

January - June 2010
Colombia

 **EAFIT**
Journal of International Law

01
Vol. 1





JOURNAL OF INTERNATIONAL LAW
Volume 1 | 01 | January - June 2010

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Contents

- 5** **Editorial**
Rafael Tamayo Franco

- 6** **Nato in kosovo: operation allied force viewed from the core principles of *jus in bello***
Felipe Montoya Pino

- 19** **Enforcing human rights through the doctrine of responsibility to protect**
Ana Estrada Sierra Ana Estrada Sierra

- 32** **Un looking for peace or pushing it away: assessing the effectiveness of peacekeeping missions**
Manuela Gómez

- 43** **Derechos humanos en el ambito internacional: la tortura como noticia actual**
Ana María López Pinilla

- 52** **The concept of security and the viability of global governance**
Carolina Aguirre Echeverri

- 69** **The right to water: dimension and opportunities**
María Adelaida Henao Cañas

Editorial

“A man cannot govern a nation if he cannot govern a city; he cannot govern a city if he cannot govern a family; he cannot govern a family unless he can govern himself; and he cannot govern himself unless his passions are subject to reason”

Hugo Grotius

It is a real pleasure for me to present to the academic community, the first edition of EAFIT Journal of International Law. EAFIT University was created 50 years ago, by a group of young professionals who wanted to implement successful education models from North America. This University has grown up and continues to expand in a process that follows international standards and it is nowadays one of the most prominent Universities in Colombia.

Rafael Tamayo Franco
International Law Coordinator
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EAFIT Law School was created in the very year of the new millennium. Together, the focus on business, trade law and globalization, allowed the strengthening of the International Law Academic Area. Thus, an international law emphasis (major) was developed with an increasing number of students working as interns in several public and private international organizations. In this context, international affairs research and analysis found a home.

Taking into consideration the positive and dramatic changes of Colombia in the last few years plus its role in the region and the capabilities of the coming generations, this Journal wants to be a forum for academic discussions about international legal issues; a publication by and for students, who will not keep silent when faced with an increasingly complex and inter-connected world.

In our first number, a variety of topics were submitted to the Committee making selection a demanding but an interesting task. The situation in Kosovo, the performance of NATO, Responsibility to Protect, Security and Global Governance, and Peacekeeping Missions, were some of the matters developed in the articles. We are pleased with the quality of the chosen manuscripts and we consider this first Volume to be relevant and current.

With no more preambles, we thank all those who made possible this first edition of EAFIT Journal of International Law which will hopefully be the foundation of many future ones.

Nato in Kosovo: operation allied force viewed from the core principles of *jus in bello*

✉ By Felipe Montoya Pino

Abstract

This paper reviews NATO's Operation Allied Force conducted in Kosovo in 1999 based on the principles of International Humanitarian Law, namely those of distinction, proportionality, precaution and limitations on the type of weapons to be used within military operations. This document is distributed in two main parts. The first one describes NATO's constitutive treaty by making emphasis in what are considered its most prominent articles followed by a presentation of the four principles of jus in bello, mentioned previously. The second part deals with the description of four air incidents within the Operation aiming at the violation of International Humanitarian Law along with scholars opinions regarding the subject matter of discussion as well as the International Criminal Tribunal for the Former Yugoslavia (ICTY) final decision not to initiate investigations.

This paper is the result of research made through different International Law Journals and news from NATO's official webpage. Finally, it is worth mentioning that it is not pretended to criticize neither the arguments presented by scholars opposing NATO's intervention nor the decision at which the ICTY arrived, the aim is to present a case which still has not had consensus among International Law analysts but that can help in understanding jus in bello in International Relations.

Introduction

The North Atlantic Treaty Organization (NATO) is an Alliance of 28 countries from North America and Europe entrusted "to fulfilling the goals of the North Atlantic Treaty signed on 4 April 1949".¹ This organization holds among its main purposes to "safeguard the freedom and security of its member countries"² and the values of democracy, individual liberty, the rule of law and the peaceful resolution of dis-

1. North Atlantic Treaty Organization, "What is NATO?" Web site North Atlantic Treaty Organization [on line], available in: http://www.nato.int/cps/en/natolive/what_is_nato.htm, accessed: 5 April 2010.

2. *Ibíd.*

putes through both political and military means. Throughout its enlargements NATO has been cataloged as one of the most successful and perdurable military alliances in the history of International Relations, nevertheless, “[f]rom March 24 to June 10, 1999, the North Atlantic Treaty Organization (...) engaged in a bombing campaign against the Federal Republic of Yugoslavia (“FRY”) in response to the atrocities committed by Serbian forces against the ethnic Albanian population in Kosovo. Code-named “Operation Allied Force,” the campaign resulted in the deaths of approximately 500 innocent civilians while injuring more than 800 others”.³

Although this was meant to be a humanitarian intervention, given the way in which the operations were conducted and its results in terms of casualties, some scholars argued that NATO had committed war crimes and that it should be judged before the International Criminal Tribunal for the Former Yugoslavia (ICTY) which had jurisdiction in this particular case. In this context, the purpose of this paper is to analyze the arguments which indicate that such war crimes did occur given that “[t]he core rules of international humanitarian law [which] consist of the principles of distinction, proportionality, and precaution in the attack, as well as the idea of limiting the use of certain types of weapons”⁴ were violated.

This paper is distributed in two main parts. The first one (1) makes a brief introduction on NATO and describes its constitutive treaty by making emphasis in what are considered its most important articles (1.1), then within the frame of *jus in bello* the four main principles of International Humanitarian Law, mentioned above, are presented and described (1.2). The second part (2) focuses on NATO’s “Operation Allied Force” by describing four particular air bombings that, arguably, violate the mentioned principles (2.1), and finally a brief analysis is made based on the arguments posed by different scholars as well as the ones presented by the ICTY (2.2).

1. NATO and the core rules of International Humanitarian Law

Several criticisms related to NATO as a pro-democracy organization have put its reputation in question. Some authors agree that NATO’s *raison d’être* is mutual confidence and that as such its purposes encompass topics beyond national security interest. The debate has different and equally valid arguments, some of them; for example, argue that since “[s]everal of its members have at different times in history



3. Anne-Sophie Massa, “NATO’s Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion?” *Berkeley Journal of International Law*, vol.24, num. 2, June 2006, p. 611

4. *Ibid.*, p. 621.

been non-democratic states”⁵, the question as to when did NATO get its democratic identity shows that the organization has been “clearly inconsistent over time in terms of the importance it attributes to democratic principles”.⁶

On the other hand, others say that if a military alliance is “an organization that is set up with the sole aim of protecting the member states from a clearly identified external threat, and that is held together chiefly as a result of a common perception of such a threat, then it seems plausible that NATO has ambitions to, and perceives itself as, something more; and there is some evidence to support the idea that the ‘new NATO’ has sought to forge a basis of legitimacy for itself, and a definition of its own purpose, that are somehow linked to the idea of democratic governance”.⁷

Other authors remain more neutral and state that even if “NATO is certainly not the direct causal mechanism for democratization and democratic survival (...) official and unofficial NATO alliance ties facilitate an underlying process that helps reduce external threat, (...) [and] [t]his underlying process increases the probability of democratic transition or consolidation by aiding the settlement of the territorial disagreements that have such a deleterious effect on the state”.⁸ Nonetheless, to avoid taking sides, the following section will focus only on NATO’s constitutive treaty. Afterwards, the core rules of International Humanitarian Law will be briefly described based on analysis made by Anne-Sophie Massa, PhD candidate at the Criminal Law Department from Faculty of Law at Maastricht University.

1.1. The North Atlantic Treaty of April the 4th, 1949

“(...) the North Atlantic Treaty, as well as numerous subsequent documents and declarations from NATO, emphasize the importance of democratic principles. Thus, in the preamble to the treaty it is stated that the parties are ‘determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of law’.⁹ Principles of the UN Charter are commonly mentioned in the NATO treaty, consequently the parties are committed to act in accordance with them, as cited in Article 1, “[t]he Parties undertake (...) to settle any international dispute in which they may be involved by peaceful means (...) and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.”¹⁰

5. Helene Sjørnsen, “On the Identity of NATO”, *International Affairs*, vol. 80 num. 4, p.695.

6. *Ibid.*, p. 695.

7. *Ibid.*, p.693.

8. Douglas M Gibler and Jamil A. Sewell, “External Threat and Democracy: The Role of NATO Revisited”, *Journal of Peace Research*, vol. 43, num. 4, July 2006, p. 416.

9. Helene Sjørnsen, *Op. cit.*, p.691.

10. The North Atlantic Treaty, 4 April 1949.

“While for most Europeans Article 5 [mentioned below] was NATO’s premier attraction, the North American members were more interested in Article 2, which called for the strengthening of free institutions and the promotion of political stability and material wellbeing through international trade and economic cooperation”.¹¹

The military aspect of the treaty can be perceived from Article 3, which calls for each party to “maintain and develop [its] individual and collective capacity to resist armed attack”.¹² Also, Article 4 states the opportunity for parties to call for consultations whenever, in their opinion, “the territorial integrity, political independence or security of any of the Parties is threatened”.¹³ But “[t]he North Atlantic Treaty’s critical component is Article 5, in which the signatories agree that “an armed attack against one or more of them in Europe or North America shall be considered an attack against them all,” and pledge to assist one another “by taking forthwith, individually and in concert with the other Parties, such action as [each signatory] deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area”.¹⁴ This article also states that the arm attack as well as the measures taken to respond it should be immediately reported to the Security Council and that the actions taken to respond to the mentioned attack will cease when the Council has taken measures to restore order.

In this sense, Article 6 defines what for NATO constitutes an armed attack and Article 7 clarifies that the treaty does not affect in any way the obligations and rights under the UN Charter and that it does not intend to modify the role of the Security Council as the grantor of peace and security. Furthermore, Article 9 establishes a Council in which each party shall have representation, a Council able to meet “promptly at any time”, and it gives it the freedom to establish as many subsidiary bodies as necessary, finally, it urges the creation of a defense committee in charge of the implementation of articles 3 and 5.

Articles 10 to 14 refer to formal things such as the procedure for a state to become a party (Article 10), the conditions for the treaty to enter into force (Article 11), the possibility of reviewing the treaty by request of any party after it has been in force during ten years (Article 12), the option of notice of denunciation by a party after the treaty has been in force for more than twenty years (Article 13), and the place of deposit of the treaty (Article 14) that for this purpose was the archives of the Government of the United States of America.



11. Zoltan Barany, “NATO at Sixty”, *Journal of Democracy*, vol. 20, num. 2, April 1 2009, p.110.

12. The North Atlantic Treaty, *Op. cit.*

13. The North Atlantic Treaty, *Op. cit.*

14. Zoltan Barany, *Op. cit.*, p.109.

However, these last five articles are not that important given the purpose of the present paper. Finally, it can be said that although opinions about NATO's *raison d'être* and democratic identity may be contradictory, one thing is clear and is that at the moment of constitution and throughout its enlargements "NATO's members entered freely and could not be compelled to take part in it against their will. [Also] [t]he Alliance has always had a European secretary-general, and its structure has allowed genuine and active participation by member states".¹⁵

1.2 The core rules of International Humanitarian Law

In order to describe the principles of International Humanitarian Law, a difference must be made between *jus ad bellum* and *jus in bello*. "The *jus ad bellum*, in the first place, consists of the UN Charter rules on resort to force. Thus, states may use force only in response to an armed attack (as per Article 51) or with Security Council authorization".¹⁶ Nevertheless, as it has been observed in International Public Law, States may go to war based on one of three situations that come from doctrine, namely anticipatory self-defense, national security, or humanitarian intervention.

"(...) [T]he state resorting to force must then assess whether the use of force meets the requirements of necessity and proportionality. Necessity "determines whether the situation warrants the use of armed force". (...) If so, proportionality then requires assessment of the means to accomplish the legitimate objective. Will the cost of achieving that objective in terms of civilian lives lost and destruction of civilian property and the natural environment exceed the value of the objective?"¹⁷

Alternatively, "[t]he *jus in bello* consists of the many treaties, rules of customary international law, and general principles that govern the conduct of force -whether lawful under the *jus ad bellum* or not".¹⁸ Special emphasis is to be made on this last remark. The fact that whether the war is lawful or not under *jus ad bellum*, *jus in bello* still applies is critical because sometimes although the justification to go to war is lawful under the UN Charter, the means used during the conflict are not, and the State that committed such acts must respond before an international court for having violated International Humanitarian Law.

15. Zoltan Barany, Op. cit., p.112.

16. Mary Ellen O'Connell, "Reviewed work(s): Necessity, Proportionality and the Use of Force by States by Judith Gardam" *The American Journal of International Law*, vol. 100, num. 4, October 2006, p.973.

17. *Ibid.*

18. *Ibid.*, p.974.



International Humanitarian Law (IHL) seeks “to moderate the conduct of armed conflict and to mitigate the suffering which it causes. It follows that persons who are not or are no longer participating in the hostilities, such as civilians, wounded and sick combatants, and prisoners of war, must be protected during the conflict and allowed to benefit from humanitarian care”.¹⁹ As mentioned before, four main principles compose IHL, they are codified in the Additional Protocol I to the Geneva Conventions and they are recognized as International Custom.

The first principle is that of distinction. It is contained in Article 48 of the Additional Protocol I and points that “a war is waged only against the armed forces of the enemy and thus requires distinctions to be drawn between civilians and combatants and between civilian property and military objectives (...) The civilian population as such, as well as individual civilians, shall not be the object of attack. In other words, the civilian population and civilian property (...) must be protected in all circumstances”.²⁰ Hence, defining what is considered a military object is crucial when applying the principle of distinction. According to Additional Protocol I “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”.²¹

Nowadays it has become difficult to identify some objects which are used both for civilian and military purposes. These “dual purpose objects” as defined by Annie-Sophie Massa have to be clearly identified as objects that contribute effectively to military action, because if there is room for doubt, they are presumed to be civilian, as stated in Article 52(3) of the Protocol: “In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used”.²²

The principle of *proportionality* comes in second place. It “prohibits an attack that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.²³ In addition, the principle of *precaution* has been codified in Article 57 of the Additional Protocol I (AP I), where a series of precautions are to be taken at “different levels of the military hierarchy in order to avoid civilian casualties”.²⁴ Some of these precautions are to spare the civilian population, civil-

19. Anne-Sophie Massa, Op. cit., p.621.

20. *Ibid.*

21. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.]

22. *Ibid.*

23. Anne-Sophie Massa, Op. cit., p.623.

24. *Ibid.*, p.624.

ians and civilian objects; to verify that the targets to be attacked are strictly military objectives; to cancel or suspend the attack if special conditions are presented²⁵; to give an effective advance warning for the attacks that may affect the civilian population, among others.

Finally, the *use of weapons* is mentioned in Article 35 (3) of the (AP I) which “bans the use of weapons “of a nature to cause superfluous injury or unnecessary suffering.” As far as the protection of the environment is concerned Article 35(3) excludes the use of means of warfare that would cause “widespread, long-term and severe damage to the natural environment”.²⁶ The use of weapons is mentioned in other conventions where the use of certain types of weapons is prohibited since they violate “the laws or customs of war”.

The violation of the principles of distinction, proportionality and the use of weapons constitutes a war crime, and although the violation of the principle of precaution does not constitute a war crime itself “if a violation of the principle leads to a direct attack on civilians or civilian property, or an indiscriminate attack, the lack of precaution indirectly contributes to the commission of war crimes”.²⁷ These elements described above show that actions committed in war must be carefully regulated since a single imprudence can constitute the violation of a principle that is both codified in treaties ratified by most countries in the world and an International Custom. Now that some concepts of International Humanitarian Law have been explained, this paper will focus on describing NATO’s Operation Allied Force with the purpose of analyzing specific events in the light of *jus in bello*.

