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Just War and Humanitarian Intervention

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1. In this paper, I present a version of just war theory and try to expand it to include a normative analysis of humanitarian intervention. The view of just war theory I adopt, although taking into account an illustrious tradition, is made consistent with a liberal normative political philosophy affirmed in this day and age.

I anticipate my main points:

- (i) I present the classic theory of just war;
- (ii) The (contemporary) legalistic interpretation of just war implies that a just war is a defensive war;
- (iii) Within this theory we must distinguish between just cause and right entitlement to wage war;
- (iv) One has also separate bivalent cases (state A attacks state B with the right of state B to react) from cases in which the bivalent situation does not work, like in terrorism and violation of human rights (called here “oblique” cases);
- (v) In the bivalent case, if you have a just cause you are also entitled;
- (vi) In... oblique cases, just cause and entitlement do not necessarily overlap. If a genocide is taking place, as in Kosovo, there is a just cause presumption in favor of an intervention, but no single state is *prima facie* entitled to intervene;
- (vii) The simplest way out of the problem of entitlement consists in relying on the legitimation provided by formal procedures (legality). However *rebus sic stantibus* international legality does not work;
- (viii) This implies that the legitimation of the entitlement in oblique cases must be different from legality. Legitimation depends very much on the context;
- (ix) If there is a just cause, one can imagine that sometimes a state can act in isolation, and nevertheless be legitimated in doing so. The plausibility of such an option is understandable if we think of the rescue case (imagine a single state intervening in Rwanda 1994 to avoid genocide);
- (x) Note that the simplest case (bivalence) and the most complicated case (unilateral legitimation) tend to coincide;
- (xi) I conclude by stating why the American 2003 intervention in Iraq was not justifiable according to this vision of mine.

2. The basic distinction within just war theory has been between *jus ad bellum* and *jus in bello*.¹ This traditional distinction has been set out clearly and elegantly by Michael Walzer:

“War is always judged twice, first with the reasons states have for fighting, secondly with reference to the means they adopt. The first kind of judgment is adjectival in character: we say that a particular war is just or unjust. The second is adverbial: we say that a war is fought justly or unjustly... The two sorts of judgment are logically independent. It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules”.²

3. The origin of the classical just war theory is embedded in medieval religious thought, although they have important precedents in classical Greek thought. Aristotle, following Plato, coined the term “just war” in his *Politics*, drawing inspiration from the idea of a balance between change and stability. To respect borders, to avoid ruining crops, to keep everyone (including slaves) in his or her place, were classical elements of this sort of natural law *in nuce* that underlies the Aristotelian conception. Cicero, particularly in *De Officiis* and *De Republica*, undertook to take up the Platonic-Aristotelian and Hellenistic just war theory, reformulating it within the perspective of an imperialistic and expansionist state – Rome – that needed war to increase and maintain its power.³ In this way, the philanthropy of the stoics became the *humanitas* of Cicero and the Romans.

In the Christian Middle Ages, Augustine presented the just war paradigm from an essentially anti-pacifist perspective.⁴ From then on, just war theory served to determine the moral conditions for waging war rather than for its avoidance. The dawning of Christianity had witnessed a radical pacifism according to which no war could be participated in or be morally acceptable to believers. This pacifism could trace its origins to the New Testament, and in particular to the Sermon on the Mount (“turn the other cheek!”). However, further to the barbaric invasions and the Christianization of the Roman Empire after Constantine, the historical background at the time when Augustine was writing had substantially changed.

Against this background, Augustine conceived just war theory as a set of necessary conditions that helped to make war morally acceptable in a few cases rather than absolutely unacceptable. First and foremost, the end-purpose of a just war – according to Augustine – had to be peace. Secondly, the object of a just war was justice, based on the reparation of wrongs. Finally, the Christian at war should be inspired by Christian love. If radicalized, the Augustinean thesis could turn the idea of just war into

¹ The traditional distinction between *jus ad bellum* and *jus in bello* is criticized in a fine article by Jeff MacMahan, “The Ethics of Killing in War”, *Ethics*, July 2004, vol. 114, i.4. MacMahan suggests that he who is in the wrong in entering a war does not have the same rights in conducting the war as he who is instead in the right. In the subsequent pages, I will not take into account this sophisticated objection to the traditional thesis.

