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From Humanitarian Intervention to the Responsibility to Protect:
From Kosovo to Libya and Beyond



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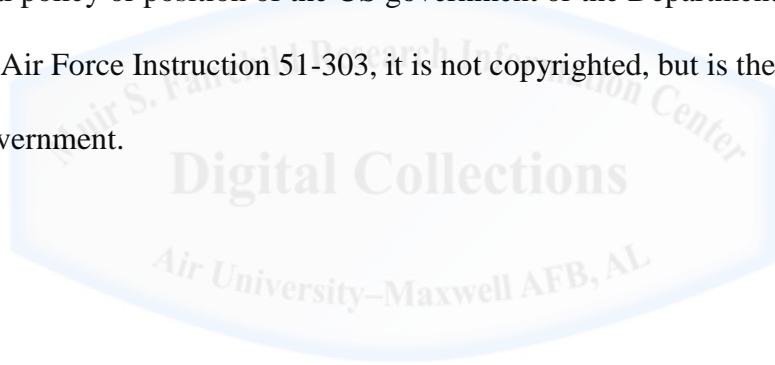
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Abstract

In 1999, NATO engaged in a humanitarian intervention without the authorization of the United Nations Security Council to stop ethnic cleansing by Serbians against ethnic Albanians in Kosovo. While the Serbian campaign against the Kosovars eventually ended, the NATO operation took longer than anticipated, caused hundreds of civilian deaths, and set the conditions that enabled the crisis to become worse before it ended. Following the intervention, the international commission established to review the operation deemed it legal, but unlawful, as it ended the crisis, but did so by the use of armed force against a sovereign state without the consent of the Security Council. In an attempt to reconcile the competing interests of sovereignty and protection of civilians, an international commission proposed the responsibility to protect, which it placed on the pillars of prevention of, reaction to, and rebuilding after crimes against the civilian population. States had the primary responsibility as sovereigns to protect civilians under their power. If they failed to do so, the responsibility fell to the international community. This concept was accepted by the international community, and was the rubric under which NATO conducted its operation in Libya to protect civilians during the 2011 uprising. The operation was marred by accusations of overreaching, the effects of which were felt almost immediately in the response to Syria's attacks on its civilian population. Given the unwillingness of the Security Council to approve resolutions dealing with the Syria situation, the application of the responsibility to protect must either revert to the extralegal humanitarian intervention model of Kosovo or rely much more heavily on its non-military aspects.

Introduction

Operation ALLIED FORCE, NATO's 1999 intervention in Kosovo, conducted without the approval of the United Nations Security Council under the rubric of humanitarian intervention, spurred the development of what some would call a new paradigm to address the most serious atrocities against civilians – the responsibility to protect. Colloquially referred to as RtoP or R2P,¹ it is an attempt to reconcile the frequently competing interests of state sovereignty and human rights.² It is fitting, therefore, that another NATO operation likely will change the application of the protection of civilians even further. While broadly viewed as successful, Operation UNIFIED PROTECTOR, the NATO military action in response to the Libyan government's attempted suppression of the 2011 rebellion, will either drive state practice back toward the extralegal humanitarian intervention model seen in Kosovo or force a more complete implementation of the non-intervention aspects of the responsibility to protect.

Humanitarian Intervention

Armed interventions under the banner of a humanitarian cause have a long history. Ellery Stowell's book *Intervention in International Law* extensively addressed humanitarian intervention. He found roots extending as far back as a 1579 publication in which a French Huguenot author advocated intervention "in behalf of neighboring peoples who are oppressed on account of adherence to the true religion or by any obvious tyranny."³ The zenith of the practice

¹ Ban Ki-Moon, Secretary-General, United Nations (address, Conference on Responsible Sovereignty: International Cooperation for a Changed World, Berlin, Germany, 15 July 2008). Ban stated "the concept has received the ultimate United Nations accolade, a distinctive acronym."

² International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, Canada: International Development Research Centre, 2001), 13.

³ Ellery Stowell, *Intervention in International Law* (Washington, DC: John Bryne and Co., 1921), 55.

of intervening in another state for humanitarian concerns was in the late nineteenth century, when imperialism was still prominent on the international stage.⁴

By the time of the adoption of the United Nations charter, however, the pendulum had swung in the other direction. United States Supreme Court justice Robert Jackson, while the chief of the U.S. delegation working on the London Charter of the International Military Tribunal, succinctly described the principle of noninterference that dominated international relations theory at the time. “It has been a general principle of foreign policy of our Government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself in our problems.”⁵

This principle of noninterference is enshrined in the United Nations charter, which established an obligation for states to resolve disputes peacefully⁶ and refrain from the threat or use of force against another state absent specific conditions.⁷ While collective security actions are permitted, the charter specifically prohibits any intervention in domestic affairs of states unless sanctioned by the Security Council.⁸ While there are exceptions, such as the self-defense provision of Article 51, the charter does not permit a humanitarian justification to form the basis for a military intervention.

Looking beyond the charter, it is clear that there is no right in customary international law for a nation to engage in humanitarian intervention. At the Group of 77 South Summit in 2000,

⁴ Ryan Goodman, “Humanitarian Intervention and Pretexts for War,” *American Journal of International Law* 100, no. 1 (January 2006): 108.

⁵ Robert H. Jackson, Chief of U.S. Delegation (address, International Conference on Military Trials, London, England, 23 July 1945).

