The use of force to protect civilians and humanitarian action: the case of Libya and beyond

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Abstract

The Libyan crisis of 2011 has again raised the crucial problem of the choice of means in protecting civilians. Authorized by the international community as part of military operations in Libya, the use of force in protecting civilians has revived the concept of 'humanitarian war' and has raised a number of issues for humanitarian organizations, in particular concerning the notion of neutral, impartial, and independent humanitarian action.[1] The article focuses on these humanitarian issues and, inter alia, on the possible impact on humanitarian action of the concept of the Responsibility to Protect (R2P), which was at the basis of the intervention in Libya.

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After street pressure had toppled the governments of neighbouring countries, a popular uprising also took place in Libya. The first demonstrations demanding Muammar al-Gaddafi's departure took place in the city of Benghazi on 15 February

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2011 and were severely repressed. This was the beginning of the escalation of violence leading to the adoption of two resolutions of the United Nations (UN) Security Council and a military intervention of foreign forces in Libya to 'protect the civilian population'.

On 17 March 2011, the Security Council adopted Resolution 1973 authorizing the use of force in Libya.[2] While Germany, Brazil, China, India, and Russia abstained, the resolution drafted by France and the United Kingdom and co-sponsored by Lebanon and the United States received ten favourable votes out of fifteen (South Africa, Bosnia and Herzegovina, Colombia, France, Gabon, Lebanon, Nigeria, Portugal, the United Kingdom, and the United States).

Focusing on protecting the civilian population, Resolution 1973 called for an immediate cease-fire and the complete cessation of violence against civilians. It authorized Member States to take all necessary measures to protect civilians under Chapter VII of the UN Charter, while excluding any form of occupation of Libyan territory.[3] In addition, it allowed Member States to take all measures required to implement the flight ban over Libyan airspace (the 'No-Fly Zone'). Finally, the text strengthened the arms embargo, banning flights of Libyan airlines and freezing Libyan financial assets such as those already defined in Resolution 1970 of 26 February 2011. Implicitly underlying this call for the protection of civilians was the concept of the Responsibility to Protect (R2P), although the R2P concept was not always explicitly raised in the debates leading to the adoption of the resolutions.

Written a few months after the end of military operations undertaken following the adoption of Resolution 1973, this article aims to identify some of the lessons that can be drawn from the Libyan crisis, particularly in regard to the effects on humanitarian action and to discourse on the use of the notion of civilian protection. The article also initiates an examination of issues of importance to humanitarian actors attached to a neutral, independent, and impartial action. Far from any moral stance counterposing the actions of political and humanitarian actors, the essential intention is to highlight the care needed in the use of the concepts 'humanitarian action' and 'protection of civilians', whose meanings and implementations can sometimes be fundamentally different.

In the first section, we unpack the meaning of R2P and place it in the context of armed intervention in Libya. We then address a series of topics with political or operational importance for humanitarian actors, including the value and usefulness of the principles of impartiality, neutrality, and independence.

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1   A much debated and controversial notion, in particular during the Kosovo war. This use of the term 'humanitarian' to qualify and even justify the use of armed force is of great concern to many humanitarian actors who base their actions on agreement between parties. On this topic, see Cornelio Sommaruga (the former ICRC President), 'Il n'y a pas de "guerre humanitaire"', paper given at 'Le droit international humanitaire au seuil du troisième millénaire: bilan et perspectives' conference, 30 October 1999, Geneva, available at: http://www.horizons-et-debats.ch/9_10/cicr/pas%20de%20guerre%20humanitaire.htm (last visited October 2011).

2   See UNSC Res. 1973, 17 March 2011.

3   Chapter VII of the UN Charter (arts 39–51), entitled 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression', is the chapter authorizing the use of force.

Finally, we explore the different options for future use of armed force in protection of civilians.

The Responsibility to Protect (R2P), the protection of civilians, and Resolutions 1970 and 1973

Review of the R2P concept

Origins

The lack of an international response capable of preventing the mass slaughters of the late twentieth century (Rwanda, Liberia, the former Yugoslavia, and so on) has fuelled the idea that the protection of civilians should be seen as an inescapable moral imperative and a collective responsibility of states.[4] In response to a clarion call by the UN Secretary-General Kofi Annan at the General Assembly, in September 2000 the Canadian government and a group of major foundations announced the creation of an International Commission of Intervention and State Sovereignty (ICISS).[5] This commission's role was to support the discussions in the UN on the Responsibility to Protect. The International Crisis Group, led by its President, Gareth Evans, was a driving force in formulating the concept, which, while referring to the 'right of intervention' developed by Bettati and Kouchner,[6] saw the question from the angle of sovereignty having responsibilities and as one that was not built solely around interventionist logic.

In 2005, the World Summit Outcome Document finally presented the concept of R2P, a minimal agreement between states after long and arduous negotiations.[7] Although this concept targeted a variety of situations including, but not limited to, armed conflict, a link was specifically made to Security Council procedure in 'Protection of Civilians in Armed Conflict'.[8] Indeed, in 2006, Security Council Resolution 1674 on protection of civilians in armed conflict directly referenced the 2005 text.[9] This resolution attempts to reconcile national

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4   UNGA Res. 43/131, 8 December 1988 and 45/100, 14 December 1990, vectors of the right of intervention, already presented a dichotomy between the responsibilities of the state on whose territory the violations were committed and those incumbent upon the community of states.

5   Kofi A. Annan, 'We the peoples: the role of the united nations in the twenty-first century', UNGA Doc. A/54/2000, 27 March 2000: 'if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how *should* we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?', available at: http://unpan1.un.org/intradoc/groups/public/documents/un/unpan000923.pdf (last visited December 2011).

6   Mario Bettati and Bernard Kouchner, *Le devoir d'ingérence*, Editions Denoël, Paris, 1987; Mario Bettati, *Le droit d'ingérence*, Éditions Odile Jacob, Paris, 1996.

7   See 'The 2005 World Summit', High-level plenary meeting of the 60th session of the General Assembly, 14–16 September 2005, available at: http://www.un.org/summit2005/ (last visited October 2011).

