

**FROM PARALYSIS IN RWANDA TO
BOLDNESS IN LIBYA: HAS THE
INTERNATIONAL COMMUNITY TAKEN
“RESPONSIBILITY TO PROTECT” FROM
ABSTRACT PRINCIPLE TO CONCRETE
NORM UNDER INTERNATIONAL LAW?**

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I. TWENTIETH-CENTURY HUMANITARIAN INTERVENTION

Sovereigns have a responsibility to protect their citizens. They are “responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare.”¹ Another modern view endorsed by states affirms “[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.”² The United Nations developed a three pillar system to encourage the responsibility to protect: 1) the protection responsibilities of the State, 2) international assistance and capacity-building, and 3) timely and decisive response.³ Many commentators emphasize the prophylactic aspect of the responsibility to protect.⁴ Emphasis on preventative measures has been promoted in the context of eliminating the moral hazard of intervention.⁵ However, the U.N. Charter also acknowledged a state’s right to be free from intervention.⁶ These

1. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, ¶ 2.15, at 13 (Dec. 2001) [hereinafter ICISS]; The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General*, ¶ 132, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005).

2. G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

3. The Secretary-General, *Implementing the responsibility to protect: Rep. of the Secretary-General*, delivered to the General Assembly, U.N. Doc. A/63/677 (Jan. 12, 2009).

4. See Desmond Tutu, *Taking the Responsibility to Protect*, INT’L HERALD TRIB., Feb. 20, 2008, available at <http://www.nytimes.com/2008/02/19/opinion/19iht-edtutu.1.10186157.html> (“The place to start with is prevention: through measures aimed in particular at building state capacity, remedying grievances, and ensuring the rule of law.”); Dan Kwali, *The End of Humanitarian Intervention: Evaluation of the African Union’s Right of Intervention*, 9 AFR. J. CONFLICT RESOL. 41, 59 (2009).

5. See Alan J. Kuperman, *The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans*, 52 INT’L STUDIES QUARTERLY 49, 74 (2008).

6. U.N. Charter art. 2, para. 7 (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the

two values conflict, as they do in domestic systems, such as in the U.S. where the right to be free from unreasonable searches and seizures clashes with the government's interest in crime control.⁷ The importance of human rights law and policy strengthened during the twentieth century, changing the balance. The increased importance of human rights law is manifested by the UN Charter (1945)⁸; instruments such as the Universal Declaration of Human Rights (1948)⁹ and the International Covenant on Civil and Political Rights (1966);¹⁰ numerous human rights institutions, such as the Inter-American Commission on Human Rights (1959),¹¹ the European Court of Human Rights (1959);¹² organizations, such as Amnesty International (1961) and Human Rights Watch (1978);¹³ and international humanitarian law courts, including the Nuremberg tribunals (1945),¹⁴ the International Criminal Tribunal for the Former Yugoslavia (1993),¹⁵ and the International Criminal Court (2002).¹⁶ These structures plainly embody the modern enthusiasm for norms and mechanisms for the protection of human rights.

When the balance tilts towards human rights, society

application of enforcement measures under Chapter VII.”)

7. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000).

8. See U.N. Charter.

9. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

10. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, U.N. Doc. A/RES/2200(XXI)A (Dec. 16, 1966).

11. Inter-American Commission on Human Rights, <http://www.cidh.oas.org/what.htm> (last visited Sept. 21, 2011).

12. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

13. See *About Us*, HUMAN RIGHTS WATCH, <http://www.hrw.org/about/> (last visited Sept. 21, 2011).

14. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (“London Agreement”), Aug. 8, 1945, 82 U.N.T.S. 279.

15. The Secretary-General, *Statute of the International Tribunal of the former Yugoslavia: Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, at 36–48, delivered to the Security Council, U.N. Doc. S/25704 (May 3, 1993).

16. Rome Statute of the International Criminal Court (“Rome Statute”), July 17, 1998, 2187 U.N.T.S. 90.

desires intervention, which is defined broadly as “any application of pressure to a state.”¹⁷ The humanitarian appellation is applied to interventions that occur when a state intervenes in order to protect individuals from only the most serious crimes (for example, genocide, war crimes, ethnic cleansing, and crimes against humanity)¹⁸ or denial of a more expansive list of rights (such as access to food, employment, and environmental security).¹⁹

The prototypical humanitarian intervention occurs where ethnic, religious, or political (opposed to the regime in power) minorities need protection. The Kosovo intervention was humanitarian in nature and sought to protect Kosovars, who are primarily of Albanian origin and Islamic.²⁰ The Libyan intervention protected political opposition members.²¹

Historically, states have intervened to protect individuals from harm. Humanitarian intervention was strongly supported in the 19th century, when international law was less reserved about the use of force.²² One noted academic claims humanitarian intervention was the basis for the founding of the U.S. and that the English King’s principal end in granting the Massachusetts Bay Colony its Charter was to rescue “the natives from their bitter pagan fate.”²³

The UN Charter, specifically Article 2(4) in conjunction with Article 51, supports Security Council authorized intervention.²⁴ The argument has been made that unilateral humanitarian intervention was approved before the Charter, which did not

17. ICISS, *supra* note 1, ¶ 1.37.

18. G.A. Res. 60/1, *supra* note 2, ¶ 138.

19. ICISS, *supra* note 1, ¶ 2.22.

20 Nigel S. Rodley & Basak Cali, *Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law*, 7 *HUM. RTS. L. REV.* 275, 277 (2007).

