rawls and International Political Theory" in *Review of International Studies*, Vol. 28, No. 1, 2002, pp. 5-21.

Brun, Ellen and Hersh, Jacques. "Faux Internationalism and Really Existing Imperialism" in *Monthly Review*, Vol. 63, No. 11, 2012, pp. 36-48.

Brunkhorst, Hauke. *Critical Theory of Legal Revolution* (New York: Bloomsbury, 2014).

Brunnee, Jutta and Toope, Stephen J. "Norm, Institution and UN Reform: The Responsibility to Protect" in *Behind the Headlines*, Vol. 63, No. 3, 2006, pp. 1-20.

Buchanan, Allen. "Rawls's Law of Peoples: Rules for a Vanished Westphalian World" in *Ethics*, Vol. 110, No. 4, 2000, pp.697-721.

_____."Reforming the international law of humanitarian intervention" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003)

_____."Taking the Human out of Human Rights"in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

_____."The Legitimacy of International Law" in in Samantha Besson & John Tasioulas, Eds. *The Philosophy of International Law*. (Oxford: Oxford University Press, 2010).

_____. *The Heart of Human Rights*. (Oxford: Oxford University Press, 2013).

Bucher, David. "Limiting What Rights Permits with What Interests prescribes: Rawls's Law of Peoples in Context"in Rex Martin and David Reidy, Eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Burmester, Byron F. "On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights" in *Utah Law Review*, Vol. 269, No. 1, 1994, pp. 269-323.

Butengwa, Florence. "Mediating Culture and Human Rights in Favour of Land Rights for Women in Africa: A Framework for Community-Level Action" in Abdullahi An-Na'im, Ed. *Cultural Transformation and Human Rights in Africa* (London/N.Y: Zed Book, 2002).

Byers, Michael and Chesterman, Simon. "Changing the Rules about Rules? Unilateral Intervention and the future of International Law"in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003).

Cabrera, Luis. "Toleration and Tyranny in Rawls's Law of Peoples" in *Polity*, Vol. 34, No. 2, 2001, pp. 163-179.

Cassese, Antonio. "The General Assembly: Historical Perspective 1945-1989" in Philip Alston, (Ed.), *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992).

Cassin, René. *La pensée et l'action*. (Edition F. Lalou, 1972).

Chandler, David. "*The Responsibility to Protect*? Imposing the 'Liberal Peace'" in *International Peacekeeping*, Vol. 11, No. 1, 2004, pp. 59-81.

_____."The Paradox of the 'Responsibility to Protect'" in *Cooperation and Conflict*, Vol. 45, No. 1, 2010, pp. 128-134.

Chesterman, Simon. *Just War or Just Peace? Humanitarian Intervention and International Law*. (Oxford: Oxford University Press, 2001).

Clapham, Andrew. *Human Rights Obligations of Non-States Actors* (Oxford: Oxford University Press, 2006).

_____.*'Leading from Behind': The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*. Paper present at New York University School of Law, 2011

Cohen, Joshua. "Minimalism About Human Rights: The Most We Can Hope For?" in *The Journal of Political Philosophy*, Vol. 12, No. 2, 2004, pp. 190-213.

_____."Is there a Human Rights to Democracy?" in Sypnowich, C., Ed. *The Egalitarian Conscience: Essays in Honor of G.A. Cohen* (Oxford: Oxford University Press, 2006).

Conklin, Alice L. "Colonialism and Human Rights, A Contradiction in Terms? The Case of France and West Africa, 1985-1914" in *The American Historical Review*, Vol. 103, No. 2, 1998, pp. 419-442.

Cooke, Maeve. *Language and Reason: A Study of Habermas's Pragmatics* (Cambridge: MIT Press, 1994).10

Cooper, Richard H. and Kohler, Juliette V. *The "Responsibility to Protect:" The New Global Moral Compact*, 2006. On http://www.kentlaw.edu/faculty/bbrown/classes/HumanrsemFall2008/CourseDocs/12ResptoProtect.pdf

Cortell, Andrew and Davis, James. "When Norms Clash: International Norms, Domestic Practices, and Japan Internationalization of the GATT/WTO" in *Review of International Studies*, Vol. 31, No. 1, 2005, pp. 451-479.

_____."How do International Institutions Matter? The Domestic Impact of International Rules and Norms" in *International Studies Quarterly*, Vol. 40, No 4, 1996, pp. 451-478.

_____."Understanding the Domestic Impact of International Norms: A Research Agenda" in *International Studies Review*, Vol. 2, No. 1, 2000, pp. 65-87.

Curtin, Philip D., Ed. *Imperialism*. (New York: Walker and Co., 1972).

Czernecki, Jennifer L. "The Limited Nations' Paradox: the Battle between Humanitarian Intervention and State Sovereignty" in *Duquesne Law Review*, Vol. 41, No. 2, 2003, pp. 391-407.

Dacyl, Janina W. "Sovereignty versus Human Rights: From Past Discourse to Present Dilemmas" in *Journal of Refugees Studies,* Vol. 9, No. 2, 1996, pp. 136-165.

Dale, John. "Transnational Legal Conflict Between Peasants and Corporations in Burma: Human Rights and Discursive Ambivalence under the US Alien Tort Claims Act" in Mark Goodale and Sally Engle Merry, (Eds.), *The Practice of Human Rights: Tracking the Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

Damrosch, Lori F. et al., *International Law: Cases and Materials*, Firth Edition (St. Paul: West, 2009).

Davenport, John. "Just War Theory, Humanitarian Intervention, and the Need for a Democratic Federation" in *Journal of Religious Ethics*, Vol. 39, No. 3, 2011, pp. 493-555.

Davies, Mathews. *Realizing Rights: How Regional Organisations Socialize Human Rights* (London/N.Y: Routledge, 2015).

Demaine, Jack and Smith, Penny. "Liberalism, Neoliberalism, Social Democracy: Thin Communitarian Perspectives on Political Philosophy and Education" in *British Journal of* Sociology *and Education*, Vol. 31, No. 4, 2010, pp. 509-514.

Deng, Francis M. "A cultural Approach to Human Rights among the Dinka" in Abdullahi A. An-Na'im & Francis M. Deng, ed., *Human Rights in Africa: Cross-cultural Perspective* (Washington, D.C.: The Brooking Institution, 1990).

Donnelly, Jack. "Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights" in *The American Political Science Review*, vol. 76, No. 2, 1982, pp. 303-316.

_____."Human Rights, Humanitarian Crisis, and Humanitarian Intervention" in *International Journal,* Vol. 48, No. 2, 1993, pp. 607-640.

_____. "Human Rights: A New Standard of Civilization?" in *International Affairs*, Vol. 74, No. 1, 1998, pp. 1-23.

————. "Human Rights and Asian Values: A Defense of 'Western' Universalism" in Joanne R. Bauer and Daniel A. Bell, Eds., *The East Asian Challenge for Human Rights*. (Cambridge: Cambridge University Press, 1999).

_____. *International Human Rights*, 4th ed. (Boulder: Westview Press, 2013).

_____. *Universal Human Rights in Theory and Practice*. 3rd Ed. (Ithaca & London: Cornell University Press, 2013).

Douzinas, Costas. *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000).

Doyle, Michael. "J. S. Mill on nonintervention and intervention" in Stefano Recchia and Jennifer M. Welch, Eds. *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill.* (New York: Cambridge University Press, 2013).

____."A few words on Mill, Walzer and Nonintervention" in *Ethics and International Affairs*, 2010, pp. 349-369.

Dworkin, Ronald. *Justice for Hedgehogs* (Cambridge: The Belknap Press of Harvard University Press, 2011).

Edgar, Andrew. *The Philosophy of Habermas* (Chesham: Acumen, 2005).

Elwood, Douglas. *Human Rights: A Christian Perspective* (Quenzon City: New Day Publishers, 1990).

Engle, Karen. "From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999" in *Human Rights Quarterly*, Vol. 23, No. 3, 2001, pp. 536-559.

Erlinder, Peter. "Human Rights or 'Human Rights Imperialism'? Lessons from the War against Yugoslavia" in *Guild Practitioner*, Vol. 57, 2000, pp. 76-92.

Ernst, Gerhard. "Universal Human Rights and Moral Diversity" in Gerhard Ernst and Jan-Christoph Heilinger,Ed.*The Philosophy of Human Rights: Contemporary Controversies* (Berlin/Boston: De Gruyter, 2012).

Etinson, Adam. "To Be or not to Be: Charles Beitz on the Philosophy of Human Rights," a book review in *Res Publica*, Vol. 16, 2010, pp. 441-448.

Evans, Gareth. "The Responsibility to Protect: Rethinking Humanitarian Intervention" in *American Society of International Law*, Vol. 98, 2004, pp. 78-89.

_____. "From Humanitarian Intervention to the Responsibility to Protect" in *Wisconsin International Law Journal,* Vol. 24, No. 3, 2006, pp. 703-722.