8   The 'Protection of Civilians in armed conflicts' (PoC) brings together all the measures taken in conflicts and aimed at protecting civilians, measures rooted in the provisions of international humanitarian law (IHL), human rights, and rights of refugees. The PoC has been an established concept in the thematic agenda of the UN Security Council since 1999.

9   See UNSC Res. S/RES/1674, 28 April 2006, para. 4.

sovereignty – a cardinal principle of international law dear to emerging countries – and the controversial 'right or duty of humanitarian intervention'.

Principles

R2P provides that every state has the primary responsibility of protecting populations within its jurisdiction against acts of genocide, war crimes, ethnic cleansing, and crimes against humanity. However, if the concerned state is unable or reluctant to stop these crimes, the international community as a whole has a collective and subsidiary responsibility to take appropriate measures to 'protect the civilian population' who are victims of war crimes, crimes against humanity, genocide, or ethnic cleansing. Specifically, R2P rests on three pillars: first the re-sponsibility of each state; second, the responsibility of the international community to support a particular state in exercising its responsibility to protect its people; and finally, in cases where a state fails in its duty, the responsibility of the international community to take diplomatic, humanitarian action or other means to stop these violations. While initially non-violent, these additional measures may be extended to armed or unarmed coercive means, as authorized under Chapter VII of the UN Charter. According to those who developed R2P, responsibility for the use of force should be guided by strict criteria: seriousness of the harm done to the population; a just cause for intervention; intervention as a last resort; proportionality of the means used and an assessment of its consequences.[10] While these criteria were also in the report of the UN Secretary-General in 2005, they were not, however, included in the outcome document of 2005 which founded the R2P, and as such are not formally attached to the concept, which does not detract from their relevance, as we shall see below.

Two further points should be emphasized. R2P is a political concept and is not and does not purport to be a new norm of international law, while basing its arguments on the existing body of such laws. Furthermore, R2P is not a new label aimed at authorizing military intervention, and is primarily focused on preventive efforts.

Resolutions 1970 and 1973 and the use of force

Resolutions 1970 and 1973 clearly concern the situation covered by the third pillar of R2P. Indeed, the two resolutions were adopted under Chapter VII of the UN Charter, which provides for the use of coercive means 'in case of any threat to peace, breaches of the peace or acts of aggression'.[11]

Resolution 1970 referred the Libyan case to the International Criminal Court, and provided for both an arms embargo against Libya and also a travel ban and an asset freeze for those involved in violations of human rights (including

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10   Criteria established in 2001 by the ICISS, which brought together members of the UN General Assembly.
11   UN Charter, Art. 39.

attacks against civilians).[12] Only persons linked to the Gaddafi regime were targeted by the latter measures.

Resolution 1973 reaffirmed the objectives of Resolution 1970, giving even greater emphasis to the concept of 'protection of civilians' in the preamble of the resolution.[13] Moreover, a specific paragraph of the resolution is dedicated to this question and authorizes governments to use all means, including force, to protect civilians in Libya.[14] It is interesting to note that the resolution assigns a central role to a regional organization, the League of Arab States, for the implementation of measures related to the protection of the civilian population and the no-fly zone.[15]

The objectives and rationale for intervention

Resolutions 1970 and 1973 create a sort of amalgam between 'humanitarian' objectives and other political considerations such as 'the legitimate demands of the Libyan people vis-à-vis the necessary reforms'. It is symptomatic that, on several occasions, the notion of a 'just' or a 'humanitarian war' has reappeared, particularly in the European press.[16] It has even been said by many analysts that, for the first time, the conditions for a 'just war' had been brought together, and some were pleased to see 'the UN finally acting': a war whose purpose was to protect civilians would be just, and the validation by the UN would give it the legality and additional legitimacy that the intervention in Kosovo had only timidly been granted and that *ex post facto*. At the same time, however, critics of the operation condemned this principle of a 'just war', which could be declared only by the discretionary authority of the great military powers and which would not be free from ulterior motives aiming at regime change. Those government leaders most active in implementing the resolution did not hide the fact that, in their own words, 'Gaddafi has to leave'.[17] This unequivocal position concerning the political future was not translated, during the first few months of the intervention, into military actions

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12 See UNSC Res. 1970, 26 February 2011, available at: http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4d6ce9742 (last visited June 2011).
13 See UNSC Res. 1973, above note 2, preamble.
14 *Ibid.*, para. 4.
15 *Ibid.*, para. 8.
16 The doctrine of 'just war' is a conceptual model defining the conditions under which war is a morally acceptable action. There is a moral philosophy of war that has been developed since ancient times and conceptualized from the fourth century by Christian thinkers such as Thomas Aquinas. In modern times, Michael Walzer considers that, to be just, war must be undertaken only as a last resort; the probability of success must be greater than the damages inflicted; violence committed in the conflict must be proportionate to the damage inflicted; and civilians must be distinguished from the military aggressors. The ultimate goal of a just war is to restore peace. See Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977, with further editions in 1992, 2000, and 2006.
17 Common letter of Presidents Obama and Sarkozy and Prime Minister Cameron published in *Le Figaro, The Times, The International Herald Tribune, The Washington Post*, and *Al-Hayat*, 15 April 2011. See also the US State Department Press Release, 23 May 2011 (AFP), indicating that 'the United States remains committed to protecting Libyan civilians and believes Qadhafi must leave power and Libya', available at: http://188.93.97.21/headline/assistant-secretary-feltman's-travel-benghazi-libya (last visited December 2011).

that would have ostensibly demonstrated a desire to eliminate the Libyan leader. However, it would be difficult not to recognize that, over the course of the operation, the military as well as the diplomatic activities of the coalition strongly converged with a goal of regime change. Parallel to the military pressure that gradually neutralized the capacity of those loyal to the regime, the Libya Contact Group demanded at every opportunity, starting with its second meeting (Rome on 5 May, Abu Dhabi on 9 June, and Istanbul on 15 July), the end of the regime, in words generally formulated as follows: 'Gaddafi (and his family) and his regime have lost all legitimacy'; 'They must go so that the Libyan people can determine their own future'.[18]

The implementation of Resolutions 1970 and 1973

Military operations

Abstentions during the Security Council vote indicated that some governments already had reservations about implementing the protection of civilians by force. From the beginning of operations, tensions emerged within the international community concerning what Resolution 1973 specifically allowed.

