# State prosecution of terrorism and rebellion: a functional examination of the protection of civilians and the erosion of sovereignty

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***Abstract***

This paper outlines a possibly emerging policy governing the transnational use of force. It contends that the Security Council has begun allowing, even calling for, the use of force in response to large-scale targeting of civilians. This new policy, by focusing on the threat to "civilians" instead of the Charter's express prohibition on the use of force and its fundamental respect for sovereignty, violates the cornerstones of the Charter system. While these considerations are facially incompatible with the Charter's principles governing force, they help provide a new framework for analysing how the Security Council will act regarding intervention in today's security environment. The Security Council, due to its unique nature, small voting structure and the broad deference afforded it by states and under the Charter, has been able to respond to threats against civilians from transnational terrorism and state violence on a step-by-step basis. This paper pieces together some of these steps to show the Security Council is indeed using a new framework for the use of force that incorporates considerations outside those contemplated in the Charter.

## INTRODUCTION

In this article I outline a possibly emergent policy governing the transnational use of force. I contend that the Security Council (SC) has begun allowing, and even calling for, the use of force in response to large-scale targeting of civilians. By focusing on the threat to civilians rather than the Charter's express prohibition on the transnational force and its fundamental respect for sovereignty, this new policy, violates the cornerstones of the Charter system. Although this article analyses the legitimacy of this policy only briefly, its focus in no way diminishes the critical importance of this

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question. Indeed, the legitimacy of this new policy will have far-reaching effects on the legitimacy of the Charter system as a whole.

I first argue that article 2(4)'s prohibition on the use of force is no longer applied. NATO's 2011 invasion of Libya, and the American targeted campaigns in Yemen and Pakistan show that article 2(4), as it was originally construed, is well and truly dead. In both instances, foreign forces violated the territorial integrity of a sovereign state, even though the targeted state posed no threat to international peace and security. These actions clearly contravene the principles embodied in article 2(4), and such blatant violations render its prohibition on the use of force meaningless. However, even though these actions violate the Charter, the SC called for – or at least condoned – both violations of sovereignty.

Accordingly, I argue that the SC has started using new criteria to govern the use of force. To abstract these new criteria, I compare Gaddafi's actions against his rebels – to which the SC responded with force – with President Obama's actions against al-Qaeda – in which the SC seemingly acquiesced. In Libya, the SC found a threat to international peace and security in the Libyan government's intrastate actions to address a domestic problem. By contrast, the SC allowed the United States to engage in transnational raids and drone strikes against its own anti-government rebels, al-Qaeda. Yet, under the Charter, Gaddafi's domestic actions were not illegal, while the United States' violations of Yemeni and Pakistani sovereignty, were.

Therefore, it seems that the SC has grouped al-Qaeda and the Gaddafi regime together as legitimate targets of transnational force. Indeed, the SC's actions suggest that Gaddafi, the leader of a state, should be treated and judged in the same manner and under the same rules as al-Qaeda, a violent non-state actor. However, this is not a grouping one would expect under the state-centric UN Charter. In fact, the grouping seems to disregard the rights of sovereignty. As undemocratic or ruthless as Gaddafi may have been, his regime was the state, and that state faced attacks from armed rebels attempting to overthrow the government.[1] Thus, Gaddafi's actions, much like the United States' response to al-Qaeda, were the actions of a sovereign acting in defence of the state. It is consequently inappropriate to compare Gaddafi to al-Qaeda. Rather, from a theoretical perspective, Gaddafi's response to the armed rebels should have

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[1] All states, even the most undemocratic or 'unfree' enjoy an equal amount of protection under the UN Charter. See *eg*, Kelsen 'The principle of sovereign equality of states as a basis for international organization' (1944) 53/2 *Yale LJ* 207.

been compared to the actions of Presidents Bush and Obama against the al-Qaeda rebels. Gaddafi and Obama are both leaders of legitimate states responding to anti-government violence. Both actors were attempting to regain a monopoly on the use of force within their respective countries.

However, I claim further, that the different treatment accorded to Gaddafi and Obama, actually shows that the SC is doing something, informally and by default, that no other UN organ has been able to do through formal legal and political channels. The SC is beginning to incorporate new considerations[2] governing the use of force in response to anti-government violence, terrorism, and the resulting threat to civilians.[3] While the current system still protects the rights of sovereignty in many instances, I contend that something exogenous to the Charter animates the SC's actions. The SC's new focus imposes limitations on sovereignty. Specifically, it has begun focusing on the protection of civilians from mass indiscriminate violence.[4] This new consideration will more readily allow states and groups of states, to engage in transnational force in the protection of civilians who face mass acts of indiscriminate violence.