_____."The Responsibility to Protect: An Idea whose Time has Come… and Gone?" in *International Relations,* Vol. 22, No. 3, 2008, pp. 283-298.

_____. "The Responsibility to Protect: Ending Mass Atrocities Crimes Once and for All" in *Irish Studies in International Affairs*, Vol. 20, 2009, pp. 7-13.

Farer, Tom J. "Humanitarian intervention before and after 9/11: legality and legitimacy" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003).

Fearon, James D. and Laitin, David D. "Neotrusteeship and the Problem of Weak States" in *International Security*, Vol. 28, No. 4, 2004, pp. 5-43.

Ferrara, Alessandro. "Two notions of Humanity and the Judgment Argument for Human Rights" in *Political Theory*, vol. 31, No. 3, 2003, pp. 392-420.

Finnemore, Martha. "International Organization as Teachers of Norms: The United Nations Educational, Scientific, and Cultural Organisation and Science Policy" in *International Organisation,* Vol. 47, No. 4, 1993, pp. 565-597.

_____."Review: Norms, Culture and World Politics: Insights from Sociology's Institutionalism" in *International Organisation*, Vol.50, No. 2, 1996, pp. 325-347.

Finnemore, Martha and Sikkink, Kathryn. "International Norm Dynamics and Political Change" in *International Organization*, Vol. 52, No. 4, 1998, pp. 887-917.

Fiore, Pasquale. *Le droit international codifié et sa sanction juridique*. (Paris: Pedone, 1911).

Firmin, Anténor. *De l'égalité des races humaines*. (Port-au-Prince: Les Editions Fardin, 2011).

Flynn, Jeffrey. "Habermas on Human Rights: Law, Morality, and Intercultural Dialogue" in *Social Theory and Practice*, Vol. 29, No. 3, 2003, pp. 431-457.

Focarelli, Carlo. "The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine" in *Journal of Conflict and Security Law,* Vol. 13, No. 2, 2008, pp. 191-213.

Fonteyne, Jean-Pierre L. "The Customary international Law Doctrine of Humanitarian Intervention: Its current Validity under U.N. Charter" in *California Western International Law Journal*, Vol. 4, No 2, 1974, pp. 203-270.

Forst, Rainer. The Right to Justification: Elements of a Constructivist Theory of Justice. Trans. Jeffery Flynn (New York: Columbia University Press, 2012).

Frank, Thomas. "Legality and Legitimacy in Humanitarian Intervention" in Terry Nardin and Melissa S. Williams, Eds., *Humanitarian Intervention*. (NY and London: New York University Press, 2006).

Frankenberg, Günter. “Why Care?—The Trouble with Social Rights” in *Cardozo L. Rev*., Vol. 17, 1996, pp. 1365-1390.

Freeman, Samuel. “Introduction” In Samuel Freeman, Ed. *Cambridge Companion to Rawls*. (Cambridge: Cambridge University Press, 2002).

_____.“The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice” in *Social Philosophy and Policy Foundation*, 2006, pp. 26-68.

_____.“Distributive Justice and The Law of Peoples” in in Rex Martin and David Reidy, Eds. *Rawls’s Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Gane, Nicholas. “Trajectories of Liberalism and Neoliberalism” in *Theory, Culture & Society*, Vol. 32, No. 1, 2015, pp. 133-144.

Garwood-Gowers, Andrew. “China and the ‘Responsibility to Protect’: The Implications of the Libyan Intervention” in *Asian Journal of International Law*, Vol. 2, No. 2, 2012, pp. 375-393.

Gathii, James T. “Imperialism, Colonialism, and International Law” in *Buffalo Law Review*, Vol. 54, No. 4, 2007, pp. 1013-1066.

Genugtern, Willem van. “Human Rights are not for Sale: On Universality and Conditionality” in Martha Meijer, (Ed.), *Dealing with Human Rights: Asian and Western Views on the Value of Human Rights* (Utrecht: Greber Publisher, 2001).

Getz, Trevor R. and Streets-Salter, Heather. *Modern Imperialism and Colonialism: A Global Perspective.* (Boston: Pearson, 2011).

Gitlitz, John. “Peasant Justice and Respect for Human Rights: Perù” in Adamantis and Peter Schwab, Eds. *Human Rights: New Perspectives, New Realities* (London: Lynne Rienner Publishers, 2000).

Glendon, Mary A. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. (New York: Randon House Trade Paperbacks, 2001).

Goldstein, Daniel. "Whose Vernacular? Translating Human Rights in Local Contexts" in Mark Goodale, Ed. *Human Rights at the Crossroads* (Oxford: Oxford University Press, 2013).

Goodale, Mark. "Introduction to 'Anthropology and Human Rights in a New Key'" in *American Anthropologist*, Vol. 108, No. 1, 2006, pp. 1-8.

_____. "Toward a Critical Anthropology of Human Rights" in *Current Anthropology*, Vol. 47, No. 3, 2006, pp. 485-511.

_____. "Ethical Theory as Social Practice" in *American Anthropologist*, Vol. 108, No. 1, 2006, pp. 25-37.

_____. "The Power of Right(s): Tracking Empires of Law and New Modes of Social Resistance in Bolivia (and elsewhere)" in Mark Goodale and Sally Engle Merry, (Eds.), *The Practice of Human Rights: Tracking the Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

_____."Introduction: Locating Rights, Envisioning Law between the Global and the Local" in Mark Goodale and Sally Engle Merry, (Eds.), *The Practice of Human Rights: Tracking the Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

Grant, Kevin. *A Civilized Savagery: Britain and the New Slaveries in Africa, 1884-1926.* (New York: Routledge, 2005).

Gränzer, Sieglinde. "Changing Discourse: International Advocacy Network in Tunisia and Morocco" in Thomas Risse, Stephen Roppand Kathryn Sikkink, Eds. *The Power of*

Human Rights: International Norms and Domestic Change (Cambridge: Cambridge University Press, 1999).

Graubart, Jonathan. "R2P and Pragmatic Liberal Interventionism: Values in the Service of Interests" in *Human Rights Quarterly*, Vol. 35, No 1, 2013, pp. 66-90.

Green, Abigail. "Intervening in the Jewish question, 1840-1878)"in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Gregg, Benjamin. "Translating Human Rights into Muslim Vernaculars" in *Comparative Sociology*, Vol. 7, 2008, pp. 457-483.

_____. "Individuals as Authors of Human Rights: Not only Addressees" in *Theory and Society,* Vol. 39, No. 6, 2010, pp. 631-650.

_____."Advancing Human Rights in Post-Authoritarian Communities through Education" in *Journal of Human Rights Practice*, Vol. 7, No. 2, 2015, pp. 199-222.

Greiff, Pablo de. "Habermas on Nationalism and Cosmopolitanism" in *Ratio Juris*, Vol. 15, No 4, 2002, pp. 418-438.

Griffin, James. *On Human Rights* (Oxford: Oxford University Press, 2008).

Grotius, Hugo. *The Rights of War and Peace*, Book II. Ed. by Richard Tuck. (Indianapolis: Liberty Fund, 2005).

Gueli, Richard. "Humanitarian Intervention in Africa: Towards a New Posture" in *Scientia Militaria, South African Journal of Military Studies*, Vol. 32, No. 1, 2004, pp. 120-142.

Günther, Klaus. "Communicative Freedom, Communicative Power, and Jurisgenesis" in *Cardozo L. Rev*., Vol. 17, 1996, pp. 1035-1058.

Gurowitz, Amy. "Mobilizing International Norms: Domestics Actors, Immigrants, and the Japanese State" in *World Politics*, Vol. 51, No. 3, 1999, pp. 413-445.

Guterres, Antonio. "Millions Uprooted: Saving Refugees and the Displaced" in *Foreign Affairs*, Vol. 87, No. 5, 2008, pp. 90-99.

Habermas, Jürgen. *Knowledge and Human Interest*. Tans. Jeremy J. Shapiro. (Boston: Beacon Press, 1971).

_____. *La technique et la science comme idéologie*. Intro. and trans. Jean-René Ladmiral. (Paris: Gallimard, 1973).

_____. *Theory and Practice*. Trans. John Viertel (Boston: Beacon Press, 1973).

_____."A Reply to my Critics" in John B. Thompson and David Held, Eds. *Habermas: Critical Debates* (Cambridge: MIT Press, 1982).

_____.*The Theory of Communicative Action. vol. 1: Reason and The Rationalization of society*. Trans. Thomas McCarthy (Boston: Beacon Press, 1984).

_____.*Theory of Communicative Action. vol.* 2.*Lifeworld and System: A Critique of Functionalist Reason*. Trans. Thomas McCarthy (Boston: Beacon Press, 1987).

_____."Law and Morality" in M. McMurrin, Ed. *The Tanner Lectures on Human Values*, vol. VIII, 1988.

_____."Justice and Solidarity: On the Discussion Concerning Stage 6" in Thomas Wren, Ed., *The Moral Domain: Essays on the Ongoing Discussion between Philosophy and Social Sciences*. (Cambridge: MIT Press, 1990).

