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JUS IN BELLO AND THE SOLIDARIST CASE FOR HUMANITARIAN INTERVENTION. FROM THEORY TO PRACTICE

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Abstract

It is our contention that even though in theory the array of arguments supportive of humanitarian intervention (with the purpose of saving innocent people in cases "that shock the human conscience") are by now fortified, in practice certain military actions aimed at the protection of civilians are highly controversial, thus managing to undermine the plea for the legitimatization of forcible humanitarian actions. In this article we will follow the pluralist vs. solidarist debate on humanitarian intervention and discuss the R2P norm. Then, we will analyze the extent to which the military means employed by intervening forces contribute to collateral damage (i.e. to civilian casualties) and the way in which such actions collide with the morally loaded concept of responsibility to protect and the core ideas of jus in bello. The article will address the following questions: How is humanitarian intervention defined and how is the forcible humanitarian intervention defended? To what extent phrases such as "humanitarian war", "armed humanitarians" or "humanitarian military intervention" entail a plea for ending human suffering; or, are they simply an oxymoron? What is the grounding attribute of both Just War theory and humanitarian intervention? To what extent was the jus in bello, as chief element of Just War theory, respected during NATO's campaign in 1999 and during the intervention in Libya (2011)? Is there an incremental respect for the jus in bello during the period 1999-2011?

Key words: humanitarian intervention, just war theory, *jus in bello*, responsibility to protect, solidarism

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Introduction and research questions

This article tackles the correlation among the following conceptual issues: humanitarian assistance/intervention, just war theory, the binary *right* and *duty* of intervention, the responsibility to protect, the *jus in bello* (chief component in the just war tradition) and its (mis)use in the cases of Kosovo and Libya. The documentation for the article has two main sources: on the one hand, it tries to encapsulate the relevant literature on the topic of humanitarian intervention and just war theory (including most of its controversial approaches), and, on the other hand, reports and resolutions of the United Nations and of key non-governmental organizations preoccupied with human rights and *just conduct* during intervention (such as Amnesty International and Human Rights Watch).

The article will further be divided in different sections: firstly, we will define humanitarian intervention and relate pivotal attributes of it to theoretical claims in International Relations literature and then we will present the debate between what Nicholas Wheeler calls *The Pluralist Case* against, and *The Solidarist Case* for, humanitarian intervention. Secondly, we will discuss the Just War Theory and focus mostly on its *jus in bello* element, trying to emphasize its Grotian source, its relevance in subsequent codification of the laws of war and in contemporary international law. Thirdly, we will analyze the interventions in Kosovo (1999) and in Libya (2011) with the primary purpose of identifying respect for, or flawed aspects of, *just conduct of the intervening forces*. Finally, we will attempt to design a sketch for future humanitarian interventions which is meant to incorporate the lessons learned by the international community, and to correct previous mismanagement.

The research questions which triggered this analysis are: How is humanitarian intervention defined and how is the *forcible humanitarian intervention* defended? To what extent phrases such as "humanitarian war", "armed humanitarians" or "humanitarian military intervention" entail a plea for ending human suffering; or, are they simply an oxymoron? What is the grounding attribute of both Just War theory and humanitarian intervention? To what extent was the *jus in bello*, as chief element of Just War theory, respected during NATO's campaign in 1999 and during the intervention in Libya (2011)? Is there an incremental respect for the *jus in bello* during the period 1999-2011?

Defining humanitarian intervention: conceptual clarifications

Humanitarian intervention has gradually become one of the most salient issues in world politics, receiving both positive and negative assessments in inter-state interaction, as well as a great deal of attention in the academic field.

Defining humanitarian intervention has also been a chief endeavour and, by now, this is based on systematic empirical research and solid conduct of documentation. English School scholars have been preoccupied with the international society of states, high degree of order among states, and the role of norms in regulating state behaviour. R.J. Vincent defined *intervention* in his seminal book *Nonintervention and International Order* as follows: "Activity undertaken by a state, a group within a state, a group of states or an international organization which interferes coercively in the domestic affairs of another state."[1] This description of the *intervening* action does not necessarily entail the complex moral-legal-political problematic on humanitarianism and responsibility attached to it; it explains the act of outsider-performed intervention within the internal jurisdiction of states and highlights the traditional account on intervention, which implies "a coercive breach of the walls of the castle of sovereignty."[2] Vincent's definition from the early 1970's exposes a key feature of international order during the Cold War and a stringent necessity in inter-state relations, namely *the rule of non-intervention* in the domestic politics of states, which is the corollary of state sovereignty. Consequently, intervention was traditionally regarded as violation of state practice and international law, as a controversial action, and Vincent is accurate in adding this to his definition: "[Intervention] is a discrete event having a beginning and an end, and it is aimed at the authority structure of the target state. It is not

[1] R. J. Vincent, *Nonintervention and International Order*, Princeton: Princeton University Press, 1974, p. 13. Vincent's definition and approach is largely discussed by Timothy Dunne who explains the importance of R.J. Vincent's seminal work (based on his doctoral dissertation), since it "presents a genealogy of the idea of intervention and the way in which the theory and practice of non-intervention has, in part, constituted the evolution of international society." See Tim Dunne, *Inventing International Society. A History of the English School*, New York: St. Martin's Press, 1998, pp. 161, 164.

[2] Nicholas J. Wheeler; Alex J. Bellamy, "Humanitarian intervention and world politics", in Jon Baylis; Steve Smith (eds.), *The Globalization of World Politics*, Oxford: Oxford University Press, 2005, p. 557.

necessarily lawful or unlawful, but it does break a conventional pattern of international relations."[3]

The ICRC (International Committee of the Red Cross) advanced a non-political and non-discriminatory explanation for understanding *the humanitarian* component of the humanitarian intervention concept, by referring to acts aiming at "preventing and alleviating human suffering"; such a nuance was fraught with controversy since there is no consensus over what constitutes human suffering and since the latter has different connotations along time and space.[4] From its inception the Red Cross has been trying to "civilize wars", to care for wounded during armed conflict and to protect civilians; these efforts stemmed from ideals of the founder of ICRC, Jean Henri Dunant, and were later coalesced in the Geneva Convention (1964). As David Forsythe noted, "the ICRC has been trying to promote the development of International Humanitarian Law from its very beginnings", it has been working to foster humanitarian protection, and to "transfer the basic humanitarian obligation from private parties to public authorities."[5]

According to Weiss and Hubert, "the definition of 'humanitarian', as a justification for intervention, is a high threshold of suffering. It refers to the threat or actual occurrence of large scale loss of life (including, of course, genocide), massive forced migrations, and widespread abuses of human rights. Acts that shock the conscience and elicit a basic humanitarian impulse remain politically powerful."[6] The authors rigorously trace the references to humanitarian intervention within international legal literature during the second half of the 19th century and the beginning of the 20th and mention "the intervention in Greece by England, France, and Russia in 1827 to stop Turkish massacres and suppression of populations associated with insurgents; and the intervention by France in Syria in 1860 to protect Maronite Christians" and "the prominent interventions undertaken by European powers against the

[3] Vincent, *op. cit.*, p. 13.

[4] *Ibidem*, 2001, p. 471. The authors explain that *slavery* is nowadays unconceivable but it was a legitimate practice in previous centuries, and that *human rights* have different understandings and underpinnings in Western and Muslim societies.

[5] David P. Forsythe, *The Humanitarians. The International Committee of the Red Cross*, Cambridge: Cambridge University Press, 2005, pp. 259-260.

[6] Thomas G. Weiss; Don Hubert, *The Responsibility to Protect: Supplementary Volume to the Report of ICISS*, Ottawa: International Development Research Center, 2001, p. 15.

Ottoman Empire from 1827 to 1908" by pinpointing to the fact that "intervention was invoked against a state's abuse of its sovereignty by brutal and cruel treatment of those within its power, both nationals and non-nationals. Such a state was regarded as having made itself liable to action by any state or states that were prepared to intervene."[7]

Scholars like J. L. Holzgrefe and Allen Buchanan provide a definition which includes the act of humanitarian relief and which clearly mentions the preoccupation for human rights associated with such practice: "[Humanitarian intervention] is the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals others than its own citizens, without the permission of the state within whose territory force is applied."[8] A further clarification is provided by Holzgrefe, by stating that this operational definition is meant to deliberately exclude other types of engagement occasionally associated with the term: "*non-forcible* interventions such as the threat or use of economic, diplomatic, or other sanctions, and *forcible* intervention*s* aimed at protecting or rescuing the intervening state's own nationals." The purpose of this differentiation is meant to tackle the issue of "whether states may use *force* to protect the human rights of individuals other than their own citizens."[9] According to Michael Walzer, "humanitarian intervention is justified when it is a response (with reasonable expectations of success) to acts that 'shock the moral conscience of mankind'."[10]

Nicholas Wheeler and Alex Bellamy also distinguish between non-consensual, *forcible humanitarian intervention* and *non-forcible intervention*,

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[7] *Ibidem*, pp. 16-17.

[8] J. L. Holzgrefe, "The humanitarian intervention debate", in J. L. Holzgrefe; Robert O. Keohane, *Humanitarian Intervention. Ethical, Legal, and Political Dilemmas*, Cambridge: Cambridge University Press, 2003, p. 18; Allen Buchanan, "Reforming the international law of humanitarian intervention", in J. L. Holzgrefe; Robert O. Keohane, *Humanitarian Intervention. Ethical, Legal, and Political Dilemmas*, Cambridge: Cambridge University Press, 2003, p. 130.

[9] *Ibidem*.

