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SECURITY COUNCIL RESOLUTION 1973 ON LIBYA: A MOMENT OF LEGAL & MORAL CLARITY*

Paul R. Williams[†] & Colleen (Betsy) Popken[‡]

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I. INTRODUCTION

When the United Nations Security Council adopted Resolution 1973 on March 17, 2011, the world witnessed a brief moment of legal and moral clarity.¹ Although at least 17 humanitarian interventions have taken place since 1990—including northern and southern Iraq, East Timor, Bosnia, Somalia, and Kosovo²—humanitarian intervention has often been hand-

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¹ This moment of legal and moral clarity may have already passed. At the time of writing this article, the Syrian government had killed more than 2,900 civilians and the Security Council had yet to pass any resolution condemning the violence. *See Syria Protests: More Than 2,900 Killed Overall, Says UN*, BBC NEWS (Oct. 6, 2011) <http://www.bbc.co.uk/news/world-middle-east-15203188>; Joe Lauria, *Russia, China Veto U.N.'s Syria Move*, WALL ST. J., Oct. 5, 2011, at A9.

² Taylor B. Seybolt, HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE 28 (2007).

icapped by narrow legal mandates and weak implementation. But in Libya, the world got it right. The Security Council quickly passed a well-drafted legal blueprint for humanitarian intervention and an international coalition³ aggressively implemented it. In doing so, a coalition led by the British and French demonstrated the legal skill and moral commitment to prevent an impending massacre.⁴

This article argues that Resolution 1973 and its subsequent implementation provide a blueprint for effective humanitarian intervention.⁵ The humanitarian intervention in Libya was characterized by: (1) swift action by the Security Council to authorize military intervention when diplomacy appeared fruitless;⁶ (2) a well-drafted resolution that provided the mandate necessary for a successful intervention; and (3) aggressive and immediate implementation by an international coalition. This article does not take the view that humanitarian intervention is always the appropriate response to the international community's responsibility to protect civilians from atroci-

³ The international coalition that contributed to the operation in Libya included the United States, France, Britain, Italy, Canada, Spain, Denmark, Norway, Sweden, Belgium, the Netherlands, Bulgaria, Turkey, Qatar, the United Arab Emirates, and Jordan. Simon Rogers, *NATO Operations in Libya: Data Journalism Breaks Down Which Country Does What*, GUARDIAN DATABLOG, (Oct. 31, 2011, 7:30 AM), <http://www.guardian.co.uk/news/datablog/2011/may/22/nato-libya-data-journalism-operations-country#data>.

⁴ Because the British and French were moral leaders of the humanitarian intervention in Libya from the beginning, this article will refer to the international coalition that implemented Resolution 1973 as the "British-French led coalition." See generally S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011). However, the authors of this article do recognize that the U.S. played a large role in the redrafting of Resolution 1973 days before it was passed, and has committed the largest number of military assets to the campaign. Rogers, *supra* note 3. Some scholars have referred to the U.S.'s participation in the humanitarian intervention as "leading from behind." See generally Simon Chesterman, "Leading from Behind": *The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*, 25 ETHICS & INT'L AFF. 279 (2011).

⁵ For one of the first efforts to analyze humanitarian intervention in Libya, see generally contributions from the Carnegie roundtable entitled *Libya, RtoP, and Humanitarian Intervention*, including articles from Alex J. Bellamy, Simon Chesterman, James Pattison, Thomas G. Weiss, and Jennifer Welsh, available at http://www.carnegiecouncil.org/resources/journal/25_3/roundtable/index.html. For discussion of Libya as the first exercise of the Responsibility to Protect, see Gareth Evans, *UN Targets Libya with Pinpoint Accuracy*, NAT'L TIMES (Mar. 24, 2011), <http://www.theage.com.au/opinion/politics/un-targets-libya-with-pinpoint-accuracy-20110323-1c6pc.html#ixzz1aIS0mLlW> [hereinafter *Pinpoint Accuracy*]; Gareth Evans, *Former Foreign Minister Gareth Evans: Responsibility to Protect*, YALE GLOBAL ONLINE (Apr. 15, 2011), <http://yaleglobal.yale.edu/content/gareth-evans-responsibility-protect-transcript> [hereinafter *Evans on Responsibility to Protect*].

⁶ The international coalition was not deceived by repeated calls for a ceasefire from the Gadhafi regime, a tactic that has deceived the international community in so many other instances where atrocities have been committed against civilians. See Simon Denyer & Leila Fadel, *NATO Strike Kills Son of Gaddafi*, WASH. POST, May 1, 2011, at A1.

ties and crimes against humanity.⁷ However, when the international community does determine that humanitarian intervention is the right course of action, Resolution 1973 and its implementation provides a model framework to successfully protect civilians.

In Libya, it took less than one month and just one prior resolution for the Security Council to authorize the use of force to protect civilians.⁸ Less than one month after Muammar Gadhafi first ordered helicopters and snipers to kill protesters in Benghazi⁹ and just nineteen days after measures under Security Council Resolution 1970¹⁰ had failed to stop Gadhafi's forces advancing towards Benghazi, the Security Council authorized the use of force to protect civilians. Resolution 1973 is a well-drafted legal blueprint that provides intervening forces with the mandate necessary for a successful intervention.¹¹ This legal blueprint authorized: (1) the use of "all necessary measures" to enforce the resolution; (2) the protection of all "civilian popu-

⁷ The intervention in Libya is widely recognized as the first exercise by members of the international community of the full spectrum of measures available under the Responsibility to Protect. The Responsibility to Protect developed as a result of several humanitarian crises in the 1990s, and in response to the debate regarding the legality of humanitarian intervention. The primary dilemma addressed by the doctrine is how to balance a state's sovereign right to conduct its affairs with the international community's responsibility to protect civilians. The Responsibility to Protect encompasses three Pillars: (1) states' responsibility to protect their own citizens; (2) the international community's responsibility to aid states in protecting their citizens; and (3) timely and decisive action by the international community if states manifestly fail to do so. The third pillar encompasses a variety of measures which may be peaceful—such as fact-finding or mediation, coercive—such as sanctions or embargos, or forceful—such as military intervention. Humanitarian intervention under Pillar 3 is considered a last resort, when other peaceful or coercive measures have failed or would prove inadequate. In Libya, when more diplomatic and other non-violent measures failed to yield results, the British-French led coalition did not hesitate to intervene militarily to protect Libyan civilians. For discussion of Libya as the first exercise of the Responsibility to Protect, see *Pinpoint Accuracy*, *supra* note 5; *Evans on Responsibility to Protect*, *supra* note 5. The authors recognize that some scholars address the military action in Libya as humanitarian intervention while others address it as the responsibility to protect. The distinction between humanitarian intervention and the responsibility to protect is unimportant for the purposes of this article, which will refer to military action in Libya as humanitarian intervention.

⁸ See *Timeline: Libya's Gaddafi Killed as His Hometown Taken*, REUTERS (Oct. 22, 2011), <http://www.reuters.com/article/2011/10/22/us-libya-events-idUSTRE79L17J20111022> (providing a timeline of the conflict in Libya).

⁹ Nick Meo, *Libya Protests: 140 'Massacred' as Gaddafi Sends in Snipers to Crush Dissent*, TELEGRAPH (Feb. 20, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8335934/Libya-protests-140-massacred-as-Gaddafi-sends-in-snipers-to-crush-dissent.html>.

¹⁰ Security Council Resolution 1970 included an asset freeze, arms embargo, travel ban, and referral to the International Criminal Court (ICC). S.C. Res. 1970, ¶¶ 1–23, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

¹¹ Other scholars agree that Resolution 1973 is a well-drafted resolution. See *Pinpoint Accuracy*, *supra* note 5.

lated areas . . . including Benghazi”; (3) the protection of areas “under threat of attack”; (4) an exception to the arms embargo “notwithstanding paragraph 9 of resolution 1970”; (5) an exclusion of a “foreign occupation force” that still allowed for limited presence on the ground; and (6) a no fly zone with teeth.¹² A coalition led by the British and French immediately and aggressively implemented the mandate under Resolution 1973. Just two days after Resolution 1973 was adopted, French planes attacked Gadhafi’s forces advancing on Benghazi, and the U.S. and U.K. launched over 110 cruise missiles into Libya.¹³ On March 31, NATO assumed full responsibility for the mission in Libya, and conducted over 9,000 strike sorties in six months.¹⁴

Humanitarian intervention in Libya was characterized by recognition by the international community that this was not a war between two moral equals.¹⁵ This recognition was reflected throughout Resolution 1973, particularly in the cleverly drafted clause extending protection to civilian populated areas including Benghazi and in the exception to the arms embargo.¹⁶ This notion was also apparent in the firm manner in which the international coalition implemented the resolution to protect persons under threat of attack by Gadhafi’s forces.¹⁷

Rarely has the Security Council responded so quickly and effectively to stop a humanitarian crisis. In Bosnia, for instance, over a year passed from the time Serbian forces first fired on peaceful demonstrators in Sarajevo until the Security Council authorized the use of force to deter attacks against safe areas.¹⁸ And, by the time the Dayton Peace Accords were

¹² S.C. Res. 1973, *supra* note 4, ¶¶ 4–12.