While these considerations initially appear incompatible with the Charter's principles governing force,[5] they do help provide a new framework for analysing how the SC will react to intervention in the current security environment. Due to its unique nature, voting structure, and the broad deference afforded it by states and under the Charter, the SC has been able to respond to threats against civilians from transnational terrorism and state violence on a step-by-step basis. I piece together some of these steps to show that the SC is indeed using a new framework for the use of force that incorporates considerations outside those contemplated in the Charter.

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2 See *infra* at page 126 for a discussion of the legality of the Security Council using considerations that exist outside the Charter.

3 While the Security Council does not have the legal authority to alter the Charter or make law, it enjoys a significant amount of leeway under art 39 in determining a 'threat to international peace and security'.

4 See *Responsibility to protect*, ICISS (December 2001), available at: http://responsibilitytoprotect.org/ICISS%20Report.pdf.

5 See UN Charter art 2(4) and 51.

**THE RISE AND FALL OF THE UN CHARTER**

In the Autumn of 2011, Libyan rebels, with the support and tactical[6] assistance of NATO forces, toppled the Muammar el-Gaddafi regime.[7] While the overthrow of the unpredictable and dangerous dictator could have prevented further human rights abuses in Libya and expedited the conclusion of a civil war, it was also the death knell for article 2(4) of the UN Charter. Reacting to the devastation of World War II, the UN Charter expresses a solemn commitment to peace, non-intervention, sovereignty, and stability.[8] Accordingly, it forbids the use of transnational force save in self-defence, or in response to threats against international peace and security.[9] This prohibition is the 'cornerstone' of the Charter.

Despite the importance of this prohibition, as early as 1970, Thomas Franck pointed to the changing norms governing the use of force and declared article 2(4) dead.[10] Yet, the latest UN-sponsored regime change in Libya, violates not only the object and purpose of article 2(4), but also makes a mockery of its very existence. The situation in Libya clearly did not present a threat to international peace and security, yet the SC authorised military intervention. Thus, instead of preventing international conflict and respecting sovereignty, the SC used its power under the Charter[11] to violate the principles of sovereignty and non-intervention by authorising international intervention in a domestic civil war. When viewed in light of the UN's original and stated principles, this authorisation of transnational force against Libya's domestic acts of violence is a clear violation of the Charter's original meaning.

The second threat to the Charter's conception of sovereignty, is the rise of transnational terrorism and state responses to it. As the world witnessed on 11 September 2011, national borders mean nothing to armed non-state actors who can move across borders and plan the infliction of massive civilian casualties from a host state. The effectiveness and lethal nature of

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6 Starr 'Foreign forces in Libya helping rebel advance' CNN 24 August 2011 (special forces helped rebels 'improve their tactics' and organise their operations).

7 Al-Shaheibi 'NATO ends victorious 7-month Libya campaign' *The Guardian* 31 October 2011; McElroy 'Libya: Nato to be investigated by ICC for war crimes' *The Telegraph* 2 November 2011.

8 See generally UN Charter art 1; Khare 'Use of force under UN Charter' 343 Metropolitan 1985.

9 Allain *The true challenge to the United Nations system of the use of force: the failures of Kosovo and Iraq and the emergence of the African Union* (2004) 237 240.

10 Franck 'Who killed article 2(4)? Changing norms governing the use of force by states' (1970) 64 *Amer J of Int'l Law* 809.

11 See UN Charter art 39.

transnational terrorism, present a fundamental challenge to a Charter premised on sovereignty, and on states as the basic units in the international system.[12] The new threat that terrorists will target civilians, has prompted states to respond. Indeed, the United States has engaged in transnational strikes against terrorists in Yemen and Pakistan under a very broad interpretation of the inherent right of self-defence embodied in article 51. This interpretation of article 51 is extraordinarily loose, and fails to take into account the traditional requirements of imminence, or the sovereignty of the host states. As the former UN special rapporteur stated, 'if other states were to claim the broad-based authority [...], to kill people anywhere, anytime, the result would be chaos'.[13] However, the SC not only tolerated these strikes, it actually appears to have endorsed them. Thus, the use of force against Libya in response to domestic acts, is further complicated by the SC's contradictory tolerance of the United States' transnational strikes against al-Qaeda members in Yemen and Pakistan.[14]