[10] Michael Walzer, *Just and Unjust Wars. A Moral Argument with Historical Illustrations*, 4th edition, New York: Basic Books, 2006, p. 107. Walzer adds that "it is not the conscience of political leaders that one refers to in such cases. They have other things to worry about and may well be required to repress their normal feelings of indignation and outrage. The reference is to the moral convictions of ordinary men and women, acquired in the course of their everyday activities."

explaining that while the former involves coercion and the breach of sovereignty, the latter "emphasizes the pacific activities of states, international organizations, and non-governmental organizations in delivering humanitarian aid and facilitating third party conflict resolution and reconstruction."[11] A further subdivision is then made between *consensual non-forcible intervention* and *non-consensual non-forcible intervention*: the first points to the activities of different humanitarian agencies or relief organizations and particularly to the International Committee of the Red Cross whose work is correlated with consent of sovereign governments; the second is relevant for relief work of other NGO's, and one example is the activities of Médecins sans Frontières which operates without the consent of host governments.[12]

During the 1990's the concern for humanitarian intervention intensified and approaches on the topic multiplied. Ian Holliday refers to a "humanitarian turn" and identifies two key factors that contributed to it: the United Nations and the role of the Secretary-General, and the "new" humanitarians.[13] In 1992, Boutros Boutros-Ghali issued his *Agenda for Peace* and warned the international community about the dynamics and nature of intra-state turmoil which threatened the new international order, by stressing the need to formulate and design efficient means to address such risks[14]; he also emphasized the transformative role of the UN in international politics. This new active role of the UN was developed in other subsequent organization's reports (notably the *Supplement to An Agenda for Peace* from 1995 and the Brahimi Report from 2000). Additionally, in 1993, the UN General Assembly issued a resolution which, *inter alia*, established a Department of Humanitarian Affairs and listed twelve principles for humanitarian intervention.[15] All these documents

[11] Wheeler; Bellamy, *op. cit.*, 2001, pp. 573-574.

[12] *Ibidem.*

[13] Ian Holliday, "Ethics of Intervention: Just War and the Challenge of the 21st Century", *International Relations*, vol. 17(2), pp. 116-117.

[14] See Boutros Boutros-Ghali, *An Agenda for Peace*, where the terms *preventive diplomacy*, *peace keeping*, *peace-making* and *post-conflict peace building* are described as means to accommodate threats to international peace and security in the aftermath of Cold War order, [http://www.unrol.org/files/A_47_277.pdf].

[15] Holliday, *op. cit.*, pp. 116-117. See details in *Supplement to An Agenda for Peace* [http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/080/95/PDF/N9508095.pdf?OpenElement],

mark the concern of UN for humanitarian intervention. Ian Holliday asserts that a parallel phenomenon outlined the salience of humanitarian intervention, namely the increasing contribution of NGO's to international humanitarian missions and their deployment in different areas of the world. The author refers to the old humanitarians (also called conventional) "who professed an apolitical impartiality and neutrality"(which, we may add, is best identified with the work of ICRC) and to the "development of new humanitarianism" (practised by Amnesty International, Médecins sans Frontières, Human Rights Watch). He argues that "new humanitarians are openly radical, political and campaigning. They prioritize human rights over the principle of human need that long underpinned humanitarian intervention."[16]

In this article we will discuss the *forcible humanitarian intervention* and its controversial aspects in the case of Kosovo and in Libya.

Humanitarian intervention: development of debate and theory-laden claims

There is a long tradition pertaining to what we now call humanitarian intervention and the precursors in the legal field go back to Hugo Grotius and Emmerich de Vattel, in philosophy to the works of Immanuel Kant, John Stuart Mill, Christian Wolff, John Rawls, and in theology to Thomas Aquinas and Saint Augustine. We will focus, though, on the development of the debate during the second part of the 20th century and on the extent to which *international order among states* and promotion of *justice within states* were perceived as mutually exclusive. Basically, the tension between *international order* and *justice* refers to the post Second World War codification of an international society based on state sovereignty and the banning of outside interference in internal jurisdiction of states (as stipulated in the UN Charter, article 2, paragraphs 4 and 7) and

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the Brahimi Report
[http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/594/70/PDF/N0059470.pdf?OpenElement]. See also, Paul Taylor, "The United Nations and international order", in Baylis; Smith (eds.), *op. cit*, (especially the subchapter on *The typology of the roles of the United Nations in 2000*), pp. 347-350.

[16] Holliday, *op. cit.*, p. 117. See also Thomas G. Weiss, *Humanitarian Intervention. Ideas in Action*, Cambridge UK: Polity Press, 2007, especially the chapter "New Wars and New Humanitarianisms", pp. 59-87.

the promotion of human rights as conveyed by the Preamble of the UN Charter, by article 1 (paragraph 3) and articles 55 and 56 of the Charter, and by the Universal Declaration of Human Rights from 1948. The attempts to correct injustices (such as human rights violations, torture, mass killing, or any other atrocities committed against individuals) by recourse to intrusion in states' affairs were counterweight by the need to protect an international order among states which eliminated war as means to end the disputed in inter-state relations, but also had two chief tenets: the sacrosanct state sovereignty and the rule of non-intervention.

Those who opposed humanitarian intervention were arguing that jeopardizing the rules of sovereignty would result in undermining an order among states that was in fact a prerequisite for the protection of individuals and their well-being. This position against humanitarian intervention is called rule-consequentialism and claims that "international order and hence general well-being is better served by a general prohibition against humanitarian intervention than by sanctioning [it] in the absence of agreement on what principles should govern a right of unilateral humanitarian intervention."[17]

Nicholas Wheeler, in his impressive *Saving Strangers*, thoroughly followed the two lines of arguments and structured the debate as follows: the *pluralist* conception on humanitarian intervention and the *solidarist* case for humanitarian intervention. The debate is also organized in terms of restrictionists ("international lawyers who argue that there is a legal right of humanitarian intervention in both UN Charter law and customary international law") *versus* counter-restrictionists ("international lawyers who argue that humanitarian intervention violates Article 2(4) of the UN Charter and is illegal under both UN Charter law and customary international law").[18]

The pluralist approach (pertaining to scholars, policy-makers or international law experts) is centred on several objections to legitimizing humanitarian intervention. The first one is based on the aforementioned disagreement over "what moral principles should govern a right of humanitarian intervention" (the rule-consequentialism argument), which does not mean that pluralism is not concerned with human rights; instead,

[17] Wheeler; Bellamy, *op. cit.*, 2005, p. 566.

[18] Nicholas J. Wheeler, *Saving Strangers*, Oxford: Oxford University Press, 2002, pp. 27-51; Wheeler, Bellamy, *op. cit.*, 2005, pp. 558-561.

theorists of international society, such as Hedley Bull, assert that "it might be expected that the society of states would agree to privilege individual justice over the non-intervention principle."[19] Robert Jackson, another English School scholar, also points to consequentialism and to the efforts of legitimizing the use of force, by warning that it could be well-intentioned but it could also lead to chaos; consequently international peace should not be jeopardized by promotion of international justice: "there is a moral obligation to prevent war – which trumps the moral obligation to promote human rights and democracy elsewhere."[20]

The second objection belongs to the Realist account on world politics and claims that "states do not intervene for primarily humanitarian reasons."[21] According to Bhikhu Parekh, humanitarian intervention should be "an act wholly or primarily guided by the sentiment of humanity, compassion or fellow-feeling, and it is in that sense disinterested"[22] and, as mentioned before, Walzer correlates humanitarian intervention with actions that "shock the moral conscience of mankind". The Realist thought in international relations is based on the postulate that states interact on the basis of self-maximizing power and their actions target issues which are serving them to pursue their national interests. In fact, when realist thinker Henry Kissinger expressed his opinion about the intervention in Kosovo, he argued the USA had no vital national interests in the Balkans, and thus the US involvement was not stringent. The Realist theorizing belongs to rationalism and assumes prudence, calculation of positive outcomes, and rational thinking in policy making. Therefore, Kissinger claimed that the state's national interest could be compromised by "irrational" endeavours and contented that "intervention in the name of humanitarianism or democracy is likely to create more problems than it solves. It is impossible to know beforehand if intervention will succeed or whether it will lead to an acceptable level of casualties; there are simply too many unknown variables that the intervening state cannot control."[23] In trying to define *national interest* in broader terms (including herein both material-security

[19] Wheeler; Bellamy, *op. cit.*, 2005, p. 559.

[20] Jennifer Welsh, "From Right to Responsibility: Humanitarian Intervention and International Society", *Global Governance*, Oct.-Dec. (8/4), 2002, p. 509.

[21] Wheeler; Bellamy, *op. cit.*, 2005, p. 558.

[22] As quoted in *ibidem*.

[23] Welsh, *op. cit.*, p. 508.

issues and "humanitarian interests"), Joseph Nye Jr. argues that under certain circumstances interventions undertaken to end slavery, mass murder or genocide is a morally obligatory.[24] In this argument, though, humanitarian imperative is situational and is correlated to national interest. Closely related to this argument, the third objection asserts that "states are not allowed to risk the lives of their armed forces on humanitarian crusades."[25] The Realist thinking has a double approach on what counts as moral for state leaders, by separating the attitude towards the states' own citizens, which is based on responsibility and prudence, from the attitude towards other equal sovereign's individuals which fall under the responsibility of their respective leaders. In other words, moral decision makers are those who act in the interest of the state and of their own citizens (soldiers included), and they "do not have the moral right to shed blood on behalf of suffering humanity."[26] As Wheeler explains, "realists [...] might concede that humanitarian considerations can play a part in motivating a government to intervene, but states will not use force unless they judge vital interests to be at stake."[27] Samuel Huntington asserted in 1992 that "it is morally unjustifiable and politically indefensible that members of the [United States] Armed Forces should be killed to prevent Somalis from killing each other."[28]

The objection could further be discussed not only in Realist underpinnings, but also in terms of domestic public opinion pressure, compassion for fellow-individuals, and governments' "elasticity" in risky humanitarian action: incumbents in democratic states are accountable for their actions in the eyes of the population and they tend to respond to societal pressure; therefore, democratic state leaders are willing to deploy military troops to save the lives of innocents in other countries, but such engagement's elasticity stretches to the point whereby the own nation's soldiers are killed. The United States' active participation to UNITAF and its efforts to end famine in Somalia in 1992-1993, to secure humanitarian convoys, and to reduce violence were genuinely based on humanitarian

[24] Joseph S. Nye Jr., "Redefining the National Interest", *Foreign Affairs*, 78, 1999, pp. 22-35.
[25] Wheeler; Bellamy, *op. cit.*, 2005, p. 558; Wheeler, *op. cit.*, p. 29.
[26] *Ibidem*.
[27] Wheeler, *op. cit.*, p. 29.
[28] Samuel P. Huntington, "New Contingencies, Old Roles", *Joint Forces Quarterly*, 1992, *apud* Holzgrefe, *op. cit.*, p. 30.

feelings towards atrocities in a Horn of Africa country. When US soldiers were ambushed, killed, mutilated and dragged through the streets of Mogadishu, both American leader and public opinion empathized more with the fate of US rangers and urged for the withdrawal of American troops. It is our contention that a state's willingness to relief aid, to help innocents or to redress gross human rights violations belongs to an "elasticity stretch" whose limits are the safety of its own troops.

