



Libya and the State of Intervention

Context-shaping cases of humanitarian action without host state consent

- **Iraq 1991:** first use of a 'no-fly zone' to protect Kurds and Shias after the war that liberated Kuwait (no explicit UNSC cover)
- **Somalia 1992:** the first instance of an 'trigger' UNSC resolution authorizing all necessary means for humanitarian ends
- **Bosnia 1993:** another instance of a no-fly zone although this time with a covering UNSCR 816 to provide air support for the UN PKO
- **Rwanda 1994.** Chronic failure of the P5 to respond to genocide – significant driver of R2P through the ICISS (2001) into the UNGA (2005). Late French intervention.
- **Kosovo 1999:** no parallel with Libya in terms of legality given the absence of UNSC authorisation; strategic comparison in relation to the limits of air power and the interplay of humanitarian war and regime change
- **Iraq 2003:** almost no legal or diplomatic convergence with the Libya case; however, Iraq significantly raised the 'bar' for the legal authority of subsequent forcible action – the 'trust us guys' days of unipolarity are well and truly over
- **Darfur 2006:** a UNSC R2P resolution 1706 mandates UN peacekeeping and 'recalls' paras 138 and 139 of the World Summit document – never implemented unlike the later resolution mandating AU/UN hybrid peacekeeping operation
- **Libya 2011:** UNSC 1973 provides clear authorization for civilian protection; pursuant to this goal, states may conduct military operation against Libya armed forces

Previous diplomatic debates about intervention for humanitarian purposes could be categorized into two types: those where the moral and legal rationale was clear but there was no collective will to carry out the action (a variant on this theme being a lack of consensus about whether force was able to achieve the humanitarian goals); and those where there was a will to act but no proper authorization from regional and international institutions.

At first sight, Libya is a unique case in the history of post-Cold War interventions because of the convergence between will, operational speed, and gold-plated legality. Those liberal internationalists who argued tirelessly through the 1990s and early 2000s for a revised conception of 'humanitarian intervention', must be seeing in the Libyan case the culmination of two decades of tireless diplomacy.

But wait. The 'revolution' in moral consciousness that is symbolized by the acceptance of universal human rights and their protection through the doctrine of responsibility to protect (R2P), is at best incomplete. For every case of protective intervention there are instances of nonintervention (for Libya, why not Syria?), and for every articulate defender of the doctrine there is a profoundly pessimistic voice (Ed Luck for R2P, and David Rieff against).

In short, what is the state of intervention today, both in theory and in practice? One way to begin answering this question is to ask: 'what is Libya an instance of?' Looking at a broad sweep of history, Libya is the most recent in a succession of cases where coercive power had been deployed, either in whole or in part, for humanitarian ends (see below). More narrowly on its own terms, the intervention is a UN mandated no fly zone with the aim of protect civilians: UNSC Resolution 1973, passed on 17 March, grants members states permission to 'take all necessary measures... to protect civilians and civilian populated areas under threat of attack'.

The Libya file: so what is new?

Despite convergences with prior post Cold War cases, the Libya case is noteworthy either because it clarifies certain trends that were previously visible but lacked clear focus.

While being mindful of the shadow cast by past cases of intervention, it is also important to be clear about what is

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either novel or noteworthy about the current enforcement action – such that the enforcement against the Libyan government will itself have dimensions that will become a precedent for future actions. The remainder of this *Ideas-in-Brief* discusses the novel and noteworthy dimensions of the current case.

Gold-plated Legality

Even in those cases – such as Kosovo – where military action for broadly humanitarian purposes did not receive an explicit UNSC mandate, it would be wrong to infer that such interventions were illegal. Established opinion in the natural law tradition has long viewed the punishment of ‘unjust enemies’ as being lawful; and in relation to the positive law of nations, intervention for reasons of protection has been unchallenged in relation to ‘co-nationals’ and more widely in the name of universal morality (such as naval wars to end the 19C trade in slaves).

Apart from these two legal traditions that allow states to justify humanitarian war, the international legal order is sufficiently indeterminate that a reasonable legal defence can be found to cover most forms of liberal interventionism – let us not forget that the ‘coalition of the willing’ in 2003 found legal backing for their actions from law officers inside governments to senior international lawyers such as Christopher Greenwood (LSE), Ruth Wedgwood (Johns Hopkins), and Anne-Marie Slaughter (Princeton).

Yet, while appreciating both legal indeterminacy and the creative application of legal rules by experts, it is still the case that legal contestation has a negative impact on international action. All leaders of the ‘coalition of the willing’ states were dogged by the diplomatic cleavages wrought by the 2003 Iraq War, not least because elite opinion and public opinion was skeptical about the argument that the ‘combined effect’ of prior UNSC resolutions gave *Operation Iraqi Freedom* sufficient legality. It is noteworthy that R2P advocates, such as Gareth Evans, did not allow humanitarian justifications for the Iraq war to be made without being categorically denounced.