² *Just and Unjust Wars*, Basic Books, New York, 1992, 2nd ed..

³ For Cicero and, in general, for the Romans, the *bellum justum* is a war declared according to the rules; hence it must be a *bellum denuntiatum* and *indictum*.

⁴ Classical reference for Augustine on just war is *The City of God*, Book XIX. It should be noted however that Augustine did not write a treatise on war and that his famous theses are drawn from passages scattered throughout works devoted to different subjects. As regards this subject, see R. A. Marcus, “Saint Augustine’s View on Just War”, in *The Church and the War*, W. J. Sheils (ed.), Blackwell 1983. See also Paul Ramsey “The Just War according to St Augustine” in Jean Bethke Elshtain, (ed.) *Just War Theory*, Blackwell Oxford 1993, p. 8-22. Many authors, however, agree that Augustine was the originator of just war theory, see *The New Catholic Encyclopedia*, (New York, McGraw-Hill, 1967) vol 14, “Morality of War”.

something similar to a crusade or a holy war since his conditions for a just war roughly coincided with a concept of war in keeping with Christian religiousness and the community of believers. In short, viewed in these terms, a just war is not too different from the jihad-type war nowadays.⁵ It is therefore no wonder that over the centuries, the Christian doctrine in power showed a tendency to set limitations to this interpretation.

Hence, there is a progressive legalization of just war theory – and its signs may be clearly seen in Thomas Aquinas – who increasingly favors the hermeneutics of natural law and the canonistic legal tradition with respect to the Testament inheritance.⁶ From this point of view, with Thomas Aquinas' work, the just war theory becomes more ethical and juridical and less theological than it had been. Aquinas - *Quaestio 40 Summa Secunda Secundae*- lays down three conditions for a just war: (1) appropriate authority; (2) just cause; (3) rightful intention. Firstly, there is the appropriate authority of the sovereign who is the only agency with the lawful right of recourse to the sword; secondly, there is the just cause, according to which the sword needs to be drawn in name of some wrong committed by the opposite party; thirdly, there is the rightful intention that corresponds to the theory of the underlying virtue and the pursuit of good.⁷

The order of these criteria is not fortuitous. Aquinas ranks the appropriate authority first, holding in no uncertain terms that a war may not be conducted in a morally acceptable manner without the endorsement of all these three criteria, but in some way placing the legitimacy of sovereignty first. In so doing, he lays considerable emphasis on the distinction between the private and the public aspect of war, between “*duellum*” on the one hand and “*bellum*” on the other.⁸ Hence, it is quite clear that only in the case of *bellum* or proper war may we sensibly ask ourselves the subsequent questions, those regarding the just cause and the *intention recta*.

We owe to the theoretical mediation of the Enlightenment a version of the just war theory, similar to that of Aquinas and Vitoria after him⁹, which stresses to an even greater extent the role of law with respect to the role of theology in determining the sense of our moral judgment on war. Here we encounter the just war theory propounded by Grotius and Pufendorf in terms of natural law. With this version, however, which quite obviously presupposes the dark period of the wars of religion and the subsequent beginning of a religious pluralism, we have already moved beyond the era of the classical just war theories. One can almost imagine that, during the wars of religion, the crusade spirit prevailed at one end of the spectrum of the moral positions on war, nourishing at its side, by reaction, the absolute pacifism of the radical sects, from the Anabaptists to the Quakers. The Enlightenment brought back into fashion the great theme of humanity, stressing at times the virtue of pity for those who suffer during war (Voltaire), and at times displaying an ironic attitude to the martial virtues (Swift). Finally, this is the era of the great theoretical peace plans, which involve such extraordinary

⁵ For a fair presentation of jihad in comparison with the just war tradition, see John Kelsay, *Islam and War; A Study in Comparative Ethics*, Westminster John Knox Press, 1993.