The fourth major objection against humanitarian intervention brings in the problem of abuse. According to the UN Charter (which is perceived as pivotal international legal document) the use of force is banned, according to article 2(4); the only exceptions to the rule of non-use of force rest upon the right of states to self-defence (codified in article 51) and to situations pertaining to collective security whereby international peace is threatened (articles 39 and especially 42 and 43 of the Charter). According to some scholars, "article 2(4) is already vulnerable" and states might "abuse it in the name of self-defence" and thus "creating a new legal right of humanitarian intervention would be equally open to abuse."[29] Therefore, states might pursue self-interested actions under the guise of humanitarian assistance, therefore turning the humanitarian imperative into pretext for selfish national interests. The objection claims that "because humanitarian concerns will be manipulated by intervening states, a doctrine of humanitarian intervention becomes a weapon that the strong will use against the weak."[30]

The fifth objection is intertwined with the previous Realist ones and invokes the *selectivity of response*. Since the Realist claim is that states always pursue national interests, they will tend to design a foreign policy agenda governed by what they will prioritize as serving the national interests. As a result, there will be an inconsistency in addressing humanitarian issues because states will select, will opt for those cases which are congruent with their interests. According to Wheeler and Bellamy, "the problem of selectivity arises when an agreed moral principle is at stake in more than one situation, but national interest dictates a divergence of responses"; the authors exemplify by mentioning voices that criticized NATO's intervention in Kosovo in 1999, which "could not have been driven by

[29] Thomas Franck, Nigel Rodley quoted in Wheeler, Bellamy, *op. cit.*, 2005, p. 558.
[30] Wheeler, *op. cit.*, pp. 28-29.

humanitarian motives because the Alliance had done nothing to address the equally terrible plight of Turkish Kurds, the Chechens, or the East Timorese."[31]

One of the strongest legal cases against the right of humanitarian intervention is provided by Simon Chesterman in his *Just War or Just Peace?*; the author sets as illustrative example NATO's intervention in Kosovo and argues that the post-1945 international law's strict tenet consists in the presumption that *the use of force is illegal* (as provisioned by Article 2(4) of the UN Charter).[32] In arguing against a customary law favouring intervention, Chesterman draws back to the origins of humanitarian intervention emerging from two opposing views: on the one hand, the one of Hugo Grotius[33] based on the belief that war was justified or just when opposed to an immoral enemy, and on the other hand, the coalescence of the principle of non-intervention as inherent part of sovereignty.[34] The latter belongs to the modern doctrine of non-intervention associated with writings of Emmerich de Vattel and Christian Wolff. By recourse to historical survey Chesterman asserts that a pre-1945 state practice supporting the right of humanitarian intervention did not really exist, since it was merely a "lacuna" in an international order/law that did not prohibit war. By the 20th century, it became clear that international law (strengthened by the Briand-Kellog Pact and by the League of Nations) acknowledged and sanctioned intervention "only in situations of civil war where clear lines could be drawn between rulers and their people; it could not be justified as a defence of the rights of the oppressed in other jurisdictions against their sovereign."[35] The ban on use of force (with the exceptions of self-defence and collective security), claims Chesterman, is fortified by the UN Charter's chief purpose: "to delegitimize individual acts of war be vesting sole authority for the non-defensive use of force in the Security Council." Besides, he argues that establishing a new rule that weakens the constraints on the use of force is highly dangerous,

[31] Wheeler; Bellamy, *op. cit.*, 2005, pp. 558-559.
[32] Simon Chesterman, *Just War or Just Peace? Humanitarian Intervention and Humanitarian Law*, Oxford: Oxford University Press, 2001, *apud* Welsh, *op. cit.*, p. 504.
[33] Hugo Grotius, *On the Law of War and Peace*, (translated from the original Latin *De Jure Belli ac Pacis* and slightly abridged by A. C. Campbell), Kitchener: Batoche Books, 2001.
[34] As synthesized by Welsh, *op. cit.*, p. 505.
[35] *Ibidem*.

and unilateral humanitarian intervention (like NATO's in Kosovo), without explicit authorization from the Security Council, "is not the alternative to collective action under the charter, but rather the antithesis of it."[36]

Tom J. Farer is also constructing a comprehensive objection against unilateral humanitarian intervention by exploring the legal debate; he stresses the potential for abuse of a doctrine of humanitarian intervention that would enable states to act parallel to (the consent/lack of consent of) the UN Security Council.[37] There is a clear-cut warning about the association of secessionist struggles and humanitarian intervention, "the tendency of secessionist conflicts to create the triggering conditions for humanitarian intervention", but also one about the debate on the legitimate use of force. The aftermath of the Cold War reasserted "a three-fold division of the universe of force into aggression, self-defence, and enforcement action authorized by the Security Council"; it is Farer's contention that this "is obviously incompatible with affirming a unilateral right to march across borders in pursuit of liberal or [...] any other ends arguably including the pre-emption of suspected terrorists. So, a debate about humanitarian intervention is inseparable from the larger debate about the conditions of legitimate violence."[38]

Michael Byers and Simon Chesterman argue against "the Kosovo intervention as state practice supportive of a new customary rule, with statements by the United States and several of its allies articulating humanitarian motives presented as evidence of an accompanying *opinion juris*"[39] and contend that customary international law cannot be changed by powerful states within the system. They also warn that "relaxing the non-intervention norm would alter the principle of sovereign equality"[40] which points to the rule of the strong against the weak already mentioned. The entire argument is meant to clarify that cases like Kosovo could be discussed in terms of morally required, but not in terms of creating new rules established by NATO practice.

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[36] *Ibidem*, pp. 505-506.

[37] Tom J. Farer, "Humanitarian intervention before and after 9/11: legality and legitimacy", in J. L. Holzgrefe; Robert O. Keohane, *op. cit.*, pp. 53-89

[38] *Ibidem*, p. 58.

[39] Michael Byers; Simon Chesterman, "Changing the rules about the rules? Unilateral humanitarian intervention and the future of international law", in Holzgrefe; Keohane, *op. cit.*, p. 187.

[40] Robert O. Keohane, "Introduction", in Holzgrefe; Keohane, *op. cit.*, pp. 5-6.

A non-Western restrictionist view has been formulated by Mohammed Ayoob who argues that "humanitarian intervention carries shades of neo-colonialism" and tends "to impair the capacity of states to provide for political order inside their frontiers"; as such, the suggestions is that "this contemporary revival of imperialism threatens to erode the legitimacy of an international society that for the first time has become truly global in character."[41]

The solidarist case for humanitarian intervention (or the so-called *counter-restrictionist* position) holds that humanitarian intervention is legally permitted (since there is a loophole in article 2(4) of the UN Charter and a customary law legitimizing it) and morally imperative.

According to Nicholas Wheeler "interventions have to satisfy certain tests to count as humanitarian" and there are chief requirements to me met which "are derived from the Just War tradition". Thus, humanitarian intervention must be based on: 1) *just cause* (or what Wheeler prefers "to call a supreme humanitarian emergency, because it captures the exceptional nature of the cases under consideration"); 2) "the use of force must be a last resort"; 3) "it must meet the requirement of proportionality"; 4) "there must be a high probability that the use of force will achieve a positive humanitarian outcome."[42] Basically, a *Solidarist theory of legitimate humanitarian intervention* is inextricably connected to just war principles. Referring to the first criterion, Wheeler agrees that there is no universally accepted definition over what counts as "extreme humanitarian emergency"; and yet, without emphasizing the need to resort to numbers of killed or displaced individuals, Wheeler argues that it "exists when the only hope of saving lives depends on outsiders coming to the rescue", that intervention is justified in cases where "huge violations of human rights" have occurred in target states and have reached an extreme magnitude.[43] This is precisely what Michael Walzer refers to when he formulates the justification for intervention as reaction to acts that "shock the moral conscience of mankind."[44] The second requirement simply states that force, or *forcible humanitarian intervention*, must represent the *ultima ratio*, resulting

[41] Mohammed Ayoob, "Humanitarian Intervention and State Sovereignty", *International Journal of Human Rights*, 2002, *apud* Welsh, *op. cit.*, p. 509.
[42] Wheeler, *op. cit.*, pp. 32-33.
[43] *Ibidem*, p. 33.
[44] Walzer, *op. cit.*, p. 107.

after all others means to stop the atrocities (preventive diplomacy, economic sanctions, condemnation of actions of targeting state in UN Resolutions, threats with intervention) have been exhausted and have failed to achieve a positive outcome. According to Wheeler, the problem is "how to reconcile the moral imperative for speedy action with the Just War requirement that force always be a last resort"[45]; in other words, the problem is how to justify and deploy a humanitarian mission that is able to save the lives of the innocents and, at the same time, submit to the non-use of force until the very last minute. The Kosovo case was controversial, *inter alia*, because of this: was there enough evidence that all other means have been exhausted? Was it obviously a case that "shocked the conscience of mankind"? Were the means employed to redress the wrongs proportional to the moral imperative?[46] The last question leads us to another important principle of the Just War theory, namely the principle of proportionality which requires "that the gravity and extent of the violations be on a level commensurate with the reasonably calculable loss of life, destruction of property [and] expenditure of resources"[47] or, as Wheeler formulates it "the level of force employed [does] not exceed the harm that it is designed to prevent or stop." The final criterion, *the high probability of success* in the case of humanitarian intervention, is meant to assure the necessity to design a solid humanitarian response which does not lead to more chaos, whose consequences indicate the end of atrocities, and one which justifies the privilege of human rights that trumps over non-use of force. This criterion could be discussed as an attempt of Solidarism to respond to objections arguing that forcible humanitarian intervention is based on a violation of the principle of non-use of force and that jeopardizing this tenet of

[45] Wheeler, *op. cit.*, p. 34.