By contrast, the legal basis of the NATO-led action is uncontested. It rests on what international lawyer Michael Schmitt calls ‘a robust and carefully crafted no-fly zone authorization’. The UNSC determined that the action of the Gaddafi government represented a threat to the peace, and invoked Chapter 7 to authorize measures short of war (UNSC 1970); following further deterioration, ‘all necessary measures’ were enabled in UNSC 1973 for the protection of ‘civilians and populated areas’.

The power of speech-acts: Australian R2P activism

Two of the leading philosophers of the 20th century – Wittgenstein and Austin – brought attention to the relationship between language and reality. Rather than objects existing independently of language, both of them showed how words are critically important in the making of social reality. For eg, rights-talk came into being with Enlightenment ideas about ‘the rights of men and citizens’, only to be instantiated much later in the UN order through the Universal Declaration of Human Rights and associated legal covenants.

Language matters in relation to R2P. This is evident from the sequence with which atrocity crimes are reported, publicized, and responded to or ignored. In relation to the latter, the refusal among the P5 to openly talk about genocide during the Rwandan bloodletting of March/April 1994 reveals that UNSC members knew the power of language and how best to avoid the obligations of the 1948 Convention against the crime and punishment of Genocide. The *genocidaires* also knew the power of language, as they bombarded the airwaves with hate-speech about Tutsi ‘cockroaches’ and other vocabulary designed to unleash an ethnically motivated mass atrocity.

Speech matters to trigger atrocity crimes and speech matters to effectively prevent or contain them. The Foreign Minister’s address on Feb 28th to the HR Council in Geneva strongly defended the principle of R2P and its relevance to Libya. The diplomacy of responsibility conducted by Canberra is a good illustration of the effective mobilization of soft power. For reasons of geography and scale, Australia was never in a position to join the military action – though some deployment might have been possible without the significant contribution to the ISAF operation in Afghanistan. But what Australia achieved was that it helped to ‘**securitise**’ the case: this entailed the following three moves (i) shifting the importance of Libya up the international agenda (ii) highlighting the need for ‘last resort’ action to be taken by the UNSC (iii) justifying coercion on the exceptional grounds of the international community’s duties to assist and protect peoples in Eastern Libya facing mortal danger (in effect, moving the action from Article 138 of the 2005 UNGA Outcome Document on R2P to Article 139).

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Regional Diplomacy

Action against Libya reveals the significance of regional organizations as enablers of intervention. The League of Arab States (LAS), a long-standing advocate of non-interference, announced on February 22 that they would suspend Libya from the organization while violence ensued. The Gulf Cooperation Council and the Organisation of Islamic Conference endorsed a no-fly zone in early March.

The critical resolution, was however, the LAS declaration of 12 March that called for both a no fly zone and the establishment of safe areas. The combined power of these regional bodies was decisive, according to R2P experts Alex Bellamy and Paul Williams; in their words, regional organizations are the new 'gatekeepers' of international humanitarian action. If they are correct in this formulation, many questions need to be raised about the basis of regional organizations effectively having de facto veto power over the deliberations of the UNSC? Is this evidence of a further weakening of global institutions in relation to regional orders? And does this regional prerogative extend to NATO, or just non-western organizations? And which region is to be heard in those parts of the world where many institutions overlay the regional order (in the case of the Maghreb, the OAU, LAS, and OIC can all claim to have regional legitimacy).

America

It was evident during the immediate aftermath of Libya's 'Day of Rage' that the United States did not want to incur the risks and costs associated with another foreign entanglement. Despite this, Libya became a 'just cause' for the Obama administration providing the Europeans played a leading role in dealing with humanitarian crises on its borders.

The reasons for the shift in the US position were numerous and included the clarity of the case itself, helped by the fact that Gaddafi was openly threatening to kill the opposition movement until 'the last drop of blood' had been spilled. A related factor, that was critical to Secretary of State Clinton's support, was the degree to which a coercive response was gaining both regional and international legitimacy. It is doubtful, however, that future US administrations will regard regional 'permission' as a requirement for action – although it could be that China and Russia will not allow a Chapter 7/A42 resolution to be passed without support from the relevant regional organization(s).

To see Ambassador Rice openly supporting the ICC referral (UNSC Res 1970) and military action to protect civilians (UNSC Res 1973) shows how far the US under Obama has shifted from the unilateralism of the George W Bush period. This support for action against Libya is unlikely, however, to lead the US to 'opt-in' to the ICC, or to shift its long-held view that *the US will give effect to their right to intervene but not a generalized responsibility to protect.*

R2P with or without regime change?