⁶ On the just war, see Boyle, *op. cit.*, as well as Rene' Coste, *Theologie de la Paix*, CERF, Paris 1997.

⁷ As regards this subject, see Turner Johnson and Ramsey, *op. cit.*

⁸ On the centrality of the concept of *auctoritas* in the position of Thomas (but also Luther), see James Turner Johnson, “Aquinas and Luther on War and Peace”, *Journal of Religious Ethics* 31, 1:3-20, 2003. According to the author, in the perspective of *auctoritas*, the difference between *bellum* and *duellum* is so crucial as to make any other distinction irrelevant for Thomas.

⁹ It's important to stress that according to Vitoria a defensive war does not need special moral justification. To Thomas' conditions Vitoria added that war must be fought as a last resort and in a proper manner. See *New Catholic Encyclopedia*, New York, McGraw-Hill 1967, “Morality of War” 803.

philosophical personalities as Rousseau and Kant. It is clear, however, that here we have moved well beyond the classical just war theories.

4. Nowadays, a normative political theory of just war inherits much of the medieval and natural law tradition, but in a version that turns out to be more secular¹⁰. The prevailing character of the classical just war doctrine is unquestionably moral and religious, whereas in the modern and contemporary doctrine it is typically *legalistic*.¹¹ For the classical doctrine, just war means something similar to a war that falls within the natural or heavenly order of things. For the modern-contemporary doctrine, just war is more or less a synonym of war that is justifiable, meaning war that is in keeping with a given ethical-political-legal order.

There is a distinction to be made between the modern just war doctrine and the contemporary just war doctrine. It concerns the limits of so-called political realism.¹² The typical realism of the modern doctrine of international relations identifies state and people, and subsumes them in the sovereignty. No expression of the will of the people other than at the state level is conceivable in the modern doctrine. As a result, one may hardly preach an idea of global humanitarian justice, other than at a utopian and subjective level, that is separate from the level of justice between states.¹³ Instead, the contemporary theory has criticized political realism in the name of a normative liberal approach that may be inspired by various ethical theories, including cosmopolitanism or that of a realistic utopia (Rawls).

5. For the legalistic paradigm, a just war usually coincides with a defensive war. The concept of just war as a defensive war also pertains to the Catholic doctrine of the 20th century,¹⁴ although it moves beyond it, being shared not only by religious or theological theories, but also by a substantial part of legal theory, moral-political philosophy and by the Charter of the United Nations.¹⁵

¹⁰ I use here the terms classical “doctrine” and modern-contemporary “doctrine”, meaning by a doctrine a set of theories with some common basic presuppositions.

¹¹ This does not imply a legalistic position in the sense of legal positivism such as that upheld by H. Kelsen, *La dottrina pura del diritto*, Einaudi, Turin 1975.

¹² A classic work within the realist tradition is considered H.J.Morgenthau, *Politics among Nations*, McGraw Hill 1948 (first of several editions). Good reconstructions and improvements of the realist paradigm can be found in J. Donnelly, “Twentieth-Century Realism”, in Mapel-Nardin *Traditions of International Ethics*, Cambridge: Cambridge University Press, 1992.; K. Waltz, “Realist Thought and Neo-realist Theory”, in Charles W.Kegley junior (ed.), *Controversies in International Relations Theory*, 67-82; Keohane Robert O., “Institutional Theory and Realist Change”, in D. Baldwin (ed.), *Neorealism and Neoliberalism*, Columbia University Press 1993, 269-300. See also among the peculiar interpretations of realism, H. Bull, *Justice in International Relations. 1983-84 Hagey Lectures*, University of Waterloo UP, pp. 1-34 and *The Anarchical Society: A Study of Order in World Politics*. London: Macmillan, 1977; M. Walzer “The Moral Standing of States. A response to Four Critics”, in Beitz, Cohen, Scanlon, Simmons *International Ethics*, 1985, Princeton University Press. And “The distribution of membership”, in Brown, Peter G., and Henry Shue, eds. *Boundaries, National Autonomy, and Its Limits*. Totowa, NJ: Rowman & Littlefield, 1981.

