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BRIEF

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Spanish Ministry of Defence

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Introduction

After NATO was founded in 1949, its forces were not involved in a single military engagement until the early 1990s. In 1992, NATO got fully involved in the first crisis response operation in the new post-Cold War era. NATO forces were deployed to enforce the UN arms embargo on weapons in the Adriatic Sea and to enforce the no-fly zone declared by the UN Security Council in the Balkans conflict. Since then, many other crises have triggered interventions by NATO beyond its traditional area of responsibility, all of them non-Article 5 operations, except for the ongoing Operation Active Endeavour (OAE) and the AWACS support mission after the 9/11 terrorist attacks in New York.

The purpose of this brief is to analyse NATO's criteria for intervention in Crisis Response Operations. For obvious reasons, an Article 5 contingency should not present, in principle, any legitimacy problem since it is, by definition, a self-defence intervention covered expressly by the UN Charter. Yet interventions in Crisis Response Operations present some difficulties in regard to the decision-making process leading up to the use of force and to the way the operations are conducted. In legal terms, these are the *ius ad bellum* and the *ius in bello*. When and under which circumstances it is legitimate to intervene with military force in a sovereign country is the question the *ius ad bellum* tries to answer. How to behave during the conflict is addressed by the *ius in bello*. Although both are deeply interconnected, the scope of this brief will cover only the legitimacy criteria for intervention, but some reference to the employment of military means will be made to underline that interrelation in a way that shows that an initial legitimate intervention can turn out to be unjust because of the way it is executed. As Professor Kuzniar summarizes, "*Even a just war ceases to be just when it is waged by inappropriate means.*"¹

From the outset, it is necessary to state that legality and legitimacy are not equivalent concepts, even if they are used synonymously in debate. A legal war is one authorized by international law, i.e. in accordance with the UN Charter and the decisions of the UN Security Council. Legitimacy is more of a moral concept impossible to translate into positive law, hence its controversial essence². It has been more or less systemized through history in the so-called Just War Tradition, which will be the yardstick for measuring the criteria analysis that follows. Some

(1) **Roman Kuzniar** "The contemporary world and use of armed force: legal and political dilemmas" *The Polish Quarterly of International Affairs*, 18.4, 2009, p. 63-71

(2) As **Pavel Barsa** puts it when referring to an intervention without a UNSC mandate, "*Such an intervention is clearly 'illegal' even if it may be conceived of as morally 'legitimate'*". In Pavel Barsa, "Waging War in the name of Human Rights? Fourteen Theses about Humanitarian Intervention". *Institute of International Relations, Prague. Perspectives: Summer 2005*, p.10

Nigel White makes the same distinction about the Kosovo intervention: "*..it was felt that the use of force may not be clearly lawful but was nevertheless legitimate*". Nigel D. White "Libya and the lessons from Iraq: International Law and the use of force by the United Kingdom". *Netherlands Yearbook of International Law* 42, Dec 2011, p. 225. Finally, a commission of experts found the intervention in Kosovo to be "illegal but legitimate" as reported by **Alex J. Bellamy** in his "Just Wars: From Cicero to Iraq", *Polity Press, Cambridge* 2006, p. 215.

argue that the UN Charter is the modern translation of the Just War Tradition and that the concept is not useful anymore since the Charter now regulates the international use of force. But I am more of the opinion of Delahunty and Yoo that the Charter “*is far from codifying traditional just war theory*” and that the two instruments are better viewed as complementary³.

NATO’s Criteria for Intervention

Does NATO have standard criteria to decide whether to intervene in a humanitarian crisis situation in a sovereign country? Of course, the final decision will always be a matter of consensus among the 28 member nations, but that consensus must be built upon safe grounds of coherent policy and moral standards. The answer to that question cannot be found in any of NATO’s documents, but recently NATO officials have referred to “the criteria”, or the conditions, that must be satisfied to allow for an intervention. It all started with Operation Unified Protector in Libya in 2011 under the mandate of UN Security Council Resolution 1973 of 17 March 2011. This is the first mandate ever by the Security Council for a military intervention based on the Responsibility to Protect – or R2P – doctrine.

During the internal NATO debates preceding the operation, the long shadow of the Iraqi war was always present, and there was a fear of precipitation. The United Kingdom led the debate and presented a set of three conditions to be met prior to authorizing the humanitarian intervention in Libya. These conditions were **demonstrable need, regional support and a clear legal basis**⁴. Since Ambassador Mariot Leslie, the Permanent Representative to the North Atlantic Council at the time, was the one who presented them to the NAC, they are now commonly referred as the “Leslie criteria”. Since then, there has been a shared understanding that these are NATO’s standard criteria for intervention.