⁶ United Nations, *Charter of the United Nations*, 12 October 1945, 1 UNTS XVI, Article 2, paragraph 3.

⁷ *Ibid.*, paragraph 4.

⁸ *Ibid.*, paragraph 7.

the 133 attending nations stated unequivocally, “We reject the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.”⁹ One could hardly call something authorized under customary international law if more than half of the world’s nations expressly oppose it. The principle is then merely a “manifestation of a policy of force . . . such as cannot . . . find a place in international law”¹⁰

Kosovo

In the late 1980s, as part of his campaign of Serbian nationalism, Slobodan Milosevic orchestrated changes in the Serbian constitution that revoked the autonomous status of Kosovo. The ethnic Albanians in the province declared independence and conducted their campaign in a nonviolent manner, hoping for international support to carry the day for their cause.¹¹ In 1997, after the failure of the Dayton Peace accords to address the issue of Kosovo, the Kosovo Liberation Army began a guerrilla war to obtain independence. The Serbs responded to violence with violence, and the conflict escalated. Both sides committed and endured atrocities, but the slaughter of dozens of Kosovars by Serbian paramilitaries in January 1999 stood out, and it was shortly followed by a Serbian campaign to eliminate the ethnic Albanian population of Kosovo. On 24 March, despite not having tabled a resolution for intervention in the Security Council, NATO began bombing Serbian positions in Kosovo and Yugoslavia in response to this attempt at

⁹ Group of 77, "Group of 77 South Summit Declaration," 14 April 2000, http://www.g77.org/summit/Declaration_G77Summit.htm.

¹⁰ Noam Chomsky (statement, United Nations General Assembly Thematic Dialogue on the Responsibility to Protect, New York, NY, 23 July 2009).

¹¹ Mary Ellen O’Connell, “The UN, NATO, and International Law After Kosovo,” *Human Rights Quarterly* 22, no. 1 (February 2000): 73-74.

ethnic cleansing. While NATO anticipated Milosevic would back down almost immediately once the air strikes started, that supposition proved dramatically incorrect.¹²

During the 78-day bombing campaign, NATO air power was largely ineffective in the role of protecting civilians. To avoid air defenses, the rules of engagement required the aircraft to remain above 15,000 feet, an altitude that made it difficult to identify targets precisely. The strikes did little to stop attacks on civilians. A month into the campaign, with no sign that Milosevic was weakening, NATO broadened its target list, attacking bridges, highways, airports, telecommunications facilities, electrical production, factories, and oil refineries.¹³ Many of these targets were essential to civilian life, and the associated hardships experienced by the civilian population of Serbia gave credence to the claim that NATO was no longer protecting civilians, but had taken sides in a civil war.

Russia, China, and India railed against the intervention. Each declared it unilateral aggression against a sovereign state that undermined the United Nations and the international regime. Russia in particular blasted NATO's decision to intervene without a Security Council mandate, claiming that political and diplomatic methods had not been exhausted. A specific target was the argument that the air strikes were justified to prevent a humanitarian disaster. The Russian representative to the Security Council stated the action was "in no way based on the Charter or other generally recognized rules of international law," and warned that "the unilateral use of force will lead precisely to a situation with truly devastating humanitarian consequences."¹⁴

¹² Adam Jones, *Genocide: A Comprehensive Introduction*, 2nd ed. (London, England: Routledge, 2011), 329-30.

¹³ Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford, England: Oxford University Press, 2000), 93.

¹⁴ UN Security Council, "Provisional Verbatim Record of the 3988th Meeting" (S.PV/3988), 24 March 1999, 2-3.

The Russian position turned out to be prescient. NATO airstrikes directly killed at least 500 civilians.¹⁵ Indirectly, “there are grounds for arguing that the bombing in fact prompted an escalation of the Serb campaign” against Kosovo.¹⁶ Indeed, the Independent International Commission on Kosovo found that the bombing likely created the environment that made possible the widespread attacks on the Kosovar civilian population.¹⁷ While that is not to say that NATO is to blame for the expulsion of over 800,000 refugees,¹⁸ the internal displacement of almost 600,000 Kosovars,¹⁹ and the deaths of 10,000 ethnic Albanians,²⁰ when an organization claims to be acting for a humanitarian purpose, evidence that its actions instead increased the hardship on the civilian population tends to undermine their legitimacy. Regrettably, NATO’s failure to protect civilians continued after the cease-fire, as revenge attacks against Serb civilians caused 150,000 Serbs to seek safe haven as refugees in Serbia.²¹

Despite the significant impact the NATO campaign had on civilians, the Kosovo Commission found that the intervention was “illegal but legitimate.” While it lacked Security Council sanction, it “had the effect of liberating the majority population of Kosovo from a long period of oppression under Serbian rule” and was only undertaken after diplomatic avenues had been exhausted.²² As a matter of interest, this last point is patently false. The report itself acknowledged that no resolution regarding intervention in Kosovo was tabled in the Security Council, so the one avenue that could have legalized the intervention was left untried.²³

¹⁵ Independent International Commission on Kosovo, *Kosovo Report*, 5.

¹⁶ Jones, *Genocide*, 330.

¹⁷ Independent International Commission on Kosovo, *Kosovo Report*, 88-89.

¹⁸ Jones, *Genocide*, 331.