In view of the real development of operations and of what we now know, it appears that the notion of civilian protection was extended beyond its initial conception as expressed in the resolution, applying military and political objectives that had only an indirect link to threats to the civilian population. Indeed, it appeared that the military operations, at least in part, were aimed at supporting the forces assembled by the National Transition Council (NTC) – the representative body of the Libyan opposition – in its efforts to rout the elements loyal to the regime. Once the threat of a massacre in Benghazi had been ruled out, but with actions by Gaddafi's troops against other cities continuing, the operations entrusted to the North Atlantic Treaty Organization (NATO) continued, with an increasingly blurred line between the prevention of massacres on the one hand and, on the other, a systematic air campaign that aimed to dismantle the military apparatus and whose ultimate goal was regime change.

With the risk of getting bogged down, the contact group initiated other actions: arming the rebellion and sending it military advisors; sending it financial support through the creation of a fund supplied, in part, by the regime's frozen assets; repeated and solemn calls for Gaddafi's departure; growing recognition of the legitimacy of the rebel movement represented by the NTC. It became clear over the months that the coalition's objective was the collapse of the Gaddafi regime, finally

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18   The Libya Contact Group was a coalition of forty countries and international organizations entrusted with the political leadership of the implementation of the military campaign launched in the framework of Resolution 1973. The Contact Group brought together the contributors and supporters of the intervention and six international institutions, including the UN, the European Union, the North Atlantic Treaty Organization, the Organization of the Islamic Conference, the League of Arab States, and the Gulf Cooperation Council, the last three having observer status until the July meeting.

considering this objective as one of the 'necessary measures to protect civilians and civilian populated areas under threat of attack'.[19] The increasing pressure from NATO and its air raids not only weakened the offensive capacity of loyalist forces but also gradually undermined their ability to respond to the actions of the armed opposition. The fall of Tripoli on 22 August did not put an end to NATO forces' effective support of the continuing armed action of NTC, which continued until the surrender of Sirte and the last bastions of Gaddafi supporters, even after the death of the Colonel himself.

So we see that – in the Libyan case at least – the 'protection of civilians' was open to a very broad interpretation, going far beyond its originally declared objectives and provoking a strong, though expected, reaction from those governments that felt they had been forced into not opposing the adoption of Resolution 1973, namely Russia and China.

The perception that the legitimacy of the use of force to 'protect civilians' had been distorted also divided the international community. Evoking this protection in a campaign based on Chapter VII to justify operations whose objective seemed more and more clearly oriented towards the overthrow of Gaddafi's regime by supporting the rebel forces had cast doubts not only on the intentions of the protagonists but also on the validity of the principle of using force to protect civilians.

The attempt to establish a military–humanitarian operation

Another episode deserves some reflection, namely the unrealized project of using armed force, this time not to protect civilians but rather to facilitate the delivery of humanitarian aid. In the first months of the operation, the possibility of military backing for humanitarian assistance received growing support in the face of the resistance of loyalist forces and the fear of losing access to affected populations caught in the midst of the conflict. Several initiatives were undertaken, such as a unilateral action in early April 2011 by British, Turkish, and American marines in a co-ordinated evacuation of civilians and wounded from Misrata, and the construction of the European Union Force–Libya (EUFOR Libya) a European project for a humanitarian operation supported by military means. The decision to create EUFOR Libya was taken on 1 April 2011, in preparation for possible intervention to support humanitarian assistance in the area if so requested by the UN Office for the Coordination of Humanitarian Affairs (OCHA). Although not deployed in the field, EUFOR Libya was assigned an operational headquarters in Rome and headed by an Italian rear-admiral. The operation's aim was to ensure the safe movement and evacuation of displaced persons, as well as to use its specific capabilities in support of the activities of humanitarian agencies. There was tremendous pressure from European states, some of which were themselves contributors to allied military operations, for the UN Secretary-General to activate the European offer to provide military support

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19   UNSC Res. 1973, above note 2, para. 4.

to humanitarian action. Nevertheless, the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator, Valerie Amos, refrained from using this military operation, considering it unnecessary and to be used only as a last resort.

The strong position of the humanitarian branch of the United Nations was maintained until the end. This episode is nevertheless symptomatic of a growing tendency to consider the use of armed force for logistical and occasional security support of humanitarian action. In terms of civil–military relations we can expect, however, that the Member States will propose new projects such as EUFOR Libya. These attempts developed for the Libyan case represent one more manifestation of a trend applicable to other contexts. This trend points to undertaking humanitarian action with the strong support of military action, thus depriving humanitarian action of its strictly civilian character.

The concerns for humanitarian action

The explicit legitimization of the use of force in preventing serious violations raises a number of concerns, which we propose to group under four main themes:

– international humanitarian law (IHL) and the use of armed force to protect civilians: specific issues;
– the politicization of the concept of protection of civilians;
– the public positioning of humanitarians concerning the armed component of R2P;
– the value of the humanitarian principles of impartiality, neutrality, and independence.

IHL and the use of armed force to protect civilians

The situation in Libya on the eve of the vote on the resolution presaged a bloody crackdown on the population of rebellious Benghazi, which statements of the regime did little to conceal: Gaddafi bluntly declared on 17 March 2011 that his forces would show no mercy and no pity for the insurgents.[20]

The fact that the UN Security Council sought to ensure the physical protection of civilians at risk cannot be criticized in and of itself. One might congratulate the commitment *in extremis* of the international community in trying to prevent massacres, which in the past would have been committed with impunity amid general helplessness. While the consensus that led to coalition military operations had been obtained on the basis of quite a fragile agreement, it had nonetheless been developed within the framework of the UN and with consultation

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20 See 'Frappes aériennes ou pas, Kadhafi menace Benghazi', *L'Express*, 17 March 2011, available at: http://www.lexpress.fr/actualite/monde/frappes-aeriennes-ou-pas-kadhafi-menace-benghazi_973573.html?xtor=x (last visited October 2011).

with the regional bodies most concerned. This was an action that many considered to be perfectly legal from the standpoint of international law, at least in terms of the decision-making process that had been followed.