Indeed, when viewed against the SC's mandate as set out in Chapter VII, which is further informed by article 2(4), these actions are the complete antithesis of what one would expect. These differing responses can be explained by two possible theories: either the SC is acting outside of the Charter on an *ad hoc*, unprincipled basis; or the SC, while still operating outside of the Charter, is acting in a more principled way, incorporating new considerations governing the use of force. I contend that the two case studies illustrate more of a principled approach that reflects many of the considerations and rules embodied in the 'Responsibility to Protect' (R2P) report.[15] Specifically, the SC's treatment of Gaddafi's regime and the American targeted killings campaign, evince an increasing concern for the protection of civilians from large scale death at the hands of an actor who is avowedly indiscriminate in its violence.[16]

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12 In larger freedom: towards development, security and human rights for all' *Report of Secretary General* 21 March 2005 UN Doc A/59/2005 (2005).

13 Alston 'Statement of former UN Special Rapporteur on US targeted killings without due process' *ACLU* 3 August 2010.

14 See Press Release, Security Council 'Security Council unanimously adopts wide-ranging anti-terrorism resolution: calls for suppressing financing, improving international cooperation', UN Press Release SC/7158 28 September 2001.

15 See Triplett *Sexual assault on college campuses: seeking the appropriate balance between due process and victim protection* (2012) 62 *Duke LJ* 487, 491 (explaining the importance of consistent standards regulating state conduct).

16 The fact that the nature of the actor creating the threat, state or non-state, is becoming less important is a fundamentally important issue.

Before examining whether the SC has violated the Charter's rules governing the use of force, and what considerations it is now incorporating, it is helpful to examine the original rule and the problems to which it was responding.

## THE BIRTH OF THE CHARTER: A SYSTEM OF NON-INTERVENTION

> The primary, the fundamental, the essential purpose of the United Nations is to keep peace. Everything it does which helps prevent World War III is good. Everything which does not further that goal, either directly or indirectly, is at best superfluous.[17]

Following the devastation caused by World War II, the Allies gathered to establish a new world order that would 'save succeeding generations from the scourge of war'.[18] To secure this end, states undertook, in article 2(4), to 'refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'.[19] Accordingly, the context in which the Charter was born, along with its text, and the stated goals of its drafters, demonstrate one overarching goal, namely peace. The drafters hoped to achieve this peace through the two key principles of the illegality of war, and respect for the sovereignty of states.

### Outlawing war

> If the United Nations once admits that international disputes can be settled by using force, then we will have destroyed the foundation of the organization and our best hope of establishing a world order.[20]

The text of the UN Charter expresses the determination to 'to practice tolerance and live together in peace with one another as good neighbours' and 'to unite our strength to maintain international peace'.[21] Article 1(1) explicitly lays out the *raison d'être* of the United Nations as follows:[22]

> [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to

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17 Lodge Jr *The United Nations Weekly* 25 November 12 1954 available at: http://www.unz.org/Pub/Colliers-1954nov12-00025.

18 UN Charter, Preamble.

19 *Id* at art 2(4).

20 Dwight D Eisenhower's radio and television address to the American People on the situation in the Middle East, 20 February 1957.

21 *Ibid*.

22 Cassese *The current legal Regulation of the Use of Force 3* (1986).

> the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.[23]

This text expresses a strong presumption in favour of the peaceful settlement of disputes by proclaiming that force is allowed only when it seeks to restore international order and stability.[24] The words: '[t]here shall be no violence by states' represent the rallying cry of the Charter; a call explicitly embodied by article 2(4)'s prohibition on the use of force against other nations:[25]

> 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.[26]

Article 2(4)'s rule of non-aggression has been treated as the fundamental basis for the UN and the cornerstone of international law.[27] In fact, in the *Armed Activities on the Territory of Congo case*,[28] the International Court of Justice (ICJ) typified article 2(4) the 'cornerstone of the United Nations Charter'. General Assembly resolutions also enshrine this principle.[29] Moreover, states arguing for or against the legality of the use of force, always appeal to article 2(4), and frame their arguments to satisfy its demands.[30] Consequently, this article is a clear and general prohibition on the

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23 Article 1(1) UN Charter.

24 UN Charter Preamble; United Nations Conf on Int'l Orgs 334–35 (United Nations Information Office, 1945).

25 Judge Hersch Lauterpacht *The function of law in the international community* 64 (1933). The impact and influence of Judge Lauterpacht's principles are discussed more thoroughly in Franchk *Recourse to force* (2002).