[46] All these questions were addressed by many others. See, *inter alia*, Robert C. DiPrizio, *Armed Humanitarians. U.S. Interventions from Northern Iraq to Kosovo*, Baltimore&London: The Johns Hopkins University Press, 2002, chapter "Kosovo: Operation Allied Force", pp. 130-145; Ruth Wedgwood, "NATO's Campaign in Yugoslavia", *The American Journal of International Law*, October, vol. 93, 1999; Robert Tomes, "Operation Allied Force and the Legal Basis for Humanitarian Interventions", *Parameters*, vol. 30, Spring 2000; Julie Mertus, "Legitimizing the Use of Force in Kosovo", *Ethics and International Affairs*, vol. 15, no.1, 2001; Henry F. Carey, "U.S. Domestic Politics and the Emerging Humanitarian Intervention Policy: Haiti, Bosnia, and Kosovo", *World Affairs*, vol. 164, 2, Fall 2001; Ivo H. Daalder; Michael E. O'Hanlon, "Unlearning the Lessons of Kosovo", *Foreign Policy*, no. 116, Fall 1999.

[47] *Cf.* Nigel Ridley, quoted in Wheeler, *op. cit.*, p. 34.

international law, in cases where the probability of success is not secured, grossly undermines an international order (based on the absence of inter-state war and on compliance to the rule of non-use of force). Cases like Somalia (namely the activities of UNOSOM II) clearly point to ambivalent strategies that combine humanitarian relief, with warlord hunting, and with engagement in military action, that point to the often mentioned oxymoron "*humanitarian war*", which means intervention ending in debacle and departing from envisaged humanitarian consequences.

At the heart of the solidarist arguments lies the preoccupation for human rights, for *individuals*, perceived as key subjects in international law, rather than for states and their rights. Wheeler asserts that "Solidarism is committed to upholding minimum standards of common humanity, which means placing the victims of human rights abuses at the centre of its theoretical project, since it is committed to exploring how the society of state might become more hospitable to the promotion of justice in world politics."[48]

The solidarists counter the Realist or pluralist objections as follows: first of all, related to the motives behind state-performed intervening action (which is congruent to national interest rather the humanitarian rationale), the solidarist argument states that "the primacy of humanitarian motives is not a threshold condition", since "even if an intervention is motivated by non-humanitarian reasons, it can still count as humanitarian provided that the motives, and the means employed, do not undermine a positive humanitarian outcome."[49] According to Fernando Tesón, the rules of state-sovereignty and non-intervention are not unconditional; they belong to a society of states (and in this respect Wheeler places him within the "solidarist wing of the English School") based on a commonly agreed value: human rights protection. It is Tesón's contention that (as synthesized by Wheeler) "governments that massively violate human rights forfeit their right to protection of the rules of sovereignty and non-intervention, and as a result, other states are morally entitled to intervene."[50] Consequently, "the true test is whether the intervention has put an end to human rights deprivations. That is sufficient to meet the requirement of disinterestedness, even if there are other, non-humanitarian reasons behind

[48] Wheeler, *op. cit.*, p. 37.
[49] *Ibidem*, p. 38.
[50] Emphasis added.

the intervention."[51] As far as separation between *national interest* and *pursuit of justice* (instantiated in humanitarian action) is concerned, Paul Taylor observes that the United Nations has incrementally contributed to a *locus* where the "disentanglement between moral motives and national interests" became difficult, that the "clear-cut conflict between perceptions of national interest and the pursuit of justice" is currently surmounted; moreover, "states' contributions to activities such as peacekeeping, or humanitarian intervention, were defended in terms of national interest [...] states like Canada accepted an obligation to develop their capacity for peacekeeping, which was the moral course, but one which could also be justified as a reflection of national interest."[52] The counter-restrictionist argument says that in the post Cold-War international order, due to the emergence of intra-state violence (associated with human deprivation, massive flows of refugees, displacement, torture) which destabilizes regions and threatens international security, there is no "divorce" between states' interests and international peace based on the well-being of individuals. With respect to the Realist assumption over the potential of abuse, Wheeler argues that this constitutes "an objection to humanitarian intervention only if the non-humanitarian motives behind an intervention undermine its stated humanitarian purposes"; furthermore, he believes in the solidarist claim that "states are responsible for human rights at home but also for defending them abroad", and this might include, in certain situations (*i.e.* "to save the victims of gross and systematic violations of human rights"), putting their soldiers at risk.[53] The latter is also a counter-view on what counts as moral for decision makers and to the concern for states' military troops.

The most salient discussion related to forcible humanitarian intervention is centred on its legality. Since we chose to discuss Kosovo in the final part of the article, we should mention at this point that NATO's military action in 1999 was a precedential case and it triggered numerous discussions related to: (il)legality, lawfulness/unlawfulness, (il)legitimacy, and (short/long term) success or failure/abuse. The main point in Solidarist argumentative package is that the disjunction between *international order* and *internal justice* should be turned obsolete, that they are not mutually

[51] Tesón, *Humanitarian Intervention*, quoted in *ibidem.*

[52] Taylor, *op. cit.*, p. 336.

[53] Wheeler, *op. cit.*, p. 38.

exclusive, and that members of the UN signed up both to protect human rights, and to ban the use of force. The latter idea is connected to a revisiting of the concept of sovereignty (idea to which we will come back).

One chief legal interpretation is related to Article 2(4) of the UN charter, which stipulates 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 any other manner inconsistent with the Purposes of the United Nations."[54] According to some legal scholars this does not represent "a general and comprehensive prohibition on the use of force", instead "it merely regulates the conditions under which force is prohibited, but allows exceptions beyond the two mentioned in the Charter (Articles 51 and 42)."[55] Basically, this view interprets the article as if the Charter allows the use of force in certain circumstances (others than those described under Articles 51, 39 or 42). The loophole identified here, as Tesón asserts, indicates that humanitarian purposes backed by the use of force are supported in the Charter[56] and that "humanitarian intervention would not contravene the charter if it did not violate 'the territorial integrity or political independence' of the target state", especially if humanitarian intervention does not run contrary to the purposes drafters of the UN Charter, namely human rights and freedoms listed in Article 1(3).[57] But, the cases we selected to analyze both depart from this argument: in the case of Kosovo, the outcome of the intervention was secession and it infringed the territorial integrity of the Republic of Serbia, whereas intervention in Libya resulted in regime change (ousting the Gaddafi government) which is essentially connected to the state's "political independence."[58] This does not mean that we argue against these

[54] See article 2(4) of the UN Charter available at [http://www.un.org/en/documents/charter/].

[55] Chantal De Jonge Oudraat, "Humanitarian Intervention: The Lessons Learned", *Current History*, Dec. (00/641), 2000, p. 421.

[56] Tesón, *Humanitarian Intervention: An Inquiery into Law and Morality*, 1997, *apud* Welsh, *op. cit.*, p. 505.

[57] Welsh, *op. cit.*, p. 505.

[58] Here the discussion could be further continued by raising other salient questions: should a murderous/tyrannical regime be equaled to the state, and thus should it benefit from its prerogatives, even though the individuals contest its legitimacy and the internal society provides an alternative regime? Does states' political independence and sovereignty stretch to an understanding in which this is, in the words of Wheeler and Bellamy, a "license to kill" the citizens?

two interventions (or against humanitarian intervention for that matter), but rather that we do not believe that this argument is supportive for the case studies selected here.

Some counter-restrictionists argue that humanitarian intervention should be permitted even without the explicit authorization of the UN Security Council and assert that "if the UN fails to take remedial action in cases of genocide and mass killing [...] individual states gain the legal right to intervene with force to reduce human suffering"[59]; Reisman and McDougal argue that the provisions related to human rights from the Charter "provide a secure legal basis for unilateral forcible intervention."[60] Drawing attention to the dramatic events in Rwanda and the genocide against the Tutsi, Kofi Annan addressed the same issue in 1999, then took the debate to the UN General Assembly and urged states "to develop criteria to permit humanitarian interventions in the absence of a consensus in the Security Council"[61] in situations where abhorrent acts against human beings are occurring and certain states are ready to engage militarily with the sole purpose of stopping them. The problem is not related to states acknowledging what counts for genocide or abhorrent, but rather to the need of an immediate response of the international community and paralysis of Security Council (which results in lack of resolution) or slowness in issuing a prompt response. In fact, Kofi Annan tackled three key salient issues in his *Report* to *The Millennium Assembly of the United Nations*, in 2000: *protecting the vulnerable*, *addressing the dilemma of the intervention*, and *strengthening peace operations*. Related to humanitarian intervention he asserts that the debate over *sovereignty* and *protection of human rights and use of force* constitutes a real dilemma, but he contends that "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica — to gross and systematic violations of human rights that offend every precept of our common humanity?"[62] Moreover, he contends that "surely no legal

[59] Wheeler; Bellamy, *op. cit.*, p. 560.

[60] As mentioned in *ibidem.*

[61] De Jonge Oudraat, *op. cit.*, pp. 419-420.