¹³ For a recent reformulation of this idea, see Thomas Nagel, “The Problem of Global Justice”, *Philosophy and Public Affairs*, 33, (2) 2005.

¹⁴ See the Papal Encyclical *Gaudium et Spes*, which represents at best the Catholic doctrine after the Second Vatican Council. Paragraph 82 of this Encyclical also connects the theme of *auctoritas* to the theme of a global authority that, up to now, has been believed to be lacking. The defensive character of war for the Catholic Church of our times is stressed by the Catechism. For a philosophical rendering of the Catholic just war tradition see also John Finnis, “The Ethics of War and Peace in the Catholic Just War Tradition”, in T. Nardin (ed.) *The Ethics of War and Peace: Religious and Secular Perspectives*, Princeton University Press 1996.

¹⁵ The only two exceptions to the general prohibition to resort to force in the Charter are the consent of the Security Council (article 24) and self-defense (article 51).

Within the context of the contemporary version of the legalistic paradigm, the dogma of national sovereignty, which derives from the modern version, comes to be challenged in the name of general interests in peace and justice¹⁶. In the case of such events, the so-called right of intervention is a response to a perturbation of the international order by some states or groups, and cites reasons that are defensive but without necessarily remaining within the context of a bivalent model – i.e. the simple case where one state attacks another and the latter defends itself – and without necessarily remaining within the limits of the full respect of sovereignty, as the modern version would instead require.

There may be a variety of changes with respect to the classical bivalent situation (attacking state vs. defending state): in combating terrorism, for instance, a state may attack an armed group that is not a state; in the assumption of a preventive war, a state expects to attack another with good reasons without having suffered an earlier attack, on the grounds that the opposing party is preparing an offensive; finally, a state or a group may violate fundamental rights of citizens and groups, and this may be the cause of a sanctionary intervention. All these situations may be called “oblique” with respect to the simple and bivalent case of one state attacking and another defending itself.

The case of humanitarian intervention presupposes an oblique situation¹⁷. We may take this kind of intervention to mean the series of (mostly economic, legal and jurisdictional) sanctions that range as far as armed conflict, adopted by one or more states against other states whenever the latter are deemed incapable of respecting certain obligations laid down at an international level to ensure peace and the security of peoples. This type of intervention violates the sovereignty of the states being attacked, but professes to do so for good reasons that are deemed to prevail over the respect of the self-determination of states. These reasons include serious and systematic violations by a state of fundamental human rights that the intervention intends to rectify. It may be held that, in the case of serious and systematic violations of human rights, the concept of defense that is at the base of the idea of just war may be extended. Moving from the modern to the contemporary version of the legalistic paradigm, if one considers the context of an oblique (non bivalent) case, then it may be maintained that serious and systematic violations of human rights give rise to a defense against an offence that is not made against an individual state but against certain representatives of the human species as a whole. In the present context, just war means defensive war in the strict or broad sense of the word, where defensive war in a broad sense means that it is in keeping with the contemporary version of the legalistic paradigm and within the context of what I have called an oblique situation, just as a humanitarian intervention is. In so doing, I avoid the debate – which is obviously of some significance in just war doctrine – over the existence of a (moral) right to a humanitarian intervention. I confine myself to saying that even when taking a stance that, under certain conditions, accepts the prospect of an (armed) humanitarian intervention, it may be held that not all wars are the same: some are justifiable in principle and others clearly are not. Finally, I should add that the justification is always consistent with a legalistic presupposition that connects it to the defense, but that – as I have already pointed out - the defense is not only that of a state that suffers an attack from another state, but also what may be appealed to in the face of a suitably specified violation of **human rights**.

¹⁶ On this subject, reference is often made to “quasi-states” or “failed states”. A separate problem is represented by the distinction between constraints to sovereignty placed on the basis of plausible reasons and actual sovereignty violations.