21 See Martin Shaw, *Libya: Popular Revolt, Military Intervention*, *OPENDEMOCRACY* (Apr. 7, 2011), <http://www.opendemocracy.net/martin-shaw/libya-popular-revolt-military-intervention>.

22 Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 *AM. J. INT’L L.* 107, 107–08 (2006).

23 Professor Noam Chomsky, Statement to the United Nations General Assembly Thematic Dialogue on the Responsibility to Protect (July 23, 2009), *available at* <http://www.un.org/ga/president/63/interactive/protect/noam.pdf>.

24 Rodley & Cali, *supra* note 20, at 279.

explicitly forbid it, and that narrowly applied to save lives, it does not infringe upon territorial integrity or political independence.²⁵ However, state practice disappoints as a source of law in favor of unilateral humanitarian intervention. Examples of interventions during the cold war and before Kosovo (Bangladesh 1971, Vietnam in Cambodia 1978, France in Central Africa 1979, US in Grenada 1983, and Panama 1989) are not sufficient because they were not claimed by the interveners to be humanitarian; they were more responsive to national security interests, or were disapproved of by the United Nations General Assembly.²⁶

The deadlier the violence, the more justified an attempted intervention is. Crimes that are the subject of important treaties, including genocide,²⁷ crimes against humanity,²⁸ war crimes,²⁹ for example, would more strongly call for intervention than less serious crimes, particularly when large scale loss of life or ethnic cleansing is at hand.³⁰ Aggression, which is the subject of at least one modern treaty³¹ and prohibited by the United Nations Charter³² (hereinafter “UN Charter”) is anathema to modern society. The UN Charter was adopted after the Second World War.³³ It prohibits the use of force against political independence and territorial integrity³⁴ unless in self-defense

²⁵ *Id.* at 281.

²⁶ *Id.* at 279–80 (2007).

²⁷ Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277.

²⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 1950 U.N.T.S. 32.

²⁹ The Hague Conventions and Declarations of 1899 and 1907 (James Brown Scott ed., 1915).

³⁰ ICISS, *supra* note 1, ¶¶ 4.18–19.

³¹ Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 3.

³² U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

³³ *Overview of the United Nations 50th Anniversary Celebration*, UN.ORG, <http://www.un.org/UN50/un50.htm> (last visited Sept. 30, 2011).

³⁴ U.N. Charter art. 2, para. 4.

(individually or collectively).³⁵

According to one source, between 500,000 and a million people, possibly more, died in the Rwanda conflict ending in 1994.³⁶ Officials in the United Nations Secretariat and some of the permanent members of the Security Council had been aware that genocide was being planned³⁷. The Belgian foreign minister warned his UN representative of the potential for unstoppable violence.³⁸

UNAMIR commander Major-General Dallaire informed the United Nations in New York that arms caches had been discovered and asked for a change in engagement rules to enable him to seize them.³⁹ His request was turned down.⁴⁰ There is a near universal regard that this failure to intervene was one of the biggest lapses in international diplomacy in modern history.

Military Intervention in Kosovo in 1999

Ethnic Albanians, who comprised 80% of Kosovo, actively opposed Serbian rule after the breakup of the former Yugoslavia.⁴¹ By 1998, a paramilitary organization, the Kosovo Liberation Army (hereinafter “KLA”) was formed.⁴² Violence increased in Kosovo, and by March, terrorist acts by the KLA and repressive acts by the Serbian military and police increased to a point where the international community was forced to act.⁴³ The Security Council passed a resolution condemning the violence, imposing an arms embargo on both sides, urging the

35 U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

36 Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 111 (Sept. 2, 1998), *available at* <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>.

37 ICISS, *supra* note 1, ¶ 1.1.

38 Akayesu, *supra* note 36, ¶ 105.

39. *See id.*

40. *See id.*

41. Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 10 FINNISH Y.B. INT'L L. 141, 145–46 (1999).

42. *Id.* at 146.

43. *Id.* at 145–46.