It is interesting at this stage to consider the use of armed force in terms of IHL. International humanitarian law, or *jus in bello*, regulates how war is waged. Having a purely humanitarian mission, this branch of law aims to limit the suffering caused by war, regardless of considerations relating to its justifications or motives, or to prevent war, as covered by *jus ad bellum*.[21] While the decision to resort to the use of force remains a matter of *jus ad bellum*, which has no basis in *jus in bello*, the combination of Article 1 common to the Geneva Conventions 1949 and Article 89 of the Additional Protocol I of 1977 form a point of contact between *jus ad bellum* and *jus in bello*.[22] Part of the legal doctrine, including the ICRC Commentaries to Additional Protocol I, in fact recognizes the opportunity provided by the combination of these two articles to use force to stop violations of IHL to the extent that this is done in the framework of the UN Charter.[23] While this interpretation is disputed, at least we can note that nothing in IHL prohibits the use of armed force in implementing the obligations contained in the above articles, provided that this is done in compliance with the Charter. This does not mean that IHL can be considered as providing a legal basis for the use of force, which is solely the prerogative of the UN Charter. The measures implementing the obligations described in Common Article 1 to the Geneva Conventions concern states, both independently and through the collective security mechanism described in the UN Charter. Civilian protection, being the first responsibility of governments, may if necessary – when the state does not fulfil its responsibility – be 'transferred' to the international community and assumed by them. If this responsibility is made effective through the use of armed force, such use of force must obviously comply with the relevant rules of IHL.

As in any military action, it is obvious that military actions with the stated goal of protecting civilians must be conducted with the utmost respect for civilians and in accordance with the relevant rules of IHL. It therefore appeared essential, in the case of Libya, to establish a regular and serious consideration of how the war would be conducted. For humanitarian organizations devoted to ensuring respect for the life and integrity of those affected, and particularly for the International Committee of the Red Cross (ICRC) in its capacity as guardian of IHL, the challenge was how to accomplish such a task. This is the necessary basis in the development of

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21 See ICRC, 'IHL and other legal regimes: jus ad bellum and jus in bello', 29 October 2010, available at: http://www.icrc.org/eng/war-and-law/ihl-other-legal-regmies/jus-in-bello-jus-ad-bellum/overview-jus-ad-bellum-jus-in-bello.htm (last visited December 2011).

22 Geneva Conventions, Common Article 1: 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'. Additional Protocol I (AP I), Art. 89: 'In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter'.

23 See Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977*, ICRC/Martinus Nijhoff Publishers, Geneva, 1987, paras. 3597–3599.

a credible IHL dialogue concerning the respect for IHL and the conduct of hostilities based on law and informed by the facts.

Thus, the ICRC sent numerous memoranda on IHL rules to all the protagonists, including the Libyan government, the armed opposition as represented by the NTC, members of the coalition, and NATO. These memoranda on humanitarian law were made at various times, as a function of the changing situation. They concerned the protection of those who took no part in, or were no longer taking part in, hostilities; the conduct of hostilities; the respect for medical missions; and the treatment of missing persons and the dead.

In addition to these memoranda we should also note how, from the opening of hostilities, the ICRC was able to contribute rapidly to a code of conduct for combatants in the armed opposition concerning obligations relating to compliance with IHL.[24]

The politicization of the protection of civilians

It is perhaps appropriate to recall the obvious fact that the concept of protection is not the sole prerogative and responsibility of humanitarian action. Physical protection against a recognized imminent danger unquestionably exceeds the possible scope of action of humanitarian organizations when a state explicitly declares its intention of not respecting its obligations.

In the political-mediatized environment of the Libyan crisis, the notion of protection of civilians has increasingly been associated with political and military actors – not only national but also international. The rationale developed to justify the use of armed force relies on the notion of civilian protection. But this notion, which is also central to *jus in bello*, is only concerned with the humanitarian aspects of conflict and not with the reasons for or the legality of the use of force. It lies outside politics, while *jus ad bellum*, which tries to limit the use of force between states, is at the centre of political debate within the collective security mechanism of the UN. Thus, we see that the same concept – the protection of civilians – is used alternately and simultaneously in fundamentally different fields: one resolutely detached from politics and the other impregnated with it.

Resolution 1973 and the ensuing armed action therefore derive from a political decision. Protection through the respect of IHL lies in the legal field. The measures prescribed by IHL are to be applied by all parties from the start of armed conflict, and the obligatory provisions of international human rights law (such as the right to life, prohibition of torture, and guarantees of due process) are applicable at all times. The value and application of these rules should not be affected by uncertainties about the legal significance of the concept of R2P or by its excessive politicization. The assessment of the applicability of IHL has in itself

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24 For the text of the code of conduct, see 'A collection of codes of conduct issued by armed groups', in *International Review of the Red Cross*, Vol. 93, No. 882, June 2011, pp. 497–500, available at: http://www.icrc.org/eng/resources/documents/article/review-2011/irrc-882-codes-conduct.htm (last visited December 2011).

no relation to the decision process leading, or not, to launching an intervention to protect civilians by decision of the UN Security Council, whether or not this is done in reference to R2P. As a result, by limiting the argument to IHL alone, the efforts taken to promote its implementation are necessary from the beginning of armed conflict (and even earlier, from the point of view of prevention). This is true, regardless of possible controversies surrounding the consideration of military intervention, as was the case with Libya. Thus, when the ICRC or another organization supporting IHL invokes the protection of civilians, such a call is first and foremost aimed at the parties to the conflict and should not be perceived as a call for the use of force by external forces, even if this came with a UN blank cheque. Therefore, there are real stakes in ensuring that the efforts for implementation of IHL are not derailed by debates related to the political interpretation of the notion of civilian protection in the resort to the use of force, whether or not reference is made to R2P.

As a result, humanitarians must be constantly concerned to avoid confusion regarding the concept of protection of civilians. Such confusion could be harmful to organizations such as the ICRC, which work tirelessly to promote the concept of protection of civilians in armed conflict by convincing governments and parties directly responsible to meet their obligations as codified by IHL. These organizations pursue an approach that seeks to limit the dangers to which civilians are exposed and to stop or prevent abuse by putting violations under conventional and customary standards. The implementation of this protective action is significantly different from that invoked in the context of *jus ad bellum*, which undertakes coercive action by mixing juridical principles with considerations that have a political and diplomatic echo and may also arise from a sense of moral imperative.