¹⁷ See M.J. Smith, “Humanitarian Intervention”, *Ethics and International Affairs*, vol.12, spring 1998; Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, Oxford University Press 2000; Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, Dobbs Ferry, New York 1997 (second edition); Holzrefe and Kohane (eds.), *Humanitarian Intervention: Ethical, Legal and Political Dimensions*, Cambridge University Press 2003.

6. The most evident problem of humanitarian intervention arises from the contradiction between the assumption of sovereignty by individual states and the will to defend human rights whenever these rights are seriously and systematically jeopardized, even when this involves going against the will of those states where such violations take place.

The debate on humanitarian intervention combines two different underlying questions: “is there something like a humanitarian intervention and under what conditions can it be deemed justified?” and “who is entitled to authorize such an intervention?” The answers to these questions vary according to the theories adopted – from those that turn it into an issue of strict legality and cause it to depend entirely on (for example) the authorization of the Un Security Council, to those that claim that international security is worth more than sovereignty pure and simple. Given that strict legality does not seem a plausible criterion in the actual panorama, a connection has been made between this debate and just war theory. In an attempt to summarize the criteria that make a humanitarian intervention right, the International Peace Academy singled out the following principles: seriousness of the offence, urgency, objectivity, acceptability, practicability, proportionality of the means to be used and sustainability. In general, the scale of the atrocities committed in a country where it is necessary to intervene is deemed relevant: they need to be serious violations of human rights committed by a government or, at least, serious violations occurring on a nationwide scale when the government in power is unable to enforce the bare minimum order. The purpose of the intervention must also be apolitical and unbiased, and the peacemaking military action must be conducted on a multilateral basis to be defined in a suitable way. Finally, it is clear that a military intervention for humanitarian purposes must be viewed as a last resort, after having tried every other opportunity to bring the continuing atrocities to a stop, and it is necessary that criteria of proportionality between damage and intervention be taken into account, as in a reasonable consequentialist calculation of the balance between risks and human and material costs on the one hand, and the outcome to be obtained on the other.

7. *Prima facie*, a just war – meaning a war that it is justifiable – is a defensive war in the light of the extensive concept of defense that, at times, also includes humanitarian interventions. My point is that such an argument, however necessary it may be, is not enough to differentiate just and unjust wars (and interventions) in a suitable manner. Indeed, this type of argument while it tells us something about the justness of the cause, which must be defensive in the strict or broad sense, tells us nothing about those who are entitled to intervene. The modern and contemporary just war theory has often dealt with the second point of the Thomistic version of just war, namely the *iuxta causa* issue, while at the same time almost completely neglecting its first point, that is to say the insistence on the appropriate *auctoritas*. (It goes without saying that strictly speaking *auctoritas* and entitlement are not synonyms. Here, I am using the terms in a slightly forced way, using *auctoritas* and entitlement as synonyms for the sake of the argument).

This lacuna becomes more understandable if one considers that the problem of entitlement, or – if one prefers – the problem of “*auctoritas*” suitably reformulated- is not acute in the standard bivalent case,

namely that of defense in a strict sense. If State A attacks State B, State B usually has a just cause on its side and an entitlement to protect itself. This is not so in the oblique cases. Who is entitled to intervene in these cases and on the basis of what reasons¹⁸?

My thesis is that contemporary just war theories have failed to take the legitimation of the entitlement (which is a sort of contemporary relative of Thomistic *auctoritas*) into due account and, for this reason, are not suitable for answering our most significant questions.

Here, I suggest we take into consideration a distinction – which I have already proposed a number of times in my writings – between justification and legitimation. My thesis is that contemporary just war theories have failed to take legitimation (and entitlement) into due account and, for this reason, are not suitable for answering our most significant questions. If we want to keep up our parallel with the theory of Thomas Aquinas, we may say, roughly, that justification is to *iuxta causa* what legitimation is to *auctoritas* (although Aquinas uses *auctoritas* in a different and more restrictive sense that usually refers to the sovereignty of the state that wages war¹⁹).