ICTY to investigate, and supporting an “enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration.”⁴⁴ Seven months later, on September 23, 1998, the Security Council passed another Chapter VII resolution, noting intense fighting, displacement of 230,000 people, self-reported jurisdiction of the ICTY as an international conflict, an impending humanitarian catastrophe, and increasing violations of human rights and of international humanitarian law.⁴⁵ The resolution called for a ceasefire and meaningful negotiations towards a peaceful resolution and left open the option of “further action and additional measures to maintain or restore peace and stability in the region.”⁴⁶

Violence continued and NATO issued activation orders against Serbian forces if they would not comply with Security Council Resolution 1199.⁴⁷ Serbian President Slobodan Milosevic negotiated with Special Envoy Richard Holbrooke and an agreement was reached that averted the air strikes.⁴⁸ The Security Council passed a resolution on October 24, 1998, noting that the Federal Republic of Yugoslavia (composed of Serbia and Montenegro, hereinafter “FRY”) entered into an agreement with the Organization of Security and Cooperation in Europe (hereinafter “OSCE”) to allow a verification mission in Kosovo (hereinafter “KVM”).⁴⁹ Further, the FRY agreed to a NATO air verification mission.⁵⁰ Violence continued, and the President of the Security Council noted a massacre of Kosovo Albanians by FRY security forces and Serbian special police in the town of Racak, around January 15, 1999.⁵¹ KVM personnel were also

44. S.C. Res. 1160, at 5, U.N. Doc. S/RES/1160 (Mar. 31, 1998).

45. S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998).

46. *Id.* at 6, 13.

47. Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. OF INT'L L. 1, 6–7 (1999).

48. Roger Cohen, *Conflict in the Balkans: The Negotiators; Milosevic-Holbrooke: Never a Smooth Mix*, N.Y. Times, Mar. 24, 1999, available at <http://www.nytimes.com/1999/03/24/world/conflict-in-the-balkans-the-negotiators-milosevic-holbrooke-never-a-smooth-mix.html?src=pm>.

49. S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

50. *Id.*

51. S.C. Pres. Statement 1999/2, U.N. Doc. S/PRST/1999/2 (Jan. 19, 1999).

shot at.⁵² Several states' officials (hereinafter "the Contact Group," consisting of France, Germany, Italy, the Russian Federation, the United Kingdom, and the United States) met in London on January 29, 1999 to move negotiations along.⁵³ Negotiations took place and were initially fruitful; known as the Rambouillet Accords, they produced an agreement that was endorsed by the Contact Group on February 23rd.⁵⁴ However, when talks reconvened in Paris on March 15th, the FRY/Serbian delegation posed radical amendments.⁵⁵ The Contact Group indicated that only technical changes could take place and on March 19th, the French and American co-chairmen announced that the attitude of the FRY/Serbian delegation made further talks pointless.⁵⁶ One noted academic criticized the lack of "diplomatic flexibility" in not allowing Kosovo to remain part of FRY in exchange for other concessions.⁵⁷

Also on March 19th, the OSCE decided to remove the KVM from Kosovo because of increasing danger.⁵⁸ Three days later, on March 22nd, in Belgrade, Richard Holbrooke made an ultimately unsuccessful attempt to reach an agreement.⁵⁹ As a result, on March 23, 1999, Dr. Javier Solana, Secretary General of NATO, announced that he had directed General Wesley Clark of SACEUR to begin air operations in FRY.⁶⁰ After a NATO air campaign that lasted from March 24th to June 10, 1999, FRY agreed to settlement principles drawn up by the Group of Eight countries (Canada, France, Germany, Italy, Japan, the Russian Federation, the United Kingdom, and the U.S.). The Security Council accepted this settlement of the dispute officially with Resolution 1244.⁶¹

52. *Id.*

53. S.C. Pres. Statement 1999/6, U.N. Doc. S/PRST/1999/5 (Jan. 29, 1999).

54. Greenwood, *supra* note 41, at 149.

55. *Id.* at 150.

56. *Id.*

57. Richard Falk, *Reflections on the Kosovo War*, 1 GLOBAL DIALOGUE 2 (1999).

58. Greenwood, *supra* note 41, at 150–51.

59. *Id.* at 151.

60. Press Statement, Dr. Javier Solana, Secretary General of NATO (Mar. 23, 1999), available at <http://www.nato.int/docu/pr/1999/p99-040e.htm>.

61. S.C. Res. 1244, ¶ 1, U.N. Doc. S/RES/1244 (June 10, 1999).

The Security Council did not pass a resolution authorizing military force in Kosovo in March 1999. An attempt by Russia, Belarus, and India at introducing a draft resolution⁶² condemning NATO intervention (“such unilateral use of force constitutes a flagrant violation of the United Nations Charter, in particular Articles 2 (4), 24 and 53”) to the Security Council failed twelve votes to three (Russia, China, and Namibia).⁶³ Thus, the NATO military intervention was neither sanctioned nor condemned by the UN Security Council. The June 10th resolution previously mentioned, which was passed after the hostilities ceased and by a vote of fourteen to none (China abstaining)⁶⁴, made no mention of the NATO force.⁶⁵

The intervention in Kosovo sparked an extensive discussion on the lawfulness of the NATO force, since it was not authorized by the Security Council.⁶⁶ Some commentators found the NATO intervention lawful, while others disagreed, finding it an illegal intervention.⁶⁷ Still others found it unlawful but legitimate and an action that would eventually be held as lawful.⁶⁸ The Security Council as gatekeeper for intervention is identified as a major problem.⁶⁹ In a discussion on Sudan, one diplomat listed sixteen reasons why the international community has been reticent to enforce a responsibility to protect (these reasons include the complexity of the problem, vested interests of veto-wielding Security Council members and sophisticated maneuvering by Sudan).⁷⁰ A second article details three challenges to the responsibility to protect as “political limitations inherent in the [Responsibility to Protect] framework; moral dilemmas emerging from military action; and