_____.*Moral Consciousness and Communicative action*. Trans. Christian Lenhardt & Shierry Weber Nicholsen (Cambridge: MIT Press, 1990).

_____. *The Philosophical Discourse of Modernity: Twelve Lectures*. Trans. Frederic G. Lawrence (Cambridge: MIT Press, 1990).

_____."A Reply" in Axel Honneth and Hans Joas, eds. *Communicative Action: Essays on Jürgen Habermas's The Theory of Communicative Action*. Tans. Jeremy Gaines and Doris L. Jones (Cambridge: MIT Press, 1991).

_____."Multiculturalism and Liberal State" in *Stanford Law Review*, Vol. 47, No. 5, 1995, pp. 849-853.

_____. *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* Trans. Thomas Burger (Cambridge: MIT Press, 1991).

_____."Paradigms of Law" in *Cardozo L. Rev*., Vol., 17, 1996, pp. 771-784.

_____.*Postmetaphysical Thinking: Philosophical Essays*. Trans. William Mark Hohengarten (Cambridge: MIT Press, 1996).

_____."Reply to Symposium Participants, Benjamin N. Cardozo School of Law" in *Cardozo L. Rev*., 1996, pp. 1477-1588.

_____."Popular Sovereignty as Procedure" in James Bohman & William Rehg, Eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge: MIT Press, 1997).

_____. *Between Fact and Norm: Contributions to a Discourse Theory of Law and Democracy*. Trans. William Rehg (Cambridge: MIT Press, 1998).

_____.*On the Pragmatics of Communication*. Ed. Maeve Cooke (Cambridge: MIT Press, 1998).

_____."Bestiality and Humanity: A War on the Border between Legality and Morality" in *Constellations,* Vol. 6, No. 3, 1999, pp. 263-272.

_____."Private and Public Autonomy, Human Rights and Popular Sovereignty" in Obrad Savić, Ed. *The Politics of Human Rights* (London: Verso, 1999).

_____."Short Reply" in *Ratio Juris*, Vol. 12, No. 4, 1999, pp. 445-453.

_____."Kant's Idea of Perpetual Peace: At Two Hundred Years' Historical Remove" in *The Inclusion of the Other: Studies in Political Theory,* ed. Ciaran Cronin and Pablo de Greiff (Cambridge, MA: MIT Press, 2000).

_____. *The Inclusion of the Other: Studies in Political Theory*. Ed. Ciaran Cronin (Cambridge: MIT Press, 2000).

_____. "Constitutional Democracy: A Paradoxical Union of Contradictory Principles" in *Political Theory*, Vol. 29, No. 6, 2001, pp. 766-781.

_____. *Justification and Application: Remarks on Discourse Ethics*. Trans. Ciaran Cronin (Cambridge: MIT Press, 2001).

_____."Remarks on Legitimation through Human Rights" in *Postnational Constellation*, trans. Max Pensky (Cambridge, MA: MIT Press, 2001).

_____. "Religious Tolerance: The Pacemakers for Cultural Rights" in *Philosophy*, Vol. 79, No. 307, 2004, pp. 5-18.

_____."Equal Treatment of Cultures and the Limits of Postmodern Liberalism" in *The Journal of Political Philosophy*, Vol. 13, No. 1, 2005, pp. 1-28.

_____. *Legitimation Crisis*. Trans. Thomas McCarthy (Boston: Beacon Press, 2005).

_____. *Times of Transition*. Ed. Ciaran Cronin (Malden: Polity Press, 2006).

_____. *Divided West*. Trans. Ciaran Cronin (Cambridge, Malden: Polity Press, 2007).

_____. *Europe: The Faltering Projec*t. Trans. Ciaran Cronin (Malden: Polity Press, 2009).

_____.*The Concept of Human Dignity and the Realistic Utopia of Human Rights*. A Lecture given at Stony Brook, September 30, 2009.

_____. *Between Naturalism and Religion: Philosophical Essays*. Trans. Ciaran Cronin (Malden: Polity Press. 2010).

_____. *The Crisis of European Union: A Response*. Trans. Ciaran Cronin (Malden: Polity Press, 2012).

_____."The Concept of Human Dignity and the Realistic Utopia of Human Rights" in *The Crisis of European Union: A Response*. Trans. Ciaran Cronin (Malden: Polity Press, 2012).

Hart, H. L. A. *The Concept of Law*. (Oxford: Clarendon Press, 1961).

Hayden, Patrick. *John Rawls: Towards a Just World Order* (Cardiff: University of Wales Press, 2002).

Heath, Joseph. *Communicative Action and Rational Choice* (Cambridge: MIT Press, 2001).

_____. "Rawls on Global Distributive Justice: A Defense" in *Canadian Journal of Philosophy*, Supplementary Vol. 31, 2005, pp. 193-226.

Hehir, Aidan. *Humanitarian Intervention After Kosovo: Iraq, Darfur and the Record of Global Civil Society* (New York: Palgrave, 2008).

____."The Responsibility to Protect: 'Sound and Fury Signifying Nothing?" in *International Relations*, Vol. 24, No. 2, 2010, pp. 218-239.

Heinze, Eric A. *Waging Humanitarian War: The Ethics, Law and Politics of Humanitarian Intervention*. (Albany: SUNY Press, 2009).

Heyns, Christof and Viljoen, Frans. "The Impact of the United Nations Human Rights Treaties on the Domestic Level" in *Human Rights Quarterly*, Vol. 23, No. 4, 2001, pp. 483-535.

Hinsch, Wilfried and Stepanians, Markus. "Human Rights as Moral Claim Rights" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Hobson, John A. *Imperialism: A Study* (London: James Nesbit & Co., 1902).

Holloway, David. "The War on Terror Espionage Thriller, and the Imperialism of Human Rights" in *Comparative Literature Studies*, Vol. 46, No. 1, 2009, pp. 20-44.

Holzgrefe, J. L. "The Humanitarian Intervention Debate" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003).

Honig, Bonnie. "Dead Rights, Live Futures: A Reply to Habermas's Constitutional Democracy" in *Political Theory*, Vol. 29, No. 6, 2001, pp. 729-805.

Honneth, Axel and Joas, Hans, Eds. *Communicative Action: Essays on Jürgen Habermas's The Theory of Communicative Action*. Tans. Jeremy Gaines and Doris L. Jones (Cambridge: MIT Press, 1991).

Horkeimer, Max and Adorno, Theodor. *Dialect of Enlightenment: Philosophical Fragments*. Ed. Gunzelin Schimid Noerr; trans. Edmund Jephcott (Stanford: Stanford University Press, 2002).

Howard, Rhoda E. "Dignity, Community and Human Rights" in A. A. An-Na'im, Ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*. (Philadelphia: University of Pennsylvania Press, 1992).

_____."Group versus Individual Identity in the African Debate on Human Rights" in A. A. An-Na'im and F. M. Deng, Eds., *Human Rights in Africa: Cross-Cultural Perspectives*. (Washington: The Brookings Institutions, 1990).

Howe, Leslie. *On Habermas* (Belmont: Wadsworth, 2000).

Human Rights Watch. *Protectors or Pretenders? Government Human Rights Commissions in Africa* (N.Y/London: Human Rights Watch, 2001).

Humphrey, John. *Human Rights and the United Nations: A Great Adventure.* (New York: Transnational Publishers, 1984).

_____.*No Distant Millennium: The International Law of Human Rights* (Paris: Unesco, 1989).

Hunt, Lynn. *Inventing Human Rights: A History* (New York & London: W.W. Norton & Company, 2007).

Ibhawoh, Bonny. *Imperialism and Human Rights: Colonial Discourses of Rights and Liberties in African* History. (Albany: State University of New York Press, 2007).

Ignatieff, Michael. *Human Rights as Politics and Idolatry*. (Princeton and Oxford: Princeton University Press, 2001).

_____. "State failure and nation-building" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003).

Ingiyimbere, Fidèle. "Spreading from the West: Rethinking the Universality of Human Rights" in *Hekima Review*, no. 43, Dec. 2010, pp. 153-165.

Ingram, David. "Between Political Liberalism and Postnational Cosmopolitanism: Toward an Alternative Theory of Human Rights" in *Political Theory*, vol. 31, No. 3, 2003, pp. 359-391.

_____."Of Sweatshops and Subsistence: Habermas on Human Rights" in *Ethics & Global Politics,* vol. 2, No. 3, 2009, pp. 193-217.

_____. *Habermas: Introduction and Analysis* (Ithaca: Cornell University Press, 2010).

International Commission on Intervention and State Sovereignty (ICISS). *The Responsibility to Protect: Report.* (Ottawa: ICISS, 2001).

Ishay, Michel R. *The History of Human Rights: From Ancient Times to the Globalization Era.* (Berkeley: University of California Press, 2004).