¹⁹ Independent International Commission on Kosovo, *Kosovo Report*, 90.

²⁰ Jones, *Genocide*, 331.

²¹ *Ibid.*

²² Independent International Commission on Kosovo, *Kosovo Report*, 4.

²³ *Ibid.*, 175.

A New (and Old) Framework

The Kosovo intervention threw into sharp relief the untenable situation that appeared to exist between states that viewed national sovereignty as the foundation of the international system and a bulwark against imperial aggression and states that viewed humanitarian considerations as paramount. Kofi Annan, at the time the United Nations Secretary-General, put the dilemma in stark terms. “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?”²⁴

The government of Canada established the International Commission on Intervention and State Sovereignty to tackle the issue. The solution presented in the commission’s report was termed the responsibility to protect. While United Nations Secretary-General Ban Ki-Moon later attributed the original concept of the responsibility to protect to Francis Deng and his colleagues at the Brookings Institution,²⁵ perhaps it is more accurate to assert that they simply gave new life to an old idea, for it is apparent that its fundamental concept, that of sovereignty as responsibility, is much older. In 1921, “[Ellery] Stowell insisted that a state’s enjoyment of the right to non-intervention and non-interference was conditional upon its fulfillment of sovereign obligations regarding the treatment of those within its territory.”²⁶ Another scholar agreed that sovereignty as responsibility was simply a “rearticulation” of older ideas, citing Thomas Hobbes’

²⁴ Kofi Annan, *Millennium Report of the Secretary-General of the United Nations*, (New York, NY: United Nations Department of Public Information: 2000), 48.

²⁵ Ban Ki-Moon, Secretary-General, United Nations (address, Conference on Responsible Sovereignty: International Cooperation for a Changed World, Berlin, Germany, 15 July 2008).

²⁶ Luke Glanville, “Ellery Stowell and the Enduring Dilemmas of Humanitarian Intervention,” *International Studies Review* 13, no. 2 (June 2011): 242.

theories regarding the contract between the individual and the state and the principle of popular sovereignty expounded starting in the eighteenth century.²⁷

Unfortunately, the proposed solution was as much semantic as substantive. One of the commission co-chairs wrote, “The core idea of the responsibility to protect . . . is very simple. Turn the notion of the ‘right to intervene’ upside down.”²⁸ By referring to the primary responsibility of each state to protect its own people rather than a right of other states to intervene, the commission’s report in this area simply changed the language of the discussion. This alone, however, could do nothing to address the underlying concern that the principle was merely a ruse by which powerful nations could impose their will on weaker states. After all, “there are so many human rights abuses at any given time in the world – it is too easy to use this as a front for aggression.”²⁹

While the report acknowledged that “the prohibitions and presumptions against intervention are . . . explicitly spelled out in the Charter, and . . . no ‘humanitarian exception’ to these prohibitions is explicitly provided for,”³⁰ it nonetheless suggested two alternatives should the Security Council fail to act in a given case. The first suggestion was that the General Assembly take up the action under the “Uniting for Peace” process, in which the assembly may recommend action if the Security Council is unable to act because of a deadlock between the veto-wielding members.³¹ As the General Assembly can only make recommendations rather

²⁷ Alex J. Bellamy and Catherine Drummond, “The responsibility to protect in Southeast Asia: between non-interference and sovereignty as responsibility,” *The Pacific Review* 24, no. 2 (May 2011): 181-82.

²⁸ Gareth Evans, “The Responsibility to Protect: An Idea Whose Time Has Come . . . and Gone?” *International Relations* 22, no. 3 (September 2008): 285.

²⁹ MAJ Helene E. Caras, “Humanitarian Intervention in Kosovo: The Importance of Legal and Moral Issues” (monograph, School of Advanced Military Studies, 2007), 22.

³⁰ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa, Canada: International Development Research Centre, 2001), 49.

³¹ UN General Assembly Resolution 377 (V), “Uniting for Peace,” 3 November 1950, operative paragraph 1.

than binding determinations, this option could at best provide legitimacy for an unlawful intervention rather than a legal basis in itself.³²

The second proposed that regional organizations could intervene, either inside or outside their boundaries. Interventions within the boundaries of an organization are questionable under international law. Article 53 of the UN Charter forbids any enforcement action absent authorization of the Security Council, and the preponderance of scholarly opinion is that any use of force by a regional organization would constitute an enforcement action.³³

The report, however, appears to take the position that operations within a regional organization's membership do not require Security Council authorization. While a minority position, it is bolstered by the practice of organizations such as the Economic Community Of West African States (ECOWAS) and the African Union (AU). ECOWAS, a primarily economic organization, sent a military expedition to Liberia, a member state, without prior sanction of the Security Council.³⁴ When the AU did the same in Darfur, the Director of the AU Peace and Security Department publicly declared that while the AU respected the authority of the UN, the AU would not wait for authorization to act.³⁵ Although the practice is unsupported by the text of the Charter, intervening states seeking retroactive authorization from the Security Council has become a fairly common procedure.³⁶

On the matter of actions by a regional organization against a third party (known to NATO watchers as "out-of-area" operations), the responsibility to protect report was unable to muster

³² International Commission on Intervention and State Sovereignty, *Responsibility to Protect*, 53.

³³ Suyash Paliwal, "The Primacy of Regional Organizations in International Peacekeeping: The African Example," *Virginia Journal of International Law* 51, no. 1 (October 2010): 193.