While the outcome of the intervention is as yet unknown, the debates about 'what next?' touch upon a tension between advocates of R2P, who recognize the significance of coercive measures remaining strictly within the boundaries of the relevant UNSC resolutions – as against the more outcome-oriented approach which is comfortable with the politics of 'mandate creep'. Chris Brown, from the LSE, believes that the consensus orientation of R2P belies a limited understanding of politics: protecting civilians might sound non-political but when they are being attacked for political reasons and you go and protect them 'you are, whether you like it or not, intervening in local politics'. Neoconservatives, by contrast, understand that intervention is altering an international balance of power, and believe that regime change is legitimate providing a democratic polity is created.

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In his speech at the 2007 Program to Commemorate the 1994 Rwanda Genocide, Former Australian foreign minister Gareth Evans characterised R2P as 'the best starting point we have, or are ever likely to have in preventing and responding to genocides and mass atrocities', but cautioned that there was still much practical, political and conceptual business to attend to for R2P to have practical effect. Our research and outreach Centre has a mission to bring conceptual innovation, analytical clarity, and practical effect to the understanding of R2P in the region. The current foreign minister Kevin Rudd recently highlighted Australia's on-going support for R2P as a vital element of Australia's support for a rules-based international order: we share his belief that the institutions of the global order have to respond effectively to populations experiencing, or at risk of experiencing, mass atrocities.

The Asia Pacific Centre for the Responsibility to Protect, a joint initiative of the University of Queensland and AusAID, has had considerable success in deepening the pool of understanding and expertise about R2P within the Asia Pacific region: it will produce work that provides a stronger evidence base for policy and programs to prevent and respond to genocide and mass atrocities.

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Asia Pacific Centre for the
Responsibility to Protect**R2P and BRIC ambivalence**

It is correct to see NATO's mission to protect civilians and 'population areas' as being a clear-cut example of the doctrine of R2P (at least, the pillar 3 dimension of R2P) in action. Despite the relevant UNSC resolutions being accepted, the voting pattern in relation to 1973 is noteworthy for the abstentions by the 4 BRIC countries and Germany. In light of the clarity of the case (in relation to the government of Libya's crimes against humanity), and the strength of regional support for coercive measures, the absence of *support* from Russia, China, India, and Brazil (bracketing Germany for historical & domestic reasons) shows that the R2P journey is a long and winding road, with significant obstacles in the way; that is, if a world body like the UN is to give effect to R2P in relation to the capacity to respond to atrocity crimes.

Operational & Strategic Issues

Previous no-fly zones, while more constrained in their mandate, nevertheless provide important lessons for what is currently underway in Libya. Air power to enforce a no-fly can only every be a means to an end: in the aftermath of the 1991 Gulf War, the USAF flew over 42,000 sorties over Iraq between 1991 and 1996 – showing that controlling the sovereign airspace of an adversary can be quite compatible with regime continuity. Given the complexities involved in maintaining regional and international support for military action, there is an on-going risk that those carrying out the action face a difficult choice between 'mandate creep' (and the concomitant backlash) or a military stalemate that precipitates a political compromise involving cessation or divided sovereignty.

Clear-cut cases are no barrier to controversy

As this briefing has shown, Libya is in many ways an exemplar of coercive 'pillar 3' action undertaken by a humanitarian coalition after the manifest failure of the host government to live up to its responsibilities to safeguard the basic rights of its citizens. David Rieff's article in *The National Interest* shows that what seems like a 'pure' case for humanitarian intervention for advocates of R2P is understood as being contaminated by its critics. Libya proves, to Rieff and others, that internationalists' adherence to process is superficial and that the endgame for NATO action is regime change (citing UK General Richards' claim that consideration had to be given to widening the range of targets). An obvious response to the critics is that it is too soon to tell, and Libya might yet prove to be a successful example whereby a limited humanitarian war is fought within the mandate and for specific purposes. Achieving this becomes a prelude to disengagement and a transfer of full sovereignty – over land and air – back to the Libyan people.

Critics and advocates of the Libya case all agree that R2P works best when it is preventive, they disagree on what happens when prevention has failed, and in a situation where 'every how and day that goes by increases the burden of responsibility on our shoulders', as the French ambassador to the United Nations put it just prior to the vote on Resolution 1973.

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Acknowledgement: A longer version of this article, including a greater empirical focus on the UN Security Council, will be published by Tim Dunne and Jess Gifkins later this year in the *Australian Journal of International Affairs*. I would like to acknowledge Jess's contribution to the material in this briefing document.

Suggested Readings

2009 Report of the UN Secretary-General on Implementing R2P: [Implementing the Responsibility to Protect January 2009](#)

Paul Williams 'The Road to Humanitarian War in Libya', [Global Responsibility to Protect](#) 3 (2011), pp. 248-59:

Alex Bellamy and Paul Williams, [The New Politics of Humanitarian Protection?](#) *International Affairs* 87.4 (2011) pp. 845-70.

David Rieff, [Saints Go Marching In](#), *The National Interest*, June 2011. Consulted 22.6.11

Michael N. Schmitt, [Wings over Libya: the no-fly zone in legal perspective](#), *Yale Journal of International Law* Consulted 25.6.11

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