Ivic, Sanja. "Dynamic Nature of Human Rights: Rawls's Critique of Moral Universalism" in *Trans/Form/Ação, Marília*, Vol. 33, No. 2, 2010, pp. 223-240d.

Jackson, Jean. "Rights to Indigenous Culture in Colombia." in Mark Goodale and Sally Engle Merry, (Eds.), *The Practice of Human Rights: Tracking the Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

Jahn, Beate. "Humanitarian Intervention—What's in a name?" in *International Politics*, Vol. 49, No. 1, 2012, pp. 36-58.

Jamison, Matthew. "Humanitarian intervention since 1990 and 'liberal interventionism'" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Jennings, Justin. "The Fragility of Imperialist Ideology and the End of Local Traditions, an Inca Example" in *Cambridge Archaeological Journal*, Vol. 13, No. 1, 2003, pp. 107-120.

Jessop, Bob. "Liberalism, Neoliberalism, and Urban Governance: A State-Theoretical Perspective" in *Antipode*, 2002, 452-472.

Jetschke, Anja. "Linking the Unlinkable? International Norms and Nationalism in Indonesia and the Philippines" in Thomas Risse, Stephen Roppand Kathryn Sikkink, Eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

Joas, Hans. *Sacredness of the Person: A New Genealogy of Human Rights* (Washington: Georgetown University Press, 2013).

Johnson, James T. *Morality and Contemporary Warfare*, (New Haven: Yale University Press, 1999).

_____."Religion, Violence and Human Rights: Protecting Human Rights is Justified for the Use of Armed Force" in *Journal of Religious Ethics*, Vol. 41, No 1, 2013, pp. 1-14.

Jones, Sidney. "Regional Institutions for Protecting Human Rights in Asia" in *Proceedings of the Annual Meeting* (American Society of International Law), Vol. 89, 1995, pp. 475-480.

Jouannet, Emmanuelle. "Universalism and Imperialism: The True-False Paradox of International Law?" in *The European Journal of International Law,* Vol. 18, No. 3, 2007, pp. 379-407.

Joyner, Christopher C. "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention" in *Virginia Journal of International Law*, Vol. 47, No. 3, 2007, pp. 693-723.

Julien, François. "Quel absolu pour les droits de l'homme?" in Jean-Loup Amselle et al. *Diversité culturelle and universalité droits de l'homme* (Nantes: Editions Cecile Defaut, 2010).

Jung, Kim D. "'Is Culture Destiny?' The Myth of Asia's Anti-Democratic Values: A Response to Lee Kuan Yew;"in Martha Meijer, Ed.*Dealing with Human Rights: Asian and Western Views on the Value of Human Rights* (Utrecht: Greber Publisher, 2001).

Kabau, Tom. "The Responsibility to Protect and the Role of Regional Organizations: An Appraisal of the African Union's Interventions" in *Goettingen Journal of International Law*, Vol. 4, No. 1, 2012, pp. 49-92.

Kanstroom, Daniel. *Aftermath: Deportation Law and the New American Diaspora* (New York, Oxford: Oxford University Press. 2012).

Kant, Immanuel. *Perpetual Peace and Other Essays*. Trans. Ted Humphrey (Indianapolis: Hacket Publishing Company, 1983).

Keck, Margaret and Sikkink, Kathryn. *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998).

Kelly, Erin. "Human Rights as Foreign Policy Imperatives" in Chatterjee, D. K., Ed. *The Ethics of Assistance: Morality and the Distant Needy*. (Cambridge: Cambridge University Press, 2004).

Kennedy, David. *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton: Princeton University Press, 2004).

King Jr., Martin L. *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr*., Ed. By James M. Washington (N.Y: Harper One, 1986).

Koebner, Richard and Schmidt, Helmut D. *Imperialism: The Story and Significance of a Political Word, 1840-1960*, (Cambridge: Cambridge University Press, 1964).

Koehane, Robert O. "Political authority after intervention: gradation in sovereignty" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003).

Korey, William. *NGOs and the Universal Declaration of Human Rights: "A Curious Grapevine"* (N.Y: St Martin's Press, 1998).

Koskenniemi, Martti. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. (Cambridge: Cambridge University Press, 2002).

_____. "Empire and International Law: The Real Spanish Contribution" in *University of Toronto Law Journal*, Vol. 61, No. 1, 2011, pp. 1-36.

Krasner, Stephen D. *Power, The State and Sovereignty: Essays on International Relations* (London, New York: Routledge, 2009).

Kreide, Regina. "Preventing Humanitarian Intervention? John Rawls and Jürgen Habermas on Just Global Order" in *German Law Journal*, Vol. 10, No. 1, 2009, pp. 93-114.

Kuper, Andrew. "Rawlsian Global Justice: Beyond the Law of Peoples to a Cosmopolitan Law of Persons" in *Political Theory*, Vol. 28, No. 5, 2000, pp. 640-674.

Lal, Deepak. *In Praise of Empires: Globalization and Order*. (New York: Palgrave, 2004).

Lafont, Cristina. *The Linguistic Turn in Hermeneutic Philosophy* (Cambridge: MIT Press, 1999).

_____. *Global Governance, Human Rights and the Responsibility to Protect*, Paper presented at Boston College Clough Center for the Study of Constitutional Democracy, on Nov 1, 2013.

Lauren, Paul G. *The Evolution of International Human Rights: Vision Seen*. (Philadelphia: University of Pennsylvania Press, 1998).

Laurens, Henry. *L'empire et ses ennemis. La question impériale dans l'histoire*. (Paris: Editions du Seuil, 2009).

Lenin. *Imperialism, the Highest Stage of Capitalism: A Popular outline*. (Moscow: Progress Publishers, 1975).

Li, Xiaorong. "Asian Values and the Universality of Human Rights" in Martha Meijer (ed.), *Dealing with Human Rights: Asian and Western Views on the Value of Human Rights* (Utrecht: Greber Publisher, 2001).

Lillich, Richard B. "The Role of UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World" in *Tulane Journal of International and Comparative Law*, Vol. 3, No 1, 1995, pp. 1-17.

_____."Intervention to Protect Human Rights" in *McGill Law Journal*, Vol. 15, No. 2, 1969, pp. 205-219.

Lorimer, James. *Institutes of International Law. A Treatise of the Jural Relations of Separate Political Communties,*vol. 1. (Edinburgh and London: Blackwood, 1883).

Lu, Catherine. "Humanitarian Intervention: Moral Ambition and Political Constraints" in *International Journal*, Vol. 62, No. 4, 2007, pp. 942-951.

Luck, Edward C. "The Responsibility to Protect: Growing Pains or Early Promise" in *Ethics and International Affairs*, Vol. 24, No. 4, 2010, pp.349-365.

_____. "Sovereignty, Choice, and the Responsibility to Protect" in *Global Responsibility to Protect*, Vol. 1, 2009, pp. 10-21.

Luhmann, Niclas. "Quod omnes Tangit: Remarks on Jürgen Habermas's Legal Theory" in *Cardozo L. Rev*., Vol. 17, 1996, pp. 883-899.

Luttwark, Edward. "Kofi's Rule: Humanitarian Intervention and Neocolonialism" in *National Interest*, No 58, 2000, pp. 57-62.

Macfarlane, S. Neil et al. "The Responsibility to Protect: Is Anyone Interested in Humanitarian Intervention?" in *Third World Quarterly*, Vol. 25, No. 5, 2004, pp. 977-992.

Macklem, Patrick. "Humanitarian Intervention and the Distribution of Sovereignty in International Law" in *Carnegie Council for Ethics in International Affairs*, 2008, pp. 369-393.

Macleod, Alistair. "Rawls's Narrow Doctrine of Human Rights" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

MacQueen, Norrie. *Humanitarian Intervention and the United Nations*. (Edinburgh: Edinburgh University Press, 2011).

Maffettone, Sebatiano. *Rawls: An Introduction*. (Malden: Polity, 2010).

Mahoney, Jack. *The Challenge of Human Rights: Origin, Development and Significance* (Malden: Blackwell Publishing, 2007).

Mamdani, Mahmood. *Saviors and Survivors: Darfur, Politics, and the War on Terror*. (New York: Pantheon Books, 2009).

_____. "The Responsibility to Protect or Right to Punish?" in *Journal of Intervention and State Building*, Vol. 4, No. 1, 2010, pp. 53-67.

Marcuse, Herbert. *One-Dimensional Man: Studies in the Ideologies of Advanced Industrial Society*. (Boston: Beacon Press, 1991).

Märkinen, Virpi and Korkman, Petter, Ed. *Transformations in Medieval and Early-Modern Rights Discourse* (Dordrecht: Springer, 2006).

Martin, Guy. "Africa and the Ideology of Eurafrica: Neo-colonialism or Pan-Africanism" in *The Journal of African Studies*, Vol. 20, No. 2, 1982, 221-238.