26 Article 2(4) UN Charter.

27 While there is considerable debate as to what constitutes the use of force, this paper only discusses intentional violation of sovereign airspace and the use of bombs on that territory. Such actions are clearly and unequivocally the 'use of force'.

28 ICJ Reports (2005) 168 at para 148, 45 ILM (2006) 271.

29 See 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations; 1974 Definition of Aggression.

30 See *eg* Ackerman *International law and the preemptive use of force against Iraq* CRS Report For Congress 4, 11 April 2003 (discussing the American argument for the use of force in Iraq that points to threats against international peace and security); Weller 'The legality of the threat of use of force against Iraq' *J of Hum Assistance* 10 February 1998.

use of military force in international relations – a prohibition that permeates both the Charter and international law.[31]

The Charter does sanction the use of force in two, very limited, scenarios: self-defence, as recognised under article 51: and SC authorisation in response to a threat to international peace and security.[32] These provisions only come into play once the stability and order of the international system is under threat. In fact, rather than weakening the rule against the use of force, these provisions strengthen article 2(4) by reducing the cost of compliance. Although members of the UN have agreed to give up the right to use force whenever they wish, it is unrealistic to expect states to forfeit the right of self-defence completely. Moreover, it is equally impractical to expect the UN to create a rule that would prevent nations from using force against threats to the very order they hoped to create. Like the United States Constitution, the United Nations Charter is not a suicide pact.[33] By recognising these political realities, the Charter establishes a system that prevents intrastate aggression, while still allowing states to defend themselves and protect their sovereignty.

**Respect for the sovereignty of states**

The second theme in the Charter, is closely aligned to the prohibition on the use of force in international relations. Under the Charter, states enjoy complete political and territorial integrity. Beginning with the Peace of Westphalia, the concept of state sovereignty has been a principal feature of international law.[34] Furthermore, the signatories to the Charter, were all independent states who enjoyed, and sought to maintain, complete autonomy over their respective territories.[35] Therefore, '[i]f the new system was to work, it had to engage the willing participation of nations as a whole'.[36] The promise of sovereignty was especially important for ratification by the Soviet

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31 *Ibid*; see also O'Connell 'Drones under international law' (October 2010) *Wash Univ L Rev* 1–3; 'The objects and purpose of the Charter, the structure, the drafting history, subsequent responses of the General Assembly and statements by the ICJ interpret Article 2 (4) as banning any use of armed force except in self-defense' O' Connell *International Law and the Use of Force* (2004) 22.

32 Article 51.

33 See *eg* Reisman 'Kosovo's Antinomies' (1999) *Am J Int'l L* 93/4 860.

34 Abiew *The evolution of the doctrine and practice of humanitarian intervention* (1999) 23.

35 See Charter of the Organization of American State of 1948 art 15: 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of another state.'

36 Edis 'A job well done: the founding of the United Nations revisited' (1992) 6 *Cambridge Rev Int'l Aff* 29.

Union. Article 2(4) and article 51 illustrate the importance of sovereignty to the system, by prohibiting force against the 'territorial integrity or political independence of any state', and by recognising the sovereign's inherent right to self-defence.[37]

In fact, article 2(7) goes so far as to provide that '[n]othing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state', except for 'enforcement measures under Chapter VII'.[38] As enforcement measures can only be taken in response to threats to international peace and security, this provision clearly prohibits domestic interference in the affairs of another state – much less the use of force against it – so long as that state does not present a threat to international peace and security.[39] Moreover, article 2(4) governs only the use of force in 'international relations', as opposed to domestic issues.[40] Thus, any domestic action that has purely domestic consequences falls outside the scope of the Charter.

The absolute prohibition on transnational force and profound respect for territorial integrity, are fundamental components of the Charter. Since 1945, these principles have helped, at least in part, to provide some stability and order in the once chaotic world of international relations. Any departure from the basic norms of non-intervention, holds the potential to violate the 'cornerstones' of the Charter and the foundations of the international legal system. As President Eisenhower observed, to allow transnational force, absent a threat to international peace and security, is to destroy the Charter system.[41] Thus, it seems impossible for the SC, the UN organ charged with preventing aggression, to violate the territorial integrity of a member state absent sufficient legal justification, without de-activating article 2(4). However, over the years, several developments have challenged this system.