62. S.C. Draft Res. 328, U.N. Doc. S/1999/328 (Mar. 26, 1999).

63. U.N. SCOR, 54th Sess., 3989th mtg. at 6, U.N. Doc. S/PV.3989 (Mar. 26, 1999).

64. Greenwood, *supra* note 41, at 152.

65. S.C. Res. 1244, *supra* note 61, Annex. ¶ 4.

66. ICISS, *supra* note 1, at 5.

67. Chomsky, *supra* note 23.

68. *Id.*

69. Mohammed Ayoub, *Humanitarian Intervention and State Sovereignty*, 6 INT’L J. OF HUMAN RIGHTS 81, 95–96 (2002).

70. Richard W. Williamson, *Sudan and the Implications for Responsibility to Protect*, STANLEY FOUNDATION POLICY ANALYSIS BRIEF, Oct. 2009, at 5.

tactical challenges.”⁷¹ These and other articles do not cite lack of facts upon which to base intervention. Some relate to communication of information and it is certainly important to be aware of the impact that media play in the process of intervention, possibly influencing the decision on where a state’s responsibility to protect is failing and interventions should take place.⁷²

Two regional organizations, the OSCE and NATO, as mentioned above, played a large role in ending the conflict between Serbia and Kosovo, as members of the UN Security Council were in conflict over intervention. This is an instance of security regionalization, which is, for the purposes of this paper, nations acting decisively through regional arrangements for security purposes.

II. INTERVENTION IN THE TWENTY-FIRST CENTURY

At this point in history, it is clear that the Security Council may authorize force to protect people from genocide, war crimes, ethnic cleansing, and crimes against humanity.⁷³ In 2004, the Secretary General convened a High-Level Panel on Threats, Challenges and Change, which stated:

We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.⁷⁴

Following this declaration concerning an “emerging norm,” the General Assembly adopted the 2005 World Summit Outcome

71. Christina G. Badescu & Linnea Bergholm, *The Responsibility to Protect and the Conflict in Darfur: The Big Let-Down*, 40 SEC. DIALOGUE 43 (2009).

72. See Piers Robinson, *The CNN Effect: Can the News Media Drive Foreign Policy?*, 25 REV. OF INT’L STUDIES 301, 302–303 (1999).

73. Rodley & Cali, *supra* note 20, at 276–77.

74. The Secretary-General’s High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶ 203, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

Document, which stated

. . . we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁷⁵

The Security Council, in 2006, took note of this acknowledgement and adopted it in a resolution, “[r]eaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity[.]”⁷⁶ To be sure, organizational declarations, even by the UN Security Council and General Assembly, are not dispositive statements of law.⁷⁷

Many commentators acknowledge that the Security Council can authorize force in humanitarian instances absent self-defense circumstances.⁷⁸ The corollary, that only the Security Council can authorize force, is also widely believed by commentators⁷⁹ and is included in an International Court of Justice opinion.⁸⁰ A minority of experts believe that unilateral humanitarian intervention is lawful;⁸¹ however, most states oppose it,⁸² especially weaker states that have the most to fear

75. G.A. Res. 60/1, ¶ 139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

76. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

77. Statute of the International Court of Justice art. 34(1), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

78. Goodman, *supra* note 22, at 111.

79. *Id.* (citing ANTONIO CASSESE, INTERNATIONAL LAW 373–74 (2d ed. 2005); IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 710–12 (6th ed. 2003); MALCOLM SHAW, INTERNATIONAL LAW 1046 (5th ed. 2003), and PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 221 (7th rev. ed. 1997)).

80. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 268 (June 27).

81. Goodman, *supra* note 22, at 111–12 (2006).

82. Alex J. Bellamy, *Realizing the Responsibility to Protect*, 10 INT’L STUD. PERSPECTIVES 111, 112–13 (May 2009).

from military actions. The Non-Aligned Movement, which includes approximately two-thirds of the UN member-states and half the world's population, rejects the concept of unilateral humanitarian intervention:

... the rejection by the Non-Aligned Movement of the so-called "right" of humanitarian intervention, which has no basis either in United Nations Charter or in international law and requested the Co-ordinating Bureau in New York to continue to be seized with this issue as well as other related matters in accordance with the principled position of the Non-Aligned Movement; they also observed similarities between the new expression "responsibility to protect" and "humanitarian intervention" and requested the Co-ordinating Bureau to carefully study and consider the expression "the responsibility to protect" and its implications on the basis of the principles of non-interference and non-intervention as well as the respect for territorial integrity and national sovereignty of States.⁸³

*Non-Security-Council-authorized, Multilateral
Humanitarian Intervention*

A consideration incorporated and discussed by an international body may open the door to intervention, such as in the situation where Security Council is deadlocked or does not take action. A group of experts has proposed two courses of action when the Security Council rejects or fails to deal with a proposal in a reasonable time.⁸⁴ Support for military action could be sought from the General Assembly in an Emergency Special Session under the established "United for Peace" procedures, developed in 1950 to address a failure by the Security Council to act. For expeditiousness, the session must be convened in twenty-four hours, in plenary, and proceed directly to the proposal without reference to committees.⁸⁵ The experts

83. NAM, Final Document of the XIII Summit of the Non-Aligned Movement Kuala Lumpur, ¶ 16, NAM XIII/Summit/Final Doc., (Feb. 20–25, 2003).