[62] Kofi A. Annan, *We the Peoples: The Role of the United Nations in the twenty-first century*, Report of the Secretary-General, The Millennium Assembly of the United Nations, 2000, p. 34.
[http://unpan1.un.org/intradoc/groups/public/documents/un/unpan000923.pdf], retrieved in September 2012.

principle — not even sovereignty — can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community."[63] What shall be discussed in the last part of this article is whether a clear-cut, explicit UNSC Resolution that authorizes "the use of force" according to Chapter VII of the Charter is imperatively needed, or tacit approval/*post-factum* legitimacy is enough.

Another way of defending humanitarian intervention is the recourse to customary international law. This means there is enough historical evidence in the pre-UN system period to prove that states had engaged in humanitarian action and that, if states repeat a practice and regard it as "behaviour required by law", "a norm of customary international law" is developing. One important aspect here is that states don't merely repeat an action, but they perceive it as if it is "accepted as law."[64] As we have seen, a strong objection to this interpretation comes from Chesterman who believes that it privileges custom over treaty, who argues that the evidence provided constitutes a Western interpretation of international law, and that it lacks "the necessary *opinion juris* that might transform the exception into the rule."[65] According to the legal arguments against humanitarian intervention "the law of the Charter concerning the prohibition of the use of force" has the character of *jus cogens*, which "denotes a peremptory norm of general international law that is described in the 1969 Vienna Convention of the Law of Treaties as 'a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'."[66] As Nicholas Wheeler shows, counter-restrictionists/solidarists "deny that the prohibition on the use of force is *jus cogens*" and they stem their arguments from Hugo Grotius, "the father of solidarist international society theory"[67]; according to Grotius, "if a tyrant [...] practices atrocities against his subjects, which no just man can approve [...] it would not follow that others may not take up arms for them"[68] and "it is not to be denied, but

[63] *Ibidem.*

[64] Wheeler, *op. cit.*, p. 43; Wheeler; Bellamy, *op. cit.*, p. 560.

[65] *Cf.* Chesterman, as explained and quoted by Welsh, *op. cit.*, pp. 505-506.

[66] Wheeler, *op. cit.*, p. 44.

[67] *Ibidem*.

[68] Grotius quoted in *ibidem*.

that in most governments the good of the subject is the chief object which is regarded: and that what Cicero has said after Herodotus and Herodotus after Hesiod, is true, that Kings were appointed in order that men might enjoy complete justice."[69] Wheeler counterweighs another restrictionist argument (the selectivity of responses) by stressing that "it is important to distinguish between actions that are selective because states privilege selfish interests over the defence of human rights, and those that are selective because of prudential concerns."[70]

Another strong argument of the solidarist account on humanitarian intervention is centred on the notion of sovereignty. In short, solidarism revises the essence of the concept and discusses the *sovereignty as responsibility*. As a response to the aforementioned Report of Kofi Annan, the ICISS (International Commission on Intervention and State Sovereignty) was established at the UN Millennium Assembly (September 2000). It was co-chaired by Gareth Evans[71] and Mohamed Sahnoun[72], it was launched at the initiative of the Canadian government, and in 2001 it issued the Report entitled *The Responsibility to Protect*[73] and a supplementary

[69] Grotius, *On the Law of War and Peace (De Jure Belli ac Pacis)*, p. 54.

[70] Wheeler, *op. cit.*, p. 47.

[71] Gareth Evans is former foreign minister of Australia and he published a comprehensive and highly praised book on the workings of ICISS, the concept of R2P (responsibility to protect), and its relevance for the international community's efforts in dealing with mass atrocity crimes. See Gareth Evans, *The Responsibility to Protect. Ending mass atrocity crimes once and for all*, Washington DC: Brookings Institution Press, 2008.

[72] Mohamed Sahnoun is senior Algerian diplomat and veteran UN Africa adviser (former special adviser to the UN Secretary-General and UN appointed negotiator in Somalia), extraordinarily knowledgeable on the issues from his activities of field engagement in Somalia, the Great Lakes region (East Africa), Ethiopia and Eritrea.

[73] Closely involved in writing the report were Michael Ignatieff and Ramesh Thakur. Michael Ignatieff is a Canadian scholar and human rights specialist (see, *inter alia*, his *The Warrior's Honor. Ethnic War and the Modern Conscience,* New York, 1997). Ramesh Thakur is an Indian scholar who wrote *The United Nations, Peace and Security. From Collective Security to the Responsibility to Protect*, Cambridge: Cambridge University Press, 2006. Other participants to ICISS were former Philippines president Fidel V. Ramos, African National Congress head Cyril Ramaphosa from South Africa, Guatemalan foreign minister Eduardo Stein, former U.S. congressman Lee Hamilton, German NATO general Klaus Naumann, human rights specialist Gisele Côté-Harper, the Russian diplomat and parliamentarian Vladimir Lukin, and Cornelio Sommaruga, former long-serving president of the ICRC (International Committee of the Red Cross). See Evans, *op. cit.*, pp. 38-39, where the author discusses at length "The Birth of 'The Responsibility to Protect'".

volume of research essays, bibliography, and background material, edited by Thomas G. Weiss and Don Hubert. ICISS set out *ab initio* three pivotal goals: "1) to promote a comprehensive debate on the issue of humanitarian intervention; 2) to foster a new global political consensus on how to move forward; and 3) to find new ways of reconciling the principles of intervention and state sovereignty."[74]

At this point a contextual clarification is in order, since it helps us understand how *the responsibility to protect* (R2P) was coalesced and received adherence. We previously followed the debate over humanitarian intervention and also tried to separate its content (and state practice) during the Cold War and in the aftermath of the Cold War period, when the new international order was not so much challenged by the conventional inter-state aggression (with the exception, of course, of Iraq's invasion of Kuwait), but rather by internal conflict and intra-state turmoil that grossly and shockingly affected civilians shifting the *locus* of the violence from the military sector to the societal one. Cases like Somalia, Bosnia, Rwanda, Burundi, Kosovo, East Timor, Sierra Leone are all illustrative in this respect, but also they point to the failure of the international community to prevent the atrocities and the human suffering. At the heart of the debate was actually the *right to intervene*, but gradually the centrepiece of the debate changed over the 1990's, thus providing a positive context for the emergence of R2P.

Thomas G. Weiss and Don Hubert conducted an analysis on interventions both in the pre- and post-1990 period. The examination of interventions during the period 1945-1990, such as Belgium in the Congo (1960) (which later became an international intervention - ONUC), India in East Pakistan (1971), Vietnam in Cambodia (1978), Tanzania in Uganda (1979), France in Central Africa (1979), the US and certain Caribbean countries in Grenada (1983), and the US in Panama (1989), indicates that "there [was] substantial evidence in these cases about why controversy surrounds what constitutes an actual incidence of 'humanitarian' intervention."[75] The authors' survey on military interventions conducted in the 1990s without permission of target states' governments, or without meaningful consent, but with "purported humanitarian justifications"

[74] Welsh, *op. cit.*, p. 510.

[75] Thomas G. Weiss; Don Hubert, *The Responsibility to Protect: Supplementary Volume to the Report of ICISS*, Ottawa: International Development Research Center, 2001, pp. 49-77.

included: Liberia (1990-1997), Northern Iraq (1991), The Former Yugoslavia (1992-1999), Somalia (1992-1993), Rwanda and Eastern Zaire (1994-1996), Haiti (1994-1997), Sierra Leone (1997-2000), and East Timor (1999)[76]; all these cases were regarded as humanitarian driven actions, even though heated debates emerged regarding legality in the case of Kosovo, and other discussions were centred on tragic consequences or failure in other cases. As Chantal De Jonge Oudraat observed, "unlike in the early 1990's, the debate at the end of the decade focused not on the question of whether humanitarian considerations could be characterized as 'threats to international peace and security' and thus justify intervention in states' domestic affairs, but rather whether such interventions needed the authorization of the UN Security Council."[77]

It is in under all these circumstances that R2P emerged and, as Evans rightly shows, it indicated "the solution" and the transition from the *right to intervene* to interventions dictated by, and aiming at, the *responsibility to protect*. The R2P was inherently related to new security issues (like intra-state warfare)[78], to new threats in a globalized world, such as non-state actors, the salient issue of refugees or internally displaced people/IDP's (as emphasized by scholar and former Sudanese diplomat Francis Deng[79]), human security (at length discussed by Mary Kaldor[80] or Ramesh Thakur[81]), failed states (or, as William Zartman called them, collapsed states[82]). As stated in the ICISS Report, the *responsibility to protect* is based on certain core principles:

A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.

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[76] *Ibidem*, pp. 79-126. See also John Harriss, "Introduction: a time of troubles – problems of international humanitarian assistance in the 1990's", in John Harriss (ed.), *The Politics of Humanitarian Intervention*, London and New York: Pinter, 1995, pp. 1-16.

[77] De Jonge Oudraat, *op. cit.*, p. 419.

[78] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Ottawa: International Development Research Centre, 2001, pp. 4-6

[79] Francis M. Deng; Sadikiel Kimaro; Terrence Lyons; Donald Rothchild; William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa*, Washington: The Brookings Institution, 1996.

[80] Mary Kaldor, *Human Security*, Cambridge: Polity Press, 2007.

[81] Thakur, *op. cit.*, pp. 71-157.

[82] William Zartman (ed.), *Collapsed States: The Humanitarian Challenge to the United Nations*, Boulder, 1995.