¹³ *See Libya: US, UK and France Attack Gaddafi Forces*, BBC NEWS (Mar. 20, 2011), <http://www.bbc.co.uk/news/world-africa-12796972>.

¹⁴ Strike sorties are intended to identify and engage appropriate targets, but do not necessarily deploy munitions each time. Press Release, NATO, NATO and Libya: Operational Media Update, Sept. 29, 2011, *available at* http://www.nato.int/nato_static/assets/pdf/pdf_2011_09/20110930_110930-oup-update.pdf.

¹⁵ *See* Garth Evans, *Viewpoint: ‘Overwhelming’ Moral Case for Military Path*, BBC NEWS (Mar. 8, 2011), <http://www.bbc.co.uk/news/world-africa-12676248> (arguing that there is a strong moral justification for the West intervening in Libya to protect civilians); Steve Clemons, *Viewpoint: Libya Intervention ‘Brings Huge Risks,’* BBC NEWS (Mar. 12, 2011), <http://www.bbc.co.uk/news/world-africa-12708727> (arguing that the western nations are in danger of losing their moral status by intervening and becoming crusaders).

¹⁶ S.C. Res. 1973, *supra* note 4, ¶ 4. Some scholars look unfavorably upon the partiality showed by the Security Council in this resolution. *See* Jennifer Welsh, *Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP*, 25 ETHICS & INT’L AFF. 1, 4–6 (2011).

¹⁷ *See* S.C. Res. 1973, *supra* note 4, ¶ 4 (indicating the strength with which the international community responded to this issue by authorizing all necessary measures to protect civilians).

¹⁸ S.C. Res. 836, ¶¶ 5, 9–10, U.N. Doc. S/RES/836 (June 4, 1993).

signed nearly four years later, thirty-three separate resolutions provided piecemeal legal authorization for intervention in Bosnia,¹⁹ and between around one hundred thousand civilians were killed and over two million displaced.²⁰ Despite Security Council authorization to use force in Bosnia, the international community was timid and tardy in the implementation of military intervention. In fact, General Michael Rose, who led the U.N. mission in Bosnia, specifically said that the U.N. “must . . . avoid all situations that involve the use of force It is not part of our mission to impose any solution through force of arms.”²¹ As a result, NATO forces and U.N. peacekeepers turned a blind eye to numerous attacks by Serbian forces on civilians in designated safe areas, and when NATO did use force, it was characterized by pinprick airstrikes on unmanned tanks²² and airport runways.²³

Unlike Libya, the humanitarian intervention in Bosnia was blinded by a notion that both sides should be treated equally. This was reflected throughout the campaign in the slow authorization for the use of force, the lack of response to violations by the Serbian troops, and the duration of a two-sided arms embargo.²⁴ In one particularly egregious instance, U.N. forces destroyed the bunkers and trenches of Bosnian government troops and drove over 550 of them at gunpoint from a strategic area in order to “preempt the Serbs from doing it themselves.”²⁵

¹⁹ Between April 7, 1992 and December 14, 1995, the Security Council passed thirty-three resolutions, beginning with U.N. Security Council Resolution 749 (1992) and ending with U.N. Security Council Resolution 1016 (1995). S.C. Res. 749, U.N. Doc. S/RES/749 (Apr. 7, 1992); S.C. Res. 1016, U.N. Doc. S/RES/1016 (Sept. 21, 1995).

²⁰ *Bosnia War Dead Figure Announced*, BBC NEWS (June 21, 2007), <http://news.bbc.co.uk/2/hi/europe/6228152.stm>; U.N. HIGH COMM’R FOR REFUGEES [UNHCR], UNHCR GLOBAL APPEAL 224 (Ann Encontre et al. eds., 2004), available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3fc754793&query=2.2%20million%20bosnia>.

²¹ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Oct. 24, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-7-Oct.-24-19941.pdf>.

²² BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Sept. 26, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-3-Sept.-26-19942.pdf>.

²³ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Nov. 28, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-12-Nov.-28-19941.pdf>.

²⁴ See Richard K. Betts, *The Delusion of Impartial Intervention*, 73 FOREIGN AFF. 20, 24–25 (1994) (explaining the danger of impartiality in Bosnia and the negative consequences that stemmed from it).

²⁵ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Oct. 11, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-5-Oct.-11-19941.pdf>.

Often, in the face of ongoing atrocities, the Security Council fails to authorize intervention.²⁶ This was the case in Kosovo, where over a year after attacks by Serbian forces on ethnic Albanians and a massacre of the Jashari family in the village of Prekaz,²⁷ the Security Council had adopted only two resolutions,²⁸ neither of which authorized the use of force. Eventually, NATO airstrikes began without Security Council approval. And later, the international community refused to admit the legality of intervention, instead dubbing it “illegal but legitimate.”²⁹

Tragically, sometimes the international community does nothing at all. In 1994, the world watched in silence while over eight hundred thousand were killed in the Rwandan genocide.³⁰ The genocide in Darfur has claimed over four hundred thousand lives,³¹ and despite strong rhetoric condemning the attacks against civilians, the international community’s response to the atrocities has been wholly inadequate to protect them.³²

Despite these and other lessons, humanitarian intervention in Libya did not have the full support of the international community every step of the way. In the adoption of Resolution 1973, five countries abstained: Germany, Russia, China, India, and Brazil.³³ Germany was concerned that there would be large-scale loss of life and that implementation of Resolution 1973 would result in “protracted military conflict.”³⁴ Brazil believed that humanitarian intervention would exacerbate the situation in Libya, “causing more harm than good to . . . civilians,”³⁵ and Russia warned against “unpredicted consequences” and expressed concern about who would enforce the measures and how they would enforce them.³⁶ India was similarly con-

²⁶ See generally George A. Critchlow, *Stopping Genocide Through International Agreement When the Security Council Fails to Act*, 40 GEO. J. INT'L L. 311 (2008) (discussing the failures of the Security Council to act and the reasons why).

²⁷ See *Balkans Special Report*, WASH. POST, <http://www.washingtonpost.com/wp-srv/inatl/longterm/balkans/timekosovo4.htm> (last visited Feb. 29, 2012).

²⁸ See S.C. Res. 1199, U.N. Doc. S/RES/1199 (Sept. 23, 1998); S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

²⁹ INDEP. INT'L COMM'N ON KOSOVO, *THE KOSOVO REPORT* (2000), available at http://site maker.umich.edu/drwcasebook/files/the_kosovo_report_and_update.pdf.

³⁰ *Genocide in Rwanda*, UNITED HUM. RTS. COUNCIL, http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm (last visited Feb. 29, 2012).

³¹ *Genocide in Darfur*, UNITED HUM. RTS. COUNCIL, <http://www.unitedhumanrights.org/genocide/genocide-in-sudan.htm> (last visited Feb. 29, 2012).

³² TAYLOR B. SEYBOLT, *HUMANITARIAN MILITARY INTERVENTION: THE CONDITIONS FOR SUCCESS AND FAILURE I* (2007).

³³ U.N. SCOR, 66th Sess., 6498th mtg. at 3, U.N. Doc. S/PV.6498 (Mar. 17, 2011).

³⁴ *Id.* at 4–5.

³⁵ *Id.* at 6.

³⁶ *Id.* at 8.

cerned about implementation and unintended consequences,³⁷ while China simply disagreed with a resolution that authorized force when peaceful means had not been exhausted.³⁸

Once Resolution 1973 was adopted and humanitarian intervention underway, certain members of the international community continued to doubt the wisdom of intervention. Although Arab League calls for a no fly zone in Libya played a role in the adoption of Resolution 1973,³⁹ and Lebanon reportedly played a role in its drafting,⁴⁰ Arab League leaders balked once they saw what actions were actually required for a successful humanitarian intervention.⁴¹ Even amongst some NATO allies, resolve began to falter as the campaign proved to be longer than some had anticipated.⁴²

Fortunately, the fears espoused by the five abstainers proved largely unfounded. Likely far fewer civilians died in the implementation of Resolution 1973 than would have been killed if the world had done nothing. Fears about who would implement the campaign were quickly quashed as the British, French, and Americans immediately took the lead, followed shortly thereafter by NATO. And while the campaign was perhaps not as brief as some would have preferred, it began to wind down after just six months. Lastly—and not to be underestimated—the Libyan people are now free from a brutal dictator and able to determine their own future.