The public positioning of humanitarians as to the use of force to protect civilians

Humanitarians may demonstrate in both word and deed the specific protection activities that they have undertaken, but this may still be insufficient for them to avoid positioning themselves on a topic such as the armed intervention in Libya. In fact, humanitarian actors face the dilemma of taking a public position over the use of force to protect civilians. Considering the politicization and the intellectual web of concepts and principles open to various interpretations and applications, humanitarians find this a difficult question in communication, but probably one that it is impossible to avoid. Humanitarian actors must therefore distinguish themselves by supporting their strictly humanitarian interpretation of principles and concepts to which others apply various meanings. Humanitarian organizations that present themselves as 'principled' – that is to say, that base their actions on the principles of impartiality, neutrality, and independence, and are sometimes categorized as 'dunantistes' – find themselves in an uncomfortable position. From a moral standpoint, as well as in the name of consistency with regard to principles, many of them cannot or will not legitimize or openly call for military action, even when its sole objective is that of protecting civilians. Such a call would taint their overall

capacity for action linked to their being seen as neutral. But neither can they condemn such action on its merits because it might give the impression that they denied the existence of the physical danger that a part of the population would confront (while being powerless to remedy it) or that they challenged the objective merits of certain aspects of the action (such as NATO's efforts to maintain mine-free access to the port of Misrata throughout the siege of the city by loyalist troops between April and August 2011). A position that would amount to challenging the decisions of the international community expressed through the voice of the UN Security Council would not only be totally misunderstood by the affected population and much of the international community but would also be politically difficult to sustain in the international arena and questionable in terms of the interpretation of law.

The least dangerous road for humanitarians would probably be to keep to a division of roles (*jus ad bellum* – use of force and R2P – for governments, versus *jus in bello* – IHL – for humanitarians), leaving discussions more or less touching on the broader interpretation of the protection of civilians to politics and states. This would seem particularly suitable vis-à-vis the concept of R2P, as an illustration of protection of civilians specifically aimed at states. This restrained approach is probably the most viable diplomatically, helping humanitarian organizations to avoid being caught in the 'crossfire' between those states that are resolutely sceptical and intransigent concerning the concept of sovereignty and other states defending the legitimacy of the principle of challenging absolute state sovereignty.

Beyond these concerns, in different ways according to their mandates, missions, and specific identities, the humanitarian organizations may also warn that any form of armed intervention is risky, that it should probably be initiated only as a last resort, and that it must take into account the protection of persons, as provided by law.

Specifically it would be possible to highlight the perverse and unintended effects of such interventions. In the short term, such effects may include collateral damage linked to military operations and the risk of reprisals on civilians far greater than the evils that such operations were meant to prevent. Long-term effects might include the emergence of a damaging amalgam with the notion of protection afforded by the *jus in bello* and a subsequent weakening of the law, endangering humanitarian actors or limiting their ability to intervene, and the growing distrust of states concerning the notion of protection in general.

Divergent views

In conclusion, by reviving fears raised in the theoretical debates of the 1990s and 2000s around the concepts of right and duty to intervene and R2P, Resolution 1973 has also brought to light the issue of politicization of humanitarianism, when humanitarian action is perceived to be, and sometimes used as, a vector of foreign policy or expansion of power.

Some states, primarily Western ones that are the most active promoters of R2P, believe that the use of force for humanitarian purposes is a duty in certain

circumstances (its being a convergence between a duty to intervene and the concept of 'just war').[25]

Emerging countries, often in the stage of asserting their power, as well as those who are champions of respect for national sovereignty and territorial integrity such as China and Russia, have a visceral distrust vis-à-vis R2P and therefore consider the humanitarian argument as a pretext for justifying any kind of intervention (military or not) in the internal affairs of other states. On the one hand, humanitarian aid is invoked as an opportune expedient of a broader policy. On the other hand, the same humanitarianism is associated with a general disapproval of a policy deemed at best too intrusive, and at worst decidedly neo-imperialist. In both cases, humanitarianism is undermined.

Having established this amalgam or misuse of the concept of humanitarianism, we propose to consider the confusion that sometimes arises concerning the principles of humanitarian action, principles that today are more relevant than ever.

Humanity, neutrality, impartiality, and independence: imperfections and approximations in implementing principles that remain essential

As seen above, in some situations the commitment of military resources is considered by some as the only way to save lives. On the eve of the adoption of Resolution 1973, Libya became recognized as one of these cases. The space in which humanitarian organizations operated thus became a polymorphic one, in which a very diverse range of actors coexisted, each one with its unique motivations, acting according to its own operational methods. Activities described as 'humanitarian' but performed by non-humanitarian actors easily generate confusion, since they attribute the same label to different approaches and intentions. In a Briefing Note of May 2011, the Overseas Development Institute (ODI) concluded its presentation as follows:

> In Libya, as in Afghanistan, Iraq and Pakistan, any blurring of lines between humanitarian, military and political objectives may have a deep impact on the civilian population, ultimately jeopardising efforts to achieve the shared objectives of saving lives and delivering assistance.[26]

The main risk for the traditional humanitarian worker is having his or her perception blurred by the confusion of interests, objectives, and mandates of a plurality of actors, putting access or safety in jeopardy; hence the repeatedly engaged battle over the right to use – or to abuse – the term 'humanitarian' so as to preserve a space for a strictly humanitarian action, namely one which is impartial, neutral, and independent. However, confusion also exists within the community of

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25 Michael Walzer, for example, says: 'I do believe that there are just and even morally necessary wars'. See his interview with Dominique Simmonet, 'Michael Walzer: "La guerre contre la terreur ne peut pas être unilatérale"', *L'Express*, 25 October 2004, available at: http://www.lexpress.fr/culture/livre/la-guerre-contre-la-terreur-ne-peut-pas-etreunilaterale_820027.html (last visited December 2011).
26 Overseas Development Institute (ODI), 'Friend or foe? Military intervention in Libya', Briefing Note, May 2011, available at: http://www.odi.org.uk/resources/docs/7119.pdf (last visited December 2011).

humanitarian actors. Above and beyond a semantic controversy over nuances in the definitions of humanitarian principles, the question is to consider the considerably varied application that is made of these principles.

