

The Art of Law in the International Community

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with origins in colonialism, armed interventions, and civil war. In 2003, after intense sessions at the Security Council, the USA, UK, and Australia invaded Iraq, ostensibly to end a programme of weapons of mass destruction. The Security Council had not authorized the intervention. US Secretary of State Colin Powell remarked, when asked about the legality of the invasion, that it was as lawful as Kosovo. In 2005, the UN membership as a whole made clear that humanitarian intervention must be authorized by the Security Council to be lawful. The UK challenged this decision in April 2018 in its attempted legal justification for the use of force against Syria discussed at the outset of the chapter.

War for humanitarian and purposes other than countering an unlawful first resort to military force have proven highly problematic. The military objectives are vague and doubts about legality affect morale, planning, and alliances. Humanitarian intervention is a particularly challenging concept for military strategists.¹¹¹ After decades of debate, it remains elusive. Legal process is designed to deal with such concepts. The Security Council was designed to deal with 'threats to the peace', also a vague concept. To keep legal process legal, however, and distinctive from policymaking, substantive rules must apply to limit procedure – the vaguer the issue, the more substantive procedural law is needed. Article 51 provides a concrete legal standard for the use of force in self-defence – an armed attack. With this standard, less process is needed. Unilateral decisions are tolerable. Almost every other problem for which armed force has been proposed as a remedy is qualitatively different, including, or especially, humanitarian crises. For these, process solutions are needed. Security Council process consists of the relevant provisions of the Charter and international law. This law requires a finding of threat to or breach of the peace and a determination that any response meets the principles of necessity and proportionality.

Acceptance of this perspective is reflected in the UN World Summit Outcome document. After the Secretary-General's review of the UN following the 2003 Iraq invasion, the membership did

¹¹¹ For a catalogue of problems with the concept of 'humanitarian intervention' including vagueness, see M. E. O'Connell, 'Review of Mark Gibney, "International Human Rights Law: Returning to Universal Principles" (2008)'; and of T. Weiss, "'Humanitarian Intervention: Ideas in Action" (2007)', *Perspectives on Politics*, 7 (2009), 712–13.

indicate its readiness for the Security Council to be involved in responding to humanitarian crises, but the reference also indicates that the lawful use of military force requires Council authorization. No alternative body is empowered to authorize, let alone states acting alone or in ad hoc coalitions:

138. Each 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. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, 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 . . .¹¹²

No finding was made in March 2011 that peaceful means would be inadequate when the United Nations Security Council authorized the imposition of a no-fly zone to protect civilians from the Libyan government of Colonel Ghaddafi. About 172 peaceful demonstrators had been killed in the capital, Tripoli, in February 2011. As soon as the Council resolution passed, NATO began a campaign far in excess of a no-fly zone. NATO forces came to the aid of government opposition forces, assisting them in driving Colonel Ghaddafi from Tripoli and to his death at the hands of a mob. When challenged that the Security Council resolution did not authorize regime change, the answer has been that the only effective way to protect civilians was to remove Ghaddafi from power.¹¹³ The critical terms for some

¹¹² 2005 World Summit Outcome, GA Res. A/60/1 of 16 September 2005, paras. 138-9.

¹¹³ H. Roberts, 'Who Said Gaddafi Had to Go?', *London Review of Books* (17 November 2011), available at www.lrb.co.uk/v33/n22/hugh_roberts/who_said_gaddafi_had_to_go .

intervening states were, 'protect civilians'. Beyond the issue of whether NATO exceeded its authority under Resolution 1973, is the question, should the Security Council have authorized even a no-fly zone?

The evidence from the Libya crisis reveals no indication of the necessity of using force.¹¹⁴ Hugh Roberts, at the time of the Libya intervention with the International Crisis Group, wrote:

The claim that 'the international community' had no choice but to intervene militarily and that the alternative was to do nothing is false. An active, practical, non-violent alternative was proposed, and deliberately rejected. The argument for a no-fly zone and then for a military intervention employing 'all necessary measures' was that only this could stop the regime's repression and protect civilians. Yet many argued that the way to protect civilians was not to intensify the conflict by intervening on one side or the other, but to end it by securing a ceasefire followed by political negotiations.¹¹⁵

The International Crisis Group advocated the formation of a contact group to negotiate among the Libyan groups. The African Union offered high-level mediation, which Colonel Ghaddafi accepted but the rebels and their Western sponsors rejected.

These and other facts demonstrate the intervention was anything but a last resort. Nor was real success probable. President Obama spoke of Ghaddafi going but did not say how removing him would assist civilians. Richard Falk has concluded that military intervention has for decades led only to general failure. He predicted a similar failure as a result of the Libya intervention. The first six months of fighting cost an estimated 30,000 lives. Libya became the scene of lawlessness, militant activity, and vicious human rights violations, especially against minorities and immigrants. On the other hand, foreign oil interests are prospering.¹¹⁶

¹¹⁴ M. E. O'Connell, Remarks, 'Revolution and Intervention in the Middle East', *Proceedings of the Annual Meeting (American Society of International Law)*, 105 (2011), 555-75, 563-4.

¹¹⁵ Roberts, 'Who Said Gaddafi Had to Go?' 2011 (n. 113).

¹¹⁶ For a critical comment on humanitarian intervention, see R. Falk, 'Can Humanitarian Intervention ever be Humanitarian?' (4 August 2011), available at <http://mwcnews.net/focus/editorial/12577-humanitarian-intervention.html?tmpl=component>. L. Müller, 'The Force Intervention Brigade - United Nations Peacekeeping and Peace Enforcement', *Journal of Conflict and Security Law*, 3 (2015), 359-80.