This article argues that Resolution 1973 and its subsequent implementation provide a blueprint for humanitarian intervention that successfully protects civilians. In order to shed light on this framework for intervention, this article: (1) analyzes the text of Resolution 1973 authorizing the use of force; and (2) examines the interpretation and implementation of Resolution 1973 by the international coalition. In the analysis of Resolution 1973, this article focuses on paragraph 4 of the resolution, under the heading “Protection of Civilians,”⁴³ and paragraphs 6 and 8 of the resolution, under the heading “No Fly Zone.”⁴⁴

³⁷ *Id.* at 5–6.

³⁸ *Id.* at 10.

³⁹ Richard Leiby & Muhammad Mansour, *Arab League Endorses No-Fly Zone Over Libya*, WASH. POST, Mar. 13, 2011, at A1.

⁴⁰ *Libya: UN Backs Action Against Colonel Gaddafi*, BBC NEWS (Mar. 18, 2011), <http://www.bbc.co.uk/news/world-africa-12781009>.

⁴¹ Edward Cody, *Arab Group Decries West's Broad Air Campaign in Libya*, WASH. POST, Mar. 21, 2011, at A13.

⁴² One such example is Italy's Foreign Minister, Franco Frattini's call for a ceasefire. See Matt Robinson, *Italy Ceasefire Call Exposes NATO Split on Libya*, REUTERS (June 22, 2011), <http://www.reuters.com/article/2011/06/22/us-libya-idUSTRE7270JP20110622>.

⁴³ S.C. Res. 1973, *supra* note 4, ¶ 4.

Authorizes Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding para-

Where relevant, this article will compare the text of Resolution 1973 with an earlier, leaked draft of the resolution. The first draft of the resolution was prepared primarily by the British and French with input from Lebanon.⁴⁵ Reportedly, between the leaked version of the resolution and adoption of Resolution 1973, the Americans engaged,⁴⁶ and presumably contributed to broadening the resolution. This Article will compare and contrast paragraph 4 of Resolution 1973 with paragraph 10 of the draft resolution, entitled “Civilian Protection and Humanitarian Assistance Authorization.”⁴⁷ Paragraph 4 of Resolution 1973 is significantly broader than para-

graph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory, and *requests* the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authorization conferred by this paragraph which shall be immediately reported to the Security Council

Id.

⁴⁴ *Id.* ¶¶ 6, 8.

Decides to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians

Authorizes Member States that have notified the Secretary-General and the Secretary-General of the League of Arab States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6 above, as necessary, and *requests* the States concerned in cooperation with the League of Arab States to coordinate closely with the Secretary General on the measures they are taking to implement this ban, including by establishing an appropriate mechanism for implementing the provisions of paragraphs 6 and 7 above

Id.

⁴⁵ See Darren Mara, Rob Mudge & Jennifer Abramsohn, *Britain, France Draft Libya No-Fly Resolution at UN Security Council*, DEUTSCHE WELLE (Mar. 16, 2011), <http://www.dw-world.de/dw/article/0,,14911884,00.html>; *Libya: UK Forces Prepare After Libyan No-Fly Zone Vote*, BBC NEWS (Mar. 18, 2011), <http://www.bbc.co.uk/news/uk-politics-12770467>; Kevin Rudd, *Security Council Heeds Lessons from Rwanda and Balkans*, AUSTRALIAN (Mar. 19, 2011), <http://www.theaustralian.com.au/national-affairs/foreign-affairs/security-council-heeds-lessons-from-rwanda-and-balkans/story-fn59nm2j-1226024272337>; Nicholas Watt et al., *Libya: UN Security Council Backs No-Fly Zone and Air Strikes*, GUARDIAN (Oct. 13, 2011), <http://www.guardian.co.uk/world/2011/mar/17/libya-un-security-council-air>; Spokesperson of the Ministry of Foreign and European Affairs, Statement on the Adoption by the United Nations Security Council of Resolution 1973 on the Situation in Libya (Mar. 18, 2011), <http://www.franceonu.org/spip.php?article5451>.

⁴⁶ See Mara, Mudge & Abramsohn, *supra* note 45.

⁴⁷ Paragraph 10 of the draft resolution states:

Authorizes members of the League of Arab States and other States which have notified the Secretary-General, who are acting nationally or through regional organizations [sic] or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures to protect civilians and civilian objects in the Libyan Arab Jamahiriya, and to make available humanitarian and related assistance, *requests* that all States provide appropriate support for these measures, and further

graph 10 of the draft resolution in terms of the protection it extends to civilians and the flexibility it gives to states to aggressively fulfill the mandate.

This Article will compare the responses of the international community to the impending massacres in Libya and Bosnia. This Article will compare the legal authorizations for intervention from the Security Council, and the international community's implementation of these resolutions.

II. PROTECTION OF CIVILIANS

Paragraph 4 of Resolution 1973 provided states with a broad legal mandate to protect civilians in Libya by authorizing “all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”⁴⁸ The overarching purpose of Resolution 1973 was the protection of civilians, and there were five key ways that paragraph 4 authorized this protection: (1) a mandate to use “all necessary measures”; (2) protection of “civilian populated areas . . . including Benghazi”; (3) protection of areas “under threat of attack”; (4) an exception to the arms embargo “notwithstanding paragraph 9 of resolution 1970”; and (5) exclusion of a “foreign occupation force” that still allows for limited presence on the ground.⁴⁹

A. *All Necessary Measures*

The Security Council quickly responded to the violence in Libya with a comprehensive resolution that authorized all measures necessary to stop attacks on civilians.⁵⁰ “All necessary measures” is the language employed by the Security Council to authorize the use of force under Chapter VII, Article 42 of the U.N. Charter.⁵¹ While the authorization to use force to

requests the Member States concerned to inform the Secretary-General immediately of the measures they take pursuant to the authority conferred by this paragraph which shall be immediately reported to the Security Council

Libya: Draft Security Council Resolution, CBS NEWS (Mar. 16, 2011), http://www.cbsnews.com/htdocs/pdf/March_16_LibyaDraftResolution2011_1.pdf?tag=contentMain;contentBody.

⁴⁸ S.C. Res. 1973, *supra* note 4, ¶ 4.

⁴⁹ *Id.*

⁵⁰ The Security Council adopted Resolution 1973, “Acting under Chapter VII of the Charter of the United Nations.” *Id.* pmb. The Security Council can authorize the use of force under Chapter VII, Article 42 of the U.N. Charter when situations pose a threat to international peace and security. *See* U.N. Charter arts. 39, 41, 42.

⁵¹ *See* Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Ceasefires and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 124, 129 (1999) (explaining that diplomatic considerations generally describe the use of ambig-

protect civilians is not unprecedented, the speed at which the Security Council reacted to violence in Libya is certainly refreshing. Further, the international coalition actually: (1) used all necessary resources, including attack helicopters and predator drones; and actually (2) struck all necessary targets to fulfill its mandate to protect civilians.

The British-French led coalition used all resources necessary to immediately and aggressively fulfill its mandate to protect civilians. On March 19, just two days after Resolution 1973 was adopted, French planes attacked Gadhafi forces advancing on Benghazi, and the U.S. and U.K. launched over 110 cruise missiles into Libya.⁵² On March 31, NATO took over implementation of the mandate to protect civilians, and within six months, NATO forces had conducted 24,346 sorties and 9,082 strike sorties.⁵³ In fulfilling its mandate to protect civilians, NATO used fighter aircraft, surveillance and reconnaissance aircraft, air-to-air refuelers, unmanned aerial vehicles (UAVs), and attack helicopters.⁵⁴ At its peak, over 260 air assets contributed to the operation, with occasional contribution from ships and submarines.⁵⁵ Approximately 8,000 troops contributed to NATO's operation,⁵⁶ and France, the U.K., and Italy all deployed small numbers of military personnel into Libya to help organize and train Libyan

ous language like "all necessary measures" or "all necessary means" to authorize the use of force).

⁵² *Libya: US, UK and France Attack Gaddafi Forces*, *supra* note 13.

⁵³ NATO, *supra* note 14. A sortie is "one mission or attack by a single plane." *See Sortie Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/sortie> (last visited Oct. 30, 2011). "Strike sorties are intended to identify and engage appropriate targets, but do not necessarily deploy munitions each time." *See* NATO, *supra* note 14.

⁵⁴ Public Diplomacy Div., NATO, *Operation Unified Protector Protection of Civilians and Civilian Populated Areas* (June 2011) [hereinafter *Operation Unified Protector June 2011*], http://www.nato.int/nato_static/assets/pdf/pdf_2011_06/20110608_Factsheet-UP_Protection_Civilians.pdf.