> B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[83]

Moreover, according to the ICISS Report,

> The foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:
> A. obligations inherent in the concept of sovereignty;
> B. the responsibility of the Security Council, under Article 2(4) of the UN Charter, for the maintenance of international peace and security;
> C. specific legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law;
> D. the developing practice of states, regional organizations and the Security Council itself.[84]

The emerging norm states that, as a last resort, the international community or states within it are legitimized in employing military force against another state with the purpose of saving endangered civilians. This right, it is argued, derives from a shift in conceptualizing sovereignty in world politics, namely from "sovereignty as authority" to "sovereignty as responsibility."[85] The huge difference is that while the former refers to states' control over their territories and population, the latter "suggests that sovereignty is conditional on a state demonstrating respect for a minimum standard of human rights."[86] This assertion is also taken by others in order to pinpoint to the limits of sovereignty, as inherent in the UN Charter:

> According to Chapter VII, sovereignty is not a barrier to action taken by the Security Council as part of measures in response to "a threat to the peace, a breach of the peace or an act of aggression." In other words, the sovereignty of states, as recognized in the UN Charter, yields to the demands of international peace and security. And the

[83] ICISS, *op. cit.*, p. XI.
[84] *Ibidem*.
[85] See initial attempts in this respect in Deng *et.al.*, *op. cit.*;
[86] Welsh, *op. cit.*, pp. 510-511.

> status of sovereign equality only holds effectively for each state when there is stability, peace, and order among states.[87]

One of the key contributions of ICISS is that it tries to reconcile the legal-moral tension of humanitarian intervention, by reconsidering the meaning of sovereignty:

> The defence of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people. The Commission heard no such claim at any stage during our worldwide consultations. 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 good international citizenship.[88]

According to the ICISS report, the responsibility to protect is intertwined with certain principles for military operation: first of all, *the just cause threshold*, which includes situations of "***large scale loss of life*** *[...] with genocidal intent or not, and* ***large scale 'ethnic cleansing'****, actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.*" Secondly, the Report mentions four precautionary principles, also discussed by Wheeler (*right intention, last resort, proportional means, and reasonable prospects*); thirdly, *right authority* (which is not intended to bypass the UN by strengthening other types of authority, since "the task is not to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has") is explained; finally, comprehensive *operational principles* are tackled ("Clear objectives" [...] and "resources to match"; "acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state", "rules of engagement" that imply "total adherence to international humanitarian law").[89]

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[87] Weiss; Hubert, *op. cit.*, p. 7.

[88] ICISS, *op. cit.*, p. 8. Emphasis added.

[89] *Ibidem*, pp. XII-XIII.

Humanitarian intervention and the Just War tradition

As we have shown, both the solidarist approach of Nicholas Wheeler and the International Commission on Intervention and State Sovereignty (which produced the R2P milestone) derive their arguments for a defensible humanitarian intervention from the just war conceptual framework. According to Brian Orend, just war theory "is probably the most influential perspective on the ethics of war and peace."[90] The just war tradition goes back to famous writings of Saint Augustine, Thomas Aquinas, Hugo Grotius, Suarez, Emmerich de Vattel.[91] Grotius wrote *De Jure belli ac Pacis* in 1625 and argued that war, just as peace, has its inner rules and that princes should not be allowed to legitimize their crimes, that kings should be concerned with "lawfulness *of war*", should consider "precautions against rashly engaging in war, even upon just grounds" and "should respect what is lawful *in war*"[92]; the result was *bellum iustum*. The just war had three components:

- *jus ad bellum*, namely the right to wage war;
- *jus in bello*, what is permissible during the war;
- *jus post bellum*, how the war will be ended in a moral way.

Essentially, the doctrine of justifiable war or the just war tradition implied a presumption against war (since, in the words of Grotius, "it is often a duty, which we owe to our country and ourselves, to forbear having recourse to arms"[93]), but it also regulated the carrying out of war: a) it meant that war should be waged only if certain criteria are satisfied (*jus ad bellum*); b) it referred to the fact that war should be fought in a moral way (*jus in bello*), and c) that it will be ended in a moral way (*jus post bellum).*

There are certain specifications related to the rules for waging war and for the conduct during war. In the case of *jus ad bellum* (the just resort to war) the main assumption is that there are several principles that regulate warfare: <u>just cause</u>, <u>legitimate authority</u>, <u>formal declaration</u>, <u>right intention</u>, <u>probability of success</u> (so that "there must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than

[90] Brian Orend, *War*, 2005, [http://plato.stanford.edu/entries/war/], retrieved in October 2012.
[91] *Ibidem.* See also Theodore Meron, "Common Rights of Mankind in Gentili, Grotius and Suarez", *American Society of International Law*, vol. 85, no. 1, January 1991, pp. 110-116.
[92] Grotius, *op. cit.*, pp. 18-41, 239-243 and 250-265.
[93] *Ibidem*, p. 240.

the consequences of inaction"[94]), proportionality (referring to the fact that the force employed should be matched with initial moral, just, and humanitarian purpose, or, as the Report ICISS states, "the scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective"[95]), last resort (*ultima ratio*).[96]

In what concerns *jus in bello* (just conduct of war) the chief idea is that there are several rules that combatants should follow: Discrimination and Non-Combatant Immunity which means that "soldiers must discriminate between the civilian population, which is morally immune from direct and intentional attack, and those legitimate military, political and industrial targets involved in rights-violating harm."[97] Basically, the people *hors de combat* should not suffer, namely war must only target enemy combatants and not civilians caught in circumstances they are not guilty of. Other criteria include No Atrocious Weapons, Proportionality (which means that "unjustified killing and destruction are not allowed and collateral civilian deaths must be minimal"[98] and "the damage must not be greater than the offenses one aims to halt"[99]), Prisoners of War Treated Humanely (later, this provision was stressed by the Geneva Conventions), No Reprisals (which means that respect for the *jus in bello* must be retained even if the enemy violates it), No Repression of One's Own Civilians.[100] In fact, Hugo Grotius asserted that "the final object is always some good, or at least the evasion of some evil, which amounts to the same. The means are never to be considered by themselves, but only as they have a tendency to the proposed end. Wherefore in all cases of deliberation, the proportion,

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[94] *Cf.* ICISS, *op. cit.*, p. XII.

[95] *Ibidem*.

[96] See, *inter alia*, Jean Bethke Elshtain, "The Third Annual Grotius Lecture: Just War and Humanitarian Intervention", *American Society of International Law. Proceedings of the Annual Meeting*, 2001, pp. 1-12; Orend, *op. cit.*; James Pattison, *Humanitarian Intervention and the Responsibility to Protect*, Oxford: Oxford University Press, 2010, pp. 100-101; Ian Holliday, "Ethics of Intervention: Just War and the Challenge of the 21st Century", *International Relations*, vol. 17(2), pp. 119, 125-126.

[97] Orend, *op. cit.*

[98] *Just war criteria* available at [http://www.vernalproject.org/papers/Understanding.html], retrieved January 2013.

[99] Elshtain, *op. cit.*, p. 4.

[100] Orend, *op. cit.* and *Just war criteria*,
[http://www.vernalproject.org/papers/Understanding.html], retrieved January 2013.

which the means and the end bear to each other, is to be duly weighed."[101] Finally, as Orend explains, *jus post bellum* "seeks to regulate the ending of wars, and to ease the transition from war back to peace."[102] Another subdivision is made between two sorts of principles: "external *jus in bello*" (which refers to the way in which the intervener should treat the opposing party's soldiers) and "internal *jus in bello*"[103] (which "concerns the rules that an agent should follow in connection with its own soldiers and citizens"[104]). As Brian Orend pointed, the just war tradition has been incorporated into "contemporary international laws governing armed conflict, such as The United Nations Charter".[105] With respect to the proper conduct during war, namely *jus in bello*, the second half of the 19th century and the first part of the 20th century indicated a major leap aiming at codifying the rules of waging war. Several international conventions were signed and several international conferences were held in order to codify rules for combatants during war.[106] In the academic field, the just war theory was restated and defended by Michael Walzer in his *Just and Unjust Wars*.

When discussing the just war tradition and humanitarian intervention, certain limits and nuances regarding the criteria are questioned; for instance, Wheeler raises the following issue: even if civilians are not deliberately targeted by the intervening forces, "what risks interveners should take in order to avoid civilian losses; Military necessity can be used to justify the killing of innocents on the grounds that this happens to be an inadvertent consequence of attacks against legitimate military targets."[107] The latter idea was incorporated in military strategy and is today known as the doctrine of double effect whose source dates

[101] Grotius, *op. cit.*, pp. 241-242.

[102] Orend, *op. cit.*

[103] *Idem*, *The Morality of War,* Ontario: Broadview Press, 2006, *apud* Pattison, *op. cit.*, pp. 101-102. Here the binary aspect of "discrimination" is emphasized: one the one hand "permissible targets", based on the "moral equality of soldiers", and, on the other hand, "impermissible targets" (*i.e.* civilians) who benefit from "non-combat immunity".

[104] *Cf.* Pattison, *op. cit.*, p. 101.

[105] Orend, *op. cit.*

[106] The Geneva Convention (1864), the Declaration of Sankt Petersburg (1868), the Hague Conventions (1899 and 1907), the diplomatic conference in Geneva (1949) and the Conference on the reassertion and development of international law in case of armed conflict in Geneva (which had four different sessions: 1974, 1975, 1976, and 1977).