The first conclusion is evident: these criteria are very different from the ones used for the humanitarian intervention in Kosovo in the spring of 1999. Then, the lack of any legal basis triggered some international criticism of the operation. Actually, the Leslie criteria have some precedent in the Blair Doctrine laid out by Prime Minister Tony Blair in a speech in Chicago on 22 April 1999⁵.

The analysis of these three criteria in light of the Just War and R2P doctrines can help us evaluate their suitability to better inform the decision making process of our leaders in general, and of NATO in particular. Throughout this analysis, the comparison between the Kosovo and Libya cases recurs in order to better illustrate

(3) **Robert J. Delahunty and John Yoo** “From Just War to False Peace”. *Chicago Journal of International Law* 13.1, Summer 2012, p. 36 and ss

(4) Statement of the UK Prime Minister to the House of Commons on 18 March 2011. And repeated on a substantive motion on 21 March, two days after the RAF had become involved in the military action. See **Hansard**, HC Vol, 525, Col. 700, 21 March 2011 (David Cameron MP).

(5) See **Chris Abbott**. “Rights and Responsibilities: The Dilemma of Humanitarian Intervention” *Global Dialogue* 7. 1/2, Winter 2005.

the study and to help us to raise some considerations in relation to Syria's current crisis.

Demonstrable need: the case to intervene

The key prerequisite is, of course, an obvious case, a demonstrable need to intervene. It is common understanding that a ruthless violation of human rights must be occurring or will occur imminently. The right to intervene in such circumstances is considered an exception to the universal principle of territorial sovereignty (Art. 2(4), 2(7) of the UN Charter), even if the only formal exceptions to it are self-defence (Art. 51) and Security Council enforcement for the restoration or maintenance of international security and peace (Chapter VII). Humanitarian intervention is an old "just cause" to wage war already contained in the Just War spirit, and it's at the core of the modern Responsibility to Protect doctrine of the UN. The main obstacle to applying this criterion is identifying where the threshold of an unbearable violation of human rights is in order to justify the exceptional measure of intervening against the will of the affected country. There is no clear answer to this, but a good rule of thumb is the "minimalist definition" of fundamental human rights proposed by Pavel Barsa⁶ (following Michael Walzer in this regard), i.e. only massacres, ethnic cleansings and forced labour.

The humanitarian crisis in Kosovo in 1999 was considered by NATO members to have gone well beyond the threshold, and the aerial campaign over Serbian targets started in spite of the lack of authorization by the UN Security Council. There is little doubt about the illegality of NATO decision but, at the same time, there is broad consensus that it was the right decision - a legitimate one, a moral duty. And it was such because it complied with the Just War Tradition precepts.

A retrospective application of the R2P doctrine to that intervention also affirms its correctness. This doctrine, presented by the ICCIS⁷ to Kofi Annan in December 2001, comprises three specific responsibilities: to prevent, to react and to rebuild. All of them were exercised by NATO. It also contains four principles: right intention, last resort, proportional means and reasonable prospects. Again, in our opinion, NATO broadly respected those yet to be stated principles. The only caveat some analysts offer up about the legitimacy of the operation is in regard to the means employed during its execution: it is not clear if the high altitude bombing posed an extra risk to the civil population⁸, which would have been an infringement of the proportionality and discrimination principles of the *ius in bello*.

(6) **Barsa** (2005), p. 7

(7) The International Commission on Intervention and State Sovereignty (ICISS) was established by the Prime Minister of Canada during the UN Millennium Summit in September 2000. R2P is fully explained in **Abbot** (2005).

(8) There are opposing opinions about this issue. See **Hugh Beach** "Secessions, interventions and just war theory: the case of Kosovo" *Pugwash Occasional Papers*, Volume 1, Number 1, February 2000. <http://www.pugwash.org/reports/rc/beach.htm>

The same conclusion can be reached about the Libya intervention; in our opinion, the previously mentioned UN Security Council Resolution 1973 only added a *plus* of legality, but NATO should have intervened without it - we will come back to this in the final section. But ironically, in spite of its extra legality, the Libya intervention has provoked much more international criticism. If the operation's final phase was craped to effectively become a regime change including support of the rebels, then the initial legitimacy of the operation was lost, not only because regime change was not authorized by Resolution 1973 (therefore making the execution of it illegal) but, mainly, because it was no longer a humanitarian intervention. In other words the "right intention" principle would have been violated⁹. The aftermath of Libya has created the perception among many that NATO abused the international order and the Security Council mandate; this is the main reason stated by Russia and China¹⁰ for vetoing any resolution to intervene in Syria, and it will probably undermine the promising prospects of the R2P doctrine in the Security Council for some time to come.