⁵⁵ Public Diplomacy Div., NATO, *Operation Unified Protector, Protection of Civilians and Civilian-Populated Areas & Enforcement of the No-Fly Zone* (Oct. 2011) [hereinafter *Operation Unified Protector Oct. 2011*], available at http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_protection_civilians.pdf.

⁵⁶ *Id.*

opposition forces.⁵⁷ Additionally, France airdropped arms to Libyan opposition forces in June when the fighting appeared to reach a stalemate.⁵⁸

The contribution by the U.K. and France of attack helicopters to the NATO campaign demonstrated these states' commitment to provide all necessary resources to protect civilians, including at the risk of life to their own pilots. Although attack helicopters are better able to conduct precision airstrikes in urban areas, they are more vulnerable to being hit by missiles because they are relatively slow and fly low to the ground.⁵⁹ Despite this danger, in June, the U.K. contributed Apache attack helicopters and France contributed Tigre and Gazelle attack helicopters to the NATO campaign.⁶⁰ Some commentators hailed the July introduction of attack helicopters as a "game changer" in a conflict that was beginning to look like a stalemate.⁶¹

In addition to French and British attack helicopters, the U.S. deployed unmanned predator drones with hellfire missiles into Libya.⁶² A resource that only the U.S. can provide, predator drones are well-known for their use in targeted killings of individual al Qaeda operatives.⁶³ In one of the more controversial elements of the NATO campaign, predator drones may have been used in Libya in an attempt to target Gadhafi.⁶⁴

The international coalition also struck a wide range of targets in its implementation of "all necessary measures." As of October, NATO had destroyed over 5,900 military targets, including over 400 artillery or rocket launchers, over 600 tanks or armored vehicles, and over 400 military com-

⁵⁷ Alan Cowell & Ravi Somaiya, *France and Italy Will Also Send Advisers to Libya Rebels*, N.Y. TIMES, Apr. 20, 2011, <http://www.nytimes.com/2011/04/21/world/africa/21libya.html?pagewanted=all>; *Foreign Secretary Announces Assistance to the National Transitional Council in Libya*, FOREIGN & COMMONWEALTH OFF. (Apr. 19, 2011), <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=582334882> [hereinafter *Foreign Council Announcement to NTC*]. This will be discussed in more detail in the sections on the arms embargo and the exclusion of a foreign occupation force.

⁵⁸ David Jolly & Kareem Fahim, *France Says It Gave Arms to the Rebels in Libya*, N.Y. TIMES, June 30, 2011, at A4. This will be discussed in more detail in the arms embargo section.

⁵⁹ John F. Burns, *NATO Begins Helicopter Attacks in the Hope of Ending the Stalemate with Qaddafi*, N.Y. TIMES, June 5, 2011, at A18.

⁶⁰ *Id.*

⁶¹ *Id.*; see also U.K., *French Helicopters Strike Qaddafi Troops*, CBS NEWS (June 4, 2011), <http://www.cbsnews.com/stories/2011/06/04/501364/main20068953.shtml>.

⁶² *Libya: U.S. Confirms First Predator Strike*, BBC NEWS (Apr. 23, 2011), <http://www.bbc.co.uk/news/world-africa-13176645>.

⁶³ Mark Mazzetti, *C.I.A. Kills Top Qaeda Operative in Drone Strike*, N.Y. TIMES, Sept. 16, 2011, at A8; see also *Predator Drones and Unmanned Aerial Vehicles (UAVs)*, N.Y. TIMES, Nov. 1, 2011, http://topics.nytimes.com/top/reference/timestopics/subjects/u/unmanned_aerial_vehicles/index.html.

⁶⁴ See *infra* Part C for further discussion on the potential targeting of Gadhafi.

mand and control centers.⁶⁵ Targets included the usual suspects—anti-aircraft facilities, bunkers, ammunition storage sites, armored personnel carriers, artillery vehicles, command and control facilities, armored vehicles, buildings, missiles, helicopters, anti-aircraft guns, rocket launchers, surface to air missile launchers, tanks, and vehicle storage buildings⁶⁶—and some unusual suspects, including television satellites,⁶⁷ Gadhafi's palaces,⁶⁸ and perhaps Gadhafi himself.⁶⁹

The immediate and aggressive implementation of “all necessary measures” was a dramatic shift from the timid and tardy implementation conducted by the international community in response to attacks on civilians in Bosnia. In Bosnia, over a year passed before the Security Council authorized U.N. member states to take “all necessary measures, through the use of airpower” to protect “safe areas.”⁷⁰ And even after the Security Council authorized the use of force, force was rarely actually used. In one instance, in response to Serbian attacks on a safe area, General Michael Rose delivered a letter to Serbian military leader Ratko Mladić asking Serbia to please stop violating the weapons exclusion zone.⁷¹ Another time, in response to Serbian attacks on civilians, General Rupert Smith wrote to Mladić to remind him that Smith had the authority to order NATO airstrikes, though he did not actually do so.⁷² And yet another time, in response to the killing of one U.N. peacekeeper and the wounding of four others, General Michael Rose “lodged an official complaint” with Bosnian Serb leaders.⁷³ Throughout the war in Bosnia, U.N. officials repeatedly denied NATO permission to target Serbian anti-aircraft systems despite repeated

⁶⁵ *Operation Unified Protector Oct. 2011*, *supra* note 55.

⁶⁶ Rogers, *supra* note 3.

⁶⁷ *NATO Strikes Libyan State TV Satellite Facility*, NATO (July 30, 2011), http://www.nato.int/cps/en/natolive/news_76776.htm?selectedLocale=en.

⁶⁸ Tom Shanker & David E. Sanger, *NATO Plans to Take War to Qaddafi's Doorstep*, N.Y. TIMES, April 26, 2011, at A10.

⁶⁹ David Batty, *Libyan Forces Loyal to Gaddafi Attacked on Retreat from Misrata*, GUARDIAN (April 23, 2011), <http://www.guardian.co.uk/world/2011/apr/23/gaddafi-forces-attacked-misrata/print> (discussing the attack on the Gadhafi compound).

⁷⁰ S.C. Res. 836, *supra* note 18, ¶ 10.

⁷¹ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Sept. 19, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-2-Sept.-19-19942.pdf>.

⁷² BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Apr. 17, 1995, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-2-Issue-14-April-17-19951.pdf>.

⁷³ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Dec. 19, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-15-Dec.-19-19941.pdf>.

attacks on NATO planes and despite an authorization to use “all necessary measures.”⁷⁴

When force was used by NATO in Bosnia, it was usually in the form of pinprick airstrikes. In one instance, after two months of no airstrikes, and in retaliation for repeated Serbian attacks on peacekeepers, NATO warplanes attacked a single, unmanned tank.⁷⁵ Another time, NATO forces struck an airport runway, purposely leaving a number of planes next to the runway intact.⁷⁶ Soon thereafter, these runways were used by the Serbians to resupply their forces.⁷⁷ Furthermore, when NATO did decide to conduct airstrikes, the U.N. often informed Serbian forces in advance. In October of 1994, the U.N. and NATO settled on a draft agreement that would finally allow NATO to conduct airstrikes without warning “unless the U.N. feels that civilians may be endangered.”⁷⁸

While the international community in Bosnia hesitated to authorize force and then failed to use the full extent of force authorized, approximately one hundred thousand lives were lost and 2.2 million civilians displaced.⁷⁹ Fortunately for the Libyan people, the Security Council did not wait for wide-spread massacres before authorizing “all necessary measures,” and the British-French led coalition did not hesitate to implement the full scope of its mandate by using all available resources and by striking all crucial targets.

B. Civilian Populated Areas . . . Including Benghazi

Resolution 1973 extended protection to civilians and “civilian populated areas . . . including Benghazi.”⁸⁰ According to the Geneva Convention, even if military personnel are present in an area, their presence

⁷⁴ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Dec. 12, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-14-Dec.-12-19941.pdf>.

⁷⁵ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Sept. 26, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-3-Sept.-26-19942.pdf>.

⁷⁶ BALKAN WATCH, *supra* note 24.

⁷⁷ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Jan. 23, 1995, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-2-Issue-2-Jan.-23-19951.pdf>.

⁷⁸ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Oct. 31, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-8-Oct.-31-19941.pdf>.

⁷⁹ *Bosnia War Dead Figure Announced*, *supra* note 20; UNHCR, *supra* note 20.