84. ICISS, *supra* note 1, ¶¶ 6.28, 6.29, 6.31.

85. *Id.*

reiterated that the Security Council is the preferred body to make decisions on the use of force for humanitarian interventions, but noted this process would serve as additional leverage on it to act.⁸⁶

The second option entails regional or sub-regional organizations pursuing collective intervention within their boundaries.⁸⁷ The basis for this deviation is that member states to those organizations are more conversant with the political actors and are more likely to feel the impact of the human catastrophe due to refugee influx, rebels setting up bases, and decreased trade or tourism.⁸⁸ These alternatives are not assertions of current customary or conventional international law. They are proposed by experts appointed to the International Commission on Intervention and State Sovereignty.⁸⁹ Their importance lies in their ability to propel international law through debate and the role of state action, which could be swayed by their persuasiveness.

III. EFFECT OF INTERVENTION IN LIBYA ON INTERNATIONAL LAW

The intervention in Libya conforms to and confirms the international law concerning the responsibility to protect and intervention as discussed so far. The perception was that Qaddafi failed to fulfill his responsibility to protect the lives and welfare of his citizens; the international community subsequently intervened according to generally accepted principles.⁹⁰ Qaddafi specifically failed to protect his citizens from the military and police that he controlled.⁹¹ The evidence indicated that police fired live ammunition into unarmed protesters; Qaddafi responded by making statements supporting this use of force and further threatened to clean Libya “house by

86. *Id.* ¶¶ 6.28, 6.30.

87. *Id.* ¶ 6.31.

88. *Id.* ¶¶ 6.31–.35.

89. *Id.* ¶¶ 6.28–.35.

90. David D. Kirkpatrick & Mona El-Naggar, *Qaddafi's Grip Falters as His Forces Take on Protestors*, N.Y. TIMES, Feb. 22, 2011, at A1.

91. Kareem Fahim & David D. Kirkpatrick, *Qaddafi Massing Forces in Tripoli as Rebellion Spreads*, N.Y. TIMES, Feb. 25, 2011, at A1.

house.”⁹² Human rights groups reported 300 deaths, witnesses suggest more, and the Italian foreign minister estimated 1000.⁹³ Egypt claimed that approximately 30,000 Egyptians working in Libya had fled into Egypt.⁹⁴ The interior minister Gen. Abdel Fattah Younes al-Abidi resigned after citizens in Benghazi were shot down with machine guns and he reported that Qaddafi intended to use planes to bomb the city.⁹⁵ Three pilots reportedly deserted rather than carry out bombing missions over Benghazi.⁹⁶ The Security Council, noting condemnation of Qaddafi by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference, as well as the possibility of crimes against humanity, and shortages of medical supplies to treat the wounded, passed a resolution on February 26, 2011 condemning the violence, use of deadly force against civilians, repression of peaceful demonstrations, and calling for an immediate end to violence, referral of the situation to the International Criminal Court, an arms embargo, asset freeze and a travel ban.⁹⁷

The Arab League asked the United Nations to provide a no-fly zone over Libya on March 12, 2011 after a meeting in Egypt.⁹⁸ This action was critical for Britain, France, and the United States, the major forces in the intervention, to avoid the perception that they were meddling in Arab affairs. On March 17th, the United Nations Security Council passed resolution 1973, introduced by Lebanon, ten-zero, with five abstentions.⁹⁹ The action by the Arab League and African Union meets the definition of security regionalization. Both organizations acted quickly and assertively to protect regional security.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

98. Zainab Fattah & Abdel Latif Wahba, *Arab League Asks UN for No-Fly Zone on Libya, Egypt TV Reports*, BLOOMBERG BUSINESSWEEK (Mar. 12, 2011), <http://www.businessweek.com/news/2011-03-12/arab-league-asks-un-for-no-fly-zone-on-libya-egypt-tv-reports.html>.

99. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

Since the plain evidence shows that Qaddafi was failing to protect his citizens and there was universal acceptance of this fact, as manifested by both regional international organizations, the League of Arab Nations and the African Union,¹⁰⁰ who suspended Libyan membership and sent negotiators, respectively, the next step in the process is to examine the requirements for intervention. There is no agreed upon list of requirements. The six requirements cited by the International Commission on Intervention and State Sovereignty, as just one example, include right authority, just cause, right intention, last resort, proportional means, and reasonable prospects.¹⁰¹

Right authority is present when the Security Council authorizes force.¹⁰² As discussed in Part Two, above, it is commonly accepted that the Security Council has the authority to authorize military intervention for humanitarian purposes.¹⁰³ Since the Security Council authorized intervention in Libya by passing Resolution 1973,¹⁰⁴ right authority is present, and this case does not contribute to the debate on unilateral humanitarian intervention.