From the humanitarian perspective, the situation in Syria is very similar to the one in Libya before the NATO intervention¹¹. Nevertheless, according to NATO officials, there is no intention or appetite to consider intervention for the time being. That brings to the table another related issue that is not possible to address in the space of this brief, but is worthy of mentioning: "selectivity" in humanitarian intervention affects the credibility.

The point to make here is that the international responsibility to avoid crimes against humanity should no longer be a choice – it should be a duty. The recourse to arguing a lack of national interest or appetite reveals that we are still far away from a pure humanitarian ethic unmixed with other political considerations. And

(9) Besides, NATO has officially refuted these accusations, and some argue that it was not NATO but individual states that deviated from the mandate. The article jointly published by US President Barak Obama, French President Nicolas Sarkozy and British Prime Minister David Cameron on 14 April 2011 does not help the official posture. There is also evidence that at least France, Qatar, Canada and Egypt supplied arms to the rebel forces. Unsurprisingly, some NATO and US officials have also mentioned "regime change" and "rebels support" when asked about Libya during their lectures and briefings, according to the last NDC Field Study. Finally, some try to justify the regime change by alleging "intervention by invitation", but there is wide consensus that that is not allowed in a civil war scenario.

(10) Not only Russia and China, but South Africa, India, Brazil, and others have joined in the same criticism and in feeling betrayed by the UK, US and France. See **Geir Ulfstein and Fosund Hege** "The Legality of the NATO bombing in Libya" *The International Comparative Law Quarterly* 62.1 Jan 2013, p. 160 and ss.

Of course, Libya is not the only reason for Russia and China to oppose any resolution about Syria. They have interest in maintaining the status quo in Syria, but now they have a good alibi to do so without further explanations.

(11) As reported by **Ulfstein**, "At the end of April 2011 the revolt in Syria already displayed similar features to the Libyan uprising at the time the Security Council decided to intervene militarily to protect the civilian population there" and by September 2012 "the intensity of the conflict had reached the legal threshold for a non-international armed conflict". Ibid, p. 170

It is important to stress that the situation in Syria is only similar to Libya, as said, from the humanitarian perspective. It is understood that Syria is a more complex political scenario, and many other factors affect the decision to intervene, as always.

that doesn't mean advocating for NATO to become the police of the world: that's not its mission, it would be unrealistic, and it would generate instability and conflict.

Regional support

This second condition, having regional support, is very much related to the multilateral approach to crisis management. But it is also a valid measure for some Just War principles in regard to the probability of success and the responsibility to rebuild. Going back to multilateralism, it is very often presented as a credential for legitimacy. The argument behind it is that, when many democracies reach a consensus and join together to fight someone else, it can only be because it is a just cause to use military force and to wage war. As considered by Barsa (2005), "*international multilateral decision-making function(s) as a test for universality...*", and he concludes, "*For this reason multilateralism is the most general answer to the question of how we distinguish an imperialist conquest disguised as a humanitarian intervention from a real humanitarian intervention.*"

In our opinion, that is a very pragmatic but weak philosophical argument and, if accepted, it would make useless any further debate about the legitimacy of the intervention *vis-à-vis* the Just War principles. Therefore, we follow Walzer's judgment in regard to this issue of multilateralism. In his opinion, numbers do not matter when dealing with legitimacy - broad support and consensus or even a UN decision cannot legitimate a wrong decision to go to war. As he puts it, "*States don't lose their particularist character merely by acting together*"¹².

Finally, the concept of regional support is so vague that it can hardly serve as a discriminative factor to qualify the legitimacy of an intervention. As an example, in the Libya crisis, regional support was claimed even though the African Union opposed the intervention. So, which is the region to be considered? Is it a geographical or an ideological region? It is true that the Arab League did support it initially, but there are serious doubts about its support for the operational development of the intervention; its Secretary General, Amr Moussa, deplored the bombing campaign and declared "*What is happening in Libya differs from the aim of imposing a no-fly zone*" and then he underlined the authorization to protect civilians in Libya, but not to enforce regime change¹³.

In conclusion, while regional support and multilateralism have some significance as criteria for intervention, great care should be taken not to overestimate the weight those factors have relative to the more fundamental principles of the Just War Tradition.