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37 UN Charter Articles 2 (4) and 51.

38 Article 2(7).

39 *Ibid*; see also the UN's Response to apartheid in South Africa discussed at 'United Nations: partner in the struggle against apartheid, UN (July 18 2011) available at: http://www.un.org/en/events/mandeladay/apartheid.shtml (last accessed 25 February 2013).

40 UN Charter art 2(4); see also *eg Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in their Electoral Process* GA Res 50/172, 52/119, and 54/168; 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Res 36/103.

41 Eisenhower's Radio and Television Address to the American People on the Situation in the Middle East (20 February 1957).

**CHALLENGES TO THE CHARTER**

From its very beginning, the Charter suffered a number of setbacks. The SC was designed to have a military force at its disposal.[42] In fact, the lack of such a force was considered the fatal flaw of its predecessor, the League of Nations.[43] However, nations have not given weapons or military personnel over to the SC, forcing it instead to rely on individual or groups of nations to carry out its demands.[44] Furthermore, the SC members with veto power have often fundamentally opposed each other, thereby constraining the Council's ability adequately to respond to threats.[45] Indeed, until the end of the Cold War, it was virtually impossible to achieve consensus among the 'Permanent 5'.[46] Thus, despite the strong prohibition on the use of force, states, unilaterally and through collective security arrangements, could use unlawful force against states with little fear of SC reprisal.[47] These changing norms of transnational interference led scholars to declare the death of article 2(4).[48] However, the fall of the Soviet Union provided a glimmer of hope for the collective security system. As world powers began to cooperate more readily, the ideological and balance-of-power calculations that marked Cold War decision-making, began to give way to new considerations of collective action and security.[49]

However, the fall of the Soviet Union coincided with, and likely contributed to, new challenges – challenges that now present the greatest threat to the Charter system. First, the dissolution of the USSR and related political changes, created unstable states and regimes.[50] As their power slipped away, many of these states used violent, often bloody, tactics to repress their populace.[51] A few cases, including the breakup of the USSR, the former

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42 See art 44 UN Charter.

43 See *Dumbarton Oaks and Yalta,* History of the Charter of the United Nations (2005).

44 *Ibid*.

45 Kafala 'The veto and how to use it' BBC 17 September 2003 available at: http://news.bbc.co.uk/2/hi/middle_east/2828985.stm (last accessed 25 February 2013).

46 *Ibid*.

47 Though many states proffered art 51 arguments, these claims were, generally, without merit. Franck 'Agora: the future implications of the Iraq conflict-what happens now? The United Nations after Iraq' (2003) 97/3 *Am J Int'l L* 609.

48 See *eg* Franck n 10 above.

49 See generally Morphet 'Resolutions and vetoes in the UN Security Council: their relevance and significance' (1990) 16/4 *Re of Int'l Studies*; see also Henkin 'The reports of the death of article 2(4) are greatly exaggerated' (1971) *Am J Int'l L* 544 (claiming that the prohibition on force, while violated from time to time, was still effective at lowering expectations of violence).

50 See *eg* 'The fall of the Eastern Bloc' European Commission (9 November 2009) available at: http://ec.europa.eu/ireland/about_the_eu/fall_of_eastern_bloc/index_en.htm.

51 *Ibid*.

Yugoslavia, and the gruesome conflicts in Rwanda and Cambodia, erupted into extreme violence with government forces and militia murdering, and even attempting genocide, against their own civilian populations.[52] While these attacks were not the first instances of state violence against civilian populations, they were so gross and shocking that the very principles of state sovereignty and non-intervention were called into question.[53]

The second change that threatened the Charter's conception of sovereignty, was the rise of transnational terrorism. As the world witnessed on 11 September 2001, non-state actors can move across borders and inflict massive civilian casualties. The drafters premised the Charter on the notion that states were the principal actors in international law. However, the ability of non-state actors to move across borders fundamentally challenges this notion. Civilians now face threats that the state-centric Charter was not designed to counter, intrastate targeting by state forces, and interstate targeting from transnational terrorists.

**Violence against civilians within a state**

> [I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to Rwanda, to Srebrenica – to gross and systematic violations of human rights that affect every precept of our common humanity? (Kofi Annan)

In 2000, then Secretary-General of the UN, Kofi Annan, posed this query to the General Assembly.[54] His question cuts to a core problem of human rights in international law. Under the Charter system, states enjoy virtually inviolable sovereignty. Thus, even in the face of mass genocide and ethnic violence, the UN seemingly lacks authority to intervene. Therefore, the United Nations faces the decision to intervene and violate international law on the one hand, or to respect international law and stand idly by as a country murders its civilians. In this sense, humanitarian intervention is intensely controversial, not only when it occurs, but also when it does not occur.