The just cause requirement is met when large-scale loss of life is threatened.¹⁰⁵ In Libya the just requirement was met by the demonstrated loss of life and the use and threatened use of military weaponry on civilians. As mentioned above, the Libyan security forces were using machine guns on citizens and were on the verge of bombing Benghazi, one of Libya's largest cities.¹⁰⁶ There were also streams of refugees pouring into Egypt, contributing to the humanitarian crisis. The Security Council Resolution cited these issues and arbitrary detentions, enforced disappearances, torture, summary executions, violence and intimidation against journalists, widespread and systematic attacks against the civilian population, condemnation by three

100. Jeffrey Gettleman, *Libyan Oil Buys Allies for Qaddafi*, N.Y. TIMES, Mar. 16, 2011, at A1.

101. ICISS, *supra* note 1, ¶ 6.1.

102. *Id.* ¶¶ 6.2–12.

103. Rodley & Cali, *supra* note 20, at 275, 279.

104. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

105. ICISS, *supra* note 1, ¶¶ 4.18, 4.21.

106. Fahim & Kirkpatrick, *supra* note 91.

regional organizations, and the use of mercenaries.¹⁰⁷ One commentator rejects intervention “on behalf of rebels unless state retaliation is grossly disproportionate” on the theory that otherwise it may incite a moral hazard problem.¹⁰⁸

The right intention requirement is met when the interveners’ primary purpose is to stop human suffering, e.g. not for territorial advancement.¹⁰⁹ Use of collective or multilateral forces help to meet this test, as was the case in Libya, because it is less likely that a single state’s unjust interest is at play if multiple states are involved.¹¹⁰ On the other hand, rogue states may have allies who support them, in spite of the reality.¹¹¹ Scorecards are available for political freedoms¹¹², it is possible for a similar approach to be applied for rating humanitarian harm caused or allowed by a sovereign. The argument can be made that intervention was initiated with the ulterior motive to obtain Libya’s oil, but that is simply rhetorical unless and until one of the intervention forces seizes the oil fields and converts it for its own purposes or in some lesser manner takes advantage of the assets. If interventions are limited to cases where no ulterior motives can be identified, they might never occur, as all situations inevitably have national security and economic impacts for the parties involved.

The last resort test is satisfied when diplomatic and non-military efforts have been exhausted.¹¹³ This requirement was met in Libya where Qaddafi refused to negotiate, claimed a ceasefire while continuing to fight, was ramping up violent activities, including threatening to bomb cities, and has a history of internal and external violence.¹¹⁴ The Security

107. S.C. Res. 1973, *supra* note 104; *see also* Fahim & Kirkpatrick, *supra* note 91.

108. Alan J. Kuperman, *The Moral Hazard of Humanitarian Intervention*, 52 INT’L STUDIES QUARTERLY 49, 73 (2008).

109. ICISS, *supra* note 1, ¶ 4.34.

110. *Id.* ¶ 4.34.

111. Tom Kuntz, *Libya’s Late, Great Rights Record*, N.Y. TIMES, Mar. 6, 2011, at WK2.

112. *See 2011 Country Scorebook*, MILLENNIUM CHALLENGE CORPORATION, available at <http://www.mcc.gov/documents/reports/reference-2010001042001-fy11-scorebook.pdf>.

113. ICISS, *supra* note 1, ¶ 4.37.

114. Fahim & Kirkpatrick, *supra* note 91; *Report: Fighter jet shot down near*

Council was aware of the matter, sanctions had been applied, assets frozen, travel ban and arms embargo installed.¹¹⁵ One human rights advocate is concerned about overusing dialog and promotes using concrete, public benchmarks (noting that they be ignored when inconvenient) to encourage accountability and avoid unending negotiations.¹¹⁶

The proportional means requirement looks at the scale, duration, and intensity of the intervention force applied.¹¹⁷ In the case of Libya, intervention forces used air attacks to cripple military targets over the course of several months (they began March 19, 2011 and the opposition forces captured Tripoli in August).¹¹⁸ Their role was supportive of the ground troops and allowed them to apply offensive force. There are no indications that the scale, duration or intensity were out of proportion to the Libyan military force.¹¹⁹

The reasonable prospects test is fulfilled if the intervention has a reasonable chance of success.¹²⁰ The intervention in Libya succeeded, thus there was a chance of success. The short duration of the Libyan intervention, which lasted a matter of months as opposed to years, shows that it was not an unrealistic venture. This is comparable to the situation in Kosovo, mentioned above, which also lasted a matter of months.

The goal of this Article is not to certify the evidence discussed in it. There are arguments that can be made that none of the evidence is valid. Collecting accurate information is very difficult in war torn areas or where governments expel the

Benghazi, CNN WORLD (Mar. 19, 2011), http://articles.cnn.com/2011-03-17/world/libya.civil.war_1_rebel-stronghold-civilians-benghazi?s=PM:WORLD.

115. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); S.C. Res. 1970, *supra* note 97; S.C. Res. 1973, *supra* note 104.