⁸⁰ S.C. Res. 1973, *supra* note 4, ¶ 4.

does not “deprive [the] area of its civilian nature.”⁸¹ Thus, coupled with the Geneva Convention, three words—“civilian populated areas”—authorized states to use force to protect entire towns and villages in Libya, even if legitimate military targets existed within them, so long as civilians were present.⁸²

The explicit inclusion of Benghazi in Resolution 1973 as a protected area was especially significant because it was the command and control center for the Libyan opposition since the revolution began in February.⁸³ This was a clear acknowledgment by the Security Council that the Gadhafi regime and the Libyan opposition were not moral equals entitled to the same protection.

An earlier draft of the resolution limited protection to “civilians and civilian objects.”⁸⁴ Resolution 1973 broadened the scope of protection to include entire “civilian populated areas” of Libya and thus *everything*—not just “civilians and civilian objects”—within those areas. This authorized NATO forces to protect non-civilians—including the Libyan opposition forces—as long as they were within an area populated by at least one civilian. By extending protection to “civilian populated areas . . . including Benghazi,” the Security Council recognized that those needing protection may also be engaged in self-defense. This phrase was crafted in such a way that not only permitted Libyans to engage in self-defense, but also assisted them in doing so.

The British-French led coalition and NATO vigorously protected Benghazi and other “civilian populated areas” from Gadhafi’s forces by conducting airstrikes in and around at least thirty-five towns and cities in Libya.⁸⁵ NATO interpreted Resolution 1973 as allowing it to deter attacks by the Gadhafi regime on the Libyan opposition and to provide close air support as the Libyan opposition moved from one town to the next. States also worked with the National Transitional Council (NTC) to ensure that they understood the laws of war and how to appropriately treat prisoners.⁸⁶

⁸¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, 1125 U.N.T.S. 3.

⁸² S.C. Res. 1973, *supra* note 4, ¶ 4.

⁸³ *See id.*; *see also Into the Unknown; The Libya Campaign*, ECONOMIST, Mar. 26, 2011, at 29 (describing Benghazi as a stronghold for the Libyan opposition forces and important because of Resolution 1973 which allowed allies to use ‘all necessary measures’ to protect civilians in areas like Benghazi from Gadhafi’s forces).

⁸⁴ *See Libya: Draft Security Council Resolution*, *supra* note 47, ¶ 10.

⁸⁵ Rogers, *supra* note 3 (picturing the concentration of missiles around the cities, especially Tripoli and Brega).

⁸⁶ Michelle Faul, *Libyan Rebels Distribute Rules on POW Treatment*, MSNBC (May 30, 2011), http://www.msnbc.msn.com/id/43218412/ns/world_news-mideast_n_africa/t/libyan-rebels-distribute-rules-pow-treatment/ (reporting that the NTC distributed guidelines on how

This broad mandate to protect all civilian populated areas, and its aggressive implementation, was a significant departure from the limited “safe areas” that supposedly received protection during the war in Bosnia. In response to attacks on civilians in Srebrenica, the Security Council designated Srebrenica as a “safe area which should be free from any armed attack . . . ,”⁸⁷ but did not at first authorize means by which states could protect Srebrenica. Less than a month later, the Security Council designated five additional “safe areas,” including Sarajevo, Tuzla, Zepa, Gorazde, and Bihać, but still no means by which to protect them.⁸⁸ Finally, in June of 1993, the Security Council authorized states to use all necessary measures to deter attacks against the six safe areas.⁸⁹ However, even after the Security Council authorized the use of force to protect the six safe areas, the U.N. and NATO rarely provided the protection that was needed. Tragically, over two years after Srebrenica was designated as a safe area, more than eight thousand civilians were killed by Serbian forces in the Srebrenica massacre.⁹⁰

C. *Under Threat of Attack*

Resolution 1973 extended protection to civilians and civilian populated areas “under threat of attack,” and in doing so, provided NATO with the flexibility to successfully fulfill its mandate to protect civilians.⁹¹ Authorizing the protection of civilians “under threat of attack” may seem like common sense for a resolution with the goal of protecting civilians, but the Security Council does not often authorize the use of force before an attack actually occurs or unless an attack is imminent.

In fact, in an earlier draft of the resolution, the drafters had limited protection to a traditional mandate—“civilians and civilian objects in the Libyan Arab Jamahiriya”—without extending protection to civilians “under the threat of attack.”⁹² Fortunately, the resolution was redrafted to include flexibility for NATO to stop attacks on civilians before they occurred. While some commentators disagree with what NATO construed to consti-

to treat POWs, but that the U.N. Human Rights Council is still investigating extra-judicial killings on both sides of the fighting).

⁸⁷ S.C. Res. 819, ¶ 1, U.N. Doc. S/RES/819 (Apr. 16 1993).

⁸⁸ S.C. Res. 824, ¶ 3, U.N. Doc. S/RES/824 (May 6, 1993).

⁸⁹ S.C. Res. 836, *supra* note 18, ¶¶ 5, 9, 10.

⁹⁰ Helge Brunborg, Torkild Hovde Lyngstad & Henrik Urdal, *Accounting for Genocide: How Many Were Killed in Srebrenica?* 19 EUR. J. POPULATION 229, 229 (2003) (concluding that at least 7,475 people were killed in Srebrenica during the conflict).

⁹¹ S.C. Res. 1973, *supra* note 4, ¶ 4 (authorizing member states to take all necessary measure to protect civilians but requiring notification to the security council immediately afterward).

⁹² See *Libya: Draft Security Council Resolution*, *supra* note 47, ¶ 10.

tute a threat of attack, favoring a narrower interpretation,⁹³ this clause provided NATO with the flexibility necessary to adapt the campaign to the changing circumstances on the ground and to strike all targets that posed a risk to civilians.

Moreover, such a limited response would be all too reminiscent of the limited mandate in Bosnia Resolution 836 authorizing states to use force “in reply to bombardments” against safe areas.⁹⁴ The language of Resolution 836 ironically appeared to require the aggressors to have already attacked civilians in the designated safe areas before states could use force to protect them, leading to more civilian casualties. Resolution 1973 better protected civilians by providing states implementing the resolution—rather than technocrats negotiating the text of the resolution—with the latitude to determine which objects, facilities, actions, and people posed a threat of attack to civilians in Libya.

Fortunately for the Libyan people, NATO did not shy away from eliminating threats of attack to civilians. As of October, NATO had destroyed nearly six thousand military targets.⁹⁵ In order to begin to make sense of NATO’s list of targets, this Article synthesized NATO’s implementation of its mandate into five categories of “threat of attack”: (1) imminent threat of attack; (2) capacity to attack; (3) command and control; (4) incitement to attack; and (5) combat support role. Moving from category one to category five, the “threat” the targets posed to civilians reached the fringes of the mandate, yet all targets were deemed necessary to protect civilians.

The least controversial of NATO’s targets were those that constituted the most imminent threat to civilians: Gadhafi forces around or approaching civilian populated areas. NATO targets within this category included Gadhafi ground forces, tanks, and artillery outside of Libyan towns and villages.⁹⁶ Destroying targets that posed an imminent threat to civilians was a key objective early in the campaign when Gadhafi forces were staging offensives against opposition-held areas, including Benghazi.

The second category of targets were those which gave Gadhafi the capacity to attack in the future and were necessary to destroy in order to prevent impending attacks against civilians. This category included weapons depots and ammunition bunkers, unmanned tanks, and supply lines to Gadhafi regime forces. Also falling within the first and second categories

⁹³ See Welsh, *supra* note 16, at 1 (arguing that because Resolution 1973 only mentioned the Libyan authorities’ responsibility to protect, not the international community, this showed the Security Council still debated the appropriate rationale for military action).

⁹⁴ S.C. Res. 836, *supra* note 18, ¶ 9.

⁹⁵ *Operation Unified Protector Oct. 2011*, *supra* note 55.

⁹⁶ Steven Erlanger & Eric Schmitt, *NATO Set to Take Full Command of Libyan Campaign*, N.Y. TIMES, Mar. 26, 2011, at A4.

were defensive measures taken by the British-French led coalition and by NATO forces to ensure that their mandate under Resolution 1973 could be safely carried out. Defensive targets included anti-aircraft facilities and guns, rocket launchers, surface to air missile launchers, and all other targets that could endanger pilots.