2. Operation Allied Force and its consequences based on *jus in bello*

After the Rambouillet negotiations failed and due to the continuous attacks against the Albanian population that caused a massive flood of refugees, NATO decided to implement Operation Allied Force with the objective of putting an end to Serbs’ actions. “However, the NATO air strikes, far from stopping the humanitarian crisis, “added a new dimension” to it, thereby contributing to the greatest exodus of refugees since the Second World War”.²⁸

25 “If it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” Article 57 (2b) Additional Protocol I.
 26. Anne-Sophie Massa, Op. cit., p.625-626.
 27. *Ibíd.*, p.625.
 28. *Ibíd.*, p.613.

“On June [10] 1999, [after months of air strikes] the United Nations (UN) Security Council adopted Resolution 1244 to provide for the deployment of international civil and security presences to Kosovo under the auspices of the UN in accordance

with a peace plan agreed to by the FRY [The Military Technical Agreement]. Acting under Chapter VII of the UN Charter (...), the Security Council authorized the UN Secretary General to establish an international civil presence to provide an interim administration for Kosovo [UNMIK], and further authorized the Member States of the UN and relevant international organizations to establish an international security presence, with substantial NATO participation and operating under ‘unified command and control’, in order to establish a safe environment for all people in Kosovo”.²⁹

However, during the intervention questions about the way in which NATO was conducting the attacks started rising. NATO argued that it was not violating the rules of warfare and that rather it was following Additional Protocol I, but the incidents occurred probed wrong in the eyes of some scholars. The purpose of this section is to describe both briefly and concisely the incidents in question which later will be useful to analyze in the light of International Humanitarian Law.

2.1 Four incidents reflecting Operation Allied Force’s controversial planning and implementation phases

“On April 23, 1999, NATO aircrafts bombed the Serbian State Television and Radio in Belgrade without denying that it was their intended target. The nature of the target is at issue in this case”.³⁰ It has already been mentioned that the nature of the objective to be attacked has to be clearly defined, especially with the denominated “dual-use objects”. The ICRC has included television stations within the category of potential military objectives, however, it clarifies that the nature of the objective has to be established in a case-by-case basis. The attacks occurred past 2 AM, however, NATO forces knew that the building was staffed twenty-four hours.

Also, even if the objective is cataloged as a military one, in order to be destroyed the military advantage obtained by doing so has to be considerable. Where no or few military advantage is obtained, the destruction of the target constitutes a violation of *jus in bello*. The reasons given by NATO to justify the attacks were that the Radio Television Station “was playing a propaganda role in the conflict, [and also] contended that the television station was a dual-purpose object because it was part of the military broadcast network”.³¹ Three hours later after the bombing occurred, the broadcasting recommenced.



29. Anne-Sophie Massa, Op. cit., p.627.

30. *Ibíd.*, p.628.

31. *Ibíd.*, p.630.

“During an attack that occurred in the middle of the day on April 12, 1999, two bombs hit a civilian passenger train while it was crossing a bridge. The object of the attack was the bridge, not the train. Whereas the dropping of the first bomb on the train is attributable to the Alliance’s failure to verify the train schedules and the high altitude that apparently prevented the pilots from getting a precise view of the target at the time of the attack; the dropping of the second bomb is inexplicable”.³² This was known as the *Grdelica Railroad Bridge Incident*, the explanations given NATO stated that the pilot who dropped the second bomb “had understood the mission was to destroy the bridge regardless of the cost in terms of civilian casualties”.

The third event is known as *The Djakovica-Decan Road Incident*. Several ethnic Albanians were killed and over 100 were hurt when NATO, on April 14; bombed several refugee convoys. At first NATO denied its responsibility arguing that the attack had been conducted by Yugoslav forces, but then it “admitted that aircrafts from the Alliance had carried out the bombing but argued that the pilots thought they were attacking military vehicles”.³³ After the attack there was no evidence that military vehicles were present among the civilian population, and even if there were, Article 50 (3) of the Additional Protocol I states that “[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.³⁴ It is worth mention that after the attack, NATO changed the altitude at which the pilots were required to fly from 15.000 feet and above to as low as 6.000 feet “in order to get a visual confirmation of the absence of civilians in the vicinity of the target (...)”.³⁵

Finally, *The Nis Incident* that occurred on May the 7th at noon consisted in NATO dropping cluster bombs in two residential areas of the mentioned city. The bombs were dropped around the market place and the main hospital, fourteen civilians were killed and about thirty got injured. “According to Amnesty International, the bombs fell on a busy part of town at a time when people were out in the streets and at the market, not protecting themselves in the bomb shelters where they had spent the night”.³⁶ NATO argued that the incident had resulted from a weapon that had missed its objective given that the real targets were “a nearby airfield used by the Serbian army and the aircraft, air defense systems, and support vehicles located there, <<targets to which cluster munitions are appropriately suited>>”.³⁷ After the incident, United States issued a directive where it asked for the restriction of the use of cluster bombs.

32. *Ibid.*, p.630.

33. *Ibid.*, 631.

34. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. *Op. cit.*

35. Anne-Sophie Massa, *Op. cit.*, p.631-632.

36. *Ibid.*, p. 632

37. *Ibid.*

Having described the four incidents that occurred in the course of NATO's Operation Allied Force, this paper will now focus on presenting some arguments from scholars pointing at NATO's violations of International Humanitarian Law, in addition, arguments defending NATO's actions are illustrated, given that it is considered necessary to take into account both sides in the conflict. As mentioned before, this paper does not intend to take sides but just to present the case within the frame of IHL.

2.2 Arguments concerning NATO's actions in Kosovo

This section presents some arguments referred to the events mentioned supra. In first place the Radio-Television Station (RTS) incident poses several doubts as to the targeting of the (RTS) as a military objective by NATO, and because no significant military advantage was gotten given that three hours after the bombings occurred the broadcasting restarted. Also it is argued that there was no evidence that the target was used by the Serb military broadcast network for command, control and communication purposes. Some scholars argue that whether the (RTS) was a military objective and a significant advantage was acquired, NATO still violated the principle of precaution given that it did not warn the people working at the place in question knowing that it was occupied twenty-four hours, as Anne-Sophie Massa states "it is difficult to see how the probable death or injury of a substantial number of civilians could not be qualified as excessive when compared to an anticipated military advantage of disrupting broadcasting for a few hours past 2 AM".³⁸

With regard to the *Grdelica Railroad Bridge* incident the main argument posted is that the pilot must have realized that the bomb had hit the train, not the bridge, and thus abstain of dropping the second one. The bombing of the train, clearly a civilian objective, poses the suggestion that NATO's pilot committed "willful killing of civilian and indiscriminate attack causing excessive civilian casualties or damage".³⁹ Different arguments struggle to define if the violations were imputable to the pilot or to his superiors, and hypothesis concerning the knowledge of the commanders about the train give different degrees of responsibility to both the person who executed the action and the ones who ordered it, but among scholars it is clear that NATO had committed war crimes in this particular incident.

The third Incident also points at the willful killing of civilians since precautions were not taken by NATO before the air strikes occurred.



38. *Ibíd.*, p.629.

39. Statute of the International Tribunal for the Former Yugoslavia

Negligence is also imputed given that the pilots “mistook the convoy for a military column”⁴⁰ plus NATO acknowledged that after the attack no aircraft descended to “double check” if it was indeed a military target. In this case the debate of imputing individual criminal responsibilities to the pilots and their superiors is also present. Finally, arguments related with the Nis Incident point at an inappropriate choice of weapons and a violation of the principle of distinction. The former can be explained given that NATO’s commandants knew that the location of the military target lay near civilians and according with this they should have used other type of armory, the latter is explained by the following statement:

[t]he fact that cluster weapons were used on a target in proximity to a civilian area, and at a time of day when civilians were on the streets and most likely to be harmed, raised serious concerns as to whether NATO was indeed taking the proper steps to distinguish between military targets and civilians and civilian objects, and whether it was taking all the necessary precautions to ensure that civilians were not put at risk.⁴¹

Opinions by NGO’s, scholars and some states arguing that the events mentioned deserved a proper investigation, led to ICTY Prosecutor Louise Arbour to establish a Committee whose objective was to determine if there was sufficient basis to start an investigation on the way NATO’s Operation Allied Force was conducted. “[O]n June 2, 2000, after considering her team’s assessment of NATO’s conduct in the campaign, the Prosecutor of the ICTY, Carla del Ponte, who had taken over for former Prosecutor Louise Arbour (...), concluded “that there [was] no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign.”⁴²

The Prosecutor argued that although some mistakes were committed, knowing that NATO had not made “deliberate targeting of civilians or unlawful military targets” was enough not to proceed with an investigation. This decision generated different feelings among people, some defending the conclusion at which the Prosecutor had arrived while other claimed that political considerations had biased her judgment.

40. Anne-Sophie Massa, Op. cit., p.631.

41. *Ibíd.*, p.632.

42. *Ibíd.*, p. 611.

Conclusions

“Although the use of military force in extreme circumstances for humanitarian purposes may be arguably justified, it has to be said, especially with hindsight, that the 1999 NATO Operation Allied Force against Serbia over Kosovo raises in that respect some serious questions and doubts”.⁴³

This paper has dealt with NATO’s Operation Allied Force conducted in Kosovo in 1999 which led to the demise of Serb forces attacking Albanian population, but also to the death of civilians in particular air strikes conducted within the conflict. The fact that at the moment there is not yet a consensus among scholars about NATO’s responsibilities shows that *jus in bello* principles although recognized within the International Community are not always easy to apply and have to be analyzed in a case-by-case basis. Some important groups like Amnesty International point that an investigation of the facts was necessary; others go beyond and argue that there was an abusive exercise of prosecutorial discretion within the final decision not to investigate. Nevertheless, as it has been mentioned supra, the purpose of this paper is limited to present the case within the frame of International Humanitarian Law, thus inviting the reader to research deeper into the subject and analyze more arguments posted by outstanding scholars within International Law.

The present paper has been structured in two parts. Within the first one a few arguments concerning NATO’s democratic identity were presented and its Constitutive Treaty was described. Then *jus ad bellum* and *jus in bello* were mentioned followed by a presentation on the core principles of the latter (i.e. the principle of distinction, proportionality, precaution and use of weapons). The second part described four incidents occurred within the Kosovo war that arguably violate the principles already mentioned and to conclude some arguments concerning both the events and the principles were explained.

43. Rein Müllerson, “Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia”, Chinese Journal of International Law, vol. 8, num. 1, march 1 2008, p.9.

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Zoltan Barany, "NATO at Sixty", *Journal of Democracy*, vol. 20, num. 2, April 1 2009, p.110.

Enforcing human rights through the Doctrine of Responsibility to Protect

✉ By: Ana Estrada Sierra

Abstract

The happenings of the last 30 years have brought the International Community to seek a solution to avoidable human catastrophes through the doctrine of Responsibility to Protect. This article seeks to give insight into the cases that lead up to the creation of said doctrine, as were the events of Somalia, Bosnia and Kosovo. Afterwards, the basis and leading documents of Responsibility to Protect are examined as they shed a light to need of the actions by it permitted. However, as the doctrine permits the use of force, the Charter of the United Nations is later examined in order to conclude that the doctrine of Responsibility to Protect should be permitted under the Charter as it seeks to protect human rights, one of the corner stones of the UN. Finally, the conclusion reached in the article is that by practicing the doctrine the opening phrase of the UN Charter is put into practice.

If, in those dark days and hours leading up to the genocide [in Rwanda], a coalition of states had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

Kofi Annan

“Never again” we said after the Holocaust. And after the Cambodian genocide in the 1970s. And then again after the Rwanda genocide in 1994. And then, just a year later, after the Srebrenica massacre in Bosnia. And now we’re asking ourselves, in the face of more mass killing and dying in Darfur, whether we really are capable, as an international community, of stopping nation-states murdering their own people.

Gareth Evans Co-author, The Responsibility to Protect

During the last 30 years the World has observed how atrocious crimes have been committed against a portion of its population. As if Second World War left no teachings, violations of human rights have been once again occurring in a large scale, affecting millions of people. In some cases, like Somalia, Kosovo and Darfur, there was a humanitarian intervention, but in others, for example Ruanda and Cambodia, there was none. Even though there is consensus that the International community cannot remain a spectator to such violations, the respect for the sovereignty of each State is more important in the scale of principles that govern International relations.



Until recently, the world's leaders were concerned with other problems, like international terrorism, nuclear proliferation, Islamic extremism, nationalism and energy. Today that hasn't changed, but they have become increasingly concerned with security issues, for instance genocide, mass killings, ethnic cleansing and other crimes against humanity, as the leaders of some countries apparently do not seek to protect the people that they rule.

The question now faced by the International Community, and International Organizations is whether there should be a response, if any, to situations of catastrophic human rights violations within States, where the State in questions claims that there can be no intervention based on the longstanding principle of sovereignty and if it is permitted to take a coercive action against another State for the purpose of protecting people at risk from these violations.

1. Background

The 20th century did not begin well. With the First World War commencing in 1914, the International Community witnessed immense suffering in the European continent. Thus they set up the League of Nations as a mean to restore collective security. Sadly, it did not work, and thus had to witness the biggest human slaughter in its history. On January 1942, 26 countries signed the Declaration of the United Nations. The foundation of this organization, and its subsequent Charter, explicitly recognized individual and group human rights. In the drafting of it during the Nuremberg Tribunal in 1945, the term "crimes against humanity" was first used. The prosecutors there indicated that according to this concept, a government could commit a gross crime against its own people during a period of apparent peace. However, the Charter also recognized, and greatly supported, the traditional view of State sovereignty, as is indicated in

article 2.7, given that founding members created the organization specifically to prevent another war.

Some time after, in 1948, the Genocide Convention was signed. This was an important cornerstone for the responsibility to protect (R2P) doctrine, as it explicitly overrode the non-intervention principle stated in the UN Charter when a crime against humanity of great magnitude was committed. However, as great as the convention sounds on paper, the reality is much harsher. The convention has never been invoked; an only one case has been brought forward to the international Court of Justice. In the *Bosnia and Herzegovina v. Serbia and Montenegro* case the International Court of Justice decided that Serbia did not commit genocide in Srebrenica, although it was guilty in failing to prevent it. Even though the decision was a big blow to the Genocide Convention as it showed that the definition of this crime was very narrow in scope, it was important for the formation of the R2P doctrine, as the Court recognized that a State could be found at fault for failing to prevent such crimes, even if they couldn't be punished for it.

2. The cases that lead to R2P

2. 1 Somalia

On December 1992, US marines arrived on Somalian soil during operation "Restore Hope". The events that led to this are a product of the Cold War, as Somalia was a subject of great interest of the United States and the Soviet Union at the time because of the port of Barbera. After the fall of Somalia's dictator Siad Barre the situation of the country was difficult at best: different factions were struggling in a country that was full of weapons, refugees and starvation¹. The UN established UNOSOM² in an effort to monitor the cease of fire of the civil war and arrange an equitable and effective distribution of humanitarian assistance; but dismayed by the continuity of the conditions that impeded the delivery of humanitarian supplies the Security Council decided to accept the offer of the United States aimed at establishing a secure environment for humanitarian relief operations in Somalia in order to restore peace and stability in the country³. This was the first resolution of the Security Council that sanctioned the use of force to guarantee the delivery of humanitarian assistance⁴. It also made reference to the reports of violations of humanitarian law in Somalia, thus the member States who supplied troops were authorized "the use of the necessary means to establish a safe envi-



1. United Nations Department of Public Information, *"The United Nations and the situation In Somalia"* New York, april 1993.
2. SC Res. 751, UNSCOR, 1992, UN Doc. S/RES/751.
3. SC Res. 794, UNSCOR, 1992, 794, UN Doc. S/RES/794.
4. G.P Valladares, "Somalian Humanitarian intervention 1992-1993" [on line] available at: http://www.luisedruke.com/luise/book_thess/valladares_621_667.pdf.

ronment to carry out the operations of humanitarian assistance and relief in Somalia as soon as it were possible, acting under Chapter VII of the UN Charter”

The importance of Somalian case for the R2P doctrine was that it presented the opportunity to show the International Community that foreign intervention is feasible for humanitarian issues. It also created an interesting question to be resolved by International Law: how far can a government legitimately commit its resources in international operations without a clear relationship to its national interest?