At this point, we may introduce the more authentically philosophical distinction between justification and legitimation. Quite often, there is no adequate differentiation between these two concepts in political philosophy and, as a result, they are deemed to be interchangeable. Or else it is assumed that a sound justification is deemed to have as a necessary consequence a subsequent (from a logical point of view) legitimation, or that legitimation stands for the exercise of power through a previously justified authority. In my view, the distinction between these two concepts is, on the contrary, an important one. Although without having recourse to the terms justification and legitimation, John Locke introduced this distinction in a way that may be considered paradigmatic. Interpreting this distinction, we may say that a state is justified if it respects human rights, while it is legitimated if it obtains the citizens' consent. Further on, I will freely draw on the distinction between these two Lockean concepts, while putting aside the specific terms "human rights" and "consent" and extending the distinction itself from the perspective of the state to the perspective of every organization and practice. Within this more general perspective, legitimation depends on a point of view within the process being examined, as in the case, for instance, of the vote in a democracy or the market in an economy; it has a typically empirical aspect and proceeds from the *bottom up* (it comes from the public). Justification depends instead on a point of view that does not refer to the process being examined; it has an intrinsically theoretical nature and proceeds from the *top down* (from the experts to the public). If the former is factual, the latter is ideal or virtual. Legitimation works as a sort of

¹⁸ A biased lack of interest in such a problem becomes evident on reading American neo-conservative authors such as Robert Kagan and William Kristol, who naively open a common paper by stating: "Critics of the war, and of the Bush administration, have seized on the failure to find stockpiles of weapons of mass destruction in Iraq. But while his weapons were a key part of the case for removing Saddam, that case was already broader. Saddam's pursuit of weapons of mass destruction was inextricably intertwined with the nature of its tyrannical rule...". This is their answer to the previously self-posed question "What is a right to go to war?" There is no suspicion that perhaps Saddam was wrong but the US is not God, so that the US had no right to punish the guilty guy. (See R.Kagan and W.Kristol, "The Right War for the Right Reasons", *Weekly Standard*, February 23, 2004). Similar disinterest for US entitlement to wage war in Iraq can be found in Jan Narveson "Regime Change: the Case of Iraq" in Thomas Cushman (ed.) *A Matter of Principle*, University of California Press 2005, pp 57-75 in which he wonders whether the possibility of changing a regime can be a good reason to fight a war. Independently from the way in which we answer this question, however, it seems evident that there should be some legitimizing procedure to entitle the change-maker to operate with general consensus.

¹⁹ However, in what can be defined a classical study on the subject James Turner Johnson accepts the idea that what for Aquinas was state sovereignty became -I would say within the contemporary doctrine- international consensus, see his *Morality and Contemporary Warfare*, cit., p.32.

verification process within the system: in the certain cases, the outcome of an electoral procedure legitimates the selected candidate. Justification, on the other hand, evaluates from the outside the results obtained by the procedure: in the same cases, it may tell us that a candidate, however legitimated, does not meet the requirements of justice or honesty called for by the office to which he/she was elected. If we talk about an international war, as we are indeed doing in the present case, we know for instance that a vote of the United Nations may represent a significant factor in legitimating a conflict. However, with or without the vote of the UN, that war may prove – so to say – intrinsically unjust if it violates human rights or is waged in a pointlessly cruel manner.

For our purposes, it is enough to say that while a justification is ideal and universal, a legitimation is empirical and based on consensus. In the jargon of contemporary political philosophy, I use justification in a substantive manner and legitimation in procedural manner. It is clear that, by doing so, I force the terms of the question, given that the difference between the concepts is clearly more subtle than what I make of it here. At any rate, this forcing of the terms is proposed for the sake of the argument, and the conceptual difference between justification and legitimation remains nonetheless significant. If the distinction works, it may be claimed that my view entails a certain degree of complementariness of justification and legitimation: to have a just war, both a just cause and an entitlement are required.