(12) **Michael Walzer**, "*Just and Unjust War: A Moral Argument With Historical Illustrations*". Third Edition, Basic Books, New York 1977. p. 107

(13) "The Goal in Libya is not Regime Change", *New York Times*, March 30, 2011. And in http://www.washingtonpost.com/world/arab-league-condemns-broad-bombing-campaign-in-libya/2011/03/20/AB1pSg1_story.html

Clear legal basis to intervene

This final criterion has already been addressed partially along with the legitimacy issue discussed above. Nevertheless, it deserves a few more comments. The need for a clear legal basis emerged strongly in the Libya intervention as a consequence of the fiasco of the invasion of Iraq some years before. This time, the Allies struggled to obtain a clear mandate from the UN Security Council; it was a must. But one could argue that once they had the green light, Resolution 1973, it was interpreted and executed against its spirit and in obliviousness of the noticeably restrictive atmosphere that characterized the preparatory debates in the Security Council. That raises the question of whether a Security Council mandate is a binding document or only a tick mark on the check list before firing.

In any case, the weight of the Security Council resolutions is relative. Taking into account the Security Council's deficit of democracy, its numerous cases of paralysis and its inability to properly control its own mandates, its resolutions cannot be considered the blessing of legitimacy. And legitimacy is what truly counts, not the formality of a legal document. Abbott goes even further and alerts us: "*The problem is that its decision whether or not to intervene in a particular conflict does not necessarily reflect internationally agreed objective criteria and legal norms, but the domestic and global imperatives of the five permanent members.*"¹⁴

Therefore, it is dangerous to set this legal basis as a "go-no go" criterion for the future. In the first place, having a Security Council resolution is not unbiased proof of legitimacy; and even worse, failing to obtain it could paralyze an intervention necessary to stop a human disaster. Syria could be a sad example of this.

One possible solution to the threat of paralysis in the Security Council is to promote the authority of the General Assembly, using the Uniting for Peace procedure that allows it to recommend collective action and use of force. It was used, for example, in 1956 by the United States when Egypt was attacked for nationalizing the Suez Canal.¹⁵

To be fair, we must acknowledge the unique relevance of the Security Council in international security, especially in the application of Chapter VII of the UN Charter. And, in spite of its deficiencies, it is probably the best we can have to do the job. We are only trying to put it in perspective *vis-à-vis* the Just War Tradition, because, as said before, both must be complementary in the decision making process. The UN Charter is not enough. In Delahunty's opinion, it is even worse than that: "*...the Charter's use of force rules thus erect a formidable legal barrier to the protection of human rights and to the safety of populations at risk throughout the globe.*"¹⁶

In summary, while it is very convenient to act under the umbrella of Security Council resolutions, the lack of Security Council authorization should not be treated as a red line in severe humanitarian crises.

(14) **Chris Abbott** (2005) p. 5

(15) For details about the Uniting for Peace procedure, see **Chris Abbot** (2005).

(16) **Robert J. Delahunty and John Yoo** (2012), p. 37

Conclusion

Following this brief analysis of the so-called “Leslie Criteria”, the first conclusion is that NATO has made a very commendable effort to advance and set legal and ethical standards that facilitate consensus among member nations in the always difficult decision to intervene in a Crisis Response Operation.

The analysis of the three criteria in light of the Just War Tradition principles reveals that these criteria do not suffice for deciding on an intervention and conducting it. A more comprehensive examination is necessary to include those principles and the new Responsibility to Protect doctrine. Paradoxically, the Libya intervention, which had the clear legal basis of a UN Security Council resolution, ended up being executed on the fringe of legality, and its legitimacy is very contentious. On the other hand, the illegal Kosovo intervention is considered legitimate and a positive step forward in shaping the emerging Responsibility to Protect doctrine.

Therefore, NATO as an Alliance and, most importantly, the individual nations and their leaders should put more focus on the legitimacy strands of their decision-making process and in designing the policies for intervention. For that purpose, the Just War Tradition should be better incorporated into their political agendas.

As practical means to accomplish that, we offer some proposals to be investigated further:

- To incorporate the subject of the Just War Tradition into the academic curricula of the military staff colleges and diplomatic schools, including the NDC.
- To influence the future management of the UN Security Council and its credibility by seeking a compromise to work out an agreement on a special procedure for humanitarian interventions. Such a procedure should aim at precluding the body's frequent paralysis and should include mechanisms that foster better control over the execution of interventions.
- To promote the development and institutionalization of the Responsibility to Protect doctrine in the UN.

Let me finish with a reflection by the eminent Professor Walzer that very accurately synthesizes the thesis of this brief: *“Just war theory now provides the crucial framework, the vocabulary and the conceptual scheme, with which we commonly argue about war. This is the way war has to be examined and defended, and I hope that sets some limits on decision-making. But decision-makers are commonly moved by a complex set of considerations, in which politics and economics figure along with but also, usually, before morality.”*¹⁷

(17) **Michael Walzer**, “Words of War: Challenges to the Just War Theory”, *Harvard International Review*, Spring 2004, p. 37

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