2.2 Bosnia

At the beginning of the 90's several countries of the Balkan region declared their independence. Bosnia also sought its independence and was so recognized by the European Union and the United States in 1992. However, this newfound freedom was not happily received by all, mainly the Serbs that lived there and thought that their land should be part of Milosevic's "Greater Serbia". The Serbs had just ended the conflict with Croatia where they bombed the country and committed mass murders in the pursuit of protecting the Serb minority. Now they sought to clean Bosnia, expelling all the Croats and Muslims that were in the country and that made about 60% of the population. The actions taken by the Serbian army was known as "ethnic cleansing", and even though the media reported secret camps, mass killings, destruction of historical sights, rape camps, and the international community remained mostly indifferent.

The UN imposed economical sanctions on Serbia and deployed blue helmets to help the Muslim refugees, but no military action was taken against the Serbian military forces. Finally, in 1994, after a world broadcast showing the bombing of a marketplace in Sarajevo, NATO demanded that the genocide stop and that the Serbs withdraw their arms from Bosnia. However, the Serbs attacked the villages established as Save Heavens for Muslims and thousand others, in what was later known to be the biggest mass murder after World War II. The UN peacekeepers could do nothing, as they could not engage in action, thus in august 1995 NATO began a bombing campaign. Milosevic seeing that his forces were diminished, was forced into peace negotiations. But the damage was already done. Over 200,000 Muslims were systematically killed and 2 million more had become refugees. In the words of US Assistant Secretary of State Richard Holbrooke it was "the greatest failure of the West since the 1930s"

The world was shocked after the happenings in Bosnia were revealed. The International Court of Justice, and the International Criminal Tribunal for the former Yugoslavia both cataloged the events as genocide, as would also happen later with the Rwanda case. The international community now began to understand that they must intervene to prevent such actions, not just be an innocent bystander.

2.3 Kosovo

The events that led to NATO's bombing of Yugoslavia in 1999 date back to cultural dispute from long before, when the Serbian army lost to the Ottoman Turks in 1389. Since then there have always been disagreements between the Serbs and the Albanians, but in 1989 the last straw was drawn when the Government of the Federal Republic of Yugoslavia (FRY) terminated the political autonomy of the province of Kosovo, a region that had 1.8 million Albanians and just 200,000 Turks⁵. A group called the Kosovo Liberation Army, sought to expel all Serb authorities and establish an independent country. The Government, headed by President Milosevic attacked the liberation army and other Albanians, the prominent race of Kosovo. This generated extreme violence that made the Security Council pronounce itself in several resolutions⁶. However, the fighting continued and after failing to make the Serbs sign a peace settlement, and after Russia and China stated that they would not support the use of force to stop the attacks of FRY in Kosovo⁷, NATO commenced air strikes in FRY to stop the violence in the region⁸, under what was called Operation Allied Force.

The importance of the Kosovo case is that it was the first time a military intervention was justified on the basis of the concept of a State's R2P. Although the doctrine was not formed at the time, this case was the one that initiated the debate on whether such concept should be developed, and if so how. Furthermore, the Security Council seemed to tacitly endorse the actions of NATO, as it sanctioned the political settlement and the resolution of the conflict that NATO achieved, even though it never authorized the campaign.

Something similar happened in the case of the Congo in 1964, when the Popular Revolutionary Government took 60 Americans and 800 Belgians as hostages, as a shield to prevent the advance of the Democratic Republic of Congo's army into Stanleyville, the place where they were at. The Security Council was asked for a course of action, but could not agree on one, thus the problem was dumped on the OAU⁹

5. Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law, Humanitarian Intervention in Kosovo", *American Journal of International Law*, vol. 93, 1999, p. 161.

6. SC Res. 1160, UNSCOR, 1998, UN Doc. S/RES/1160; SC Res. 1199, UNSCOR, 1998, UN Doc. S/RES.1199; SC Res. 1201, UNSCOR, 1998, UN Doc. S/RES/1203.

7. James Terry, "Response to Ethnic Violence: The Kosovo Model", *The Brown Journal of International Affairs*, 1999, p. 233.

8. The NATO executed Operation Allied Force on 24 March 1999. See Press Release, United Nations Security Council SC/6657, NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo (Mar. 24, 1999).

9. Richard Lillich, "Forcible Self Help Under International Law", *Readings in International Law from the Naval War College Review*, vol. 62, p. 135.

This organization could not help much, thus the United States, Great Britain and Belgium organized an airdrop of paratroopers without the Security Council's authorization to rescue the hostages.¹⁰

3. The R2P doctrine

The 1990s was a decade characterized by civil war and massive internal violence, such as in Bosnia, Somalia, Rwanda and Kosovo. The International Community was faced with a great debate: to intervene, and in doing so going against one of the longest standing principles in International Law, or to do nothing and hope that the peaceful measures employed by the UN worked.

The debate that the International Community faced, was made public by Secretary General Kofi Annan in 2000 in his speech to the General Assembly: "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?"

The question was answered with the creation of the International Commission on Intervention and State Sovereignty (ICISS). This commission, presented a report titled "Responsibility to Protect" to the Secretary General in 2001, and through it the International Community developed the concept of R2P¹¹, as an answer to the rise in the recognition of Human Rights¹², the increasing number of Security Council resolutions on this matter¹³ and searching to avoid past catastrophes.

The ICISS was the one to first use the term R2P and stated that sovereignty must be seen as responsibility rather than control. States are the first responsible of the protection and security of its citizens, but if the individual State is unable or unwilling to do so this burden shifts to the International Community to ensure the population is protected.¹⁴

The most important contribution of the Commission was that it stated that the problem was not whether the states had the right to intervene, but that they had the responsibility to do so. R2P, as articulated by the ICISS did not refer just to military intervention, it also covered other obligations, like the responsibility to prevent and address the causes of internal conflict, the responsibility to react and to respond to situations of compelling human need with appropriate measures and the responsibility to rebuild and to provide assistance with recovery, reconstruction and reconciliation.

10. James Terry, "Rethinking Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism", *The Army Lawyer*, August 2004, p. 36.

11. Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", *American Journal of International Law*, vol. 101, 2007, p. 99.

12. Justin Brown, "A Question of Right Authority: Moving The Responsibility to Protect from Soft to Hard Law" *Ilsa Quarterly*, vol. 17, 2008, p. 2; UN Charter at art. 1(3).

13. A Question of Right Authority, *ibid*.

14. International Commission on Intervention and Sovereignty, Report on the Responsibility to Protect, (2001).

In September 2003, Secretary General Kofi Annan announced to the General Assembly the creation of the High Level Panel on Threats, Challenges and Change. The members of this panel were to study the global threats and provide an analysis of future challenges to peace and security. They were also to recommend the changes necessary to ensure collective action. This panel included the R2P concept in its 2004 report. Afterwards, the Secretary General made it part of his recommendations to the General Assembly in 2005.

The thesis presented by the Commission, the High Level Panel has become since then accepted by the International Community, as is shown in the 2005 World Summit Report were the heads of State that meet in New York agreed on the following outcome document:

“138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations



from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”

This concept and the language that embodied it was later reaffirmed by the Security Council in a resolution passed on 28 April 2006.¹⁵

Furthermore, the High Level Panel Report complemented the concept by stating that the prevention of an avoidable catastrophe is an *erga omnes* obligation¹⁶. Moreover, former Secretary General Kofi Annan later asserted that this responsibility is to commit all nations to the rule of human security.¹⁷

The rule of R2P is opening the horizon for the enforcement of human rights, because it implies, above all, the responsibility to react to situations where there is a need to protect human beings. When all preventive measures fail, and when the State is unwilling or unable to address the situation the International Community must act, be it in a political, economical or judicial way. In extreme cases it can also take military action.

Several questions have arisen in regard to the military action, like who makes the final decision? Who has the authority? What constitutes an extreme case? The only matter in which there has been some consensus has been in the six criteria, forged by the ICISS, that after being filled allow military intervention under the rationale that it's the only way to prevent atrocious acts. These criteria are just cause, right intention, proportional means, last resort, reasonable prospects and right authority.

3.1 How R2P operates under the UN Charter

The founding fathers of the UN were mostly preoccupied with the problem of war, thus the main purposes of the Charter are the maintenance of peace and security. But the preamble also states as a purpose the protection of Human Rights. The same passage also indicates that the use of armed force can only be used when there is a common interest at stake. In other words, States have to maintain peace and security except when there is a common interest, such as the preservation of fundamental Human Rights. Later on, in article 2.1 the Charter states the principle of equal State sovereignty, that is, to be able to create the UN all members must keep their own sovereignty and thus all states are equal under the law.

15. Protection of Civilians in Armed Conflict, SC Res. 1674, 5430th Sess., UN Doc. S/1674 (2006) at 4.

16. A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN GAOR, 59th Sess., UN Doc a/59/ 565 (2004) at 201.

17. Report of the Secretary-General, UN GAOR, 59th Sess., UN Doc a/59 (2005) at 16-22.

Article 2.7 also develops the concept of sovereignty by stating the prohibition of intervention in the internal affairs of another State. However, this does not necessarily contradict the application of the measures indicated in Chapter VII in case of aggression, given that main purpose of the UN is to maintain international peace and security. Hence, the UN will have to take efficient and collective measures to prevent and eliminate a threat to peace and to suppress any act of aggression or any other breach of peace.

The Security Council is the body in charge of determining when there is a breach of peace and it has the responsibility of peacekeeping. Under article 39 of the Charter, this organ must recommend or decide what measures are to be taken in order to restore peace and security in accordance with articles 41 and 42. The measures that the Security Council can adopt are basically five: declaration of aggression (article 39), provisional measures (article 40), pacific measures (article 41) and use of force measures (article 42). Given the broad spectrum of actions that can be taken by the Security Council, States are compelled almost always to act according to the recommendations and decisions of it.

Besides the use of force authorized by the Security Council, there is also another exception to the rule of non-intervention: the Genocide Convention drafted in 1948. However, after 50 years of been ratified, the Convention as only been used twice and due to its broad language, its effects have not been great.

Another exception to the rule of non-intervention is R2P, as the result of the idea that human rights can be a legitimating reason for the use of force and also taking into account that the protection of human rights is one of the purposes of the UN, as is indicated in its preamble, where the focus is drawn to the rights of individuals. The proclamation here found is later reinforced by article 1(3) by stating: “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion....”. Furthermore, article 55 emphasizes the need to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.

In light of the happenings of the last 30 years, the use of force cannot be considered a breach of the UN Charter when it aims to save people from gross human rights violations. Not changing this concept has



made the world a passive spectator to the Tutsi murders in Rwanda. The intervention done by a State, a group of States or a regional organization, acting independently but consistent with the purposes of the UN cannot be seen as wrong if it does not affect the territorial integrity or political independence, in the language of article 2(4), of the State on the receiving end of the actions.



4. Conclusion

The respect for every State's sovereignty and the commitment to non-intervention has been the center of the international legal order.¹⁸ But sovereignty isn't just a right, its also a duty, as each State has the obligation to perform some basic functions such as distribution of resources, social welfare, political stability, civil liberties, human rights etc. States are accountable for their duties, as is the International Community. If it weren't, the Genocide Convention and the values preached by the UN Charter would be void, as it would fail to protect the ultimate sovereigns: the people, the prime obligation of each State and of the International Community.

The UN cannot be the one to always lead such initiatives. The Security Council was granted immense powers to deal with international peace and security. But this organ cannot always act given that ultimately, it is not a democratic organ, and the Council will be unable to act because of a potential veto, such as the case with Kosovo, where the threat of veto from China and Russia made an action from this organ impossible. This case, and the others previously commented make us reexamine the law of intervention in relation to the UN Charter.

The R2P is the first step in changing the perspective. However, there three things that must be solved in order for the R2P doctrine to be fully effective: the lack of authorization by the Security Council, as this organ must be persuaded to embrace specific guidelines for the use of force, specifically in the context of R2P; the lack of operational capacity given that there should always be some resources allocated and available to react when needed, and the lack of political will to act.

Although R2P can help solve many problems such as genocide, ethnic cleansing, mass expulsions and other recognized breaches of International Law, the framework created can at some point legitimate interventions that do not really seek to prevent avoidable catastrophes but rather create them. The Iraq invasion brought these fears to reality, and it shows how the doctrine can be misused. Thus, it is clear the doctrine has still a lot of questions to solve and issues to address.

Ultimately what is sought after with this doctrine is to extend the age old virtue of good Samaritans from the roadside village to the global village¹⁹, and to put into practice the opening phrase of the UN Charter "we, the peoples of the world" by protecting each other.

18. Malvina Halberstam, "The Legality of Humanitarian Intervention:", 3 *The Cardozo Journal of International and Comparative Law*, vol. 4, num. 1, 1995, p.1.

19. Syd Baumel, "Making Atrocities History: Responsibility to Protect doctrine seeks to globalize good Samaritism", *The Aquarian*, fall 2005, [online], available at: <http://www.aquarianonline.com/Values/R2P.htm>, accessed: june 1, 2009.

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UN looking for peace or pushing it away: Assessing the effectiveness of peacekeeping missions

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Abstract

This article is product of a topic review related to the UN Peacekeeping Missions established since 1945. This paper aims to address the role of these missions based on the UN official reports of each one of them in the attempt to reestablish and preserve peace in regions where conflict has arisen. The type of methodology used was phenomenological, focusing on a descriptive study. The paper is divided in two main sections, the first section is general overview of the current literature related with the effectiveness of those missions and the second section analyzes each intervention and their respective outcomes in order to come with a conclusion about the importance and effectiveness of peace keeping operations. The main conclusion reached has to do with the nature of the conflict. Missions that have taken place in a conflict related more with political aspects than those related with social issues have a better performance fulfilling their mandates and with this, having a good evaluation of their effectiveness. But, in those conflicts where there is a social aspect at stake, with manifestations of violence it is harder to achieve its mandates, thus, the effectiveness it's less clear and in some occasions, it can be seen as a failure of the mission involved.

When the UN was born in 1945 the main objective was to preserve peace, but there have been a lot of scenarios that have threatened this goal, and here is when the UN has to intervene in order to defend something that concern them deeply: peace.

But those interventions have worth it? Through a quick look into many conflicts where the UN has intervened with their peace keeping op-

erations, this article is intended to assess the effectiveness of those missions preventing and restoring peace.

This article is going to be divided in two sections: the first section is going to be a general overview of the current literature related with the effectiveness of those missions and the second section is going to analyze each intervention and their respective outcomes in order to come with a conclusion about the importance and effectiveness of peace keeping operations.