Maritain, Jacques, Ed. *Human Rights: Comments and Interpretation* (New York: Columbia University Press, 1949).

Martin, Rex. *Rawls and Rights*. (Lawrence: University of Press of Kansas, 1985).

Martin, Rex and Reidy, David. "Introduction: Reading Rawls's The Law of Peoples" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Marx, Karl. *On the Jewish Question* in Lawrence H. Simon (Ed.) *Selected Writing* (Indianapolis, Cambridge: Hackett Publishing Company, 1994).

Maus, Ingeborg. "Liberties and Popular Sovereignty: On Jürgen Habermas's Reconstruction of the System of Rights" in *Cardozo L. Rev*., Vol. 17, 1996, pp. 825-882.

Mayall, James. "Humanitarian Intervention and International Society: Lessons from Africa" in Jennifer M. Welch, Ed. *Humanitarian Intervention and International Relations.* (Oxford: Oxford University Press, 2004).

Mazrui, Ali. "The Message of Rwanda: Recolonize Africa?" in *New Perspectives Quarterly,* Vol. 2, No. 4, 1994, pp. 18-20.

McCarthy, Thomas. *The Critical Theory of Jürgen Habermas* (Cambridge: MIT Press, 1981).

_____. *Race, Empire, and the Idea of Human Development*. (Cambridge: Cambridge University Press, 2009).

Mégret, Frédéric. "Beyond the 'Salvation' Paradigm: Responsibility to Protect (Others) vs the Power of Protecting Oneself" in *Security Dialogue,* Vol. 40, No. 6, 2009, pp. 575-595.

Meijer, Martha. "The Human Dimension: Human Rights Impact Assessment as an Instrument" all in Martha Meijer, (Ed.), *Dealing with Human Rights: Asian and Western Views on the Value of Human Rights* (Utrecht: Greber Publisher, 2001).

Merle, Jean-Christophe. "The Problem with Military Humanitarian Intervention and its Solution" in *The Philosophical Forum*, Vol. xxxiv, No 1, 2005, pp. 59-76.

Merry, Sally Engle. "Legal Pluralism and Transnational Culture: The KA HO'OKOLOKONUI KANAKA MAOLI TRIBUNAL, HAWA'I, 1993" in Richard A. Wilson, Ed. *Human Rights, Culture and Context* (London: Pluto Press, 1997).

_____."Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)" in *PoLAR*, Vol. 26, No. 1, 2003, pp. 55-76.

_____. *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: Chicago University Press, 2005).

_____."Transnational Human Rights and Local Activism: Mapping the Middle" in *American Anthropologist*, Vol. 108, No. 1, 2006, pp.38-51.

_____."Introduction: Conditions of Vulnerability" in Mark Goodale and Sally Engle Merry, Eds. *The Practice of Human Rights: Tracking the Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

_____."Human Rights Monitoring and the Question of Indicators" in Mark Goodale, Ed. *Human Rights at the Crossroads* (Oxford: Oxford University Press, 2013).

Mertens, Thomas. "Cosmopolitanism and Citizenship: Kant against Habermas" in European Journal of Philosophy, Vol. 4, No. 3, 1996, pp. 328-347.

Mertus, Julie. *Human Rights Matters: Local Politics and National Human Rights Institutions* (Stanford: Stanford University Press, 2009).

Messer, Ellen. "Anthropology and Human Rights" in *Annual Review of Anthropology*, Vol. 22, 1993, pp. 221-249.

Mheta, Pratap B. "From State Sovereignty to Human Security (via Institutions?)" in Terry Nardin and Melissa S. Williams, Eds. *Humanitarian Intervention*. (NY and London: New York University Press, 2006).

Mihr, Anja and Schmitz, Hans P. "Human Rights Education (HRE) and Transnational Activism" in *Human Rights Quarterly*, Vol. 29, No. 4, 2007, pp. 973-993.

Mill, John S. *Considerations on Representative Government*, in *On Liberty and Other Essays*. Ed. John Gray. (Oxford: Oxford University Press, 1998).

___. *On Liberty* in *Essential Works of John S. Mill*, ed. Marx Lerner. (New York: Bantam Books, 1971).

___. *A Few Words on Non-Intervention* in *New England Review*, Vol. 27, No. 3, 2006, pp. 252-264.

Miller, David. "Collective Responsibility and International Inequality in *The Law of Peoples*" in Rex Martin and David Reidy, Eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Miller, Richard. "Humanitarian Intervention, Altruism, and the Limits of Casuistry" in *Journal of Religious Ethics*, Vol. 28, No. 1, 2000, pp. 3-35.

Mitzen, Jennifer. "Reading Habermas in Anarchy: Multilateral Diplomacy and Public Sphere" in *American Political Science Rev.*, Vol. 99, No. 3, 2005, pp. 401-417.

Mommsen, Wolfgang J. *Theories of Imperialism*; trans. by P.S. Falla. (New York: Randon House, 1980).

_____. "The End of Empire and the Continuity of Imperialism" in Wolfgang J. Mommsen and Jürgen Osterhammel, Eds., *Imperialism and After: Continuity and Discontinuity*. (London: Allen & Unwin, 1986).

Moon, J Donald. *John Rawls: Liberalism and the Challenges of Late Modernity*. (NY, London: Rowman & Littlefield, 2014).

Morsink, Johannes. "The Philosophy of the Universal Declaration" in *Human Rights Quarterly*, Vol.6, No. 3, 1984, pp. 309-334.

_____. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. (Philadelphia: University of Pennsylvania Press, 1999).

_____.*Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009).

Moyn, Samuel. *The Last Utopia: Human Rights in History* (Cambridge: The Belknap Press of Harvard University Press, 2010).

Muldoon, James. *Empire and Order: The Concept of Empire*, 800-1800. (London: Macmillan Press, 1999).

Mulligan, Michael. "Nigeria, the British Presence in West Africa and International Law in the 19th Century" in *Journal of the History of International Law*, Vol. 11, 2009, pp. 273-301.

Mulligan, William. "British Anti-Slave Trade and Anti-slavery Policy in East Africa, Arabia and Turkey in the Late Nineteenth Century" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Mumby, Dennis K. "Ideology & the Social Construction of Meaning: A Communication approach" in *Communication Quarterly*, Vol. 37, No. 4, 1989, pp. 291-304.

Münkler, Herfried. *Empires: The Logic of World Domination from Ancient Rome to the United States*, trans. by Patrick Camiller. (Malden: Polity Press, 2007).

Murphy, Sean D. *Humanitarian Intervention: The United Nations in an Evolving World Order*. (Philadelphia: University of Pennsylvania Press, 1996).

Mutua, Makua. *Human Rights: A Political and Cultural Critique*. (Philadelphia: University of Pennsylvania Press, 2002).

_____."Terrorism and Human Rights: Power, Culture, and Subordination" in *Buffalo Human Rights Law Review*, Vol. 8, No 1, 2002, pp.1-13.

_____."The Iraq Paradox: Minority and Group Rights in a Viable Constitution" in *Buffalo Law Review*, Vol. 54, 2006, pp. 927-955.

_____."The Banjul Charter and the African Cultural Fingerprint: an Evaluation of the Language of Duties" in *Virginia Journal of International Law*, Vol. 35, 1994-95, pp. 339-380.

_____."Human Rights in Africa: the Limited Promise of Liberalism" in *African Studies Review*, Vol. 51, No. 1; 2008, pp.17-39.

_____."Human Rights and Powerlessness: Pathologies of Choice and Substance" in *Buffalo Law Review*, Vol. 56, 2008, pp. 1027-1057.

_____."Standard Setting in Human Rights: Critique and Prognosis" in *Human Rights Quarterly*, Vol. 29, No. 3, 2007, pp. 547-630.

_____."Critical Race Theory and International Law: The View of an Insider-Outsider", Keynote Address. In *Villanova Law Review*, Vol. 45, 2000, pp. 841-853.

_____."Human Rights NGOs in East Africa: Defining the Challenges" in Makua Mutua, Ed., *Human Rights NGOs in East Africa: Political and Normative Tension* (Philadelphia: University of Pennsylvania Press, 2009).

Nader, Laura. "Introduction: Register of Power" in Mark Goodale and Sally Engle Merry, (Eds.), *The Practice of Human Rights: Tracking the Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

Nardin, Terry. "Introduction" in Terry Nardin and Melissa S. Williams, Eds. *Humanitarian Intervention*. (NY and London: New York University Press, 2006).

_____."'Humanitarian Imperialism': Responding to 'Ending Tyranny in IRAQ" in *Ethic and InternationalAffairs,* Vol. 19, No. 2, 2005, pp. 21-26.

Naticchia, Chris. "Human Rights, Liberalism and Rawls's Law of Peoples" in *Social Theory and Practice*, Vol. 24, No. 3, 1998, pp. 345-374.

Navin, Mark. "The Authority of Human Rights Practice" in *Jurisprudence*, Vol. 2, No. 1, 2011, pp. 239-247.