Influenced by the ICRC's work in mobilizing around these action principles, by the specific history of some of the non-governmental organizations (such as Doctors without Borders), and finally as the result of their official recognition in the UN humanitarian resolutions of 1991[27] and 2004,[28] the principles of humanity, neutrality, impartiality, and independence have been proclaimed as pillars of humanitarian action. This is so much the case that, for some proponents of humanitarianism, these principles are presented as the necessary frame of reference of 'real' and genuine humanitarian action.[29]

This practice of labelling humanitarian action clashes with reality. In Libya, as in other contexts, the zeal with which humanitarian actors as a whole (UN agencies, non-governmental organizations) have verbally defended the principles of independence and neutrality has not always been confirmed in practice.[30] The humanitarians of the United Nations, naturally the most exposed to an amalgam with their political and military wing, have indeed tried to maintain an autonomous space and distance themselves from the political process of the UN. To this end, they invoked the principles of neutrality, impartiality, and independence and have made themselves the representatives of the entire humanitarian world. This is not a peculiarity of the Libyan conflict. It can be seen wherever humanitarian actors strive to present their activities as neutral and independent, whether or not they are intentionally related to processes that are not strictly humanitarian, such as political or judicial processes. It is to be feared that this distortion, which is not due merely to the Libyan context, will gradually weaken the value of these principles themselves.

Ultimately, is it appropriate for humanitarian actors to continue in an unclear way along the lines of continuous and uniform support of 'principled' action? The reality of a universal humanitarian model based on these principles is often no more than rhetoric. Rather than insisting on respect for humanitarian principles for all humanitarian action, would it not be more appropriate to recognize the coexistence of various humanitarian projects, some 'principled' and others not, without necessarily making value judgements? In this sense, a reflection on the part of humanitarian actors on humanitarian principles appears more

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27 UN General Assembly Resolution AG 46/182, 19 December 1991.
28 UN General Assembly Resolution AG 58/114, 5 February 2004.
29 For instance, the UK's humanitarian policy makes a series of commitments to respect humanitarian principles of humanity, impartiality, neutrality, and independence. See Department for International Development, (DFID) 'Humanitarian principles and policy', available at: http://www.dfid.gov.uk/what-we-do/key-issues/humanitarian-disasters-and-emergencies/humanitarian-principles-and-policy/ (last visited October 2011). For OCHA, humanitarian principles provide the fundamental foundations for humanitarian action; see OCHA, 'What are humanitarian principles?', available at: http://ochanet.unocha.org/p/Documents/OOM_HumPrinciple_English.pdf (last visited October 2011).
30 See, among other declarations, Valerie Amos's statement to the Security Council on the Libyan humanitarian situation, 9 May 2011, available at: http://ochanet.unocha.org/p/Documents/USG%20Amos%20briefing%20to%20the%20Security%20Council%20on%20Libya_9%20May%202011.pdf (last visited October 2011).

justified and even more desirable than ever.[31] Perhaps this would help shape the dialogue with other actors and help build bridges to them, including to local communities and new actors from the private sector. This would certainly help clarify the coexistence of various actors within an inevitably plural and shared humanitarian space.

Finally, the Libyan episode demonstrates the functional requirements, going beyond speeches or positions, required by an action truly based on the principles of neutrality, independence, and impartiality. It also demonstrates the possibilities that these requirements, when duly observed, open in terms of access to populations. For, while impartiality is a fundamental – one might call it an ethical – requirement of humanitarian action, it is, alongside 'humanity', the only legal requirement under the Geneva Conventions and their Additional Protocols. Neutrality and independence arise as principles of action. These principles help humanitarian actors build the necessary acceptance among the population and the various interested parties in a given situation.

The future of 'humanitarian war': different interpretations of R2P and the confirmed relevance of IHL following the events in Libya

Was the war in Libya 'humanitarian'?

Since one of the rationales for this article is to recall that words have meaning, it would be appropriate to consider at this point whether it is legitimate or unjust to describe the intervention in Libya as 'humanitarian'. The question is: can a military engagement with the explicit goal of saving lives be described as 'humanitarian'?

Consideration of two criteria may provide clues in answering this question: the motivation (intention) and the impartiality of the 'military humanitarian' action. On the one hand, the motivation should not hide other objectives such as political or military aims under a humanitarian label. On the other hand, the underlying principle of the relief and protection aspects of the action must be that of impartiality, the cardinal principle from which every actor claiming to pursue humanitarian action should not deviate. In the case of the Libyan intervention, we should therefore assess the conduct of military actions from March to November 2011 in the light of these two criteria of motivation and impartiality. An appreciation of the real motivation can be developed based on an examination of the facts, as well as of the discourse and positions taken by the coalition members. In this case, although NATO communications with the monitoring committee of the UN continued to justify its entire operation as intended for the protection of

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31 Simon Schorno, 'MSF on the politics of humanitarian action', *Intercross* weblog, 27 January 2012: '[Michael] Neuman explains why an honest debate about the realities of humanitarian action is today necessary and healthy, not only for MSF but for all humanitarian actors', available at: http://intercrossblog. icrc.org/ (last visited January 2012).

civilians, its political statements regularly advocated regime change, without anyone being reasonably able to make a direct and permanent link between the alleged need for such regime change and the need to protect civilians from imminent danger. Even for a casual observer, not all the military operations seemed to have a direct link to the prevention of acts against civilians.

As for impartiality, some voices were raised denouncing violations against civilians or non-combatants by soldiers of the armed opposition, whether they were due to individual acts or were the result of military tactics that did not sufficiently spare civilians. It is not the purpose of this article to review these allegations. In addition, without further research it would be difficult to determine whether or not a particular action of the coalition was able to halt or to interrupt these attacks on the civilian population, and the aim should be to measure carefully the efforts made by the forces of the NTC regarding distinction and proportionality. One thing is certain, however: to our knowledge, and thus without full knowledge of the range of actions and intentions, it was never considered a possibility to carry out the coalition's mission to protect civilians in the case of civilians threatened by the actions of the armed opposition. It can therefore be argued that, given the information at our disposal and in the light of the criteria of motivation and impartiality, the operation launched by Resolution 1973 cannot be described as 'humanitarian', although it was partly intended to save lives.