UN Peacekeeping Missions

In the first place, this article aims to make a general summary of the UN missions since its creation in 1945 until now. According to the website of the UN, in the section of peacekeeping operations, it states that “there have been a total of 63 UN peacekeeping operations around the world. The first UN peacekeeping mission was established in 1948, when the Security Council authorized the deployment of UN military observers to the Middle East to monitor the Armistice Agreement between Israel and its Arab neighbors.”¹

The operations of peacekeeping are in charge of the Department of Peacekeeping Operations (DPKO) attached to the Security Council which determine when is appropriate to create a mission. Those missions are constituted by military arms to protect the population but also by administrators and economists, police officers and legal experts, de-miners and electoral observers, human rights monitors and specialists in civil affairs and governance, humanitarian workers and experts in communications and public information.²

Peace keeping operations initially were intended to monitor and control of the conflict, but recently the missions are getting a multidimensional field of action “through social and economic cooperation, rebuilding infrastructure, and reforming institutions so as to reduce incentives for future violence.”³ According to this there are two main types of mission: the traditional and the multidimensional missions.

After this general overview, the article is going to move forward to a more specific but still general look of those UN missions highlighting the number of those in each continent and the main form the missions have taken to deal with the conflict and protect the civil population affected.



1. United Nations Webpage, “United Nations Peacekeeping”, United Nations web page, [online] available at <http://www.un.org/en/peacekeeping/> retrieved March 30, 2010.

2. *Ibid.*,

3. Macartan Humphreys, & Jeremy M Weinstein, “Demobilization and Reintegration”, *Journal of Conflict Resolution*, vol.51, num 4, 2007, p. 531.

As it is mentioned earlier the DPKO has participated in around 63 conflicts through missions such as UNMOGIP (United Nations Military Observer Group in India and Pakistan), UNAMIC (United Nations Advance Mission in Cambodia), UNOMUR (United Nations Observer Mission Uganda-Rwanda)⁴ and so on.

Those missions have taken place in almost all the continents: In Africa there is the place where more missions have settled down; there have been in the following countries: Angola, Congo, New West Guinea, Burundi, Chad, Côte d'Ivoire, Ethiopia, Eritrea, Mozambique, Rwanda, Sierra Leone, Somalia, Sudan and Uganda. In Asia there have been a lot of missions as well: in Afghanistan, Cambodia, Cyprus, Georgia, India, Pakistan, Iran, Iraq, Kuwait, Lebanon, Tajikistan, Yemen. In Europe there have been missions in Bosnia Herzegovina, Croatia, and Georgia. In America the missions have been focused in Central America: Haiti, El Salvador, Guatemala and Dominican Republic.

The UN's greatest involvement has been in the conflicts of the "Third World" through numerous peacekeeping missions in Asia and Africa, which have intensified in scope and in number since the end of the Cold War."⁵

The missions in America "involved an ambitious multinational operation, with thousands of blue helmets who ultimately assisted in verifying and enforcing ceasefire agreements. The United Nations took an active position in disarming factions in civil wars."⁶

In the literature review there are contradictory findings. According to a study called The UN's Effectiveness in Post Civil War Peace Durability of Jung In Jo, he found that UN interventions (specially the multi-dimensional missions) facilitate the duration of peace stability in the aftermath of civil war. In other words, UN interventions diminish the hazard of recurrent crisis.⁷

In the other hand, according to an Economic Review of the World Bank, "UN peace keeping operations have succeeded in maintaining peace in the two to five years after the ends of civil wars."⁸ Thus, the UN missions have not achieved the goal of peace sustainability, that the organization desires it.

Here, it concludes the first section of the article giving a partial report of the UN missions and the main two perspectives by the third parties regarding conflicts and the role of the United Nations within them.

4. United Nations Webpage, "United Nations Peacekeeping", *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/list.shtml> retrieved March 30, 2010.

5. Sunil Amrith and Glenda Sluga, "New Histories of the United Nations", *Journal of World History: Special Issue: New Histories of the United Nations*, vol. num. 3, september 2008, p. 251.

6 Arturo Sotomayor, . (2002). "Peacemaking and Democratization in the Western Hemisphere", *Journal of International Affairs*, vol. 55, num. 2 , 2002, p. 531.

7. Jung In Jo. (2006). "The UN's Effectiveness in Post Civil War Peace Durability", *Journal of International and Area Studies*, vol1. 3, num. 1, 2006, p. 23.

8. Ibrahim Ahmed Elbadawi, "Postconflict Transitions: An Overview", *The World Bank Economic Review*, vol. 2, 2008, p. 1.

Assessment of UN Peacekeeping Missions

The second section first analyzes some of the most remarkable past missions' reports made by the UN which are supposed to be impartial and objective leading to factual conclusions if the missions succeeded or failed. Then, the article looks to highlight some important terms related with the importance of peace keeping Missions before to make a conclusion of their role in conflicts.

UNAMIR and UNOMUR were two missions sent to Rwanda, but according to the report of the UN "the United Nations and the whole international community remained accused of not having prevented the genocide and that the overriding failure in international community's response was the lack of resources and political will, as well as errors of judgment as to the nature of the events in Rwanda".⁹

In Angola there were four missions: UNAVEM I, UNAVEM II, UNAVEM III and MONUA, they were created in this order, being UNAVEM III the predecessor or MONUA. The secretary General stated that the situation in Angola remained grave, with heavy fighting continuing to rage in several parts of the country. Deep animosity and distrust persisted between the Government of Angola and the National Union for the Total Independence of Angola (UNITA).¹⁰

The United Nations Operation in the Congo (ONUC), which took place in the Republic of the Congo from July 1960 until June 1964, marked a milestone in the history of United Nations peacekeeping in terms of the responsibilities it had to assume, the size of its area of operation and the manpower involved. It included, in addition to a peacekeeping force which comprised at its peak strength nearly 20,000 officers and men, an important Civilian Operations component.¹¹

In Sierra Leone there have been two missions: UNOMSIL and UNAMSIL that replaced the first. With help of UNOMSIL "Negotiations between the Government and the rebels began in May 1999 and on 7 July all parties to the conflict signed an agreement in Lome to end hostilities and form a government of national unity."¹² But the following creation of the UNAMSIL shows that the conflict has not ended and there are still some actions to do.

In Somalia there were 2 missions: UNOSOM I and UNOSOM II that was the extension of the first. "The Security Council underlined that the timely intervention of UNOSOM II and the humanitarian assistance given to Somalia had helped to save many lives and much property,

9. United Nations Webpage, "United Nations Peacekeeping", *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unamirFT.htm> retrieved March 30, 2010.

10. United Nations Webpage, "United Nations Peacekeeping", *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/monua/monuab.htm> retrieved March 30, 2010.

11. United Nations Webpage, "United Nations Peacekeeping", *United Nations web page*, [online] available <http://www.un.org/en/peacekeeping/missions/past/onucB.htm> at retrieved March 30, 2010.

12. United Nations Webpage, "United Nations Peacekeeping", *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unomsil/UnomsilB.htm> retrieved March 30, 2010.

mitigate general suffering and contributed to the search for peace in Somalia. However, “the continuing lack of progress in the peace process and in national reconciliation, in particular the lack of sufficient cooperation from the Somali parties over security issues, undermined the United Nations objectives in Somalia and prevented the continuation of UNOSOM II.”¹³

Regarding to Africa, there are other current missions that cannot be assessed yet because they have not finish it therefore they have not fulfill their mandates.

In America there have been several missions: with ONUCA mission the United Nations became directly involved in peacekeeping and peacemaking efforts in Central America in 1989, when the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua requested its assistance in the implementation of their collective agreement. “The Secretary-General paid tribute to the military and civilian personnel who served in ONUCA for their great success in establishing the first large-scale peacekeeping operation of the United Nations in the Americas and for the contribution which they made to the restoration of peace and stability in Central America.”¹⁴

In Dominican Republic there was a mission denominated DOMREP that according to the Secretary-General “the effect of his role had been significant, since he had played a major part in bringing about a cessation of hostilities on 21 May 1965.”¹⁵

The mission that took place in El Salvador was ONUSAL. “the Security Council paid tribute to the accomplishments of ONUSAL, under the authority of the Secretary-General and his Special Representatives, and recognized with satisfaction that El Salvador had evolved from a country riven by conflict into a democratic and peaceful nation.”¹⁶

In Guatemala there was one mission: The Secretary-General recognized “the successful completion of their tasks and the significant contribution they have made to the Guatemalan peace process”.¹⁷

In Haiti there were four missions in the past and currently there is a mission sent by the UN. According with the respective report of each mission, there were able to accomplish the majority of their goals but the fact there still exist a mission reflect that their goals are not totally reached.

Looking trough the Asian Continent there were several missions as well: In Cambodia there were two: the UNAMIC and its replacement

13. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unosom2backgr2.html> retrieved March 30, 2010. United Nations Webpage.

14. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/onucabackgr.html> retrieved March 30, 2010.

15. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/domrepbackgr.html> retrieved March 30, 2010.

16. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/onusalbackgr2.html> retrieved March 30, 2010.

17. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/minuguabackgr.html> retrieved March 30, 2010.

the UNTAC that were established to monitor and guarantee a fair elections during its duration. According to the report of the UNTAC they were able to accomplish its central task of holding a free and fair election in Cambodia and laying a sound foundation for the people of Cambodia to build a stable and peaceful future.¹⁸

East Timor had 2 missions: UNTAET and UNMISSET that continued with the mandate of the former. Those missions saw the process of this territory from been classified as Non-Self-Governing Territory to its independence from Portugal “ensuring the security and stability of the nascent State”.¹⁹ Those missions seemed to be a success.

In Kashmir the UNMOGIP was established to supervise the ceasefire in that territory. “The Secretary-General reported that the withdrawal of the troops by India and Pakistan had been completed”²⁰ but with Following renewed hostilities of 1971, UNMOGIP has been reopen.

In the case of Tajikistan there was a mission (UNMOT) established in 1994 to monitor the ceasefire agreement between the Government of Tajikistan and the United Tajik Opposition. According to the report of UNMOT they succeeded fulfilling their mandate.²¹

Related to Iraq there have been established two missions: UNIIMOG regarding the conflict with Iran and UNIKOM related with the Kuwait issue. The former fulfilled its mandate after “Iran and Iraq had withdrawn fully their forces to the internationally recognized boundaries”.²² In the later the mandate was also accomplished. The Secretary-General Kofi Annan said “The United Nations can be proud of the achievements of UNIKOM.”²³

In Yemen the mission established (UNYOM) did not accomplished the total goals of its mandate.²⁴

Nowadays there are some missions established around Asia, in countries such as Lebanon, Afghanistan, Timor, India and Pakistan.

To close this section the last country where this article aims to analyze the missions that have been implemented is Europe.

The United Nation mission in Bosnia and Herzegovina was called UNMIBH. In words of Kofi Annan: “UNMIBH has completed the most extensive police reform and restructuring project ever undertaken by the United Nations.”²⁵ In Georgia the UNOMIG did not fulfill its mandate, “due to a lack of consensus among Security Council members on

18. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/untacbackgr2.html> retrieved March 30, 2010.

19. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unmisset/retrieved> March 30, 2010.

20. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unipombackgr.html> retrieved March 30, 2010.

21. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unmot/Unmot.html> retrieved March 30, 2010.

22. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/uniimog.htm> retrieved March 30, 2010.

23. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unikom/retrieved> March 30, 2010.

24. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unyombackgr.html> retrieved March 30, 2010.

25. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unmibh/retrieved> March 30, 2010.

mandate extension”.²⁶ In Croatia the mission implemented was UN-CRO that “United Nations-sponsored talks concluded with the signing of the Basic Agreement on the Region of Eastern Slavonia, Baranja and Western Sirmium on 12 November. The Agreement provided for the peaceful integration into Croatia of that region and requested the Security Council to establish a transitional administration to govern the region during the transitional period.”²⁷ Actually there are two missions in Europe, one in Kosovo and the other in Cyprus.

After examining all the UN reports, it is important to take into account an important aspect of the Law of the War where Missions are directly involved in the conflict but they can not be a military target because of their status. “When a peace operation is deployed in the area of an armed conflict, but not engaged in that conflict, the personnel of the peace operation are entitled to the protection of civilians under IHL. Directing an attack against such personnel, when they are entitled to the protection extended to civilians, is prohibited as a rule of customary international law in international and non-international armed conflicts.”²⁸ This is very important to highlight due to the fact that in many cases the missions are forced to withdraw specially because of their status is not respected and the life of the personnel is put in danger.

After the previous analyses of each peacekeeping mission established by the Security Council in order to prevent, control, or improve a situation where there is some kind of conflict, it is hard to make a single conclusion about the effectiveness of those missions regarding their mandates. Even though there are several missions that are succeeded, especially in America, Europe some of the missions in Africa and Asia, there are also several mission that have failed achieving their objectives or in some cases there are failed in the part of sustainable peace because the conflict has reemerged in those countries. Therefore it is very important to study each mission by separate in order to have a more objective and real analysis of the effectiveness of each mission.

To evaluate if the mission have succeeded or not it is important to take into account several aspects: in the first place, the nature of the conflict. Determining this, it can lead to show that missions that have taken place in conflict related more with political aspects than those related with social issues have a better performance fulfilling their mandates and with this, having a good evaluation of their effectiveness. But, in those conflicts where there is a social aspect at stake, with manifestations of violence it is harder to achieve their mandates,

26. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/unomig/retrieved> March 30, 2010.

27. United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/uncro.htm> retrieved March 30, 2010.

28. Ola Engdahl, “The Status of Peace Operation Personnel under International Humanitarian Law”, *Yearbook of International Humanitarian Law*, vol. 11, 2008, p. 109.

thus, the effectiveness it's less clear and in some occasions, it can be seen as a failure of the mission involved.

Another aspect to take into account that it's deeply related with the nature of the conflict is the type of missions that is assessed. By evaluating this, the multidimensional missions have better ranking of effectiveness in comparison with the traditional missions which only were observers and limited to monitor and in some cases to control parts of the conflict, with blue helmets.

And finally, it is important to highlight that with the UN missions, conflicts take importance in the International Community, because they stop being internal matters only to become an important scope of the International community, thus, the International law, which is where it find a lot of its roots and sources of its development.



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United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/domrepbackgr.html> retrieved March 30, 2010.

United Nations Webpage, “United Nations Peacekeeping”, *United Nations web page*, [online] available at <http://www.un.org/en/peacekeeping/missions/past/onusalbackgr2.html> retrieved March 30, 2010.

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Derechos humanos en el ámbito internacional: la tortura como noticia actual

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Palabras clave: Tortura, Abu Ghraib, Guantánamo, prisioneros, derechos humanos, ONU, derecho internacional.

Key words: Torture, Abu Ghraib, Guantanamo, prisoners, human rights, UN, international law.

Abstract

Este artículo examina como la tortura ocupa un lugar importante en el derecho internacional, ya que es una conducta violatoria de muchos de los derechos humanos más protegidos por las organizaciones internacionales y cuenta además con una síntesis de la evolución de la tortura en el derecho internacional. Por tanto es importante resaltar la habitual ocurrencia de estas prácticas y las medidas adoptadas por la comunidad internacional para evitar y prevenir estas conductas. Este trabajo resalta de una manera alarmante, el papel de Estados Unidos como un actor principal, ya que tiene una doble cara, por un lado de potencia mundial y país desarrollado y por el otro un Estado con una sangrienta administración amenazante de los derechos humanos.

Con todo, este trabajo logra combinar de una manera sutil y matizada una investigación y un poco de reflexión; la investigación está dirigida a conocer el verdadero papel de la tortura en los derechos humanos, cómo es tratada y qué medidas son empleadas, así mismo, de una manera muy objetiva dirige su investigación a conocer dentro de los derechos internos, cómo cada administración recurre a métodos que violenten la dignidad humana e incumplen notablemente los tratados internacionales.