[107] Wheeler, *op. cit.*, p. 35.

back to the Middle Ages and which allowed soldiers to harm civilians is situations whereby the act was not intended. In current debate on humanitarian intervention, the double-effect refers to permission of collateral damage (*i.e.* non-combatants) when the damage was not intended and "it asserts that a humanitarian intervention that has both a good effect (such as tackling genocide) and a bad effect (such as civilian casualties) can be morally permissible if the following conditions are met: *the good effect is intended* [...], *the bad effect is not intended* [...], *the bad effect is not instrumental* [...], *the bad effect is proportionate* [...]"[108] The latter two conditions are meant to prevent situations where the opposing side's civilians are hit to weaken the other or when the positive outcomes overcome the negative side-effects. According to Walzer, the doctrine of double-effect "stands in need of correction. Double effect is defensible [...] only when the two outcomes are the product of a double intention: first, that the 'good' be achieved; second, that the foreseeable evil be reduced as far as possible." Since he believes that "simply not to intend the death of civilians is" not enough, Walzer adds a third condition: "The intention of the actor is good, that is, he aims narrowly at the acceptable effect; the evil effect is not one of his ends, nor is it a means to his ends, and, aware of the evil involved, he seeks to minimize it, accepting costs to himself."[109] According to Fernando Tesón, "proportionate collateral harm caused by a humanitarian intervention, where the goal is to rescue victims of tyranny or anarchy, may, depending on the circumstances, be morally excusable." He argues in defence of intention of the act which is "to maximize the universal respect for human rights", and claims that "proportionate *collateral deaths* of innocent persons, while indirectly caused by the intervener, do not necessarily condemn the intervention as immoral."[110] The Report of the International Commission on Intervention and State Sovereignty stresses the following operational principles: "acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state; rules of engagement which [...] involve total adherence to international humanitarian law; acceptance that force protection cannot

[108] Pattison, *op. cit.*, pp. 117-118.
[109] Walzer, *op. cit.*, p. 155.
[110] Fernando R. Téson, "The liberal case for humanitarian intervention", in J. L. Holzgrefe; Robert O. Keohane, *op. cit.*, pp. 115-116.

become the principal objective; maximum possible coordination with humanitarian organizations."[111]

From Kosovo to Libya: *How much internalization* of *jus in bello* principles?

The final part of this paper intends to briefly analyze the rules of engagement during interventions in Kosovo and in Libya (namely whether the *jus in bello* was respected by the intervening forces) and to observe if there is an incremental consideration for, and compliance with, the *jus in bello* emerging from the comparative analysis of the two interventions.

In the case of Kosovo (like in the case of Libya for that matter) we will not tackle the *jus ad bellum*, the legitimacy and controversy over it, or whether they indicate fidelity to law, since this was vastly and comprehensively addressed elsewhere.[112] Instead, we will discuss NATO's air strike strategy and correspond it to the requirements from international humanitarian law. When NATO launched its air campaign, it had invoked the necessity to save the innocents and to react to atrocities in the FRY's province Kosovo; basically, it invoked the United Nations Security Council Resolution (UNSCR) 1199, issued in September 1998 which declared: grave concern because of "recent intense fighting in Kosovo" and "excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties", and mentioned the estimation of the Secretary-General regarding "the displacement of over 230,000 persons from their homes"; grave concern due to "the flow of refugees into northern Albania, Bosnia and Herzegovina and other European countries as a result of the use of force in Kosovo, as well as by the increasing numbers of displaced persons within Kosovo, and other parts of the Federal Republic of Yugoslavia", and added the United Nations High Commissioner for Refugees' estimation that there were 50,000 people "without shelter and other basic necessities"; the reaffirmation of "the right of all refugees and displaced persons to return to

[111] ICISS, *op. cit.*, p. XIII.

[112] Wheeler, *op. cit.*, pp. ; Allen Buchanan, "Reforming the international law of humanitarian intervention", in J. L. Holzgrefe; Robert O. Keohane, *op. cit.*, pp. ; Jane Stromseth, "Rethinking humanitarian intervention: the case for incremental change", in J. L. Holzgrefe; Robert O. Keohane, *op. cit.*, pp.

their homes in safety".[113] In October 1998, the North Atlantic Council issued activation orders for an air campaign.[114] After failure of negotiations (the Contact Group had dispatched Richard Holbrooke to Belgrade, and the Organization on Security and Cooperation in Europe had deployed a verification mission, but "after the breakdown of the Paris talks [...] Serbian forces began a new campaign in Kosovo of ethnic cleansing"[115]) the British Government said that

> In the mid '90s, President (Milosević) was the prime player in the war in Bosnia which gave our language the hideous phrase 'ethnic cleansing'. Only after three years of fighting in which a quarter of a million people were killed, did NATO find the resolve to use force. Now we are seeing exactly the same pattern of ethnic violence being replayed again in Kosovo [...] We cannot allow the same tragedy to be repeated again in Kosovo.[116]

According to Nicholas Wheeler, the statements of American and British leaders "point to this being a case where a key determinant of the use of force was [their] belief that this was a Just War."[117] On March 24, 1999, NATO initiated air strikes against the FRY. NATO Secretary-General Solana claimed that the military alliance acted because all diplomatic alternatives had failed, whereas President Clinton emphasized that "US interests in preventing a potentially wider war if action were not taken, as well as the humanitarian concerns, led the allies to act" and UK Prime Minister Blair stressed "the need to protect Kosovar Albanian citizens and argued that the choice was to do something or do nothing."[118] The air strike 78-day campaign was highly controversial, and it was called "humanitarian war" or "air war against Belgrade" at the time. Even though aiming at protecting the civilians,

> the bombing initially exacerbated humanitarian problems. Ethnic cleansing began with a vengeance in Kosovo. Prior to the bombing,

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[113] United Nations, *Security Council Resolution 1199*, (S/RES/1199), 23 September 1998 available at [http://www.un.org/peace/kosovo/98sc1199.htm], retrieved in September 2012.
[114] Weiss; Hubert, *op. cit.*, p. 110.
[115] Wheeler, *op. cit.*, pp. 261-264.
[116] Statement by former Foreign Secretary Robin Cook in the House of Commons, quoted in *ibidem*, p. 266.
[117] Wheeler, *op. cit.*, p. 267.
[118] Weiss; Hubert, *op. cit.*, p. 112.

> UNHCR estimated that there were 410,000 ethnic Albanians internally displaced as a result of Serb operations, and another 90,000 across the border. Within a matter of days, there were 750,000 refugees in Albania and Macedonia, as well as 250,000 IDPs at the border. UNHCR had prepared contingency plans for 100,000 refugees and was soon overwhelmed.[119]

According to other analyses, "the short-term humanitarian outcome was negative", because "air strikes did not save any lives and caused between 600 and 5000 Serbian military deaths, 400-600 Serbian civilian deaths, and an unknown (probable smaller) number of Kosovar Albanian civilian deaths."[120] Other voices are even more critical:

> The intervention itself failed in its goal of averting a humanitarian catastrophe. Serb forces responded to the bombings by dramatically escalating attacks on the Albanian population of Kosovo. Executions occurred as a means to 'eliminate resistance and to demonstrate the costs of remaining in Kosovo [...] Milosević's forces drove more than 1.3 million Kosovars from their homes, some 740,000 of whom fl ooded into neighbouring Macedonia and Albania.' An estimated 10,000 were killed.[121]

In fact air attacks from high above, even when targeting military facilities, cannot secure civilians on the ground and result in more violence, reprisals, and chaos. In the case of Kosovo the ethnic cleansing, initially *just cause for intervention*, intensified and became facilitated by NATO's bombing strategy.

We reiterate one key operational principle of the Report of ICISS, namely "acceptance of *limitations*, incrementalism and *gradualism in the application of force*, the objective being *protection of a population*, not defeat of a state"; in this case, as Wheeler and Bellamy argue it was "too much, and too soon."[122] Also, as Weiss and Hubert assert "bombing campaign was a

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[119] *Ibidem*, p. 113.

[120] Taylor B. Seybolt, *Humanitarian Military Intervention. The Conditions for Success and Failure*, SIPRI (Stockholm International Peace Research Institute): Oxford University Press, 2008, p. 80 si 82.

[121] Sara E. Davis; Luke Glanville, *Protecting the Displaced. Deepening the Responsibility to Protect*, Leiden, Boston: Martinus Nijhoff Publishers, 2010, p. 116; see also Independent Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons* Learned, Oxford: Oxford University Press, 2000.

[122] Wheeler; Bellamy, *op. cit.*, p. 566.

textbook example of escalation theory and hightech, low-risk military warfare" and even though

> initial targets were military [...] after a month the bombing extended to dual-use targets, including mass media and power grids. The war was also extended to FRY territory, including the bombing of Belgrade. Many observers are of the opinion that the destruction of Serbia's infrastructure - for instance, 70 percent of bridges and 100 percent of refining capacity - and the threat of ground forces ended the war.[123]

The military strategy based on air strikes was designed after the tragedy in Somalia and after the shock within American domestic public opinion at the sight of mutilated US soldiers dragged through the streets. So, as Wheeler notices, there is "a great attraction to Western policy-makers" because "it avoids the costs and risks of committing ground troops"; the air campaign was justified because "soldiers returning in body bags would rapidly erode domestic support for the action against Milosević." Also, a reliance on bombing could mean that "serious show of force would compel Milosević to back down after only a few days of bombing."[124]

In the case of Kosovo there was a clear inability to stop atrocities from the air. Basically, when trying to reconcile domestic pressure for sparing the military troops (and thus using air attacks) and averting a humanitarian disaster, the best solution would be to combine ground troops with air campaign. Wheeler asserted that events in Kosovo "required not only air power but also a major commitment of ground troops". James Pattison argues for more restrictive principles of external *jus in bello* and contends that

> The intervener's conduct should [...] be driven, like the domestic police, by the objectives of the protection of civilians and the maintenance of the peace [...] if ground troops had have been deployed in Kosovo, the mission would not have been to make war upon the Serbian military in a conventional manner. Rather, it would have been to prevent those forces from firing on Kosovar civilians and to prevent exchanges of fire between the Serbs and Kosovar militia.[125]

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[123] Weiss; Hubert, *op. cit.*, p. 113.

[124] Wheeler, *op. cit.*, p. 268.

[125] Pattison, *op. cit.*, p. 106.