³⁴ Comfort Ero, "ECOWAS and the Subregional Peacekeeping in Liberia," *The Journal of Humanitarian Assistance*, 25 September 1995, <http://sites.tufts.edu/jha/archives/66>.

³⁵ Paliwal, "The Primacy of Regional Organizations in International Peacekeeping," 198.

³⁶ Ademola Abass, *Regional Organizations and the Development of Collective Security* (Oxford, England: Hart Publishing, 2004), 55.

anything beyond an assertion that they are “much more controversial.”³⁷ As noted above, the Kosovo commission report was much more blunt on the subject: in the absence of prior approval by the Security Council, intervention is illegal.³⁸

Despite this focus on the armed intervention piece of the responsibility to protect framework, the concept was much broader than traditional humanitarian intervention. Armed intervention was simply a part of one of three sub-responsibilities: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.³⁹ Including, and indeed highlighting, these other elements might have diverted attention away from the militaristic elements of the proposal, but the implementation agreed to by the international community ensured that a basic structural check would exist.

In 2005, the United Nations General Assembly unanimously accepted the fundamental premise of the responsibility to protect: “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁴⁰ This was backed by the threat of collective action “through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”⁴¹ Rather than creating an exception to the rule prohibiting armed intervention, the international community reinforced that armed intervention is expressly subject to the general rules of international law and may only be exercised pursuant to a Security Council resolution.

³⁷ International Commission on Intervention and State Sovereignty, *Responsibility to Protect*, 54.

³⁸ Independent International Commission on Kosovo, *The Kosovo Report*, 4.

³⁹ International Commission on Intervention and State Sovereignty, *Responsibility to Protect*, XI.

⁴⁰ UN General Assembly Resolution 60/1, “2005 World Summit Outcome,” 24 October 2005, paragraph 138.

⁴¹ *Ibid.*, paragraph 139.

At least one commentator has asserted that the acceptance of the responsibility to protect in the General Assembly's World Summit resolution and United Nations Security Council Resolution (UNSCR) 1674 makes the concept "politically and legally binding on [UN] members."⁴² Other commentators observe that the responsibility to protect cannot be deemed a binding norm of international law until state practice establishes it as such.⁴³ There is often a significant gulf between what states say and what they do, and the latter is of far greater importance given the limited enforcement mechanisms available on the international stage.

Even if one assumes that the responsibility to protect is binding both on individual states and the international community if the individual state fails to uphold its responsibility, the practical effect of this is unclear. While the International Commission on Intervention and State Sovereignty report on the responsibility to protect proposed six criteria for military intervention,⁴⁴ these criteria were not incorporated into either the General Assembly or Security Council resolution, so there can be no binding measure to determine when the responsibility becomes operative in a given situation. The only certainty in the run-up to the Libyan campaign was that states had agreed that they had a responsibility to protect civilians that was broader than mere military involvement and any such military involvement could not be unilateral, but had to be approved by the Security Council.

Libya

On 16 February 2011, riots erupted in Benghazi following the arrest of Fethi Tarbel, a human rights activist. The rioters, armed with Molotov cocktails, torched automobiles, and

⁴² Dorota Gierycz, "From Humanitarian Intervention (HI) to Responsibility to Protect (R2P)," *Criminal Justice Ethics* 29, no. 2 (August 2010): 114.

⁴³ Francis Kofi Abiew, "Humanitarian Intervention and the Responsibility to Protect: Redefining a Role for 'Kind-hearted Gunmen'," *Criminal Justice Ethics* 29, no. 2 (August 2010): 105.

⁴⁴ International Commission on Intervention and State Sovereignty, *Responsibility to Protect*, 32.

attacked security forces.⁴⁵ Attempts to quell the violence instead exacerbated it, and the riots quickly transformed into open rebellion. Unlike previous uprisings during the so-called “Arab Spring,” the government threw the full weight of the Libyan military into the fray. By 22 February, there was evidence that Libyan forces were using helicopters and aircraft in their attacks against the opposition. Two Libyan air force colonels flew their fighters to Malta, claiming they refused orders to bomb protesters.⁴⁶

On 26 February, the Security Council, citing repression of demonstrators, killing of civilians, and government incitement to violence against civilians, established a travel ban, asset freeze, and arms embargo and referred the matter to the International Criminal Court.⁴⁷ Surprisingly, the Security Council only noted human rights violations by the Libyan authorities. Perhaps not fully understanding the moral dynamic at play in Western societies and being more forthright than might have been wise, a political activist opposed to the Libyan government had earlier spoken with approval of the summary killing of mercenaries and loyalists. “The protesters in al-Bayda have been able to seize control of the military airbase in the city and have executed 50 African mercenaries and two Libyan conspirators. Even in Derna today, a number of conspirators were executed. They were locked up in the holding cells of a police station because they resisted, and some died burning inside the building.”⁴⁸

The lack of the Security Council to make a show of impartiality demonstrated the isolation of the Gaddafi regime. Perhaps emboldened by this, the rebel National Transitional

⁴⁵ Reuters, “Rioting hits Libyan city of Benghazi,” reuters.com, 16 February 2011, <http://uk.reuters.com/article/2011/02/16/uk-libya-rioting-benghazi-idUKTRE71F16J20110216>.