Por lo mismo, el objetivo de este artículo es informar a los lectores que la tortura no es una práctica del hombre bárbaro que cae en desuso, por lo contrario, es una práctica desafortunadamente concurrida en las civilizaciones actuales. Es también objeto del informe

crear en el lector una preocupación por los derechos humanos. Pudimos concluir luego de este informe, que a pesar de toda la regulación y convenios internacionales, falta un mayor control de las Cortes Internacionales, que no en todos los casos puede actuar y suele suceder que la justicia interna es inoperante e incluso selectiva.



A lo largo de la historia, las civilizaciones se han valido de la guerra para conseguir objetivos de cualquier tipo y han logrado desarrollar los más crudos e inhumanos métodos, uno de ellos es la tortura. Esta ha logrado ir evolucionando al tiempo que lo hacen las naciones, pero al mismo tiempo las corroe ya que pone al descubierto al hombre en su lado más animal, ya que es capaz de destrozarse la dignidad humana y poner a otras personas en condiciones que superan todos los límites de la imaginación. Este tema es tan sensible como común y por eso es necesario conocer una realidad del mundo que cada vez es menos humana.

Con el fin de exponer este tema de forma concisa, este trabajo se dividirá en dos partes. La primera busca ubicar el tema de la tortura en el ámbito internacional, su fuerte rechazo por parte de las organizaciones internacionales y las numerosas discusiones que ha suscitado, incluyendo algunas definiciones por parte de organizaciones internacionales. En una segunda parte se busca aterrizar la tortura a contextos precisos en momentos y lugares determinados, que explican la importancia de dar a conocer estas actividades, que son más comunes de lo que se podría pensar y emplea constantemente el ejemplo de Estados Unidos el cual dibuja claramente este crimen, aunque no siendo el único es de los más visibles.

1. La tortura en el Derecho Internacional

A pesar de las duras batallas que han logrado proveer un catálogo de derechos inherentes al hombre, da la impresión que en los siglos siguientes haya una especie de retroceso, y países que lideraron las más históricas batallas liberales, en especial Estados Unidos, es ahora uno de los países que comete mayores violaciones a los derechos humanos y sobre todo con su invasión a Iraq que parece no tener fin.

Con todo, el derecho internacional cada vez se interesa más por tratar estos temas, debido al enorme significado moral y psicológico que tienen los derechos humanos y a que cada vez existen más formas de vulnerarlos que deben ser evitadas y prevenidas.

Sin embargo y dada la magnitud del tema, se dividirá esta primera parte en dos subtemas, en el literal a se ubica la tortura dentro de un marco legal, se tratan algunas discusiones y se enuncian algunas de las convenciones que la tratan.

En el segundo subtema, literal b, se desarrollará brevemente la aplicabilidad o mejor la inaplicabilidad de sanciones para quienes cometen crímenes de tortura, respaldada por el factor político.

a. Marco legal dentro del Derecho Internacional

Con la creación de la ONU se resaltó la importancia de proteger los derechos humanos, y un caso específico es la protección de estos derechos durante la guerra, dicha necesidad se acentuó tras la segunda guerra mundial, la cual se destacó por la crudeza alcanzada en los campos de concentración, fue esta crudeza la que sacudió a la humanidad y la llevó a tomar acciones nunca antes realizadas y fue así como se dieron los juicios de Núremberg por parte de las naciones aliadas que resultaron vencedoras.

Los juicios de Núremberg junto con los de Tokio, han sido de gran importancia para el derecho internacional, a pesar de las duras críticas que han tenido por su insuficiencia y su falsa apariencia, fue en estos juicios donde se juzgaron por primera vez a los responsables por los crímenes de guerra y en especial el de Núremberg ya que estableció unos principios que llevan el mismo nombre, entre estos principios se encuentran los de juzgar a cualquier persona que haya cometido crímenes de guerra de acuerdo con las reglas internacionales, así como darle a los acusados un juicio justo con arreglo a la ley. Estos principios fueron posteriormente adoptados por la Asamblea General de las Naciones Unidas en su resolución número 177 (II) de 1947.¹

Junto con los juicios, llegó la necesidad de definir los crímenes de guerra, y en especial el de tortura, lo que no fue una discusión sencilla debido a la variación subjetiva que tiene la tortura de acuerdo a la persona a la que se le aplique, sin embargo la CAT (Convención Contra la Tortura) ha definido la tortura como “todo acto por el cual se inflija intencionadamente a una persona dolores o sufrimientos graves, ya sean físicos o mentales...cuando dichos dolores o sufrimientos sean infligidos por un funcionario público u otra persona en el ejercicio de funciones públicas, a instigación suya, o con su consentimiento o aquiescencia”², a su vez pide a los estados que se adhieran a dicha convención y recuerda que hay ciento seis estados miembros.³

1. *Formulation of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal*, GA Res. 177 (II), UN GAOR, 1947 111.

2. Office of the High Commissioner on Human Rights “Documents by Treaty” *Sitio web Treaty Body Database* [en línea], disponible en <http://www.unhchr.ch/tbs/doc.nsf>, consulta 10 de Abril de 2010

3. *Ibid.*,

Aparentemente, la lucha por erradicar la tortura de las costumbres bélicas de las naciones es generalizada, la mayoría de los estados miembros de esta convención, e incluso los estados que no son miembros están obligados a respetar esta norma internacional, ya que hace parte del *ius cogens* y no debe bajo ninguna circunstancia ser violado, sin embargo estos actos no cesan. Por esta razón el capítulo siguiente estará dirigido a explicar la falta de control internacional en estos crímenes.

b. Impunidad sobre crímenes de tortura

El derecho internacional está estrechamente ligado con el derecho interno, en el caso de Estados Unidos, durante el gobierno W. Bush, el Congreso aprobó toda una serie de resoluciones y cambios constitucionales que daban al jefe de Estado un poder casi absoluto de la guerra⁴, pretendió suspender la Convención de Ginebra e intentó redefinir el concepto de tortura para excluir una serie de actuaciones.⁵ Con todo, tras el atentado del 11 de Septiembre de 2001 y la invasión a Irak, se dio a conocer una enorme cantidad de fotos y testimonios sobre los abusos de los prisioneros iraquíes por parte de los soldados estadounidenses, ante este impacto la administración Bush pidió que se les condenara bajo el derecho interno y lo consideró como un caso aislado y excepcional. Ante este hecho la comunidad internacional no intervino ya que EU tenía un poder hegemónico y único y ningún estado podría ejercer la suficiente presión y además el apoyo de la comunidad internacional luego del 9/11 fue sin precedentes, por lo que ha servido de excusa para continuar la guerra y justificar sus actuaciones. Empero, la Convención contra la Tortura en sus artículos 14 y siguientes se encarga de pedirle a los estados parte, que incluyan en su legislación interna todo tipo de garantías para la reparación de las víctimas de tortura, pero en cuanto a la legislación internacional, son muchos los casos de acusaciones que quedan en la impunidad, por mencionar algunos, en España se negó un comunicado por parte de víctimas de tortura, ya que no agotaron los recursos internos y por tanto se suspendieron las investigaciones en Estrasburgo ante la Comisión Europea de Derechos Humanos y el Comité Europeo para la Prevención de la Tortura.⁶

Pero al hablar de impunidad surge el tema de la amnistía, esto es el olvido legal de delitos que extingue la responsabilidad de sus autores⁷, este tema resulta problemático para la ICC (International Criminal Court) ya que cada estado según su soberanía puede conceder la amnistía a individuos que hayan cometido serios delitos, pero desde

4. Congressional Record, "Authorizing use of United States Armed Forces Against those Responsible for Recent Attacks Against the United States", *Sitio web Federation of American Scientists*, [en línea] septiembre 14 de 2001, disponible <http://www.fas.org/irp/threat/useof-force.htm>, consulta: 8 de abril de 2010.

5. Sander Van Niekerk, Aletter Smeulers, "Abu Ghraib and the War on Terror—a case against Donald Rumsfeld?", *Crime Law and Social Change*, Holanda, vol. 51 num.3-4, abril de 2009. (2009), p. 327.

6. *Convención Contra la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes*, 26 de junio de 1987.

7. Diccionario de la Real Academia Española.

un punto de vista internacional esto resulta problemático, casi inaceptable, ya que fomenta la impunidad, esto se ha logrado equilibrar en cuanto los estados no pueden conceder amnistía a quienes cometen crímenes contra el *ius gentium*, este principio fue reiterado en la Corte Especial de Sierra Leona.⁸

2. Escenarios de guerra

La mayoría de los estados, si no son todos, no pueden negar el abuso de sus criminales en alguna época, sin embargo hay en la actualidad unos lugares que parecieran competir por ser los más escabrosos; estos lugares son lo más cercano a lo que eran los campos de concentración, ubicados además en lugares no sólo estratégicos, sino también en sitios vulnerables como lo son Iraq y Cuba.

Este capítulo está dedicado a mostrar de una forma más concreta, el acto de tortura cometido por altos funcionarios, cabezas de estados “desarrollados”, a pesar de toda la regulación existente que busca erradicar estas prácticas, en momentos y lugares determinados, como Abu Ghraib en el primer literal y Guantánamo en el segundo.

Sin embargo, el fin de este capítulo no es ahondar en las prácticas que en estos lugares se realizan para evitar así una sensación escalofriante en el lector, el fin es más bien informarlo sobre asuntos de enorme gravedad que son además recientes y ubicarlo así en el marco legal internacional.

a. Abu Ghraib

Luego de múltiples hostilidades entre Iraq y Estados Unidos y con antecedentes como la guerra del Golfo, el atentado a las Torres Gemelas y un ultimátum al régimen de Saddam Hussein, el entonces presidente George W. Bush comenzó la movilización de tropas norteamericanas al territorio iraquí, comenzando la guerra con la justificación de proteger su nación contra un ataque que parecía inminente. Luego de la caída de Hussein y la toma estadounidense de Iraq, el Consejo de Seguridad en su resolución de carácter obligatorio número 1483⁹ hace un llamado a la comunidad internacional para reconstruir y contribuir a la paz de Iraq, sin embargo esta invasión occidental dejó la burda huella de la prisión de Abu Ghraib que ha marcado de sangre la administración Bush. Un año después de instituida la prisión, se dieron a conocer una gran cantidad de fotos sobre las torturas que se habían cometido allí.



8. Daniel D. Ntanda Sereko, “The Role of the international Criminal Tribunals in the Promotion of Peace and Justice: The Case of the International Criminal Court”, *Criminal Law Forum*, vol. 19, num. 3-4, diciembre de 2008, p. 373.

9. SC Res. 1518, UN GAOR, 2003, UN Doc.

S/1518

La opinión pública se dividió entre quienes se sorprendieron con los actos y quienes los aplaudieron, sin embargo la mediática norteamericana logró desviar la atención de estos atentados resaltando la necesidad de la protección de los ciudadanos y recabaron la tristeza de los recuerdos del 9/11 tiñendo de sentimentalismos sus actos criminales que han cobrado por mucho, más víctimas que el atentado a las Torres Gemelas.

Con todo, Estados Unidos no pudo dejar de llamar la atención de las UN en especial del Consejo de Seguridad el cual comienza investigaciones más profundas y ante el fortalecimiento de las pruebas, la potencia norteamericana se vio obligada a buscar una salida políticamente favorable y emitieron así un texto que impedía la competencia de la CPI en tanto que EU no hacía parte del Estatuto de Roma, además de considerar que su misión era llevar la paz y la seguridad de forma voluntaria, por lo que no era apropiado someter a sus soldados ante un tribunal que en su forma de ver, no era garantista¹⁰; para aliviar la presión política extranjera, abrió juicios bajo la justicia Penal Militar, no pudo pasarse por alto las ínfimas condenas que recibieron los agentes de la CIA.

Vemos en el caso de Abu Ghraib cómo la presión política internacional marcó la administración Bush y categorizó a Estados Unidos como un país guerrerrista, a pesar de pertenecer al Consejo de Seguridad.

b. Guantánamo

Guantánamo es una isla cubana, es el alojamiento de uno de los sitios de reclusión más perversos del mundo, que al igual que Abu Ghraib está bajo el comando norteamericano.

Durante el siglo XX, Estados Unidos le exigió a Cuba incluir en su Constitución una ley aprobada por el consejo gringo conocida como la Enmienda Platt; esta enmienda consistía básicamente en que Cuba limitaría sus relaciones internacionales y por tanto su soberanía, además de ceder una porción de su territorio para las bases norteamericanas y aún peor, todos los actos por parte del gobierno militar norteamericano eran convalidados. Los militares norteamericanos debían paradójicamente emplear su ejército para cuidar la vida y otras libertades individuales, pero debía el mismo ejército juzgar cuándo esto sucedía. Para el 2002 la prisión de Guantánamo estaba

10. "Estados Unidos retira resolución que pedía inmunidad para sus tropas", *Centro de Noticias ONU*, 26 de Mayo 2010. [en línea] disponible en: <http://www.un.org/spanish/News/fullstorynews.asp?newsID=2575&criteria1=&criteria2=>, consulta: 16 de Abril de 2010)

en funcionamiento y el Departamento de Justicia de EU reforzaba aparentemente su lucha contra el terrorismo.

No hay que dejar de lado los antecedentes de conflictos que habían tenido estos dos países, y que seguía creciendo con la Revolución Cubana y la dictadura de Fidel.

Esta prisión retenía a los que Estados Unidos veía como enemigos, sino también a inocentes, incluyendo menores de edad y les violaban sus derechos más fundamentales como la privación de un juicio justo, empleando tratos inhumanos y degradantes, muertes bajo custodia e innumerables formas de tortura. No podía ser para menos, que incluso cuando Estados Unidos maniobraba para mantener a las Organizaciones Internacionales alejadas, se dispararan las denuncias de otros Estados ante la ONU y por parte de las organizaciones de los derechos humanos. Sin embargo la prisión aún permanece abierta, a pesar de que la Secretaria de Estado de los Estados Unidos Hilary Clinton confirma fuertemente la importancia de cerrar dicha prisión y las políticas públicas del presidente actual Barack Obama parecen irse acercando cada vez más, a pesar de los múltiples obstáculos que enfrenta, como el de la espera a que otros estados reciban en sus cárceles a los prisioneros de Guantánamo. El cierre de esta prisión es solicitado urgentemente por Amnistía Internacional, la ONU, y otros jefes de estado, por lo que el entonces presidente Bush, se ve en la obligación de firmar una ley que proscriba los tratos injustificados a los prisioneros, pero esta ley es por mucho menos extensa que las plasmadas en tratados internacionales.

Frente a estos crímenes, agentes de la CIA fueron condenados no solo por la Supreme Court, si no por los jueces de otros estados como Italia.

Luego de haber visto grosso modo la situación de las prisiones más polémicas del siglo XIX y la continua violación de los derechos más propios del hombre, podemos ver que estas situaciones están latentes en nuestras sociedades y que tienen un trasfondo de poder. El hecho de que Estados Unidos haya cerrado la prisión de Abu Ghraib en Iraq, no significó el fin de estas prácticas, de igual modo los prisioneros de esta prisión fueron trasladados a Guantánamo, todo se repitió la misma historia en un escenario diferente.

Es por esto que medidas más fuertes deben ser tomadas, de tal forma que una potencia mundial no pueda ejercer más presión que la comunidad internacional restante, con el fin de evitar que el cierre



de Guantánamo sea la apertura de un nuevo centro de torturas, sino que sea un cierre definitivo, no solo para Estados Unidos, sino para todos los Estados, para darle fin a las absurdas prácticas inhumanas que solo buscan hallar un culpable, incluso al inocente, ya que bajo los tratos degradantes cualquier inocente confiesa hasta los crímenes más atroces.