116. Kenneth Roth, *A Façade of Action: The Misuse of Dialogue and Cooperation with Rights Abusers*, in HUMAN RIGHTS WATCH, WORLD REPORT 2011 1, 4 (2011).

117. ICISS, *supra* note 1, ¶ 4.39.

118. David Kirkpatrick, Steven Erlanger & Elizabeth Bumiller, *Allies Open Air Assault on Qaddafi's Forces in Libya*, N.Y. TIMES, Mar. 20, 2011, at A1; Kareem Fahim & David D. Kirkpatrick, *Rebels Pour Into Central Tripoli, Declaring Victory: Say They Captured 2 Qaddafi Sons—Crowds Rejoice*, N.Y. TIMES, Aug. 22, 2011, at A1.

119. See Kirkpatrick, Erlanger & Bumiller, *supra* note 118.

120. ICISS, *supra* note 1, ¶ 4.41.

media. It is often hard to tell from video footage if the victim belongs to the government regime or the oppressed group.¹²¹ However, NGOs and governmental agencies (often including those aligned with the investigated state) will reach a consensus that serious humanitarian violations are taking place and that will be sufficient in the gravest situations, which is where interventions should be occurring.

The six ICISS requirements were met before the intervention in Libya. That test, by way of comparison, is more comprehensive and stringent, for example, than the three requirement test set out by the United Kingdom Foreign and Commonwealth Office in 1998 which requires only: 1) convincing evidence of large-scale humanitarian distress, 2) no practicable alternatives, and 3) minimum and proportionate use, scope, and duration of force.¹²² A five-part test set out by the High-Level Panel on Threats, Challenges and Change includes the criteria of: 1) seriousness of threat, 2) proper purpose, 3) last resort, 4) proportional means, and 5) balance of consequences (chance of success and consequences of action vs. inaction).¹²³

In the conflict of values, human rights have won out over sovereignty. The international community, measured by the UN Security Council, Arab League, African Union,¹²⁴ and the Organization of the Islamic Conference (57 member states) expressed its disapproval of Libyan conduct and approval of military intervention. Inherent in this action is submission of

121. See Arwa Damon & Nada Hussein, *In Syria, 'brother of a whore' Gets Tossed Like Trash*, CNN (Aug. 2, 2011), http://articles.cnn.com/2011-08-02/world/syria.video_1_syrian-activist-razan-zaitouneh-anti-government-protesters?s=PM:WORLD; see also *Libya: 10 Protesters Apparently Executed: Troops Stormed Room Where Demonstrators Hid, Town Residents Say*, HUMAN RIGHTS WATCH (Aug. 18, 2011), <http://www.hrw.org/news/2011/08/18/libya-10-protesters-apparently-executed>.

122. Greenwood, *supra* note 41, at 157.

123. *A More Secure World*, *supra* note 74, ¶ 207.

124. See generally Richard Haass, *Armed Intervention: When Nations Forfeit their Sovereign Privileges*, N.Y. TIMES, Feb. 7, 2003, available at <http://www.nytimes.com/2003/02/07/opinion/07iht-edhaass.html> ("In contrast to the OAU, which regarded noninterference as a bedrock principle, the African Union commits all members to respect human rights and good governance, establishing a peer review mechanism to monitor compliance with these commitments.").

sovereignty to human rights and recognition of the responsibility of the sovereign to protect its citizens. The principle of non-intervention still stands strong, but the exception for humanitarian is supported by the events in Libya and actions by states. This is vital because internal wars are the most frequent type of armed conflict¹²⁵ and they harm civilians more than inter-state wars do, partly because their combatants have made it a point to target civilians.¹²⁶ Sanctions have become more effective since the cold war¹²⁷, but are less helpful in internal disputes where the sovereign drains all the resources and prevents his opponents from getting resources. Sovereignty should never win out over genocide, war crimes, and crimes against humanity.

Intervention in Syria

Unlike Libya, the calls for intervention in Syria are less urgent. To be sure, countries have uniformly denounced the killings; the factor that is not missing is multilateralism. Sanctions have been enacted. The United States has frozen Syrian assets and banned the import of petroleum products¹²⁸. The Human Rights Council opened a Commission of Inquiry to investigate the violations of human rights in Syria, estimating that more than 2,200 people have been killed.¹²⁹

There are differences between Libya and Syria. The Syrian opposition has not asked for military intervention.¹³⁰ There is no

125. The Secretary-General, *Facing the Humanitarian Challenge: Towards a Culture of Prevention*, Introduction, U.N. Sales No. E.99.1.28 (1999); Susan E. Rice, *Strengthening Weak States: A 21st Century Imperative* (2006), available at http://www.brookings.edu/~media/Files/rc/papers/2006/08globaleconomics_rice02/rice.pdf (stating that since the Cold War ended proxy wars between the superpowers no longer predominate).