Newman, Michael. *Humanitarian Intervention: Confronting the Contradictions*. (New York: Columbia University Press, 2009).

Nickel, James W. "Are Human Rights Mainly Implemented by Intervention?" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Nkhata, Mwiza J. "The Role of Regional Economic Communities in Protecting and Promoting Human Rights in Africa: Reflection on the Human Rights Mandate of the Tribunal of the Southern African Development Community" in *African Journal of International and Comparative* Law, Vol. 20, No. 1, 2012, pp. 87-109.

Nussbaum, Martha C. *Women and Human Development: The Capability Approach* (Cambridge: Cambridge University Press, 2000).

Nyamu-Musembi, Celestine. "Are Local Norms and Practices Fences or Pathways? The example of Women's Property Rights" in Abdullahi An-Na'im, Ed. *Cultural Transformation and Human Rights in Africa* (London/N.Y: Zed Book, 2002).

Orend, Brian. *Human Rights: Concept and Context* (New York: Broadview Press, 2002).

Orford, Anne. *Reading Humanitarian Intervention and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003).

Orwin, Clifford. "Humanitarian Military Intervention: Wars for the End of History" in *Social Philosophy and Policy Foundation*, 2006, pp.196-217.

Othman, Norani. "Grounding Human Rights in Non-Western Culture: Shari'a and the Citizenship Rights of Women in a Modern Islamic State" in Bauer, Joane and Bell, Daniel, Eds. *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999).

Oudraat, Chantal de J., "Humanitarian Intervention: the Lessons Learned" in *Current History*, Vol. 99, No. 641, 2000, pp. 419-429.

Outhwaite, William. *Habermas: A Critical Introduction* (Stanford: Stanford University Press, 1994).

Parekh, Bhikhu. "Rethinking Humanitarian Intervention" in *International Political Science Review*, Vol. 18, No 1, 1997, pp. 49-69.

Payandeh, Mehrdad. "With Great Power Comes Great Responsibility? The Concept of Responsibility to Protect with the Process of International Lawmaking" in *The Yale Journal of International Law*, Vol. 35, No 2, 2010, pp. 469-516.

Perelman, Jeremy and Young, Katharine. "Freeing Mohamed Zakari" in White, Lucie and Perelman, Jeremy, Ed. *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford: Stanford University Press, 2011).

Petersen, Frederick J. "Façade of Humanitarian Intervention in a Community of Sovereign Nations" in *Arizona Journal of International and Comparative Law*, Vol. 15, No. 3, 1998, pp. 871-904.

Pettit, Philip. "Rawls's Peoples" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Petzold, Herbert. "The Convention and the Principle of Subsidiarity" in R.St.J. Macdonald, F. Matscher and Herbert Petzold, Eds. *The European System for the Protection of Human Rights* (Dordrecht: Martinus Nijhoff Publishers, 1993).

Pfaff, William. "A New Colonialism? Europe Must go Back into Africa" in Foreign Affairs, Vol. 74, No. 1, 1995, pp. 2-6.

Pitts, Jennifer. *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France*. (Princeton: Princeton University Press, 2005).

_____."Political Theory of Empire and Imperialism" in *Annual Review of Political Science*, Vol. 13, 2010, pp. 211-235.

_____."Intervention and sovereign equality: legacies of Vattel" in in Stefano Recchia and Jennifer M. Welch, Eds., *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill.* (New York: Cambridge University Press, 2013).

Pogge, Thomas. *Realizing Rawls*. (Ithaca: Cornell University Press, 1989).

_____. "An Egalitarian Law of Peoples" in *Philosophy and Public Affairs*, Vol. 23, No. 3, 1994, pp. 195-224.

_____. "Do Rawls's Two Theories of Justice Fit Together?" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

_____."Moralizing Humanitarian Intervention"in Terry Nardin and Melissa S. Williams, Eds. *Humanitarian Intervention*. (NY and London: New York University Press, 2006).

_____.*John Rawls: His Life and Theory of Justice* (Oxford: Oxford University Press, 2007).

_____. *World Poverty and Human Rights* (Malden: Polity, 2008).

Pollis, Adamantis. “A New Universalism” in Adamantis Pollis and Peter Schwab, Eds. *Human Rights: New Perspectives, New Realities* (London: Lynne Rienner Publishers, 2000).

Pollis, Adamantia & Schwab, Peter. “Introduction” in Adamantia Polis and Peter Schwab, Eds., *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1980).

————————“Human Rights: A Western Construct with Limited Applicability” in Pollis and Schwab, Eds., *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1980).

_____.“Human Rights: A Western Construct with Limited Applicability” in Adamantis Pollis and Peter Schwab, Eds. *Human Rights: New Perspectives, New Realities* (London: Lynne Rienner Publishers, 2000).

Power, Samantha. *“A Problem from Hell”: America and the Age of Genocide* (New York: Basic Books, 2013).

Probert, Thomas J. W. “The Innovation of the Jackson-Vanik Amendment” in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Quong, Jonathan. *Liberalism without Perfection* (Oxford: Oxford University Press, 2011).

Rajagopal, Balakrishnan. “From Resistance to Renewal: The Third World, Social Movements, and the Expansion of International Institutions” in *Harvard International Law Journal*, Vol. 41, No. 2, 2000, pp. 529-578.

_____.*International Law from Below: Development, Social Movement and Third World Resistance* (Cambridge: Cambridge University Press, 2003.

_____.“Counter-Hegemonic International Law: Rethinking Human Rights and Development as Third World Strategy” in *Third World Quarterly*, Issue 5, 2006, pp. 148-169.

Rasmussen, David M. *Rawls, Religion and Clash of Civilizations*. Unpublished Paper.

_____. *The Possibility of Global Justice: Kant, Rawls and the Critique of Cosmopolitanism,* unpublished essay.

_____. *The Possibility of Global Justice: Kant, Rawls, and the Critique of Cosmopolitanism*. Unpublished paper.

_____. *Reading Habermas* (Oxford: Basil Blackwell, 1990).

_____."How is Valid Law Possible?: A Review of Factizität und Geltung by Jürgen Habermas" in *Philosophy and Social Criticism*, Vol. 20, No. 4,1994, pp. 21-44.

_____."Critical Theory and Philosophy" in David M. Rasmussen, Ed. *The Handbook of Critical Theory* (Cambridge: Blackwell Publishers, 1996).

_____. "Jurisprudence and Validity" in *Cardozo L. Rev*., Vol. 17, 1996, pp. 1059-1082.

_____. "Defending Reasonability: The Centrality of Reasonability in the Later Rawls" in *Philosophy and Social Criticism*, Vol. 30, No. 5-6, 2004, pp. 525-540.

_____."The Emerging Domain of the Political" in *Philosophy and Social Criticism*, Vol. 38, No. 4-5, 2012, pp. 457-466.

_____. "Rawls on Human Rights and Political Justification" in Miodrag Jovanović & Dragica Vujadinović (Eds.). *Identity, Political and Human Rights Culture as Prerequisites of Constitutional Democracy* (Hague: Eleven International Publishing, 2013).

Rawls, John. *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1971).

_____. *Political Liberalism,* expanded Edition. (NY: Columbia University Press, 2005).

_____."Reply to Habermas" in *Political Liberalism,* expanded Edition. (NY: Columbia University Press, 2005).

_____. *The Law of Peoples, with "The Idea of Public Reason Revisited."* (Cambridge, MA: Harvard University Press, 1999).

_____. *Collected Papers*, ed. by Samuel Freeman (Cambridge, London: Harvard University Press, 2001).

_____. *Justice as Fairness: A Restatement*, Ed. By Erin Kelly. (Cambridge, MA: The Belknap Press of the Harvard University Press, 2003).

Rehg, William. *Insight and Solidarity: A Study in Discourse Ethics of Jürgen Habermas* (Berkeley: University of California Press, 1994).

____."Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jürgen Habermas" in *Cardozo L. Rev.*, Vol. 17, 1996, pp. 1147-1162.

Reidy, David. "Rawls on International Justice: A Defense" in *Political Theory*, Vol. 32, No. 3, 2004, pp. 291-319.

_____."Political Authority and Human Rights" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

_____."A Just Global Economy: In Defense of Rawls" in *The Journal of Ethics*, Vol. 11, No. 2, 2007, pp. 193-236.

Renshaw, Catherine S. "National Human Rights Institutions and Civil Society Organizations: New Dynamics of Engagement at Domestic, Regional and Institutional Levels" in *Global Governance*, Vol. 18, 2012, pp. 299-316.

Repa, Luiz. "The Human Rights between Morals and Politics: On Jürgen Habermas's Cosmopolitanism" in *Florianopolis*, Vol. 13, No. 1, 2014, pp. 151-166.

Ricoeur, Paul. *Lectures on Ideology and Utopia*, Ed. by George H. Taylor. (New York: Columbia University Press, 1986).