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The Concept of security and the Viability of Global Governance

✉ By: Carolina Aguirre Echeverri

Abstract

The concept of security incorporates within its meaning, at the same time, political, social and cultural connotations, and essentially entails a certain malleability that may, at times, escape any aim for legal structure. Without a doubt, no contemporary theory of international law, no international relations approach, and no political or humanistic discourse can currently avoid it, regardless of the angle according to which it is dealt with. As to the notion of governance, it has been described as the sum of the many ways individuals and institutions, public and private, manage their common affairs through a dynamic and complex process of interactive decision-making. When attempting to encompass both ideas, that is, if the question about governance (on a global scale) is indeed pertinent or even possible security wise, the fact is that working with probabilities –as security requires it-, and trying to organize them and build them into a plan, certainly makes mandatory to question if that response to different sets of circumstances is structured according to a process of interactive decision-making –as mentioned before-, in the search for the encompassment of the majority of subjects of international law is merely logical, which is the aim of this paper.

1. The notion of security

“Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time”¹. Well, such a statement can certainly be considered anything but peaceful. M. Koskenniemi, for example, would suggest that “our inherited idea of a World Order based on the Rule of Law thinly hides from sight the fact that social conflict must still be solved by political means”². Indeed, the words above apply in a certainly accurate manner to the concept of security, which incorporates within its meaning, at the same time, political, social and cultural connotations, and essentially entails a certain malleability that may, at times, escape any aim for legal structure or infallible coherence. One can even state that due to said mal-

1. Louis Henkin, In Nathan A. Canestaro, “Realism and transnationalism: competing visions for international security” *Boston University International Law Journal*, vol 25, p.113.

2. Martti Koskenniemi, “The Politics of International Law” *European Journal of International Law*, vol.1, 1990, p. 1.

leability and lack of precise definition, security has become a plastic word.³ It has certainly developed into a positively interesting word; problematic for some, considerably handy for others, and consistently invoked within the international system by its multiple agents. Without a doubt, no contemporary theory of international law, no international relations approach, and certainly no political or humanistic discourse can currently avoid it, regardless of the angle or perspective according to which it is dealt with.

From partial visions of the globalization phenomenon such as hyperglobalism or transformationalist thesis; from international legal theories that oppose each other such as realism or transnationalism; or doctrines regarding the use of force and intervention in another State's territory like humanitarian intervention -and more recently, responsibility to protect-; to opinions about United States and its "presence", "invasion" or "intervention" in Iraq, the issue of security constitutes common ground and shared foundation for each of the above, and to address such a subject is certainly appealing for some, compelling for others. The issue that this paper seeks to address, since it apparently causes a certain level of perplexity, is whether political interaction and co-operative actions between international agents have developed enough for it to be possible to state that there is a certain level of compliance with international law -considering that it is a normative system-, and if rules regarding security matters are perceived as binding by the subjects of international law -therefore satisfactorily accommodating diverging and conflicting interests-, that is, if there is on some degree global governance with regard to the element of security. Why? Foucault's definition of security is most enlightening. According to the scholar,

"Sovereignty capitalizes a territory, raising the major problem of the seat of government, whereas discipline structures a space and addresses the essential problem of a hierarchical and functional distribution of elements, and security will try to plant a milieu in terms of events or possible elements, of series that will have to be regulated by a multivalent and transformable framework".⁴

Since governance has been described as the sum of the many ways individuals and institutions, public and private, manage their common affairs; and the scope of security would particularly require to encompass powerful actors into a dynamic and complex process of interactive decision-making, Foucault's explanation clarifies the fact that security does not seek to arrive at a point of perfection, and it is



3. Josefina Echavarría Álvarez, "La promesa de (in)seguridad; algunas reflexiones críticas" *Revista Estudios Políticos*, num. 28, 2006, p. 102.

4. Michel Foucault, 1977, *Security, territory, population; Lectures at The College de France 1977-1978*, Picador, 2009, p. 35

more a matter of maximizing the positive elements and minimizing what is risky and inconvenient –that is, the treatment of the uncertain, of the aleatory- like theft or disease, while knowing that they will never be completely suppressed.⁵ All of the above said, the question about governance (on a global scale) is indeed pertinent, mostly because security means working with probabilities, and trying to organize and build into a plan different elements and functions, positive or negative.⁶ Security works on the future, not planning according to a static perception, but open to a future that is not exactly controllable, not precisely measurable⁷; therefore to question if that response to different sets of circumstances is structured according to a process of interactive decision-making –as mentioned before-, in the search for the encompassment of the majority of subjects of international law is merely logical.

According to a classical approach, security has traditionally been considered a matter of state –domestic insecurity may or may not dominate the national agenda, but external threats almost surely will constitute a crucial issue of national security⁸-, and as such it has been studied, analyzed and criticized from an important number of perspectives and angles, and it appears to be a number of issues concerning the concept, starting with its definition. Conventional approaches seeking for a definition have been developed by scholars like Buzan, who defined security as “the aim of being free of menace”⁹ In this regard; a traditional approach is most likely to equal security with National Security, that is, the integrity of the national territory and its institutions, as well as the state’s ability to defend itself against external treats. It is indeed a Hobessian conception of the world order as a state of nature, on which states constitute a superior order that provides security inside its territory, and shields individuals in order to protect them from external terror. The fundamentals of a classical definition of security can be traced back to the Peace of Westfalia, considered by some scholars as the act that founded and structured the conditions based upon which states would coexist, hence, as quintessential for the international system. In fact, the element of sovereignty, which is inherent to the concept of state itself, was a deciding factor in the consolidation of the international system. Accordingly, states do consider it to be their right to exercise authority by coercive means, and their prerogative to defend their territory autonomously, which has been made clear enough in the United Nations Charter, which includes security as one of its purposes, as the Organ in charge of it within the international sphere.¹⁰ In any case, the Peace of Westfalia is by definition opposite to the concept of global government (if the latter were to be understood as the existence of

5. *Ibid.*, p. 34

6. *Ibid.*

7. *Ibid.*, p. 35

8. *Ibid.*, p. 103

9. *Ibid.*

10. United Nations Charter. Article 2,

an entity that beholds power and control over states), due to the fact that the possibility of the existence of an authority greater than states was immediately ruled out, since the main characteristic of all states signing the Peace was that they were all equals. Indeed, state's autonomy and authority, according to the classical formula of external sovereignty, recognizes no superior power.

Now, by virtue of the Treaties of Westfalia, the rights of autonomy and sovereignty that states were entitled to due to the fact of being recognized as such, entails for that state the possibility of self determination, and by extension, the right to go to war (*ius ad bellum*). However, after World War II, a tendency regarding the search for community integration developed, and the creation of United Nations Charter constituted an attempt towards the constitutionalization of the international system. As a consequence, an incipient step towards global governance was made, given that states intended to find the means for conflict resolution on a scope of no enforcement compliance. Indeed, interdependency between states did grow after the Second World War, and as a result, so did the level of intromission in other states' domestic affairs.

2. Reevaluation of the classical notion of security

2.1. International relations theories

Criticism to the traditional conception has aroused from different sides. Globalization theories; legal and philosophical theories or postures regarding international relations; and further developments of the prohibition of the use of force, among others, have challenged, complemented or reformulated the notion of security in different ways. For example, realism as a theory of states' motives has embraced the idea that without menace there is no security, and that insecurity is the crucial element for the existence of states -hence security must remain as a promise¹¹. Canestaro's explains that realism suggests that states are constantly competing for security and power within an anarchical international system incapable of preventing aggression or conflict, and that "because every state maintains an offensive capacity to harm others, each must gain and retain power at any cost or risk predation by aggressors"¹². As a result, in the absence of centralized enforcement or adjudication of international law, realists argue that the international system remains anarchical, with law reduced to empty legalisms used to justify the pursuit of national ends, and



11. Josefina Echavarría Álvarez. *Op. cit.*, p.106

12. Louis Henkin, *Op. cit.*, p. 2.

global governance as an utopian desire, due to states' selfish interests and unwillingness regarding political cooperation. In direct opposition to this thesis, transnationalism explains that cooperation, not competition, is the defining characteristic of international relations, and that democratization and global economic interdependence reduce the benefits of interstate conflicts and encourage long term cooperation. Global governance would be a real possibility under this perspective, since states would have binding legal obligations under international law, and those rules would gradually develop into a rule-based community capable of regulating the behavior of states, since through a framework of international law, norms and regimes, states' sovereignty would slowly yield to international legal norms that lessen the likelihood of conflict.¹³

The problem with Canestaro's exposé is that the author claims that the purpose of his work is to determine if the latter philosophies can be reconciled, therefore allowing us to determine if there is a possibility for the existence of global governance under the scope of legal theories, but he fails to sound convincing on how the reconciliation actually works. He first states they have little in common, but concludes that there is room for both transnationalism and realism in the scope of international law.¹⁴ Such a conclusion shows that evidently a politically correct path was chosen:

“The next few years may be determinative of the role of international law in security-military issues for decades to come - the continuance of the “war on terror,” a potential nuclear showdown with Iran or North Korea - all hold historic opportunities to either reinforce or repudiate international norms and institutions. In the meantime, it seems prudent to suggest that we can neither completely adopt nor dismiss transnationalism or realism as explanative doctrines in international relations. These two doctrines can be reconciled not because their tenets are complementary - but instead because their two worlds seem to co-exist in the course of daily affairs.”¹⁵

Well, to state that a hybrid international system allows scholars and policymakers to interpret states' actions in accordance to their own theoretical paradigm does not seem to bring much help to the discussion; however, such conclusions are not scarce, because finding a middle ground seems, most of the time, a perfectly happy ending. Likewise, dissertations about the relationship between international law and international relations and their focus on the laws of state behavior often reach conclusions like this: “the prospects for genuine

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

interdisciplinary collaboration, to the benefit of both disciplines, have never been better”¹⁶. It would appear that authors that choose this kind of path afford no clarity as to whether there is or there is not global governance –or at least some incipient ground for it-, and Cane-staro’s arguments seem to resemble at some point the Habermas – Foucault tension, whose perspectives reveal acute tension between power and law, just like realism and transnationalism. Regarding the relationship between law and power, Habermas states “that authorization of power by law and the sanctioning of law by power must both occur *uno acto*”¹⁷. Foucault, on the other hand, aims for an analysis that frees itself from a representation such as power-sovereignty, or power-law. In words of Flyberg:

“It is in this connection that Foucault made his famous argument to *cut off the head of the king*, in political analysis and replace it by a decentred understanding of power. For Habermas, the head of the King is still very much on, in the sense that sovereignty is a prerequisite for the regulation of power by law”¹⁸.

Indeed, a paraphrase of the Habermas – Foucault debate surely does not constitute a consistent analysis and a new approach on the matter, and quite frankly, the exposition falls into what Foucault denominates an imperative discourse, that in theoretical domain consist in saying “love this, hate that, this is good, that is bad”¹⁹, or according to a very safe in-between perspective, “reconcile this with that, this is useful, discard that, there is room for all positions”. The problem with imperative discourses is that they belong more to an aesthetic dimension, and therefore can only be based on choices of an aesthetic order.²⁰ That very comfortable middle ground seems like the politically correct option, which safely allows agreeing with everyone, and conveniently taking the best of each world in order to create a mixture of ideas, all aesthetically put together and coexisting without overturning each other. Although it may seem handy, it is certainly not very objective, and consequently, not particularly helpful.

2.2. Human Security – the changing content of the prohibition of the Use of Force and the consequences it entails for the notion of security

There is a relatively recent and increasingly embraced perspective that understands security as human security, meaning that the traditional approach should be challenged by arguing that a proper referent for security should be the individual rather than the state. According to

16. Anne-Marie Slaughter, “International Law and International Relations theory: a dual agenda” *American Journal of International Law*, vol. 87, num. 2, p. 238.

17. Bent Flyberg, “Habermas and Foucault: thinkers for civil society?” *British Journal of Sociology*, vol. 49 num. 2., june 1998, p. 214.

18. *Ibíd.*

19. Michel Foucault *Op. cit.*, p. 17.

20. *Ibíd.*

the International Commission on Intervention and State Sovereignty, four more radical challenges to the notion of state sovereignty have emerged: continuing demands for self-determination, a broadened conception of international peace and security, the collapse of state authority and the increasing importance of popular sovereignty.²¹ In this regard, the Report of the International Commission on Intervention and State Sovereignty suggests that the most marked security phenomenon since the end of the Cold War has been the proliferation of armed conflict within states, and that such disputes have aroused due to demands for greater political rights and other political objectives. The Report also explains that an unhappy trend of contemporary conflict has been the increased vulnerability of civilians, and that efforts to suppress armed (or unarmed) dissent have in too many cases led to excessive and disproportionate actions by governments, harming civilian population.

A very common opinion shared by Human Security supporters establishes that

“The concept of security has far too long been interpreted narrowly; as security of territory from external aggression, or as protection of national interests in foreign policy... It has been related more to nation-states than to people... Nations have forgotten the legitimate concerns of ordinary people who sought security in their daily lives”.²²

However, apparently there is no reason to worry, because the international community is widely resorting to human security as the idea that resolves what has been referred to as the existing dilemma of becoming a “complicit bystander in massacres, ethnic cleansing and even genocide”²³, and intervening even with the risk of not being able to “mitigate such abuses”²⁴, and even taking sides in intra-state conflicts. The common element that links every single international agent, individual, organism, entity, etc. that addresses or chooses to rely on human security is the fact that all of them resort to moral arguments or to some sort of propagandistic or even sentimental language to base upon them their opinions or to strengthen them. From scholars stating that “the analysis of recent conflicts entails not only identifying who is the decision maker regarding the dispute, or the reasons that led to it, but also, and even more important, to understand the misery arousing due to the conflict”²⁵; from authors assuring that “responsibility to protect can successfully bypass a deadlocked Security Council to finally liberate mankind from the odious scourge of the atrocity crimes”²⁶; and reports asserting that “... [It is the] Commis-

21. Thomas G. Weiss and Don Hubert, International Commission on Intervention and State Sovereignty, “The Responsibility to Protect” available at: [www. Iciss.gc.ca](http://www.iciss.gc.ca), United Nations Development Programme, “New Dimensions on Human Security”, *Web site Human Development Reports*, [on line] available in: http://hdr.undp.org/en/media/hdr_1994_en_chap2.pdf., access: july 9, 2009.

23. Thomas G. Weiss and Don Hubert, Op. cit., p. 5

24. *Ibid.*

25. Maria Teresa Aya Smitmans, “Seguridad Humana en Colombia: Donde no hay bienestar no puede haber paz” *Revista Opera*, Universidad Externado de Colombia, num. 6, 2006, p 257.