⁴⁶ The Australian, “Libya launches airstrikes to quell protests as Muammar Gaddafi’s rule teeters on brink,” theaustralian.com.au, 22 February 2011, <http://www.theaustralian.com.au/in-depth/muammar-gaddafis-rule-teeters-on-brink/story-fn7ycml4-1226009841609>.

⁴⁷ UN Security Council Resolution 1970, “Peace and security in Africa-Libya,” 26 February 2011.

⁴⁸ Ian Black and Owen Bowcott, “Libya protests: massacres reported as Gaddafi imposes news blackout,” guardian.co.uk, 18 February 2011, <http://www.guardian.co.uk/world/2011/feb/18/libya-protests-massacres-reported>.

Council (NTC) declared itself the sole representative of Libya on 5 March.⁴⁹ On 10 March, France became the first country to recognize the NTC as the legitimate government of Libya.⁵⁰

As late as that date, NATO claimed it did not intend to intervene. Only if the situation met three criteria would NATO consider action: “demonstrable need, a clear legal mandate and solid support from the region.” The Secretary General cited regional support as particularly crucial and stated he would continue discussions with regional organizations, specifically noting the African Union and the Arab League.⁵¹

The Influence of Regional Organizations

Given its struggles in Afghanistan, it is not surprising that NATO would test the prevailing opinion of the region before becoming embroiled in another conflict. It may also have been that NATO expected the regional organizations to support action. Libya is a member of the African Union, the international organization that may have gone the furthest in incorporating the responsibility to protect into its legal foundation and, as noted above, the AU had previously undertaken humanitarian interventions. The organization’s Constitutive Act specifically established “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity,”⁵² potentially making them an ideal supporter of intervention. Despite this, the AU,

⁴⁹ Radio France Internationale, “France welcomes Libyan rebel council, UK in diplomatic bind,” rfi.fr, 6 March 2011, <http://www.english.rfi.fr/africa/20110306-france-recognises-libyan-rebel-council-uk-diplomatic-bind>.

⁵⁰ BBC, “Libya: France recognises rebels as government,” [bbc.co.uk](http://www.bbc.co.uk/news/world-africa-12699183), 10 March 2011, <http://www.bbc.co.uk/news/world-africa-12699183>.

⁵¹ NATO, “NATO ready to support international efforts on Libya,” [nato.int](http://www.nato.int/cps/en/natolive/news_71446.htm), 10 March 2011, http://www.nato.int/cps/en/natolive/news_71446.htm.

⁵² Organization of African Unity, *Constitutive Act of the African Union*, 1 July 2000, Article 4(h); In 2003, the AU Assembly adopted a protocol on amendments to the Constitutive Act that would go even further by allowing intervention in cases of a “serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.” This protocol has not yet entered into force, as it has not received the required number of national ratifications.

while condemning Libya's actions, vociferously opposed foreign military intervention of any kind in Libya.⁵³

With the AU unwilling to support action, the Arab League became the prize for those seeking to intervene in Libya. After an early March declaration publicly stating its opposition to any foreign intervention,⁵⁴ by 12 March 2011 (undoubtedly after the promised consultations with NATO), it had endorsed a no-fly zone.⁵⁵

UNSCR 1973 and the Intervention

By 15 March 2011, the overwhelming force of the Libyan military was crushing the rebels and driving toward Benghazi, while the president of the Libyan League for Human Rights claimed that Libya was facing a slaughter on par with Rwanda.⁵⁶ Armed with the new endorsement of a regional organization, the Security Council adopted UNSCR 1973, authorizing all necessary measures to protect civilians short of a foreign occupation force and establishing a no-fly zone over Libya. While no Security Council members opposed the resolution, Russia, China, India, Germany, and Brazil abstained. Comments by the Russian delegate immediately after the vote foreshadowed trouble ahead. He said that questions regarding enforcement of the no-fly zone, its rules of engagement, and limits on the use of force were asked but unanswered. He specifically asserted, "the draft was morphing before our very eyes, transcending the initial

⁵³ African Union, "Communiqué of the 265th Meeting of the Peace and Security Council" (PSC/PR/COMM.2(CCLXV)), 10 March 2011.

⁵⁴ VOA News, "Arab League Opposes Foreign Intervention in Libya," voanews.com, 2 March 2011, <http://www.voanews.com/english/news/Arab-League-Opposes-Foreign-Intervention-in-Libya-117248708.html>.

⁵⁵ Ethan Bronner and David E. Sanger, "Arab League Endorses No-Flight Zone Over Libya," nytimes.com, 12 March 2011, <http://www.nytimes.com/2011/03/13/world/middleeast/13libya.html?pagewanted=all>.

⁵⁶ Mohammed Abbas, "Gaddafi forces seize key town, G8 stalls on no-fly," reuters.com, 15 March 2011, <http://af.reuters.com/article/topNews/idAFJOE72E00M20110315?pageNumber=1&virtualBrandChannel=0&sp=true>.

concept as stated by the League of Arab States. Provisions were introduced into the text that could potentially open the door to large-scale military intervention.”⁵⁷

Indeed, shortly after the intervention began, Amr Moussa, the Arab League’s Secretary General, threw the situation into disarray, saying, “What is happening in Libya differs from the aim of imposing a no-fly zone.”⁵⁸ Two days later, however, alongside the UN Secretary-General and following discussions with U.S., U.N., and NATO officials, he changed his position once again, saying, “We are committed to UN security council resolution 1973. We have no objection to this decision, particularly as it does not call for an invasion of Libyan territory.”⁵⁹ The turnabout was critical. Arab League support had given legitimacy to the intervention at the outset, and loss of that support certainly would have damaged the perceived legitimacy of the operation.