126. U.N. Sales No. E.99.1.28, *supra* note 125.

127. John Mueller & Karl Mueller, *Sanctions of Mass Destruction*, 78 FOREIGN AFFAIRS 43, 49 (1999).

128. Exec. Order No. 13582, 76 Fed. Reg. 162, 52209 (Aug. 17, 2011).

129. Human Rights Council Res. S-17, 17th Special Sess., Aug. 18, 2011, U.N. Doc. A/HRC/S-17, at 3 (Aug. 18, 2011); *Syria Unrest: UN Says 2,200 Killed in Protest Crackdown*, BBC NEWS (Aug. 22, 2011), <http://www.bbc.co.uk/news/world-middle-east-14620671>.

130. *Syrian Opposition Formally Launches National Council*, SIAM DAILY NEWS

area within Syria, like Libya's Benghazi, that is controlled by opposition forces.¹³¹ These factors are important because if there are no reasonable prospects of stemming the violence, then military action should not be taken.¹³² Syria neighbors Israel and Iraq, where U.S. troops are present and could be attacked. Syria has allies including Islamic groups Hamas and Hezbollah and the country of Iran, which are capable of launching military strikes in neighboring countries.¹³³ Regional organizations have not called for military intervention. Their opinion is meaningful to show that the interveners have the right intentions.¹³⁴ Another factor that states will examine is the aftermath of toppling Syrian leader Bashar al-Assad: anarchy, like that which occurred in Iraq after Saddam Hussein was deposed, could be worse than the status quo.¹³⁵ Ethnic groups and tribes in Syria, and the status of an anti-regime faction answer that question. It should be noted that Russia, China, Cuba, and Ecuador voted against the Human Rights Council Commission of Inquiry, mentioned above.¹³⁶ Syria has avoided cooperation and dialogue with the international community. Al-Assad controls Syria because his family has been in power for decades and has the support of those who have benefited from its rule. Support for Qaddafi persisted even in the face of overwhelming

ONLINE (Aug. 23, 2011), <http://www.siamdailynews.com/world-news/middle-east-news/2011/08/23/syrian-opposition-formally-launches-national-council/> (“[W]e do not need to ask for or back any foreign military intervention”).

131. Marc Champion & Nour Malas, *Syria Pressures Opposition: Military Units Move on Border Towns, While Expatriates Take Steps to Form Alternative Government*, THE WALL STREET JOURNAL ONLINE (July 18, 2011), <http://online.wsj.com/article/SB10001424052702304521304576449793044695976.html> (“Unlike in Libya, Syria's opposition doesn't control swaths of the country.”).

132. ICISS, *supra* note 1, ¶ 4.41.

133. See Richard Haass & Martin Indyk, *Beyond Iraq: A New U.S. Strategy for the Middle East*, 88 FOREIGN AFF. 41, 42 (2009).

134. *Id.* ¶ 4.34.

135. Gokul Agrawal, *United States Hopes to Repeat Successful Libya Strategy*, DAILY TROJAN (Aug. 29, 2011), <http://dailytrojan.com/2011/08/29/united-stated-hopes-to-repeat-successful-libya-strategy/>.

136. *Special Session of Human Rights Council Sets Up Commission of Inquiry Into the Situation in Syria*, INT'L SERV. FOR HUMAN RIGHTS (Aug. 23, 2011), <http://www.ishr.ch/council/376-council/1132-special-session-of-human-rights-council-sets-up-commission-of-inquiry-into-the-situation-in-syria>.

international force; his ouster took 6 months.¹³⁷

IV. CONCLUSION

Since the Second World War, human rights protections have expanded vigorously. International NGOs have grown from less than five thousand in the 1950s to more than twenty thousand in the four decades that followed.¹³⁸ Organizations and governments do more than ever to protect a growing number of rights. Treaties and international courts have created more opportunities to declare when authorities are failing in their responsibility to protect and when serious crimes are taking place. Technology is making witness and victim identification more accurate and obtainable. The more mechanisms in place and utilized, the more military as a last resort is justifiable. The intervention in Libya was commendable for the universality of support, but, due to the loss of lives, goes to show that measures need to be taken to prevent the use of military intervention, which has produced innumerable fatalities since the cold war.

The interventions in Libya and Kosovo may offer proof of an ascendancy of security regionalization—nations settling on regional approval for lack of central authority. This can happen through either decreased global action (a deadlocked Security Council or fund-less organizations) or increased regional acts (NATO and EU in Kosovo, the African Union and Arab League in Libya). As exceptions to the rule, the interventions confirm the UN's monopoly to authorize military interventions, but if security regionalization endures, international legal structures may not be far behind.

137. S.C. Res. 1973, *supra* note 98, ¶ 6–12 (authorizing no fly-zone military assistance over the Libyan Arab Jamahiriya); Fahim & Kirkpatrick, *supra* note 118; Myriam Ben Ghazi, *Tripoli Falls Into Rebel Hands*, TUNISIA LIVE (Aug. 22, 2011), available at <http://www.tunisia-live.net/2011/08/22/tripoli-falls-in-the-hands-of-the-rebels/> (stating that the opposition forces gained control of Tripoli on Aug. 22, 2011).

138. The Secretary-General, *We the Peoples: The Role of the United Nations in the Twenty-First Century: Rep. of the Secretary-General*, figure 13, U.N. Doc. A/54/2000 (Mar. 27, 2000).