26. J. Brown, “The Question of right authority: Moving the Responsibility to Protect from soft to hard law”. *ILSA Quarterly*, vol. 17, num. 2,

December 2008, p. 17.



sion's view that human security is indeed indivisible. There is no longer such a thing as humanitarian catastrophe occurring in a faraway country of which we know little"²⁷; to almost every single academic or author quoting Kofi Annan's famous²⁸ "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 humanity?"²⁹, the search for legitimacy is, without a doubt, the key to all matters currently regarding what has been identified as the opposition between security and human rights³⁰. Indeed, as Christine Gray explains, "The operation against Iraq has also had a precedential impact in that it made clear the advantages of the legitimacy which only the Security Council could confer... States preferred to exploit the notion of authorization rather than to rely exclusively on any unilateral right to use force".³¹ However, there are opinions that tend to believe that a search sometimes so fiercely conducted in order to achieve legitimacy through political proselytism and the encouragement of doctrines that can later be regarded as *opinio juris* may sometimes entail the distortion of certain legal institutions or previous events:

"R2P treats sovereignty as more hindrance than protection and the UN Charter less as sovereignty's guarantor than the guarantor of the rights of individuals... Instinct should warn us there must be something wrong with an idea that can be endorsed by such strange bedfellows. There is. R2P has appealed to so many because it suits too many cross-purposes. We should be cautious about turning it from political tool to legal principle."³²

Evidently, the actual existence or level of consolidation of global governance within the scope of the use of force is a thorny subject. If a security crisis were to develop in any given territory, and it was made clear that states do have the duties of preventing, reacting and rebuilding, the extent up to which the content and implications of those duties could be stressed –therefore revealing the degree on which global governance is in fact established and how legitimate it is perceived- is nowhere near being unanimous. References to the reformulation –and sometimes death- of sovereignty have poured since past years, and the weakening of state power and legitimacy has been understood sometimes as a goal for human security and the palliation of humanitarian crisis, as shown by statements as the following: "... Although the key term of the (Security Council) resolution is recommendation, a military intervention with a supra-majority of member

27. Thomas G. Weiss and Don Hubert, *Op. cit.*, p. 23.

28. Aside from the fact that the opinion of the Secretary General, regardless of how coherent or sane it may be, is not per se binding to states, and putting also aside the fact that apparently there is no source of international law upon which the opinion of the Secretary General can be based upon in order for it to be considered as binding, and, consequently, for subjects of international law to have the obligation to comply with it

29. Kofi Annan, *We the people: The role of the United Nations in the Twenty-First Century*, in www.un.org/millennium. Quoted by Canadian-sponsored International Commission on Intervention and State Sovereignty and author Justin Brown.

30. Karima Bennouna, "Sovereignty vs. Suffering? Re-examining sovereignty and human rights through the lens of Iraq" *European Journal of International Law*, vol. 13, 2002, p. 2.

31. Christine Gray, "From unity to polarization: International Law and the use of force against Iraq", *European Journal of International Law*, vol. 13, num. 1, 2002, p. 8.

32. Jose Álvarez, "The Schizophrenias of R2P. Panel presentation at the 2007 Hague Joint Conference on Contemporary Issues of International Law, available in <http://www.asil.org/pdfs/r2p-Panel.pdf>, accessed: july 9, 2009.

states has the necessary moral and political clout to be classified as legal –even without subsequent Security Council endorsement”.³³

As a result, some scholars like Bennoune have pointed out that “Increasing use has been made by some international lawyers of a simple binary opposition, holding that the preservation of sovereignty inherently vitiates concepts of human rights while conversely the erosion of sovereignty is a bell-wether of progress for human rights”.³⁴ The author also explains that, in her opinion, there seems to have been a basic misunderstanding in approaches to sovereignty, since it has been overlooked that sovereignty “has become an attribute that states are required to exercise in accordance with international law”.³⁵ The point is, as she portrays the situation:

“In human right terms, state has a duality of functions. On the one hand, it is a most likely perpetrator of human rights abuses. In response, human rights law must limit the role of the state, delimit its sovereign powers. On the other hand the state is also the agent thought most likely to be able to protect its citizens from harms committed by others, whether they be non-governmental armed groups, private persons, multinationals or foreign aggressors. The state is also vital to building the rule of law. Hence, a radical ambivalence”.³⁶

What could be the conclusion then? Well, there are certainly gross state violations of human rights in the name of security and the preservation of state’s sovereignty, as well as the exercise of the right of self determination; but it has also been suggested that the movement of power away from the state to uncontrolled entities that have barely begun to be subjects of international law –like private prisons, corporate security forces and non-state armed groups- can also be a frightening spectre in human rights terms.³⁷ Indeed, a radical ambivalence, mostly because if both the right of self determination and human rights were to be considered peremptory norms, which means they cannot be derogated or violated by any subject of international law, how is it possible to reconcile both, or to recognize only one of them, disregarding the other?

33. J. Brown, *Op. cit.*, p. 20

34. Karima Bennoune, *Op. cit.*, p. 2

35. *Ibid.*, p. 3.

36. *Ibid.*, p.17.

37. *Ibid.*, p. 18.



2.3. Globalization theories – reformulations of the role of states and consequently of their role regarding security issues

The notion of globalization has become the greatest cliché of our time: the great idea that covers everything, from financial markets to the Internet, from security to drug dealing. However, clichés sometimes are able to capture elements from a certain experience, and globalization as a phenomenon reflects a very common perception about the world today: that it is being mold into a social space shared by social, economical and technological forces, and that events that occur at a certain region in the world may entail profound consequences to individuals or communities another extreme of the world.³⁸

Indeed, hyperglobalists, skeptics and transformationalists all believe that globalization is a phenomenon that redefined the previous global order –although each one of those theories reaches different conclusions-, since it meant that states' interdependency grew, and consequently, that the level of intromission from any given state in another state's business grew as well. According to hyperglobalism, for instance, globalization is a phenomenon caused mainly because of economic forces like capitalism and technology –which would become the very foundation of the system-, and states are bound to disappear, given that they have no longer absolute power or authority within their territory or over matters that used to concern strictly them, like agriculture or security, among others. Security would in fact be considered one of the main flaws of the previous international order, and it would be no longer deemed a national issue, mainly because from the hyperglobalists point of view, national borders and the state itself are eroded, which is why their decline would be imminent. Moreover, as a consequence of the economic interdependence, war would be a very onerous situation, because the defense of any given domestic system would simply be rejected by all the international community, in accordance with the new liberal values of the new world order. Hyperglobalism would simply be the quintessence of global governance, since there would be perfect synchrony of state's interests –mainly because there would be no external menaces, given that there would be no “exterior”, and the common ground would be a system with no security crisis and no conflicts arousing, considering that states would only exist as mere domesticated entities, with no national interests to defend.

Conversely, skeptic scholars believe that nation-states are nothing but reinforced and enhanced, therefore globalization as a phenom-

38. David Held et al., *Transformaciones globales; Política, economía y cultura*, Mexico D.F, Oxford University Press, 2002, p. XXIX.

enon would not entail the uprising of new world order that is not centered in nation-states.³⁹ On the contrary, from a skeptic point of view, Schmitt's friend-enemy distinction would be more valid than ever, since such a distinction would be considered as the foundation of the basic political formula of nation-states, and in consequence, of the international system. The latter is a milieu that entails for states the need of relating in a context of force, with consequent increase of centralism regarding security decisions and procedures, and governments, instead of being regarded as the victims or globalization, would be considered its main architect.⁴⁰ Nevertheless, some skeptic theories –like Huntington's– are not always extreme in every aspect, but instead add other considerations to the skeptic perspective. He does emphasize that “while expectations of a whole united world arise at the end of great conflicts, human history has shown that individuals have a tendency of dividing the world in two: us and them, one's own group and everybody else, our civilization and those barbarians”⁴¹; and suggests not only that states are and will continue to be the main subjects of the international system –since as such entities they train armies, direct diplomatic policies, negotiate treaties, go to war, control international organizations, and influence and configure commerce and production⁴²–, but also that governments' priority is national security and external menaces. However, Huntington also suggests that not all states consider their own interests in the same exact way, and that even tough states do define their interests on the basis of power and security as they main concern, each state's culture, national institutions and own values would influence their interests and decisions regarding security affairs, therefore there could be varying levels of governance within states that share a certain kind of values –or in Huntington's words, that belong to the same civilization–, given that they would be able to encompass interests that are not conflicting in essence.

Lastly, transformationalists' approaches assure that states are not disappearing, nor are they being reinforced; on the contrary, they are bound to reshape themselves. Consequently, sovereignty is not questioned nor is it reinforced; it is just bound to be redefined, since it is considered to be a necessary element regarding states relationships. Transformationalism also understands that states' territory is not bound to become global and also that it is not being enhanced according to regional basis. It is their belief that states' territory is a mixture, ruled by both political and international agents. As a result, security is perceived both as an inter-domestic affair and as a type of conflict that exceeds one state's capacity; hence, security issues require a reconfiguration of the local and the international order,

39. *Ibíd.*, p. XXXV.

40. *Ibíd.*, p. XXXVI.

41. Samuel Huntington, *El choque de civilizaciones y la reconfiguración del orden mundial*, Paidós, Barcelona, 2005, p. 18.

42. *Ibíd.*, p. 20.

given that classic nation-states are considered bureaucratic entities, whose apparatus is too big for the resolution of security conflicts. Consequently, and given that the new world order is understood by transformationalism as an integrated and interdependent system, global governance would be considered a need more than an option, mainly because, as it was mentioned previously, security issues exceed states' scope, and require a wider framework that encompasses diverging and complex interests.

3. Conclusion – The viability of global governance in the matter of security

Conclusions regarding the actual existence of global governance, unsurprisingly, vary and differ on their very essence. A cynical view understands that the incidence of war around the world over the past sixty years, and no international police force on the immediate horizon, means that “there is little prospect for global governance mechanisms that can prevent large-scale violence”.⁴³ Furthermore, it has been said that collective security provisions set forth in Chapter VII have never been fully implemented, since efforts like Korea and Kuwait were not truly international operations with broad representative groups of contributing states.⁴⁴ According to this approach, the United Nations and international organizations in general have proven to be ineffective in preventing war, since Cold War tensions and veto power in the Security Council often prevent the United Nations from launching concerted actions when faced with threats to international peace and security.⁴⁵ Consensus in action is not reached because of superpower rivalry and financial and human costs associated with security operations that are considered too high by many key states, which believe they have few direct national interests affected by conflicts far from their home base.

Such a perspective understands that “the end of the Cold War and the establishment of what is called a new world order gave many idealists great hope for the role of international organizations in the realm of peace and security affairs”⁴⁶, because consensus on taking strong action in conflicts such as the Gulf War and Haiti emerged, and there was increasing global attention to the concept of early warning, “the notion that the international community should be able to detect nascent conflict before it reaches the militarized stage and thereby take action that actually prevents violence rather than just dealing with its aftermath”.⁴⁷ However, it has been said that failures in Somalia, Bosnia and Rwanda revealed that international organizations could not



43. P.F. Diehl, “Peace and security affairs”, *The politics of global governance: International Organization in an interdependent world*, London, Lynne Rienner, 2005, p.193.

44. *Ibíd.*

45. *Ibíd.*

46. *Ibíd.*

47. *Ibíd.*

be expected to succeed in all ventures they undertake, and that the lack of political will and the presence of complex conflicts remained as obstacles to the establishment of a true new world order; specially since “currently, international organizations are still struggling with the new global environment and searching for the right mix of organizational structures, procedures and strategies to deal with the variety of security challenges they now face”.⁴⁸

Similarly, Mearsheimer points that since the end of the Cold War, policy makers (western policy makers) have sought to create security arrangements in most regions of the globe that are based on international institutions, and that this approach to international politics rests on the belief that institutions are a key means of promoting world peace. He states that there has been a recent wave of academic interest in institutions, and quotes academic institutionalists who consider institutions to be a powerful force for stability, such as “avoiding military conflict in Europe after the Cold War depends greatly on whether the next decade is characterized by a continuous pattern of institutionalized cooperation”⁴⁹, or, commenting about the end of cold war, “there seems little doubt that multilateral norms and institutions have helped stabilize their international consequences. Indeed, such norms and institutions appear to be playing a significant role in the management of a broad array of regional and global changes in the world system today”⁵⁰. The author considers such statements to be nothing but naive, since those assessments of institutions are not warranted, and they do not accurately describe the world, hence policies based on them are bound to fail.⁵¹

On the contrary, optimistic perspectives assess that, even tough effective global governance will not be achieved quickly, since it requires an enormously improved understanding of what it means to live in a more crowded, interdependent world with limited resources, the beginnings of a new vision for humanity are given, and people and governments are challenged to see that there is no alternative to working together and using collective power to create “a better world”⁵², but such a vision can only flourish if it is based on a strong commitment to principles of equity and democracy grounded in civil society. Accordingly, it is believed that the United Nations must continue to play a central role in global governance, since “with its universality, it is the only forum where the governments of the world come together on equal footing and on a regular basis to try and resolve the world’s most pressing problems”.⁵³ Indeed, the United Nations is understood as the principal mechanism through which governments could collaboratively engage in the multilateral management of global affairs.

48. *Ibid.*, p. 194.

49. Robert Keohane, “The false promise of international institutions”, in: John J. Mearsheimer ed. *The politics of global governance*; 3d ed., London, Lynne Reinner publishers, 2005, p. 61.

50. John Ruggie, “The false promise of international institutions” in: John J. Mearsheimer, *The politics of global governance*; 3d ed., London, Lynne Reinner publishers, 2005, p. 61.

51. John J. Mearsheimer, “The false promise of international institutions”, in: John J. Mearsheimer ed. *The politics of global governance*; 3d ed., London, Lynne Reinner publishers, 2005, p. 91.

52. *Ibid.*,

53. *Ibid.*

Clearly enough, to understand the international system basically as a political conception –because the conflicts and contingencies that arise within its scope are not systematic or predictable in regard of their consequences- entails a necessary essential consequence: in terms of security, and the existence and convergence of the essential elements of governance –specially in a global level-, states usually have to cope with the fact that conflicts surpass their control, either because they are too big and no longer capable of resolving problems that affect small communities, or because they are too feeble, hence situations like international crime or drug dealing are beyond their regulatory capacity, all of which could eventually become causes of external conflict between said states, because of eventually diverging interests and conflicting positions.

As a result of the above, and although it is true that a given number of measures that aim for states' compliance with general or shared security parameters has a long way to go before it is regarded as a system of rules, -mandatory and susceptible of being enforced, like domestic legal orders-, or even as elements of governance allowing for the encompassment of diverging conceptions –therefore providing an incipient notion of order-, the fact is that the aforementioned status quo, or the mere existence of diverging opinions regarding the role of the Security Council or conflicting conceptions about the existence of exceptions to the prohibition of the use of force –like responsibility to protect- are both evidence of a fact: that a collective conception of security as no longer a domestic issue actually exists, and such encompassment –or aim for encompassment- of diverging conceptions is clearly an essential and inexorable element of an eventual international normative system.

In consequence, and even though the United Nations Charter has been deemed both by scholars and some governments as an attempt to constitutionalize the international system, it is undeniable that outside each state's own borders, political reasons and statements or conceptions greatly influence the world order. Now, all of the above considered, it would be short-sighted to suggest that there not political interaction between transnational actors, and that an important number of them does not aim for the resolution of problems that affect one particular region or the whole international community –regardless of what the existence of ulterior motives and what they could be-, therefore, there are responses to different sets of circumstances, which arise because of what security entails on international basis, and said response is indeed structured according to a process of in-



teractive decision-making –as mentioned before-, in the search for the encompassment of the majority of subjects of international law, which means there is indeed global governance in terms of security, if the latter is understood as an aim for encompassment, but not as a legal regime or structure, meticulously and flawlessly functioning.

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The right to water: dimension and opportunities

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Abstract

Water is today subject of debate in the international arena due to the deep politic, economic and social implications it carries, along with challenges that require strong commitment by governments and international agencies. In this article, the author intends to obtain a broader and more specific perception on the current condition of the so denominated [Human] Right to Water. In order to do so, a theoretical revision of the subject is conducted, using as methodology secondary sources, from which a descriptive analysis was made in order to obtain a better understanding of the matter.

Furthermore, the influence of the international community in the subject is taken into account as how the precedents regarding human rights influence the situation, and how ECOSOC's General Comment 15 is currently the latest international pronouncement. Then, it analyses how governments implement the Right to Water domestically and how the case of South Africa is one of the most important examples. After a deep analysis, the main conclusion found is that this issue, even though has had some progress, it still has a significant number of defiance ahead that will require joint and dedicated action both internationally and domestically.