Let us now return to our main problem. We mentioned the consent of the UN as a case of plausible legitimation of a war. If we consider a legitimation process more in general, and connect it with its procedural and consensus-related aspects, we may say that multilateral consent and the recourse to an adequate procedure constitute *prima facie* a good legitimation pre-requisite in case of humanitarian intervention (taking this oblique situation as being paradigmatic). All this supplements the provisions of international law and current international customs. From an empirical viewpoint, it replaces the consensus of humanity – which, in point of fact, is obviously impossible – about extreme violations of human rights, in much the same way as a majority vote within a democratic state replaces, in some cases, the will of all the citizens.

8. At this point, we might consider a further distinction that, in my view, is worth bringing into play even though its role in the present context is only a minor one: the distinction between legitimation and legality. Although legality and legitimation are related, they are not the same thing. The legality of a humanitarian intervention presupposes a well-conducted procedure that, as a rule in case of armed conflicts, is backed up by a vote of the UN Security Council in favor of such intervention. However, legal proceedings need not represent the only way of legitimating an intervention, particularly if we consider how the Security Council actually works with some states (like Russia and US) in condition of putting a systematic veto on interventions they dislike. Besides, from a historical point of view, it should be noted that the few humanitarian interventions that have been successful, such as those made by India in Pakistan and by Vietnam in Cambodia, have been conducted wholly outside the mechanism provided by the UN. At other times, the urgency of the matter might instead require an immediate intervention, where there is no time to go through all the required procedures. In these cases, although illegal in a strict sense, an intervention may still be legitimate. This was the opinion of authoritative international agencies regarding the intervention in Kosovo – an opinion that, all things

considered, does not conflict with the theory (in Kosovo there was a unanimous NATO vote and the consent of the states in the region affected by the conflict).

In other words, although legality and legitimation are related, they are not the same thing. In view of the fact that legitimation is not a synonym of legality but, in any event, presupposes procedures, it may be said that the legitimation of a humanitarian intervention should not leave aside the concrete historical circumstances in which that intervention takes place. Given a strong presumption against the use of force, and given a general respect for national sovereignty, the utmost caution is required in ascertaining the legitimation of a humanitarian intervention.

Article VI and Article VII of the UN Charter lay down effective procedures to solve international conflicts, but it is unlikely that these procedures can allow an overriding of the principle of the respect for sovereignty. What are the historical circumstances that allow them to be so overridden? It is unquestionable that serious violations of the so-called “humanitarian law”, such as genocide, may form a basis for intervention. A justified intervention in defense of human rights and the protection of a democratic political regime is unquestionably more problematic.²⁰ However, even in these cases, and under the postulate of caution, there are cases that seem to give sufficient grounds for intervention.

The international practice and the presence of strong international organizations – such as NATO in the case of Kosovo - seem to be significant factors supporting a legitimation in cases of questionable legality of the intervention. In general, a state is legitimated by either a present or an upcoming attack by another state or organized group or by a threat to the principles that protect the life and integrity of the person. However, while in the former case the legitimation is direct, in the latter case the historical circumstances and the ability to represent the offended party (humanity as a whole) are necessary requirements.

9. The hypothesis being proposed may be subject to plausible criticism, in particular as follows:

- (i) One may not talk about a single justification based on a just war theory. There may be a number of different justifications and this complicates the picture to a considerable extent. This applies in particular when human rights are at the stake, given that different ethical-political conceptions offer different views of human rights. The matter is compounded even more by the prospect that different cultures might choose different views of human rights.
- (ii) The legitimation procedures that actually exist are mostly imperfect and conditioned by history. As an example, it suffices to consider how the UN mechanism works, beginning with the relations between the Assembly and the Security Council. Not only do relationships of strength determine too much of the legal procedures, but these relationships often fail to correspond to the real situation of today’s world.

²⁰ See the ICISS document entitled “The Responsibility to protect”, <http://www.responsibilitytoprotect.org/>.

I am aware of these limits, which are after all quite clearly stated in the version of the just war theory I have proposed here. On the other hand, every purely theoretical view must give way to a casuistic conception in the case of just war theory. In other words, the more one gets to the heart of the matter, the more the historical complexity of the case prevails over the theoretical simplification of the model.