The third category of targets NATO interpreted to constitute a threat of attack during the operation were “command and control” or “communication” centers. NATO described command and control centers as facilities “used to coordinate such attacks by regime forces,”⁹⁷ and therefore their destruction was necessary to halt direct commands for attacks on civilians. Such facilities included Gadhafi “palaces, headquarters and communication centers.”⁹⁸ Many observers interpreted attacks on these places as an indication that NATO was targeting the Colonel himself.⁹⁹

The apparent targeting of Gadhafi was one of the most controversial elements of the NATO campaign.¹⁰⁰ At the beginning of the operation, NATO shied away from admitting that strikes on or near Gadhafi’s compounds were aimed at killing the leader himself: “We don’t want to kill him . . . but if he sees the bombing happening all around him, we think it could change his calculus,”¹⁰¹ said one senior NATO diplomat. Following airstrikes on a residential compound in Tripoli that killed one of Gadhafi’s sons and three of his grandchildren, NATO again denied that Gadhafi had been the target: “All NATO’s targets are military in nature and have been clearly linked to the [Gadhafi] regime’s systematic attacks on the Libyan population and populated areas. We do not target individuals,” said Lieutenant General Charles Bouchard.¹⁰² Although NATO officials remained

⁹⁷ Karin Laub & Hadeel Al-Shalchi, *NATO Strike on Gadhafi HQ Raises Pressure on Him*, WASH. TIMES (Apr. 25, 2011), <http://www.washingtontimes.com/news/2011/apr/25/nato-airtrikes-hit-gadhafis-compound/> (targeting the command and control facilities that coordinated attacks on civilians).

⁹⁸ Tom Shanker & David E. Sanger, *NATO Says It Is Stepping Up Attacks on Libya Targets*, N.Y. TIMES, April 26, 2011, available at http://www.nytimes.com/2011/04/27/world/middleeast/27strategy.html?_r=1.

⁹⁹ See Rod Nordland, *Libyan Rebels Say They Have Control of Misurata*, N.Y. TIMES, Apr. 24, 2011, available at http://www.nytimes.com/2011/04/25/world/africa/25libya.html?_r=1&hp (reporting on bombs falling near Gadhafi’s compound in Tripoli); see also John F. Burns, *NATO Bombs Libyan Capital in Heaviest Strike Yet*, N.Y. TIMES, May 24, 2011, available at <http://www.nytimes.com/2011/05/25/world/africa/25libya.html> (similarly reporting on 15 airstrike targets around Gadhafi’s command compound).

¹⁰⁰ See *Pinpoint Accuracy*, *supra* note 5 (debating impermissible activities under Resolution 1973, including express military actions designed to kill Gadhafi or force him into exile, to ensure rebel victory in a civil war, or to achieve a more open and responsive system of government in Libya).

¹⁰¹ Shanker & Sanger, *supra* note 98.

¹⁰² Ian Traynor, *NATO Denies Targeting Muammar Gaddafi*, GUARDIAN (May 1, 2011), <http://www.guardian.co.uk/world/2011/may/01/libya-nato-gaddafi-un-resolution>.

hesitant to say explicitly that they were targeting Gadhafi, later in the campaign, NATO did argue that Resolution 1973 allowed for the targeting of Gadhafi because, “as head of the military, he is part of the control and command structure and therefore a legitimate target.”¹⁰³ However, in the October 20 NATO airstrike on a Gadhafi convoy fleeing Sirte, which led to the Colonel’s capture, French Defense Minister Gerard Longuet said that, “At the time of the strike, NATO did not know that [Gadhafi] was in the convoy.”¹⁰⁴ Presumably, if Gadhafi was indeed giving orders to attack civilians, he would constitute a threat of attack to those civilians.

The fourth category of NATO targets were facilities used to incite attack against the Libyan opposition. In August, NATO conducted a precision airstrike that hit three Libyan state television satellite transmission dishes in Tripoli.¹⁰⁵ NATO’s purpose was to “degrad[e] Qadhafi’s use of satellite television as a means to intimidate the Libyan people and incite acts of violence against them.”¹⁰⁶ Thus, NATO determined that limiting Gadhafi’s ability to incite attacks against civilians—by eliminating his ability to reach wide audiences—was necessary to prevent attacks against civilians. Despite NATO’s purpose for targeting state-run media, this action received a great deal of criticism from the international community, including UNESCO, which deplored the targeting of media outlets, even if used for propaganda.¹⁰⁷

The fifth category of targets interpreted to pose a threat of attack were those struck while NATO played a combat support role for the Libyan opposition. When opposition forces advanced on Tripoli in August, they did so with close air support from NATO and in coordination with NATO command and control.¹⁰⁸ NATO also provided some coverage for Libyan opposition forces to liberate the last remaining Gadhafi strongholds, includ-

¹⁰³ Fran Townsend, *NATO Official: Gadhafi a Legitimate Target*, CNN (June 9, 2011), http://articles.cnn.com/2011-06-09/world/libya.gadhafi_1_nato-official-libyan-leader-moamar-gadhafi-libya-mission?_s=PM:WORLD.

¹⁰⁴ Luis Martinez, *Timeline of NATO Airstrikes on Gadhafi Convoys*, ABC NEWS (Oct. 21, 2011), <http://abcnews.go.com/blogs/politics/2011/10/tick-tock-of-nato-airstrikes-on-gadhafi-convoys/>.

¹⁰⁵ *NATO Strikes Libyan State TV Satellite Facility*, *supra* note 67.

¹⁰⁶ *Id.*

¹⁰⁷ *UN Official Deplores NATO Attack on Libyan TV*, REUTERS (Aug. 9, 2011), <http://af.reuters.com/article/topNews/idAFJJOE77802120110809> (“Silencing the media is never a solution Fostering independent and pluralistic media is the only way to enable people to form their own opinion.”); *see also Media Group Condemns NATO Bombing of Libyan TV*, ASSOCIATED PRESS (Aug. 3, 2011), <http://www.cbsnews.com/stories/2011/08/03/501364/main20087859.shtml> (condemning the bombings because they targeted journalists and threatened their lives).

¹⁰⁸ *Libyan Rebels Take Fight to Tripoli*, ASSOCIATED PRESS (Aug. 20, 2011), <http://www.cbsnews.com/stories/2011/08/20/501364/main20095027.shtml>.

ing Sirte.¹⁰⁹ However, the extent of NATO's participation in the liberation of Sirte was likely limited. By October, NATO strike missions had reportedly dropped from fifty a day to about two dozen, perhaps because NATO recognized that, "The ability of NATO to affect the fighting inside [Sirte] is small."¹¹⁰

When Libyan opposition forces arrived in Sirte, Tripoli had already fallen and Gadhafi was no longer in control of Libya. Thus, some argued that Gadhafi's forces no longer posed a threat of attack to civilians at this time. Reportedly, however, there were still civilians in Sirte under attack by Gadhafi's forces.¹¹¹ A U.S. Air Force lieutenant general said that "loyalist gunmen in pickup trucks are terrorizing residents, killing some and intimidating many others."¹¹² While support for opposition forces in the liberation of Sirte may have been at the fringes of NATO's mandate, there was relatively little criticism of NATO's participation in this regard. The fact that this may have been legally uncomfortable was likely outweighed by the international community's desire to bring about an end to the war.

D. *Notwithstanding Paragraph 9*

Resolution 1973 authorized states to arm and train the National Transitional Council so long as it was necessary for the protection of civilians. It does so by creating an exception to paragraph 9 of Resolution 1970 which required states "to prevent the . . . supply, sale or transfer to the Libyan Arab Jamahiriya . . . of arms and related materiel of all types . . . and technical assistance, training, financial or other assistance, related to military activities"¹¹³ In paragraph 4 of Resolution 1973, the Security Council authorized states to take all necessary measures to protect civilians "notwithstanding paragraph 9 of resolution 1970 (2011)."¹¹⁴ In common language, when "notwithstanding" is used as a preposition, as it is in para-

¹⁰⁹ See Eric Schmitt, *NATO Commander Says Resilience of the Qaddafi Loyalists Is Surprising*, N.Y. TIMES, Oct. 11, 2011, at A12. At the time of writing this article, it is unclear how large a role NATO is playing in the attempted liberation of Sirte. See also Karin Laub & Slobodan Lekic, *NATO Ends Victorious Libya Campaign*, ASSOCIATED PRESS (Oct. 31, 2011), <http://www.time.com/time/world/article/0,8599,2098327,00.html> (reporting the conclusion of NATO's seven month campaign against Libya following the death of Muammar Gadhafi).

¹¹⁰ Schmitt, *supra* note 109.

¹¹¹ See Peter Beaumont, *Sirte Residents Queue to Leave City During Two-Day Ceasefire*, THE GUARDIAN (Oct. 2, 2011), <http://www.guardian.co.uk/world/2011/oct/02/sirte-residents-leave-ceasefire?newsfeed=true> (reporting that although the NTC established a two-day ceasefire for civilians to leave Sirte, many civilians still remain).

¹¹² See Schmitt, *supra* note 109.

¹¹³ S.C. Res. 1973, *supra* note 4, ¶ 9.

¹¹⁴ *Id.* ¶ 4.

graph 4, it means “despite.”¹¹⁵ Thus, states could use all necessary measures to protect civilians “[despite] paragraph 9” of Resolution 1970. Although the meaning of this phrase has been debated, the logical interpretation is that this phrase created an exception to the paragraph 9 arms embargo for measures that were necessary to protect civilians—measures that may include arming and training civilians so that they may protect themselves.