It is therefore important to recognize that the same terminology – namely the protection of civilians – can, on the one hand, support politico-military actions and, on the other hand, partly be a main focus of 'humanitarian' action with fundamentally different realities and principles. This finding does not mean that there is no sustainable moral case for Resolution 1973, as seen above with the notion of a just war, or that, in its application – which certainly was neither neutral, nor impartial, nor humanitarian – Resolution 1973 did not produce clear positive effects for the protection of civilians. It simply means that, in the light of an examination of the intentions and impartiality of the action, it would certainly be wrong to talk of the intervention as 'humanitarian'. To this, one should also add that the humanitarian approach, which bases its action on the agreement of the concerned parties, is fundamentally antithetical to the use of armed force, even more so when it is directed against a particular camp. Finally, recalling in addition that any war claims lives, we can conclude that, even if the primary motive of a war was to put an end to serious violations of human rights and of international humanitarian law, this would not be sufficient to make it a 'humanitarian war'.

What about the principle of R2P following the Libyan crisis?

Without expressing an opinion on whether the Libyan operation was an R2P operation or simply a use of force with the aim of protecting civilians through the utilization of means of restoring peace and international security, we note that R2P has been so widely debated that it raises the question of the impact that the Libyan crisis may have had on this concept. Differences of opinion are particularly sharp. Most analysts, while conceding that the launching of the operation was almost

a textbook case for R2P, consider that it subsequently deviated from this principle.[32] Nevertheless, their conclusions differ widely. In late October 2011, Marcel Boisard, former Assistant Secretary-General of the United Nations, wrote:

> Nothing has been respected. No real negotiations towards a ceasefire have taken place. The exclusive control of the air was used to support the insurgents. Protection of civilians was the pretext to justify any operation. . . . It was no longer a question of protection, but of regime change. . . . The principle of 'responsibility to protect' died in Libya, just as 'humanitarian intervention' died in Somalia in 1992.[33]

While stressing the moral hazard of the notion of R2P in that just war has its share of barbarism, David Rieff considered that when this concept was diverted it became a threat to the legitimacy of the international system that had launched it.[34] Nathalie Nougayrède reported in *Le Monde*: 'According to the Indian ambassador to the United Nations, "Libya has given a bad name to R2P". His Russian counterpart accuses NATO of having bombed civilian areas in the name of "protection of civilians"'.[35] We may well ask ourselves, as did Philippe Bolopion of Human Rights Watch, whether R2P had not become 'collateral damage of Libyan operations'.[36]

Since R2P is a principle whose use is political, it is instructive at this stage to consider what some states have had to say about it. In a letter of 7 December 2011 to the General Assembly and Security Council of the United Nations, the BRICS states (Brazil, Russia, India, China, South Africa), among the most influential critics of the Libyan intervention, called for a thorough examination of the conformity of the actions taken by the coalition with the provisions of Resolutions 1970 and 1973. In the same paragraph, dealing significantly with both Libya and Syria, the BRICS states insisted that any external intervention in Syrian affairs conducted outside the UN Charter should be excluded. These very strict positions tend to reinforce the feeling that, even if only implicitly, this first mobilization of the coercive and armed chapter of the third pillar of R2P has acted *de facto* as a foil. While the Libyan example has probably discouraged stronger action by the Security Council in contexts such as Syria, and even in South Kordofan in Sudan, it would be premature to hastily bury a concept that, if applied impartially, would win fairly generally support. As such, Brazil's initiative in late 2011 is interesting in that, with a different formulation, it repeats the idea of criteria for applying R2P that was left out of the texts of the 2005 World Summit. Brazil proposes taking into account the concept of 'Responsibility while Protecting'.[37] This would mean agreeing on a series of

32 David Rieff, 'Muammar el-Qaddafi's threat in March to unleash a bloodbath in rebel-held Benghazi was just the kind of extreme instance that R2P's framers had in mind', in *International Herald Tribune*, 8 November 2011.

33 Marcel Boissard, 'La responsabilité de protéger, un principe jetable et à usage unique (The responsibility to protect: a principle that is disposable and expendable)', in *Le Temps*, 28 October 2011.

34 D. Rieff, above note 31.

35 Nathalie Nougayrède, 'Réguler l'ingérence', in *Le Monde*, 24 September 2011.

36 Cited in ibid.

37 See UN General Assembly, 66th session, Agenda items 14 and 117. Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations, addressed to the Secretary-General, UN

elements that would ensure that the concept of R2P not be diverted to purposes other than the protection of civilians, such as for regime change. In particular, the international community should first and in each case undertake a detailed analysis of the possible consequences of any military intervention in order to avoid aggravating existing conflicts, encouraging terrorist activities, and generating new cycles of violence that could ultimately make the civilian population even more vulnerable. Without going any further, we can see that the concept of R2P will continue to be debated, and that the conditions of its applicability may be better defined and refined, particularly concerning the questions of accountability and responsibility, which need to recall the 'do no harm' concerns and accountability of humanitarian actors. Finally, note that the concept remains relevant for the United Nations judging by an address that the UN Secretary-General made to the Stanley Foundation Conference on 18 January 2012, in which he urged UN Member States to 'make the Responsibility to Protect a reality for the peoples of the world' and noted in particular that 'prevention does not mean looking the other way in times of crisis, with the vain hope that things are improving'.[38]

The Libyan crisis: a defence and an illustration of the importance of the legal gains and protection provided by IHL

The singularity of the Libyan operation, whether or not a case of R2P *stricto sensu*, demonstrates that it is inherently more complicated to apply such a concept than simply to declare it. Because this doctrine is not a norm, it is even more prone, as we have seen, to a selective, case-by-case utilization. That does not necessarily make it a hypocritical construct but it deprives it of two fundamental attributes: predictability (and thus a degree of reliability) and impartiality. By contrast, the relevance of IHL seems even stronger, and this is certainly another lesson from the Libyan crisis. While it is true that the application of IHL continues to clash with political considerations, because of its juridical character it is an imperative, committing the responsibility of the state. Well before the confrontation over the concepts of R2P or of intervention, states had undertaken to respect and enforce a set of provisions and measures that provided real protection to populations and whose scope was much wider than that of R2P.[39] Two years before the Libyan crisis, Nathalie Herlemont-Zoritchak, made very firm recommendations to states: 'For the state, the responsibility to protect is primarily to demonstrate a real willingness to apply IHL, without any possible diplomatic exemption. Start there and the short cuts will seem less important.'[40] This statement has the merit of pointing out that, in order to

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Doc. A/66/551–S/2011/701, 11 November 2011, available at: http://www.un.int/brazil/speech/Concept-Paper-%20RwP.pdf (last visited December 2011).