10. Let us go to the case of the case of the American invasion in Iraq 2003. The acceptance of a just war theory, as a general outlook within which to place one's theoretical position, solves, in a way, a first problem. Even though all wars are abhorrent, they are not all the same and we may differentiate between them so that, while some are clearly unacceptable from a moral viewpoint, there are a few that are instead backed up by good reasons that need to be taken seriously. The distinction between justification and legitimation succeeds— in my view — in solving a second more specific problem. Saddam had actually committed atrocious violations of human rights, even though the United States mistakenly failed to appeal to them in order to wage war²¹. However, as far as we know, he did not threaten directly the peace and the security of the United States. Therefore, a unilateral attack of the United States against Iraq was not admissible from the point of view of legitimation, in the way that it had been in the case of US invasion of Afghanistan once it had been ascertained that the bases of Al Qaida were in Afghanistan. In other words, *a war against Saddam's Iraq was perhaps justified, but the United States were not legitimated in waging it*, as indeed they have done, unilaterally without plausible entitlement. There were actually good reasons to fight Saddam, but the United States was not entitled to do so. (the existence of good reasons is disputed. The major violations of human rights by Saddam that are known to us, for instance those connected with the attack against the Kurdish and Shiite populations, date back to 1991-2, which is ten years prior to the 2003 intervention. This may cause one to question not only the legitimation of the 2003 attack, but also its justness.)

To conclude: it is, as I have said, quite strange that such an obvious issue as legitimation and entitlement to wage war has not been raised up to now on more occasions. It is even more strange if we consider that Thomas Aquinas²² had already taken a first and important step in this direction. For this

²¹ We know from The National Security Strategy documents of the US that the asserted motivation was to preempt Iraq from using weapons of mass destruction, whose existence notoriously has never been proved. To quote these documents: " At the time of the Gulf War, we acquired irrefutable proof that Iraq's designs were not limited to the chemical weapons it had used against Iran and its own people, but also extended to the acquisition of nuclear weapons and biological agents...We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. ...Our comprehensive strategy to combat WMD includes:

Proactive counterproliferation efforts. We must deter and defend against the threat before it is unleashed. We must ensure that key capabilities—detection, active and passive defenses, and counterforce capabilities—are integrated into our defense transformation and our homeland security systems. Counterproliferation must also be integrated into the doctrine, training, and equipping of our forces and those of our allies to ensure that we can prevail in any conflict with WMD-armed adversaries. "

See George W. Bush, *The National Security Strategy of the United States of America*, Washington, The White House 2002, p.15 [Http://www.whitehouse.gov/nsc/nss.html](http://www.whitehouse.gov/nsc/nss.html)

²² A similar opinion is reported here with a pinch of salt and just with a view to drawing an ideal parallel. In fact, as far as we know, Thomas ended up by approving the crusades of his times, even though – I imagine – with the theoretical and practical concern that shows from what has been told in this paper.

reason, I believe that we should go back to treating the just war with in same spirit as Aquinas. As I have already pointed out, one of Aquinas' reasons was to avoid the outcome that a just war might turn into a holy war, meaning a crusade. At this point, we may hold that a crusade is nothing other than a war where the only concerns are the cause, rather than that of authorized authority, where the only thought is of justification, and not of legitimation. After all, the Bush jr. Administration in Iraq did something similar to what Aquinas feared: it endeavored to turn a war into a crusade. My attempt in this paper coincides with the rejection of such an option. This is a rejection that, unlike the position taken up by pacifists and realists, does not avoid a debate on values but, quite the opposite, aims to promote it. For the radical pacifists, Bush was wrong because whoever fights is wrong. For the realists, Bush was neither wrong nor right, because he did what any sovereign of the most powerful state in the world would do in his place, namely, whatever pleases him. Contrary to these views, I consider it more interesting to argue – as I have argued in these pages – that even if we take seriously the theory of the just war – a theory that can authorize war from a moral point of view – the American war in Iraq is not defensible.

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