Although Russia declined its opportunity to veto the resolution, the Russian prime minister, Vladimir Putin, had no qualms about expressing his displeasure with both the resolution’s drafting and the rationale behind it:

The resolution is defective and flawed. It allows everything. It resembles medieval calls for crusades. . . . During the Clinton era they bombed Belgrade, Bush sent forces into Afghanistan, then under an invented, false pretext they sent forces into Iraq, liquidated the entire Iraqi leadership – even children in Saddam Hussein’s family died. Now it is Libya’s turn, under the pretext of protecting the peaceful population. But in bomb strikes it is precisely the civilian population that gets killed. Where is the logic and the conscience? . . . The Libyan regime does not meet any of the criteria of a democratic state but that does not mean that someone is allowed to interfere in internal political conflicts to defend one of the sides.⁶⁰

⁵⁷ UN Security Council, “Provisional Verbatim Record of the 6498th Meeting” (S.PV/6498), 17 March 2011, (Masthead), 8.

⁵⁸ Edward Cody, “Arab League condemns broad Western bombing campaign in Libya,” *washingtonpost.com*, 20 March 2011, http://www.washingtonpost.com/world/arab-league-condemns-broad-bombing-campaign-in-libya/2011/03/20/AB1pSg1_story.html.

⁵⁹ Martin Culov, “Arab League to reiterate backing for Libya no-fly zone,” *guardian.co.uk*, 22 March 2011, <http://www.guardian.co.uk/world/2011/mar/22/arab-league-libya-no-fly>.

⁶⁰ Gleb Bryanski, “Putin likens U.N. Libya resolution to crusades,” *reuters.com*, 21 March 2011, <http://www.reuters.com/article/2011/03/21/us-libya-russia-idUSTRE72K3JR20110321>.

After the Russian Foreign Ministry expressed concerns about NATO's targeting,⁶¹ several countries aired their displeasure at NATO's conduct of the Libyan operation during a Security Council open debate on the protection of civilians in armed conflict. The Chinese objections were understated, but clear. "There must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians. . . . We are opposed to any attempt to willfully interpret the [Libyan] resolutions or to take actions that exceed those mandated by the resolutions."⁶² South Africa took a similar tack, stating, "we are concerned that the implementation of these resolutions appears to go beyond their letter and spirit."⁶³

Other nations were less circumspect. Nicaragua accused the intervention of using protection of civilians as a fig leaf for regime change in violation of the UN Charter.⁶⁴ Cuba declared the resolution's implementation to be a "pretext for achieving spurious political and economic objectives."⁶⁵ Venezuela flatly accused NATO of "acting as an army in the service of an insurgent group" and "seeking regime change in Libya, in violation of the Charter of the United Nations" and the authorizing resolution.⁶⁶

For some, the language of the Security Council authorization did not, in fact, authorize the NATO intervention. NATO is not, strictly speaking, a regional arrangement or agency as those terms are used in the UN Charter.⁶⁷ Rather, it is a collective defense organization

⁶¹ RIA Novosti, "Russia doubts statement that NATO not targeting Libya's Gaddafi – Foreign Ministry," rian.ru, 1 May 2011, <http://en.rian.ru/russia/20110501/163809342.html>.

⁶² UN Security Council, "Provisional Verbatim Record of the 6531st Meeting" (S.PV/6531), 10 May 2011, (Masthead), 20.

⁶³ *Ibid.*, 18.

⁶⁴ *Ibid.*, 34.

⁶⁵ *Ibid.*, 28.

⁶⁶ UN Security Council, "Provisional Verbatim Record of the 6531st Meeting (Resumption 1)" (S.PV/6531 (Resumption 1)), 10 May 2011, (Masthead), 19.

⁶⁷ Bruno Simma, "NATO, the UN and the Use of Force: Legal Aspects," *European Journal of International Law* 10, no. 1 (April 1999): 10.

expressly organized under Article 51.⁶⁸ In practice, however, it frequently acts as a regional arrangement. For instance, the Security Council authorized member states to use all necessary measures either “nationally or through regional organizations or arrangements” to protect civilians in Libya.⁶⁹ While this clearly applied to the United States, the United Kingdom, and France at the very beginning of the Libya operation, transferring those operations to NATO control would have been legally dubious unless one were to treat NATO as a regional organization or arrangement under the charter. In fact, the head of the Peace and Security Program at the United Nations University’s Institute on Comparative Regional Integration Studies was unwilling to allow NATO’s practices to act as an implied acknowledgement that NATO is a regional organization or arrangement. He went so far as to opine that the NATO intervention was not authorized by the Security Council.⁷⁰ Despite a potentially questionable legal basis and strenuous objections from other nations, the operation was going to continue.

Endgame

Two months of bombing had failed to bring Libya into compliance with the resolutions, and target list expanded as the alliance became more aggressive.⁷¹ By 23 August 2011, the rebels, backed by NATO airpower, had taken Tripoli. They seized control of Gadhafi’s massive compound, entering through a hole smashed in the perimeter by a NATO bomb.⁷² On 20 October 2011, the rebels conquered Gadhafi’s hometown of Sirte. Rebels captured and then

⁶⁸ Kent J. Kille and Ryan C. Hendrickson, “NATO and the United Nations: Debates and Trends in Institutional Coordination,” *Journal of International Organizations Studies* 2, no. 1 (March 2011): 33.