In an earlier draft of the paragraph authorizing protection of civilians, no mention was made to the arms embargo in Resolution 1970.¹¹⁶ The subsequent inclusion of “notwithstanding paragraph 9” in Resolution 1973 shows that the drafters of the resolution purposely and thoughtfully created an exception to the arms embargo. The addition of this phrase reflects an understanding by the Security Council that those who need protection may also be engaged in self-defense. Yet, despite the inclusion of “notwithstanding paragraph 9,” some commentators are skeptical that this phrase was intended by the Security Council to create an exception to the arms embargo, arguing that it would never have passed if that had been so.¹¹⁷ Others are simply critical of the fact that “notwithstanding paragraph 9” did indeed create an exception to the arms embargo,¹¹⁸ preferring an arms embargo that would have applied equally to the Gadhafi regime and the Libyan opposition.¹¹⁹

Such an interpretation fails to heed the lessons learned the hard way in Bosnia. In Resolution 713 (1991), the Security Council established a “general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Council decides otherwise.”¹²⁰ However, even while Serbian forces committed atrocities against Bosnian civilians, the Security Council neglected to modify the arms embargo so that the Bos-

¹¹⁵ *Notwithstanding Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/notwithstanding> (last visited Feb. 29, 2012).

¹¹⁶ An earlier draft of the resolution did not have the “notwithstanding paragraph 9” provision. See *Libya: Draft Security Council Resolution*, *supra* note 47, ¶ 9.

¹¹⁷ Marko Milanovic, *Can the Allies Lawfully Arm the Libyan Rebels?*, EJIL: TALK! BLOG (Mar. 30, 2011), <http://www.ejiltalk.org/can-the-allies-lawfully-arm-the-lybian-rebels/> (worrying that the Security Council implicitly took sides in this conflict and created a wink-wink embargo exception).

¹¹⁸ Dapo Akande, *Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?*, EJIL: TALK! BLOG (Mar. 31, 2011), <http://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/> (arguing that the law did create an exception to the arms embargo to assist the protection of civilians and civilian populated areas).

¹¹⁹ Yaaser Vanderman, *Is Providing Arms to Libyan Rebels Illegal?*, LAW THINK BLOG (Mar. 31, 2011), <http://www.lawthink.co.uk/2011/03/is-providing-arms-to-libyan-rebels-illegal/> (showing that the drafters of Resolution 1973 did not really through the resolution as an exception to the arms embargo. However, Secretary Clinton stated that the US interpreted that Resolution 1973 overrode the absolute prohibition on arms to anyone in Libya).

¹²⁰ S.C. Res. 713, ¶ 6, U.N. Doc. S/RES/713 (Sept. 25, 1991).

nians could protect themselves.¹²¹ Individual states also failed to lift the arms embargo for the Bosnians during much of the war despite other legal justifications for doing so, including the right of self-defense and the fact that Bosnia and Herzegovina had become an independent state since adoption of Resolution 713, which placed an embargo on “Yugoslavia.” At one point, French Foreign Minister Alain Juppé denounced a U.S. decision to stop enforcing the arms embargo against the Bosnian Government as “favoring those who wanted war over those who wanted peace.”¹²² However, U.N. peacekeepers and NATO troops rarely used force to stop violations of the arms embargo. Thus, a two-sided arms embargo had the unintended effect of protecting Serbian forces—which regularly violated the embargo—while keeping Bosnian civilians defenseless. In one instance, U.N. observers watched idly as 15–20 helicopters flew from Serbia to arm Serbian forces on the outskirts of Srebrenica.¹²³ Because the Bosnian Government was the only side realistically subjected to the arms embargo, Bosnian civilians were left unprotected when Serbian forces attacked them.

Fortunately, “notwithstanding paragraph 9” was interpreted aggressively by the French and Americans, and narrowly by the British, to allow for arming of the Libyan opposition. The U.S. believed that “notwithstanding paragraph 9” created a blanket exception to the arms embargo: “[Resolution] 1973 amended or overrode the absolute prohibition of arms to anyone in Libya so that there could be legitimate transfer of arms if a country were to choose to do that,” said U.S. Secretary of State Hilary Clinton.¹²⁴ The U.K., on the other hand, interpreted “notwithstanding paragraph 9” more narrowly, to allow only for arming the Libyan opposition with “defensive weapons” in “certain limited circumstance.”¹²⁵ On June 29, France was

¹²¹ See S.C. Res. 724, ¶ 5, U.N. Doc. S/RES/724 (Dec. 15, 1991) (providing procedures for ensuring member state compliance with arms embargo covering Bosnia and Yugoslavia and calling upon states to fulfill obligations of previously instituted arms embargo); see also S.C. Res. 757, ¶ 13, U.N. Doc. S/Res/757 (May 30, 1992) (requesting further details from states regarding implementation of arms embargo and soliciting requests for ways to improve embargo effectiveness).

¹²² BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Nov. 21, 1994, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-1-Issue-11-Nov.-21-19941.pdf>.

¹²³ BALKAN WATCH (Action Council for Peace in the Balkans, Washington, D.C.), Feb. 6, 1995, available at <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2011/09/Vol.-2-Issue-4-Feb.-6-19951.pdf>.

¹²⁴ Nicolas Watt, *U.S. Paves Way to Arm Libyan Rebels*, GUARDIAN (Mar. 29, 2011), <http://www.guardian.co.uk/world/2011/mar/29/arms-libya-rebels>.

¹²⁵ Richard Spencer, *France Supplying Weapons to Libyan Rebels*, THE TELEGRAPH (U.K.) (June 29, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/Libya/8606541/France-supplying-weapons-to-Libyan-rebels.html> (stating that although the U.K. has adopted a broader interpretation of Resolution 1973, the U.K. is not currently involved in providing defensive weapons).

the first and only of the three NATO leaders to confirm that it had actually provided weapons to the Libyan opposition.¹²⁶ France airdropped assault rifles, machine guns, and rocket-propelled grenades and launchers to rebels in Misrata and the Nafusa Mountains.¹²⁷ The airdrop was credited with breaking the stalemate with Gadhafi forces in the Nafusa Mountain region.¹²⁸ Egypt,¹²⁹ Qatar,¹³⁰ and the United Arab Emirates¹³¹ also reportedly provided weapons to the Libyan opposition. Such efforts were credited with providing ill-equipped opposition troops with the means to defend themselves against Gadhafi forces and with the ability to forge offensive fronts against his regime.¹³²

In Resolution 2009, the Security Council crafted further exceptions to the arms embargo, including an exception for “arms and related materiel of all types, including technical assistance, training, financial and other assistance, intended solely for security or disarmament assistance to the Libyan authorities.”¹³³ While on its face this may appear to be redundant if “notwithstanding paragraph 9” did indeed create an exception to the arms embargo for the Libyan opposition, a close reading of the two provisions reveals that the two exceptions are in fact created for different purposes. “Notwithstanding paragraph 9” in Resolution 1973 lifted the arms embargo for NTC forces if it was necessary to protect civilians under threat of attack. On the other hand, paragraph 13(a) of Resolution 2009 lifted the arms embargo for the new Libyan authorities “for security or disarmament assistance.”¹³⁴ Thus, the inclusion of additional exceptions to the arms embargo in Resolution 2009 did not undermine the argument that “notwithstanding paragraph 9” created an exception to the arms embargo for the Libyan opposition.

E. Excluding a Foreign Occupation Force

Resolution 1973 allowed states the flexibility of putting limited foreign intelligence and military personnel on the ground in Libya so long as they did not constitute “a foreign occupation force of any form on any part

¹²⁶ Jolly & Fahim, *supra* note 59.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Charles Levinson & Matthew Rosenberg, *Egypt Said to Arm Libya Rebels*, WALL ST. J., Mar. 17, 2011, at A6.

¹³⁰ Ian Black, *Libyan Rebels Receiving Anti-Tank Weapons from Qatar*, GUARDIAN (Apr. 14, 2011), <http://www.guardian.co.uk/world/2011/apr/14/libya-rebels-weapons-qatar>.

¹³¹ Jolly & Fahim, *supra* note 59.

¹³² *Id.* (explaining the strategy of the opposition rebels to gain ground against Gadhafi).

¹³³ S.C. Res. 2009, ¶ 13, U.N. Doc. S/RES/2009 (Sept. 16, 2011).