Risse, Thomas; Ropp, Stephen and Sikkink, Kathryn Eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

Risse, Thomas and Ropp, Stephen. "International Human Rights Norms and Domestic Change: Conclusions." in Thomas Risse, Stephen Roppand Kathryn Sikkink,Eds.*The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

Risse, Thomas and Sikkink, Kathryn. "The Socialisation of International Human Rights Norms into Domestic Practice: Introduction" in Thomas Risse, Stephen Roppand Kathryn Sikkink, Eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

Roberts, Adams. "Humanitarian War: Military Intervention and Human Rights" in *International Affairs*, Vol. 69, No. 3, 1993, pp. 429-449.

Robinson, Ronald. "The Excentric Idea of Imperialism, with or without Empire" in Wolfgang J. Mommsen and Jürgen Osterhammel, Eds., *Imperialism and After: Continuity and Discontinuity*. (London: Allen & Unwin, 1986).

Rodley, Nigel S. "Human Rights and Humanitarian Intervention: The Case Law of the World Court" in *The International and Comparative Law Quarterly*, Vol. 38, No. 2, 1989, pp. 321-333.

Rodogno, David. "'The Principle of humanity' and the European Powers' Intervention in Ottoman Lebanon and Syria in 1860-1861" in Brendan Simms and D.J.B. Trim, Eds.

Humanitarian Intervention: A History. (Cambridge: Cambridge University Press, 2011).

_____."The European powers' intervention in Macedonia, 1903-1908: an instance of humanitarian intervention?" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Ropp, Stephen and Sikkink, Kathryn. "International Norms and Domestic Politics in Chile and Guatemala" in Thomas Risse, Stephen Roppand Kathryn Sikkink, Eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

Rosenfeld, Michel. "Can Rights, Democracy and Justice Be Reconciled through Discourse Theory? Reflection on Habermas's Proceduralist Paradigm of Law" in *Cardozo L. Rev*., Vol. 17, 1996, pp. 791-824.

Roy, Paramita. "Neoliberalism, Liberalism and Development Practice: A Theoretical Exploration in the Context of the Changing Role of State" in *The Echo*, Vol. 1, No. 4, 2013; pp. 238-246.

Runzo, Jozeph et ali., Eds. *Human Rights and Responsibilities in the World Religions* (Oxford: Onworld, 2008).

Ryan, Maeve. "The Price of Legitimacy in Humanitarian Intervention: Britain, the Right of Search, and the Abolition of the West African Slave Trade, 1807-1867"in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Said, Abdul A. "Human Rights in Islamic Perspectives" in Pollis and Schwab, *Human Rights: Cultural and Ideological Perspectives* (New York: Praeger, 1980).

Sampson, Isaac T. "The Responsibility to Protect and ECOWAS Mechanisms on Peace and Security: Assessing their Convergence and Divergence on Intervention" in *Journal of Conflict and Security Law*, Vol. 16, No. 3, 2011, pp. 507-540.

Santos, Boaventura de S. "Toward a Multicultural Conception of Human Rights" in Berta Esperanza Hernandez-Truyol (Ed.), *Moral Imperialism: A Critical Anthology* (N.Y/London: N. Y. University Press, 2002).

Sarkin, Jeremy. "the Role of the United Nations, the African Union and Africa's Sub-Regional Organisations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and Responsibility to Protect" in *Journal of African Law*, Vol. 53, No 1, 2009, pp. 1-33.

Sartori, Andrew. "The British Empire and Its Liberal Mission" in *Journal of Modern History*, Vol. 78, No. 3, 2006, 623-642.

Schmitt, Carl. *The Concept of the Political*. Trans. by George Schwab. (Chicago: University of Chicago Press, 2007).

Schmitz, Hans P. "Transnational Activism and Political Change in Kenya and Uganda" in Thomas Risse, Stephen Roppand Kathryn Sikkink,Eds.*The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

Schulz, Matthias. "The Guarantees of Humanity: the Concert of Europe and the Origins of the Russo-Ottoman War of 1877"in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Schumpeter, Joseph. *Imperialism, Social Classes: Two Essays*. Trans. by Heinz Norden (New York: The World Publishing Company, 1971).

Sen, Amartya. *The Idea of Justice* (Cambridge: Harvard University Press, 2009).

____. *Development as Freedom* (N.Y: Anchor Books;1999).

Sharma, Arvind. *Are Human Rights Western? A Contribution to the Dialogue of Civilizations.* (New Delhi: Oxford University Press, 2006).

Shue, Henry. "Limiting Sovereignty" in Jennifer M. Welch, Ed. *Humanitarian Intervention and International Relations.* (Oxford: Oxford University Press, 2004).

____. *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*. (Princeton: Princeton University Press, 1980).

Simmons, Beth. *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009).

Simms, Brendan and Trim, D.J.B. "Towards a History of Humanitarian Intervention" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

_____."'A false principle in the Law of Nations': Burke, State Sovereignty, [German] Liberty, and Intervention in the Age of Westphalia" in in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Smith, William and Fine, Robert. "Kantian Cosmopolitanism Today: John Rawls and Jürgen Habermas on Immanuel Kant's *Foedus Facificum*" in *The King's College Law Journal*, Vol. 15, 2004, pp. 5-22.

Smith-Cannoy, Heather. *Insincere Commitment: Human Rights Treaties, Abusive States and Citizen Activism* (Washington, DC: Georgetown University, 2012).

Speed, Shannon. "Exercising Rights and Reconfiguring Resistance in the Zapatista Juntas de Buen Gobierno" in Mark Goodale and Sally Engle Merry, (Eds.), *The Practice of Human*

Rights: Tracking the Law between the Global and the Local (Cambridge: Cambridge University Press, 2007).

Stahn, Carsten. "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" in *The American Journal of International Law*, Vol. 101, No. 1, 2007, pp. 99-120.

Stein, H.J. et al. *International Human Rights in Context: Law, Politics, Morals*. 3rd Ed. (Oxford: Oxford University Press, 2007).

Steiner, Henry J. et al., *International Human Rights in Context: Law, Politics, Morals*. 3rd Ed. (Oxford: Oxford University Press, 2007).

Stromseth, Jane. "Rethinking Humanitarian Intervention: The Case for Incremental Change" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003).

Suarez, Francisco. *On Charity*. On heinonline.org/HOL/Index?index=beal/sftw&collection=beal.

Swartz, N.P. "Thomas Aquinas: On Law, Tyranny and Resistance" in *Acta Theologica*, Vol. 30, No. 1, 2010, pp. 145-157.

Sylvest, Casper. "'Our Passion for Legality': International Law and Imperialism in the Late Nineteenth-Century Britain" in *Review of International Studies*, Vol. 34, 3, No. 2008, pp. 403-423.

Tan, Kok-Chor. "Liberal Toleration in Rawls's Law of Peoples" in *Ethics*, Vol. 108, No. 2, 1998, pp. 276-295.

_____. *Toleration, Diversity, and Global Justice* (Pennsylvania: The Pennsylvania State University Press, 2000).

_____. "Critical Notice" a review of the Law of Peoples in *Canadian Journal of Philosophy*, Vol. 31, No. 1, 2001, pp. 113-132.

_____."The Duty to Protect" in Terry Nardin and Melissa S. Williams, Eds. *Humanitarian Intervention*. (NY and London: New York University Press, 2006).

_____. "The Problem of Decent Peoples" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Tasioulas, John. "The Legitimacy of International Law" in Samantha Besson & John Tasioulas, Eds. *The Philosophy of International Law*. (Oxford: Oxford University Press, 2010).

_____."From Utopia to Kazanistan: John Rawls and the Law of Peoples" in *Oxford Journal of Legal Studies*, Vol. 22, No. 2, 2002, pp. 367-396.

Tesón, Fernando R. *Humanitarian Intervention: An Inquiry into Law and Morality.* (New York: Transnational Publishers, 1988).

_____."Some Observations on John Rawls's The Law of Peoples" in *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 88, 1994, pp. 18-22.

_____."The Rawlsian Theory of International Law" in *Ethics and International Affairs,* Vol. 9, No. 1, 1995, pp. 79-99.

_____."Collective Humanitarian Intervention" in *Michigan Journal of International Law*, Vol. 17, 1996, pp. 323-371.

_____."The liberal case for humanitarian intervention" in J.L. Holzgrefe and Robert O. Keohane, Eds. *Humanitarian Intervention: Ethical, Legal and Political Dilemmas.* (Cambridge: Cambridge University Press, 2003).

_____."Ending Tyranny in Iraq" in *Ethics and International Affairs,* Vol. 19, No. 2, 2005, pp. 1-20.

_____."Of Tyrants and Empires: Reply to Terry Nardin" in *Ethics and International Affairs*, Vol. 19, No. 2, 2005, pp. 27-30.

Teubner, Gunther. "*De collisione Discursuum*: Communicative Rationality in Law, Morality, and Politics" in *Cardozo L. Rev*., Vol. 17, 1996, pp. 905-918.