⁶⁹ UN Security Council Resolution 1973, “The situation in Libya,” 17 March 2011.

⁷⁰ Ademola Abass, “Assessing NATO’s Involvement in Libya,” unu.edu, 27 October 2011, <http://unu.edu/articles/peace-security-human-rights/assessing-nato-s-involvement-in-libya>.

⁷¹ Mark Hosenball and Missy Ryan, “NATO targeting more aggressively in Libya-officials,” reuters.com, 18 May 2011, <http://www.reuters.com/article/2011/05/18/us-usa-libya-idUSTRE74H7B720110518>.

⁷² NPR, “Libyan Rebels Jubilant, Gadhafi Defiant,” npr.org, 23 August 2011, <http://www.npr.org/2011/08/23/139871832/libya-rebels-renew-battle-to-pry-tripoli-from-regime>.

killed him after NATO struck the convoy in which he was traveling.⁷³ On 31 October 2011, pursuant to UNSCR 2016, NATO ended its military intervention.⁷⁴

Collateral and Accidental Deaths

If the legitimacy of intervention under the responsibility to protect is based on the protection of civilians, it seems to lose that legitimacy if the intervention itself causes civilian casualties. As an extreme example, the Syrian delegate to the Security Council claimed that “some NATO members killed 130,000 Libyan civilians on the pretext of protecting civilians in that country.”⁷⁵ Were this to be true, it clearly would make a mockery of the “humanitarian” justification for the intervention. If 130,000 dead is too many, what is the point at which collateral or accidental deaths of civilians become acceptable in an operation to protect civilians?

The well-known non-governmental relief organization Médecins San Frontières does not support the responsibility to protect because it does not believe any such deaths are justifiable. “Peacekeeping policies and the development of any kind of political order inevitably produce their own share of victims and people who are excluded: the ‘residue’ that will suffer a slow or violent death.”⁷⁶ This opposition is not premised on the intervening state actually doing the killing; rather, even a perfect intervention will create an environment in which individuals will suffer and die, and the organization has determined that to be unacceptable.

During the Operation ALLIED FORCE, the Central Intelligence Agency nominated only one target. Through a series of human errors, the Chinese embassy in Belgrade was erroneously

⁷³ Jeffrey Kofman, “Moammar Gadhafi Dead: How Rebels Killed the Dictator,” abcnews.go.com, 21 October 2011, <http://abcnews.go.com/International/moammar-gadhafi-dead-rebels-killed-dictator/story?id=14784776>.

⁷⁴ NATO, “‘We answered the call’ - the end of Operation Unified Protector,” nato.int, 31 October 2011, http://www.nato.int/cps/en/natolive/news_80435.htm.

⁷⁵ UN Security Council, “Provisional Verbatim Record of the 6650th Meeting (Resumption 1)” (S.PV/6650 (Resumption 1)), 9 November 2011, (Masthead), 27.

⁷⁶ Fabrice Weissman, “‘Not in Our Name’: Why Médecins San Frontières Does Not Support the ‘Responsibility to Protect,’” *Criminal Justice Ethics* 29, no. 2 (August 2010), 199.

believed to be an arms supply headquarters, and the resulting air strike killed three Chinese and wounded twenty.⁷⁷ During Operation UNIFIED PROTECTOR, NATO acknowledged that an airstrike against a missile facility went awry due to a weapons malfunction, killing a number of civilians.⁷⁸ How should these unintended civilian deaths be weighed when the purpose of the intervention was to protect civilians?

To address this issue, the Kosovo Commission proposed that tactics and methods exercised by third parties “in an undertaking justified as ‘a humanitarian war’ should be subject to more demanding standards than those required under current international humanitarian law in wartime. In effect, the Commission believes that a greater obligation is imposed on the intervening side to take care of the civilian population in a humanitarian campaign.”⁷⁹ If a state kills civilians during an operation it ostensibly conducted to protect civilians, even if one does not accuse it of malice, recklessness, or ulterior motives, one might reasonably question its competence to accomplish the task.

Beyond

One never knows the future with certainty, but it is likely that, just as with its Kosovo operation a dozen years earlier, NATO’s conduct in Libya will change the dynamic surrounding the discussion of protecting civilians in times of crisis. “If the Libyan intervention goes well, it will put teeth in the fledgling RtoP doctrine. Yet, if it goes badly, critics will redouble their opposition, and future decisions will be made more difficult. . . .”⁸⁰ While the intervention went

⁷⁷ Eric Schmitt, “In a Fatal Error, C.I.A. Picked a Bombing Target Only Once: The Chinese Embassy,” *nytimes.com*, 23 July 1999, <http://partners.nytimes.com/library/world/global/072399china-embassy.html>.

⁷⁸ NATO, “NATO acknowledges civilian casualties in Tripoli strike,” *nato.int*, 19 June 2011, http://www.nato.int/cps/en/natolive/news_75639.htm.

⁷⁹ Independent International Commission on Kosovo, *Kosovo Report*, 165-66.