Through out all the history of mankind, water has been a central element of its progress, allowing the improvement and development of agriculture, household, industry, trade and commerce, among other activities that are part of the development obtained until today.

Unfortunately, considering geographic conditions, not all the countries have had the same kind of access to water resources, increasing the inequalities and the possibility of entering into conflicts. This situation becomes more complex taking into account that only 2,5%¹ of those water resources constitute freshwater, meaning able for human utilization.

In the last few decades, the quality and degree of contamination of this essential resource as a consequence of industrialization and human consumption, has upheld numerous debates in different meetings and conventions, highlighting, mostly by civil society, IIOO, NGO's and some governments, the relevance of cooperation and the achievement of a common understanding in relation with this fundamental natural resource.

For that reason, it has been commonly mentioned, both in the international as in the national arena, the necessity of implementing water as a fundamental right², creating the right to water. In the present article, the elements and implications of this discussion will be presented, as well as some results already obtained. In the first part, the role of the International Community will be analyzed: taking as an approach Human Rights: prior conventions that are related to the subject, its division and the most recent attempt to make water as a fundamental right: the General Comment 15.

In the second part, the role of the domestic government in implementing the right to its national constitution, and the case of South Africa being a country that already has water as a primary right, will be considered.

1. United Nations Development Program, "UN World Water Development Report", Web site Human Development Reports, [Online] available in: http://hdr.undp.org/en/media/HDR_2006_ES_Complete.pdf, access: March 29th of 2010.

2. United Nations Development Program, "World Water Council. Introduction. The Right to Water: From Concept to Implementation". 2006. [Online] available in: http://www.worldwatercouncil.org/fileadmin/wwc/Library/RightToWater_Final_Text_Cover.pdf, access: March 29th of 2010.

1. The role of the international community in the achievement of the right to water

The role that the International Community has played in creating consciousness regarding the water's situation in subjects such as quality, level of access, availability, sanitation, opportunities for cooperation, dangers of conflict, among other relevant issues, all of them in an international scope, has been extremely influential. This, considering

that NGO's, civil society associations, multilateral and international organizations, have gathered and analyzed information, made recommendations and in not few occasions, complaints against states with critical conditions.

Increased scarcity leads companies to want to take more advantages of some governments' incapacity of providing water services, increasing the possibility of developing legislation pro-privatization, and darkening the options for a right to water.

Besides of the environmental implications that the subject of water carries, the preoccupation raised by the inequalities regarding mainly its access and quality, has stimulated serious concerns and the hypothesis that the best way to address this problem is to elevate its condition to a human right, the human right to water.

In order to comprehend this, is necessary first to understand the international approach to human rights, and then, the most recent attempt by the international community, more specifically by an UN organ, the ECOSOC, to tackle this concern, the General Comment 15.



1.1 An essential approach to Human Rights

Under the 1948 Universal Declaration of Human Rights, the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.³ This includes fundamental rights like the right to life and health.

Water has been recognized to have a secondary role in the achievement of these and other fundamental rights, and the explicit recognition “of water as an individual human right”⁴ has not take place yet, being only mentioned in an implicit way, as part of rights “contained within the ICESCR [International Covenant on Economic, Social and Cultural Rights] 1966, such as an adequate standard of living, food and health”.⁵

The first time that it was explicitly acknowledged was in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) in the Article 14: “To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication”⁶. And in the Convention on the Rights to the Child (CRC, 1989),⁷ where in the Article 24 it is stated that “to combat disease and malnutrition, including within the framework

3. The Universal Declaration of Human Rights 1948.

4. Amanda Cahill, “The Human Right to Water – A Right of Unique Status”: The Legal Status and Normative Content of the Right to Water”, *The International Journal of Human Rights*, vol. 9, num. 3, September 2005, p. 390.

5. *Ibid.*

6. Right to Water, “The Right to Water in International Human Law Rights Law”, Web site The Right to Water, [Online] available in: http://www.righttowater.info/code/Legislation_1.asp, access: march 29th of 2010.

7. Right to Water, “The Right to Water: A Legal Obligation”, [Online], available in: www.righttowater.org, access: March 29th of 2010

of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;”⁸ In addition to this, children in areas where the access is very scarce and difficult, they have to walk several kilometers every day⁹ in order to obtain enough amounts of water for their families to survive, eliminating their opportunity to go to school and improve their quality of life.

Water is viewed as a “derivative right”,¹⁰ meaning that it derives “from other related or “dependent” rights”¹¹ (education, food, health, housing, and the right to life.). Also, according to Bluemel,¹² the right to water can be characterized internationally in one of three ways: 1) as **subordinate** to other primary human rights, such as health or life; 2) as **subordinate** and necessary to achieve economic and socio-cultural rights; or 3) as **independent** human right.

In this point, it is important to recognize that the State obligations differ in each of the three conditions mentioned above: it is understandable that if it gains the condition of independent right, it will represent a greater amount of responsibilities to the governments than if it gains one of the first two characterizations. For governments, this can be a significant source of obstacles to achieve this condition. On the contrary, for people, this third condition will be the most beneficial, because it would facilitate them more legal instruments to exercise its right.

People in developing countries are the one who suffer the most from the water inequalities in access, quality and availability, being at the same time, the ones who need the most this right to water. This is reflected in the serious and concerning statistics elaborated by international organisms, which show that 1.1 billion people lack access to an adequate supply of water; 2.6 billion people lack access to adequate sanitation and 1.8 million children die every year as a result of diseases caused by unclean water and poor sanitation.¹³

These conditions can get worse by the government’s behavior regarding this issue: there are no few of them which are not able to provide adequate water services (sanitation), having then to privatize the service, generating in many occasions more problems than benefits.

This issue will be deeply analyzed next, taking also into account the influence exercised in the discussion of water as a Human Right by the ECOSOC and its General Comment 15.

8. *Ibíd.*

9. UN World Water Development Report, *Op. Cit.*

10. Amanda Cahill, “The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water”, *The international journal of human rights*, vol. 9 num. 9, September 2005, p. 391

11. *Ibíd.*

12. Erik, B. Bluemel, “The Implications of Formulating a Human Right to Water”. *Ecology Law Quarterly*, vol. 31, 2004, p. 967.

13. UN World Water Development Report, *Op. Cit.*, p. 4

1.2 General Comment 15: the opinion of the ECOSOC

The first approach by international community dealing with water difficulties was to treat it as an economic good,¹⁴ developing the concept of “water privatization”. Unfortunately, this focus proved to increase the inequalities among the communities, due to the high prices that the companies charged to them, trying to recover the investment made (“full cost recovery” principle).¹⁵ The case of Cochabamba, Bolivia¹⁶ is one of the most documented and discussed internationally, due to the negative outcomes that privatization brought to this community in both economic and social aspects.

As consequence of the increasing attention received worldwide, regarding the already mentioned inequalities and the not so positive results of this policy of privatization, the international community began to draft attempts to treat water as an independent Human Right.

Within the UN framework, this job was given to the ECOSOC, who had to take into account the segmentation between the rights that are included in the International Covenant on Economic, Social and Cultural Rights (ICESCR), and those included in the International Bill of Human Rights, regarding the international enforcement that they have, the instruments of the latter have more force legally speaking. As a result of this work, the General Comment 15 was adopted in 2002¹⁷ by the ECOSOC, who uses this tool to “provide guidelines”¹⁸ to States in the interpretation of punctual issues related with its treaty concerning Human Rights.

In this case, the General Comment made by the ECOSOC was regarding the ICESCR and its Articles 11 (the right to adequate standard of living) and 12 (the right to health),¹⁹ and mentions the importance of recognizing water “as a social and cultural right”²⁰

The Comment defines the extent of the right in relation with availability, quality and accessibility (physical, economic and information accessibility, besides of non-discrimination),²¹ as the major elements in which the governments must focus its task. Additionally, it’s level of detail, allocates a considerable level of responsibility and action for states.²² And finally, it contributes with a more intangible aspect, the strong support that it gives to the human right to water.

Unfortunately, the GC15 is not comprehensible in relation with the “additional legal weight”²³ it gives to the right to water, being that

14. Erik, B. Bluemel, *Op. Cit.*, p. 962

15. *Ibid.*, p. 962.

16. Harvard Law Review “What Price for the Priceless?: Implementing the Justiciability of the Right to Water”, *Harvard Law Review*, vol. 20 num. 4, 2007, p.1077

17. General Comment 15, The right to water, Economic and Social Council Doc. E/C.12/2002/11, UN ECOSOCOR, 29th Sess., 2002.

18. *Ibid.*

19. *Ibid.*

20. What Price for the Priceless?: Implementing the Justiciability of the Right to Water, *Op. Cit.*, p. 1075.

21. Amanda Cahill, *Op. Cit.*, p. 391.

22. Amy Hardberger, “Whose Job Is It Anyway?: Governmental Obligations Created by the Human Right to Water”, *Texas International Law Journal*, vol. 41, num.3, 2006, p. 539.

23. Erik, B. Bluemel, *Op. Cit.*, p. 972.

General Comments are not-binding for states, and it relates it only by its importance with other Human Rights.

Besides, it is considered that the “[c]ommittee’s analysis of a right to water addressed only impacts on individuals without considering impacts on governments”²⁴, making more difficult for the latter to take the possible legal paths to reach an optimal point.

2. Case study: South Africa as an example of how States implement the right to water



In each state the processes of creating and/or implementing new laws can be very different, in each one, there is a different social, economical, political and cultural context that makes it unique. This is one of the possible reasons why some countries in history have not had the need to wait until an international treaty or law be established in order to implement it domestically (in this case, a human right). This does not mean that only the will of a state is necessary, on the contrary, many times it requires a great deal of work, time, money and effort to reach the desired objective.

In the present section, the role of governments will be analyzed in how they can collaborate in achieving a human right to water, and then, in order to have a better understanding of how are the dynamics in a country that already has this right within its legislation, the case of South Africa will be explored.

2.1 The role of government: implementing the right domestically

Under International Law, a State does not have to agree to be bound to an idea, and this has even more applicability when it is related with Rights, which function as implicit requirements of society.²⁵

Nevertheless, according to Hardberger, even though the need to ensure water access has increased around the world, it has not reached yet the level of customary international law.²⁶ This is possibly because states do not have yet the sense of obligation (*opinio juris*) required, making more difficult the road to achieve a universal right.

24. *Ibid.*, p. 962.

25. Amy Hardberger *Op. Cit.*, p. 536.

26. *Ibid.*, p. 538

However, this does not mean that any state has recognized the vital importance of implementing water as a fundamental right under its domes-

tic constitution, on the contrary, there are numerous cases of countries that have already done it, amongst them, can be found Ethiopia, Gambia, Uganda, Zambia and South Africa²⁷, which will be analyzed next.

Of these countries, it is of paramount importance to highlight their condition of Least Developed Countries (LDC's)²⁸, with the exception of South Africa, which is developing. These are countries (the LDC's) that do not have great amount of resources available, but have seen this as a chance to improve their inhabitants' quality of life. This does not mean, nonetheless, that for these countries this is the final and exultant end, on the contrary, this is just the beginning, because the work of putting into action the words of the Constitution can be even more stringent and constraining.

In a general context, the role that each state play in the consecution of any human right implies certain obligations such as **respect, protect** and **fulfill** the right to water²⁹, involving a positive right approach to the topic.³⁰ Nonetheless, one of the critics made to the GC15 is that "little discussion has focused on the practical [entailment] of recognizing a right to water from the perspective of State"³¹, which could ultimately hinder his role, unless further development is made.

2.2 South Africa: first steps in ensuring the right to water

After suffering approximately five decades under a regime that basically enforced discrimination and inequality among its inhabitants, South Africa is now one of the privileged countries that counts with water as one of its fundamental rights. In its constitution, in Section 27, article 1 is established: "Everyone has the right to have access to".³² This Constitution was created in 1996, and after that, several projects have been designed in order to comply with this Article: Water Act (1998), Policy on Free Water (2001), Strategic Framework for Water Services (2003), National Water Resources Strategy (2004),³³ among others that respond to other issues such as sanitation and other free water policies.

This case shows the importance that economic and social rights are receiving in one country, considering that they are most presumably, one of the best choices to solve problems related with poverty, discrimination and inequalities, some of the biggest challenges that governments have to deal with around the world, especially in the LDC and developing countries.

27. The Right to Water in International Human Law Rights Law, *Op. Cit.*

28. UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and the Small Island Developing States (UN-OHRLLS), "Least Developed Countries", Web Site UN-OHRLLS, [on line] available in " <http://www.unohrls.org/en/ldc/related/62/>

29. General Comment 15, *Op. Cit.*, p.10.

30. What Price for the Priceless?: Implementing the Justiciability of the Right to Water , *Op. Cit.*, p 1076

31. Erik, B. Bluemel, *Op. Cit.*, p. 986.

32. South African National Constitution, 1996 .

33. Right to Water, "Implementing the Right to Water through National Legislation and Policy", *Web site The Right to Water*, [Online] available in: http://www.righttowater.info/code/Legislation_5.asp, access: march 29th of 2010.

Within the south African Constitution, the socio-economic rights are protected under the principles of a positive right, meaning that the State must respect, protect and fulfill them, giving him the duty to enforce them and to its inhabitants, the right.

The principles that are fundamental in its Constitution in relation with the right to water are³⁴: 1). Equitable access to water: in this point there has been some debate, due to amount of liters per person per day that are entitled the South Africans under their national constitution, the 25 liters are said not to be enough³⁵, in comparison with the 50 liters recommended by the WHO in its estimates³⁶. 2). Sustainable use of water and, 3). Efficient and effective water use.

The present model is very helpful due to the countries' courts capacity to review the "reasonableness" present in the policies made by the State that implement the protection of the rights present in their Constitution³⁷. This means that the State can be more easily made responsible for the violations committed, assuring a better a more progressive protection to their rights, and that the situations can be more objectively judged legally.

As mentioned before, this is just one of the examples that can be currently found internationally, and each and everyone of the them has singular characteristics corresponding the country's singular political, economical, social and legal environment.

It is of utmost importance when considering the implementation of the Human Right to Water that not only the governments should be involved, but that in the decision-making process, consultation with the civil-society and communities would make it more integrative, equitable and avoid potential problems in the future.

In addition to this, despite the fact that there is still a lot of work and effort ahead for governments, civil society and international organizations, it is possible to affirm that today, the international community is one step closer to achieve this objective. The recognition of its influence by an important amount of relevant international actors means that it is not just an utopian dream of crazy environmentalists and human rights activists.

Nevertheless, it would be naïve and simplistic to believe that this process of implementation will be done in the nearest future, it requires a long and responsible labor. Also, that with the General Comment 15, the hard work is already completed, on the contrary, it is just be-

34. *Ibid.*

35. Amy Hardberger *Op. Cit.*, p.540.

36. World, Health Organization, "Global Water Supply and Sanitation Assessment 2000 Report" *Web site* World, Health Organization, [Online] available in: http://www.who.int/water_sanitation_health/monitoring/jmp2000.pdf access: March 29th of 2010; UN World Water Development Report, *Op. Cit.*

37. What Price for the Priceless?: Implementing the Justiciability of the Right to, *Op. Cit.*, p. 1088

ginning because, on one side, under the international law umbrella, for example, it still does not qualify to be called a source, meaning that it still does not constitute a treaty, nor has all the elements required to be part of the custom. On the other side, it will deal now with opposite economic and political interests that can and certainly will mean a significantly amount of obstacles, translated in extra time, economic, political and social effort.

The international community has ahead a great responsibility that hopefully, it would know how to respond it best possible way for all.



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Published by the Law School of EAFIT University
Medellín - Colombia
June -2010
EAFIT Journal of International Law
January – June 2010