Thakur, Ramesh. "Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS" in *Security Dialogue*, Vol. 33, No. 3, 2002, pp. 323-340.

Thakur, Ramesh and Weiss, Thomas G. "R2P: From Idea to Norm—and Action?" On http://www98.griffith.edu.au/dspace/bitstream/handle/10072/40521/69417_1.pdf?sequence=1

The Frankfurt Institute for Social Research, *Aspects of Sociology*, with the preface by Max Horkheimer and Theodor W. Adorno, trans. by John Viertel. (Boston: Beacon Press, 1972).

Thibaut, Jean-François. "L'Interprétation limitée du politique dans 'The Law of Peoples' de John Rawls" in *Politique et Société*, Vol. 20, No 2-3, 2001, pp. 159-179.

Thomas, Daniel. "The Helsinki Accord and Political Change in Eastern Europe" in Thomas Risse, Stephen Roppand Kathryn Sikkink, Eds. *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999).

Thompson, Andrew C. "The Protestant interest and the history of humanitarian intervention, c. 1685-c. 1756" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Thompson, John B. and Held, David Eds. *Habermas: Critical Debates* (Cambridge: MIT Press, 1982).

Thornton, A.P. *Imperialism in the Twentieth Century*. (Minneapolis: University of Minnesota Press, 1977).

Tierney, Brian. *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta: Scholars Press, 1997).

_____."Historical Roots of Modern Rights: Before and After" in Bruce P. Frohnen and Kenneth L. Grasso, ed., *Rethinking Rights: Historical, Political, and Philosophical Perspectives* (Columbia and Londond: University of Missouri Press, 2009).

Trim, D. J. B. "'If a Prince Use Tyrannie Towards his People': Interventions on Behalf of Foreign Populations in Early Modern Europe" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

_____."Intervention in early modern Europe" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

_____."Conclusion: Humanitarian intervention in historical perspective" in Brendan Simms and D.J.B. Trim, Eds. *Humanitarian Intervention: A History*. (Cambridge: Cambridge University Press, 2011).

Tsutsui, Kiyoteru and Shin, Hwa J. "Global Norms, Local Activism and Social Movement Outcomes: Global Human Rights and Resident Koreans in Japan" in *Social Problems*, Vol. 35, No. 3, 2008, pp. 391-418.

Tuck, Richard. "Grotius, Hobbes and Pufendorf on humanitarian intervention" in Stefano Recchia and Jennifer M. Welch, Eds., *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill.* (New York: Cambridge University Press, 2013).

Tugendhat, Ernest. "Habermas on Communicative Action" and the whole third section in David Rasmussen & James Swindal, eds. *Jürgen Habermas*, vol. 1. (London: Sage Publications, 2002).

Tully, James. "Modern Constitutional Democracy and Imperialism" in *Osgoode Hall Law Journal*, Vol. 46, 2008, pp. 461-493.

Tweedy, John and Hunt, Alan. "The Future of the Welfare State and Social Rights: Reflections on Habermas" in *Journal of Law and Society*, Vol. 21, No. 3, 1994, pp. 288-316.

UN. *United Nations Charter*, 1945.

___. *Universal Declaration of Human Rights* (UDHR), 1948.

___. *Convention on the Elimination of all Forms of Racial Discrimination* (CERD), 1963.

___. *International Covenant on Civil and Political Rights* (ICCPR), 1966.

___. *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966.

___. *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW), 1979.

___. *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), 1984.

___. *Convention on the Rights of the Child* (CRC), 1989.

Upadhyaya, Priyankar. "Human Security, Humanitarian Intervention, and Third World Concern" in *Denver Journal of International Law and Politics*, Vol. 33, No. 1, 2004, pp. 71-91.

Vattel, Emery de. *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*. Ed. by Béla Kapossy and Richard Whatmore. (Indianapolis: Liberty Fund, 2008).

Vienna Declaration and Program of Action, 1993

Vitoria, Francisco de. *Political Writings*. Eds. By Anthony Pagden & Jeremy Lawrance (Cambridge: Cambridge University Press, 1991).

Walker, Neil. *Making a World of Difference: Habermas, Cosmopolitanism and Consitutionalization of International Law*. European University Institute, Working Papers, Law, No. 17, 2005.

Waltz, Susan. "Universalizing Human Rights: the Role of Small States in the Construction of the Universal Declaration of Human Rights" in *Human Rights Quarterly*, Vol. 23, No. 1, 2001, pp. 44-72.

Walzer, Michael. *Just and Unjust Wars. A Moral Argument with Historical Illustrations*. Fourth Edition. (New York: Basic Books, 2006).

Wastell, Sari. "Being Swazi, Being Human: Custom, Constitutionalism and Human Rights in African Policy" in Mark Goodale and Sally Engle Merry, Eds., *The Practice of Human Rights: Tracking the Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

Weiss, Thomas G. "R2P after 9/11 and the World Summit" in *Wisconsin International Law Journal*, Vol. 24, No 3, 2006, pp. 741-760.

Welch, Jennifer M. "Introduction" in Jennifer M. Welch, Ed. *Humanitarian Intervention and International Relations.* (Oxford: Oxford University Press, 2004).

_____. "Taking Consequences Seriously: Objections to Humanitarian Intervention" in Jennifer M. Welch, Ed. *Humanitarian Intervention and International Relations.* (Oxford: Oxford University Press, 2004).

_____."A Normative Case for Pluralism: Reassessing Vincent's Views on Humanitarian Intervention" in *International Affairs*, Vol. 87, No. 5, 2011, pp. 1193-1204.

Welch, Jennifer et al. "The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty" in *International Journal*, Vol. 57, No 4, 2002, pp. 489-512.

Welch, Jennifer M. and Banda, Maria. "International Law and Responsibility to Protect: Clarifying or Expanding States' Responsibility" in *Global Responsibility to Protect*, Vol. 2, 2010, 213-231.

Wenar, Leif. "Why Rawls is Not a Cosmopolitan Egalitarian"?" in Rex Martin and David Reidy, eds., *Rawls's Law of Peoples: A Realistic Utopia*? (Malden: Blackwell Publishing, 2006).

Westlake, John. *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894).

Wheeler, Nicholas J. *Saving Strangers: Humanitarian Intervention in International Society*. (Oxford: Oxford University Press, 2000).

_____."The Humanitarian Responsibilities of Sovereignty: Explaining the Development of a New Norm of Military Intervention for Humanitarian Purposes in International Society" in Jennifer M. Welch, Ed. *Humanitarian Intervention and International Relations.* (Oxford: Oxford University Press, 2004).

_____."A Victory for Common Humanity? The Responsibility to Protect after the 2005 World Summit" in *Journal of International Law and International Relations*, Vol. 2, No. 1, 2006, pp. 95-116.

White, Lucie and Perelman, Jeremy, Ed. *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford: Stanford University Press, 2011).

Williams, Huw L. *On Rawls, Development and Global Justice: The Freedom of Peoples* (New York: Palgrave, 2011).

Wilson, Richard. "Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law" in Mark Goodale and Sally Engle Merry, Eds., *The Practice of Human Rights: Tracking the Law between the Global and the Local* (Cambridge: Cambridge University Press, 2007).

_____."Human Rights, Culture and Context: An Introduction" in Richard A. Wilson, Ed. *Human Rights, Culture and Context* (London: Pluto Press, 1997).

Wiredu, Kwasi. "An Akan Perspective on Human Rights" in Abdullahi A. An-Na'im & Francis M. Deng, ed., *Human Rights in Africa: Cross-cultural Perspective* (Washington, D.C.: The Brooking Institution, 1990).

Wolff, Robert P. *Understanding Rawls: A Reconstruction and Critique of* A Theory of Justice. (Princeton: Princeton University Press, 1977).

Woods, Kerri. Book review of Beitz's *The Idea of Human Rights*. In *The Philosophical Quarterly*, Vol. 61, No. 244, 2011, pp. 664-666.

Wotipka, Christine and Tsutsui, Kiyoteru. "Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965-2001" in *Sociological Forum*, Vol. 23, No. 4, 2008, pp. 724-754.

Yacoub, Joseph. *L'humanisme réinventé* (Paris : Editions du Cerf, 2012).

Yordán, Ca-rlos. "Towards Deliberative Peace: A Habermasian Critique of Contemporary Peace Operations" in *Journal of International Relations and Development*, Vol. 12, No. 1, 2009, pp. 58-89.

Young, Katharine. *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012).

Zajadlo, Jerzy. "Legality and Legitimation of Humanitarian Intervention: Now Challenge in the Age of the War on Terrorism" *in American Behavioral Scientist*, Vol. 48, No. 6, 2005, pp. 653-670.

Zwart, Tom. "Using Local Culture to Further the Implementation of Human Rights: The Receptor Approach" in *Human Rights Quarterly*, Vol. 34, No. 2, 2012, pp. 546-569.