38 Ban Ki-moon, 'Address to Stanley Foundation Conference on the Responsibility to Protect', 18 January 2012, available at: http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1433 (last visited January 2012).

39 Geneva Conventions, Common Article 1.

40 See Nathalie Herlemont-Zoritchak, 'Droit d'ingérence et droit humanitaire: les faux amis', in *Revue Humanitaire, Enjeux, Pratiques, Débats*, 23 December 2009.

protect civilians in armed conflict, the first responsibility is to apply IHL without it necessarily being appropriate or always helpful to draw on concepts having no juridical force.

This defence of IHL is a state's permanent responsibility. Moreover, in some countries it may be important to engage in more prevention activities. It is clear that, prior to the conflict, Libya was a kind of *terra incognita* for IHL. Organizations such as the ICRC had not really been involved in disseminating the ideas of IHL to the unreceptive Libyan authorities. As for those states that are signatories of the Geneva Conventions and are therefore required to ensure respect of IHL, this defence apparently played only a minor role in their exchanges with Gaddafi's Libya. The Libyan crisis should therefore encourage states to favour greater work in preventing violations of the law prior to a crisis and distinct from the work of preventing conflict in order to encourage greater compliance with IHL provisions should an armed conflict arise.[41]

Despite the low level of IHL awareness in Gaddafi's Libya, the Libyan crisis also demonstrated the value of any strictly humanitarian action based on IHL. Throughout the entire period of air operations, the ICRC was able to conduct its activities in areas controlled by the government, as well as those in the hands of the NTC. Again, we should emphasize that this was possible thanks to real neutrality and independence, which were both recognized as such, and to the total lack of connection to other, politically motivated, actions, including those designed and conducted in reference to the responsibility to protect. Parallel to its relief action, the ICRC collected eye-witness accounts, analysed situations thanks to its real presence on the ground, and collected reliable information that, in cases in which violations were found, could be submitted to the concerned parties in a confidential dialogue.

This finding should be an encouragement to humanitarian organizations to maintain their humanitarian assistance and protection efforts in close reference to IHL and in the absence of any political connotation. The Libyan crisis has thus demonstrated that it is still possible, in complex contexts, to develop those activities that alone make feasible a physical presence alongside the population and local partners with an approach rooted in the principles of impartiality, neutrality, and independence. In this sense, this is an invitation to humanitarian organizations to pursue strictly humanitarian work based on humanitarian principles.

The future of 'humanitarian war' and the evolution of international relations

Resolution 1973 was made possible by a set of very special circumstances and soon elicited negative reactions from some members of the UN Security Council.

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41 See 'International Committee of the Red Cross: prevention policy', in *International Review of the Red Cross*, Vol. 91, No. 874, June 2009, pp. 415–430, available at: http://www.icrc.org/eng/resources/documents/article/review/review-874-p415.htm (last visited December 2011).

While one of the protagonists regarded by the international community as a risk to his own population had been eliminated, it is rather difficult in the wake of the operation to know whether the resulting damage done to the civilian population was more or less than that estimated for a non-intervention. In addition, not enough time has passed in the evolution of post-Gadhafi Libya to enable a comparative analysis of real and perceived damage. In any case, the tumult in the family of nations has left lasting scars, and the operation itself imposed great suffering on the civilian population. Such armed support to protect civilians, whether or not in the context of R2P, could be extremely difficult to implement in the future and would depend on changing power relations within the international community.

These difficulties could also be seen as reasons to increase efforts to avoid military action, even as a last resort. Resolution 1973 and its implementation is a landmark with a profusion of reactions and analyses produced by the Libyan situation. There will be a 'before' and an 'after'. The rulers of a state that is violently attacking its own civilian population now know that a reaction up to and including the use of force against them is possible, even if not always probable. A progressive effect of deterrence may result from this, similar to the one we have seen with the implementation of the international criminal justice system. Practice creates deterrence. Twelve years after the Kosovo intervention, the notion of 'humanitarian war' has just undergone a new incarnation and thus created a new precedent, even though everyone knows that such war cannot be disinterested and devoid of political intentions. Therefore, while it is not absolutely certain that Resolution 1973 is the precursor of a new trend towards greater use of force, we can still assume that some state actors will explore the concept of prevention and other constitutive measures of R2P, including actions of a coercive but non-violent type.

We close with a comment from Antoine Rougier, published in 1910 in an article on humanitarian intervention:

> The conclusion that emerges from this study is that it is virtually impossible to separate the humanitarian from the political motives for intervention and to ensure the absolute disinterestedness of the intervening states. We will not say that respect for human rights will never be an accessory motive to an intervention: history has shown that it can sometimes be a main reason, but it will never be a unique motive. From the moment that the intervening powers are judges of the appropriateness of their own action, they will consider this opportunity from the subjective point of view of their current interests. Among many inhumane acts of which they are spectators, they will in preference repress the one that in some respect is harmful to them.[42]

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42 Antoine Rougier, 'La théorie de l'intervention d'humanité', in *Revue Générale de Droit International Public*, Vol. 17, No. 1, 1910, p. 525.

This underscores the persistence of this debate in the political field and between states, still alive after one hundred years, although many juridical tools in support of human rights have been developed since then. As a counterpart, we can see the huge advance that the development of resolutely apolitical humanitarian law and action has represented, an advance that has once again proven its relevance in 2011 in Libya.