¹³⁴ *Id.*

of Libyan territory.”¹³⁵ While on its face, this provision would appear to exclude the presence of any boots on the ground,¹³⁶ it in fact appears that the drafters cleverly chose the term “occupation force,” which is not without legal significance. According to the Hague Convention IV, a “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army[.]”¹³⁷ and comes under the “effective control of hostile foreign armed forces.”¹³⁸ Any foreign intelligence or military presence on the ground in Libya falling short of this did not constitute foreign occupation of the territory.

An earlier draft of the resolution did not include any reference to exclusion of a foreign occupation force,¹³⁹ meaning that the drafters thought very carefully about including this clause. Some commentators interpret the inclusion of this phrase as expressing the intent of the Security Council to avoid a situation similar to Iraq.¹⁴⁰ While this phrase certainly set the tone that there would not be heavily-armed peacekeeping forces in Libya, it also represents clever drafting that allowed for some military presence on the ground. This phrase ultimately provided states fulfilling the mandate with a wider range of available measures to protect civilians as the conflict progressed.

Utilizing the latitude provided by this provision, states used limited troops on the ground to gather intelligence, direct airstrikes, and organize and train the opposition as the conflict evolved. The British, French, and Italians interpreted Resolution 1973 to allow them to legally deploy small numbers of military personnel to assist the Libyan opposition. However, their governments, to varying degrees, shied away from explicitly describing their assistance as military training of the Libyan opposition.¹⁴¹ Prior to

¹³⁵ S.C. Res. 1973, *supra* note 4, ¶ 4.

¹³⁶ *Pinpoint Accuracy*, *supra* note 5.

¹³⁷ Convention Respecting the Laws and Customs of War on Land, art. 42, Oct. 18, 1907, 205 C.T.S. 277.

¹³⁸ *Occupation and International Humanitarian Law: Questions and Answers*, INT’L COMM. RED CROSS (Aug. 4, 2004), <http://www.icrc.org/eng/resources/documents/misc/634kfc.htm> (stating that international law makes no distinction between an occupation, liberation, invasion, or administration and international humanitarian law takes effect when a territory is under the effective control of hostile forces).

¹³⁹ *See Libya: Draft Security Council Resolution*, *supra* note 47.

¹⁴⁰ *Compare Libya UN Resolution 1973: Text Analysed*, BBC NEWS (Mar. 18, 2011), <http://www.bbc.co.uk/news/world-africa-12782972> (claiming that because Resolution 1973 specifically excludes any foreign occupation force that the operation will not be another Iraq and instead would have a clear limit), with Jeff Bridoux, *Why Libya Will Not Be a Second Iraq*, OPENDEMOCRACY (Apr. 15, 2011), <http://www.opendemocracy.net/opensecurity/jeff-bridoux/why-libya-will-not-be-second-iraq> (analyzing the problems with Resolution 1973’s vagueness).

¹⁴¹ While training of NTC forces would have been excluded under paragraph 9 of Resolution 1970, it likely falls under the “notwithstanding paragraph 9” exclusion to the arms em-

deployment, the French said that their officers would “organize the protection of the civilian population.”¹⁴² Italian Defense Minister Ignazio La Russa said that Italian officers would act “according to the needs” of the rebels, but that their role would fall short of being “on the battlefield.”¹⁴³ British Foreign Secretary William Hague said that British officers would help the NTC to “improve their military organizational structures, communications, and logistics” but would not “be involved in training or arming the opposition’s fighting forces” or “in the planning or execution of the NTC’s military operations” or giving “any other form of operational military advice.”¹⁴⁴ Additionally, British Special Forces and MI6 intelligence officers were reportedly gathering intelligence in Libya and directing British airstrikes since March,¹⁴⁵ and U.S. CIA operatives were reportedly working in Libya since the conflict began.¹⁴⁶

III. NO FLY ZONE WITH TEETH

Resolution 1973 established a no fly zone that applied to all flights over Libya and immediately allowed member states to use force to implement it. When the international community first began to discuss intervention in Libya, the phrase on the tip of everyone’s tongue was “no fly zone.” By the time the Security Council met on March 17 to vote on Resolution 1973, much of the world—including the Arab League—supported the idea of a no fly zone.¹⁴⁷ Paragraph 6 established a “ban on all flights in the airspace of the Libyan Arab Jamahiriya”¹⁴⁸ and paragraph 8 authorized member states to take “all necessary measures to enforce compliance with the ban on flights.”¹⁴⁹ Though it seems like common sense that the Security Council would immediately authorize measures allowing states to enforce the no fly zone, it does not always actually do so.

In Bosnia, the Security Council “established a ban on military flights in the airspace of Bosnia and Herzegovina”¹⁵⁰ in October 1992, but

bargo as a measure necessary for the protection of civilians. Cowell & Somaiya, *supra* note 57.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Foreign Council Announcement to NTC, supra* note 57.

¹⁴⁵ Mark Mazzetti & Eric Schmidt, *C.I.A. Spies Aiding Airstrikes and Assessing Qaddafi’s Foes*, N.Y. TIMES, Mar. 30, 2011, at A1.

¹⁴⁶ *Id.*

¹⁴⁷ Leiby & Mansour, *supra* note 39.

¹⁴⁸ S.C. Res. 1973, *supra* note 4, ¶ 6.

¹⁴⁹ *Id.* ¶ 8.

¹⁵⁰ S.C. Res. 781, ¶ 8, U.N. Doc. S/RES/781 (Oct. 9, 1992); *see also* S.C. Res. 816, ¶ 1, U.N. Doc. S/RES/816 (Mar. 31, 1993) (extending the no-fly zone from just military aircraft to “all fixed wing and rotary wing aircraft”).

did not authorize member states to take “all necessary measures . . . to ensure compliance with the ban on flights” until nearly six months later.¹⁵¹ During those six months, the U.N. reported 465 violations of the no fly zone.¹⁵² Even after the Security Council authorized “all necessary measures” to enforce the no fly zone, NATO forces rarely actually enforced it. In fact, U.N. officials repeatedly denied NATO permission to target Serbian anti-aircraft systems despite repeated attacks on NATO planes.¹⁵³ When NATO did take measures to enforce the no fly zone, it often did so by inflicting only minimal damage to aircraft runways, sometimes specifically avoiding the airplanes themselves.¹⁵⁴ It was not until February 1994 that NATO finally shot down a Serbian plane violating the no fly zone.¹⁵⁵

Fortunately for the Libyan people, the Security Council reacted within one month of attacks on civilians to authorize all necessary measures to enforce a no fly zone and NATO actually implemented this mandate to its fullest. NATO aggressively enforced the no fly zone under Resolution 1973 by destroying the Gadhafi regime’s flight capabilities and by ensuring that no flights from either side of the conflict were allowed in the air. Enforcement of the no fly zone required a wide range of NATO personnel and resources, including surveillance, intelligence, and tactical aircraft.¹⁵⁶ NATO fulfilled its mandate by bombing anti-aircraft facilities, early warning radar, helicopters, anti-aircraft guns, and surface to air missiles launchers.¹⁵⁷ In fact, the no fly zone has been implemented so aggressively that during the one reported challenge to the no fly zone, a French fighter jet chased a Gadhafi regime plane to the ground, and then destroyed it in an air-to-ground strike as soon as it landed.¹⁵⁸

IV. CONCLUSION

For two decades, humanitarian intervention had been handicapped by narrow legal mandates and weak implementation. But on March 17, 2011, the international community experienced a brief moment of legal and

¹⁵¹ S.C. Res. 816, *supra* note 150, ¶4.

¹⁵² U.N. Department of Public Information, The United Nations and the Situation in the Former Yugoslavia (Sept. 1993), http://www.un.org/Depts/DPKO/Missions/unprof_b.htm.

¹⁵³ BALKAN WATCH, *supra* note 74.

¹⁵⁴ BALKAN WATCH, *supra* note 23.

¹⁵⁵ DAVID OWEN, BALKAN ODYSSEY 355 (1995).

¹⁵⁶ *No-Fly Zones Explained*, NATO (Apr. 1, 2011), http://www.nato.int/cps/en/natolive/news_71959.htm.

¹⁵⁷ See Rogers, *supra* note 3 (dissecting the NATO bombing targets, and providing up-to-date details on NATO campaign in Libya, including by type of action and region affected).

¹⁵⁸ *Libya: France Jet Destroys Pro-Gaddafi Plane*, BBC NEWS (Mar. 24, 2011), <http://www.bbc.co.uk/news/world-africa-12850975>.

moral clarity, and seized this moment to stop an impending massacre. The Security Council provided a well-drafted legal blueprint that authorized all measures necessary to protect civilians, and an international coalition immediately and aggressively implemented this mandate. This article does not take the view that humanitarian intervention is always the appropriate course of action. However, the next time the world does have the moral clarity and political will for humanitarian intervention, Resolution 1973 and its implementation will provide an effective blueprint for the successful protection of civilians.