Nicholas Wheeler points out that even General Wesley Clarke (NATO commander during Operation Allied Force) admitted that "air power alone cannot stop paramilitary action."[126] Also, he reiterates one chief element of *jus in bello* and raises a proper question: "Since meeting the test of proportionality is a threshold criterion of a legitimate humanitarian intervention, did the level of force employed by the Alliance exceed the harm that it was designed to prevent and redress?"[127] Also, James Pattison showed that "NATO's use of cluster bombs and reliance on aerial bombing in Serbia certainly weakened (if not fatally) the humanitarian credentials of its intervention. What is called for, then, is consistency of means and ends: an intervener should use humanitarian means when attempting to achieve humanitarian ends."[128] At the time numerous voices criticized the refusal to deploy ground forces; The UN High Commissioner for Human Rights (Mary Robinson) questioned "whether NATO was sufficiently careful in its targeting" and Nicholas Wheeler argued that the obstinate "reliance on the air campaign reflected in her view a lack of moral courage on the part of NATO governments to place their service personnel in harm's way in defence of the values they claimed to be fighting for."[129] Another pivotal operational principle stressed by ICISS is: "Rules of engagement which fit the operational concept [...] reflect the principle of proportionality; and involve total adherence to international humanitarian law." After the bombing campaign the Allied leaders committed themselves to aiding all refugees return to their homes, and an international protectorate was established to stabilize Kosovo, but during the *forcible humanitarian intervention* this was hardly a priority on the military strategy. As Wheeler sharply concludes

> NATO could have reduced the risks of civilian casualties had it asked its pilots to fly at low level, since this would have have improved target discrimination. NATO's reluctance to bomb at low level reflected concerns not only about the safety of its air-crew, but

[126] Wheeler, *op. cit.*, p. 270.
[127] *Ibidem*, p. 82.
[128] Pattison, *op. cit.*, p. 107.
[129] Wheeler, *op. cit.*, p. 272.

> also about losing aircraft and with them the sustainability of the air campaign.[130]

The violent turmoil in Libya emerged as one *facet* of what later became known as The Arab Spring, namely stark contestation of regimes, civil unrest, and revolutionary movement that ranged across the Middle East and North Africa at the beginning of the year 2011. In the case of Libya, though, the protesters mounted against Colonel Gaddafi, who, buoyed by inner circle individuals and using military force against the rebels, brutally counter-reacted in trying to repress the insurgency; consequently the situation dramatically deteriorated. The international community was following worryingly the events in Libya and empathy for the suffering of innocent Libyans was considerable. At the same time, according to an article from *Foreign Affairs*, "the Libyan rebels [...] refused what would have been the most effective outside help: foreign boots on the ground"[131]. The milestone showing that "the world has become more committed to the protection of civilians" was reflected in the fact that two UNSC Resolutions on Libya "passed with unprecedented speed and without a single dissenting vote."[132] Resolution 1970 had "expressed its readiness to consider taking additional appropriate measures, as necessary, to facilitate and support the return of humanitarian agencies"[133], whereas in the case of Resolution 1973, issued on the 17th of March 2011, "ten countries voted in favor, including permanent members France, the United Kingdom, and the United States. None opposed. Brazil, China, Germany, India, and Russia abstained."[134] Resolution 1973

> *Expressing* grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties, [...]

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[130] *Ibidem*.

[131] Jon Western; Joshua S. Goldstein, "Humanitarian Intervention Comes of Age. Lessons From Somalia to Libya", *Foreign Affairs*, Vol. 90, No. 6, November/December 2011, p. 54

[132] *Ibidem*, p. 55.

[133] United Nations, *Security Council Resolution 1973*, (S/RES/1973), 2011, available at [http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Libya%20S%20RES%201973.pdf], retrieved in October 2012.

[134] Human Rights Watch, *Unacknowledged Deaths. Civilian Casualties in NATO's Air Campaign in Libya*, USA: Human Rights Watch, May 2012, p. 19.

> *Condemning* the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions, [...]
> *Expressing its determination* to ensure the protection of civilians and civilian populated areas and the rapid and unimpeded passage of humanitarian assistance and the safety of humanitarian personnel [...]
> *Acting* under Chapter VII of the Charter of the United Nations,
> 1. *Demands* the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians;
> 2. *Stresses* the need to intensify efforts to find a solution to the crisis which responds to the legitimate demands of the Libyan people [...]
> 3. *Demands* that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance;[135]

Consequently, under the coordination of the United States, UN member states initiated military action on the 19th of March and the key operational objective was to determine the forces of Gaddafi from the city of Benghazi. Another key element of the intervention was centred on the following humanitarian rationale: creation of *no fly zone* and *protection of civilians*, authorizing UN member states to use "all necessary measures" for that aim.[136] The intervention echoed optimist voices, such as those expressed in *Foreign Affairs*

> The intervention has accomplished the primary objective of Resolution 1973. It saved civilian lives by halting an imminent slaughter in Benghazi, breaking the siege of Misratah, and forcing Gaddafi's tank and artillery units to take cover rather than commit atrocities.[137]

It was also met with scepticism, such as formulated by Mary Kaldor:

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[135] UNSC Resolution 1973, *op. cit.*, pp. 1-3.
[136] See text of the Resolution, pp. 2-3; Human Rights Watch, *Unacknowledged Deaths*, p. 19, and Landen Garland, *2011 Libyan Civil War*, Delhi: White Word Publications, 2012.
[137] Western; Goldstein, *op. cit.*. p. 57.

> There is a difference between war and humanitarian intervention, or as I prefer to call it, a human security intervention. The current attacks on Libya, like the NATO air strikes over Yugoslavia in 1999, are intended for humanitarian ends, the protection of civilians but the means are those of war. Certainly the United Nations Security Council Resolution 1973 was a huge achievement just in time to prevent Gaddafi forces from overrunning Benghazi. [...] But are military attacks from the air an appropriate means?[138]

Our interest conveys towards the *jus in bello* and respect for international humanitarian law during the intervention. Thus, we will try to survey some opposing views on this matter. According to NATO "its efforts went beyond the requirements of international humanitarian law" as quoted in a Human Rights Report and the assertion is that "no target was approved or struck if we had any reason to believe that civilians would be at risk."[139] According to the same report,

> NATO provided more details on its Libya operations to the UN Commission of Inquiry [and it] presented the steps it said it took to protect civilians, concluding that NATO's targeting and strike methods were 'as well-designed and as successfully implemented to avoid civilian casualties as was humanly and technically possible.' These methods included a rigorous targeting review process for pre-planned and dynamic targets, the exclusive use of precision-guided weapons.[140]

The case against air attacks was taken up again by Kaldor who was warning about potential risks, especially the fact that "people get killed - mostly soldiers like those on the road to Benghazi, but also those very people who are supposed to be protected - namely civilians, however hard western forces try to be precise."[141] Amnesty International declared that some of its delegates "visited several locations of NATO air strikes [...] where civilian casualties had been reported" and later

> has documented a total of 55 named civilians, including 16 children and 14 women, who were killed in airstrikes in Tripoli (5), Zlitan (3), Majer (34) Sirte (9) and Brega (4). Twenty other civilians were

[138] Mary Kaldor, "Libya: war or humanitarian intervention?", *openDemocracy*, 29 March 2011, p. 1 [http://www.opendemocracy.net], retrieved 6th of October 2012

[139] Human Rights Watch, *Unacknowledged Deaths*, p. 23.

[140] *Ibidem*.

[141] Kaldor, *op. cit.*, p. 1.

> reportedly killed in NATO strikes in Brega (2), Surman (13) and Bani Walid (5) according to UN experts, international NGOs and journalists who also carried out on-site investigations.[142]

The NATO forces (led by the French and British, having significant support from the United States) "launched thousands of air strikes on government targets during the conflict, some of which killed civilians", claims a Human Rights Watch investigation, and "the number of civilian deaths appeared far lower than claimed by the Gaddafi government, but higher than acknowledged by NATO."[143]

Amnesty International also states that "dozens of civilians have been killed in NATO air strikes on private homes in residential and rural areas where Amnesty International, UN experts, other international NGO's and journalists found no evidence of military objectives at the strike locations at the time of the strikes."[144]

Based on all evidence indicated, NATO's targeting and strike methods were designed in such a way as to correct the errors from 1999. We claim that the brief comparative analysis on the two interventions leads to enough data to support the increasing preoccupation for the *jus in bello* during military intervention.

Conclusion

In is our contention that the Solidarist case for humanitarian intervention has considerably gained consistency in the last years and it is our belief that the norm *responsibility to protect* is a milestone. Relating to prohibitions stemming from Article 2(4) of the UN Charter, we claim that in the immediate post Second World War period (with horrifying images of Holocaust victims and with recent memory of so many innocent killed), the drafters of the Charter din not only attempt to ban inter-state war (or to prevent another total war), but also they tried to avoid in the future massive attacks on segments from the civilian family, from humanity in general. Therefore, we do not regard with textual strictness the provisions

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[142] Amnesty International, *The Forgotten Victims of NATO Strikes*, UK: Amnesty International Publications, 2012, p. 6.

[143] Human Rights Watch, *World Report (2012 – events of 2011)*, Human Rights Watch, May 2012, p. 600.

[144] Amnesty International, *The Forgotten Victims of NATO Strikes*, p. 7. See also lists with "Casualties of the 2011 Libyan Civil War", in Landen Garland, *2011 Libyan Civil War*, Delhi: White Word Publications, 2012.

of the article and we support the solidarist claim that it mererly regulates the use of force: neither completely bans it, nor does it exposes it to abuse. A constructivist claim in International Relations literature could be built on the following assumption: norms are constructed, and also concepts such as human rights, humanitarian intervention, the right/duty/responsibility to intervene or protect, sovereignty, and so on and so forth. If they are not pregiven, carved in stone, but created by state interaction, international deliberation, and practices in world politics, it follows that they are amenable to revision, (re)interpretation, alteration, or fortification. With respect to the extent in which there is internalization among states of the *jus in bello* principles, (and which is then instantiated in their actions), we claim that the intervention in Libya tried to be more attentive to human security than Kosovo. This does not mean that is was not fraught with controversy; rather, we argue that there is an evolving care for collateral victims. Even the fact that chief-commanders and policy-makers are committed to, and ready to, prove their respect for the protection of civilians means that a development is in progress at the beginning of the 21st century.

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