⁸⁰ Thomas G. Weiss, “RtoP Alive and Well after Libya,” *Ethics and International Affairs* 25, no. 3 (Fall 2011): 1.

well in that the government of Libya is no longer attacking civilians, it went badly in that the international community did split on the legitimacy of the means by which this was achieved. Fallout from that divide was seen almost immediately.

The current situation in Syria is not unlike that in Libya. The Syrian regime has attacked protesters using tanks, snipers, and airpower. In her report on the situation in Syria, the first recommendation of the United Nations High Commissioner for Human Rights was to remind the reader of both the national and international responsibility to protect to which the international community unanimously agreed at the 2005 Millennium Summit.⁸¹

Despite the evidence of gross violations of the human rights of civilians, including torture, enforced disappearance, and murder, the Security Council has not invoked the protection pillar of the responsibility to protect. Unlike during the Kosovo crisis, the Security Council did consider a resolution on the situation in Syria. Despite not including any hint of military action, Russia and China both vetoed it. Russia's justification was particularly blunt:

The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect. It is easy to see that today's "Unified Protector" model could happen in Syria.

. . . For us, Members of the United Nations, including in terms of a precedent, it is very important to know how the resolution was implemented and how a Security Council resolution turned into its opposite.

The demand for a quick ceasefire turned into a full-fledged civil war, the humanitarian, social, economic and military consequences of which transcend Libyan borders. The situation in connection with the no-fly zone has morphed into the bombing of oil refineries, television stations and other civilian sites. The arms embargo has morphed into a naval blockade in western Libya, including a

⁸¹ United Nations High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Syrian Arab Republic (A/HRC/18/53)*, 15 September 2011, 24.

blockade of humanitarian goods. . . .These types of models should be excluded from global practices once and for all.⁸²

Intervention under the responsibility to protect as accepted by the United Nations requires Security Council authorization.⁸³ With Russia and China opposed to action in this case, no such intervention can occur. That leaves two potential options.

First, if a nation or organization believes a military intervention is necessary, NATO has shown the way with the Kosovo model of humanitarian intervention without Security Council authorization, but this avenue does not appear viable. As the Libyan situation revealed, support from regional organizations provides critical legitimacy to an intervention. No regional organization supports military action against Syria. Even if one did, Russia and China are much stronger nations in 2011 than they were in 1999, and it is not clear what the consequences would be if a member of the international community took unilateral action. Finally, the institution of the Security Council might suffer irreparable harm. As evidenced by their immediate involvement in their national capacities at the start of the Libyan operation, France, the U.K., and the U.S. are likely the only states with the power projection capability capable of carrying out a nonconsensual military intervention against Syria. They also wield huge international power through their veto power as permanent members of the Security Council and may be unwilling to see that diminished.

A second path offers the international community the opportunity to utilize all the tools offered by the responsibility to protect. In addition to the expected sanctions imposed on Syria by western nations, the Arab League has imposed unprecedented economic sanctions against

⁸² UN Security Council, "Provisional Verbatim Record of the 6627th Meeting" (S.PV/6627), 4 October 2011, (Masthead), 4.

⁸³ UN General Assembly Resolution 60/1, "2005 World Summit Outcome," paragraph 139.

Syria, including travel bans and asset freezes for top officials, reductions in flights,⁸⁴ a ban on dealing with the Syrian central bank, and termination of funding for projects in Syria.⁸⁵ Some think the combined sanctions of the United States, European Union, Turkey and the Arab League might be enough to bring down the regime.⁸⁶

Given the apparent military success of NATO's intervention in Libya, it is ironic that the most prominent consequence is for the international community to turn back toward non-military means of bringing states into compliance with their responsibility to protect civilians. It is clear, however, that this is occurring. When discussing the sanctions imposed against Syria, the Qatari prime minister, leader of a government that supported the operation in Libya not only in words, but also in combat,⁸⁷ plainly put it: "We are trying to prevent any foreign intervention into Syria."⁸⁸



Conclusion

NATO's willingness to use force to intervene in humanitarian crises outside of its regional boundaries has driven the evolution of international law in this area. Just as the 1999 Kosovo operation drove a shift from humanitarian intervention to the responsibility to protect, so will the 2011 Libya operation cause a change in the landscape again. Either the international community can go back to armed interventions without a basis in international law, or it can lift

⁸⁴ VOA News, "Arab League Confirms Sanctions on Syria as Unrest Intensifies," voanews.com, 3 December 2011, <http://www.voanews.com/english/news/Arab-League-Confirms-Sanctions-on-Syria-as-Unrest-Intensifies-134967783.html>.

⁸⁵ Al Jazeera, "Arab League approves Syria sanctions," aljazeera.com, 28 November 2011, <http://www.aljazeera.com/news/middleeast/2011/11/20111127143750187116.html>.

⁸⁶ The Economist, "Sanctions against Syria: As effective as bullets, maybe," economist.com, 3 December 2011, <http://www.economist.com/node/21541078>.

⁸⁷ Larry McShane, "Qatar fighter jet flies mission over Libya, first Arab nation to join no-fly zone against Khadafy," nydailynews.com, 25 March 2011, http://articles.nydailynews.com/2011-03-25/news/29363172_1_fighter-canadian-lt-gen-coalition-forces.

⁸⁸ Al Jazeera, "Arab League approves Syria sanctions," 28 November 2011.

its focus on the military solution and implement the full spectrum of tools contemplated by the responsibility to protect.



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