Following the genocide in Rwanda and other state-sanctioned atrocities, this seemingly inescapable predicament has become an increasingly salient

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52 Murphy 'Remembering the killing fields' CBS 11 February 2009; 'Rwanda: how the genocide happened' BBC News (18 December 2008).

53 Marks 'The changing definition of sovereignty' 12 October 2001 *American Diplomacy*.

54 Report of the Secretary-General Kofi Annan, Work of the Organization, A/54/1, at 48 (1999).

issue.[55] The horrors of Kosovo and Rwanda, along with Annan's challenge, prompted the creation of the International Commission on Intervention and State Sovereignty (ICISS).[56] The Canadian government tasked the ICISS with examining a new concept for humanitarian intervention.[57] In December 2001, it released a report entitled 'The Responsibility to Protect', which proposes a new set of principles concerning the use of force when a 'population is suffering serious harm as a result of internal war, insurgency, repression or state failure'.[58]

While the General Assembly approved many of the Report's general principles[59] during the 2005 World Summit, this concept is not 'law', nor has it been incorporated into the Charter. Thus, any organ that uses these principles would be operating outside the bounds of the Charter. However, the report proposes two general principles that might have helped inform the use of force in Libya, or at least track the changing attitude toward intervention. These principles also offer some criteria for examining the SC's response, or lack thereof, to the American targeted killings campaigns.

*Responsibilities of sovereignty*

The R2P begins by avowing that nations have obligations to protect their citizens. Specifically, 'primary responsibility for the protection of its people lies with the state itself', and secondarily with the SC.[60] In terms of this theory, responsibility is 'inherent in the concept of sovereignty' and stems from 'specific legal obligations under human rights' declarations and treaties.[61] Under the General Assembly resolution, if 'national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity' the international community is 'prepared to take collective action'.[62] Thus, the right of territorial integrity would be contingent upon the state fulfilling its responsibility to protect its citizens from mass atrocities.

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55 *Ibid*.

56 'The responsibility to protect' *Report of the International Commission on Intervention and State Sovereignty* VII (December 2001) available at: http://responsibilitytoprotect.org/ICISS%20Report.pdf. (last accessed 25 February 2013).

57 *Ibid.*

58 *Id* at XI.

59 UN GA Resolution 60/1 2005 World Summit Outcome, 60th Session par 138 (adopted by UN Doc A/RES/63/308 of 2009).

60 Note 56 above.

61 *Ibid*.

62 Resolution 60 n 59 above.

While the Charter asserts a commitment to human rights, this sentiment departs from its core principles in two major ways. First, rather than supporting the rights of sovereign nations, the R2P imposes conditions on sovereignty. In fact, this principle turns the question about the 'right to intervene on its head' and sets requirements for the maintenance of sovereignty.[63] Secondly, this principle specifically condones the use of force against a state, even when there is no threat to international peace and security.[64] Both of these principles suggest a new conception of sovereignty that values certain human rights above state sovereignty.[65] Though the increased conditions on sovereignty go against the Charter's respect for territorial integrity, the R2P report argues that it is part of an increased focus on respecting human rights in the international arena.[66]

The ICISS contends that '[t]he defense of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people'.[67] This conditional sovereignty holds that some states and regimes, by failing to protect their citizens, lose the absolute right of sovereignty.[68] Though most conceptions of sovereignty might not include the 'power of a state to do what it wants to its own people', the ICISS's view of sovereignty is very controversial.[69] In fact, based on the response from Russia and China to the invasion of Libya, the proposition that states forfeit their sovereignty when they act violently against their own civilians, remains extremely unsettled.[70] However, this principle offers a concession by cautioning that the use of force should be limited, with the ultimate goal being to protect the populace, and not to defeat the state.[71]

This limiting argument appears to follow Professor Reisman's views regarding humanitarian intervention. Reisman argues that the protection of human rights is one of the main purposes of the Charter and that states

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63 Evans 'From Humanitarian Intervention to the Responsibility to Protect' (2006) 24 *Wis Int'l LJ* 703.

64 Note 56 above.

65 *Ibid.* Whether this new conception of sovereignty, by potentially creating more disorder, might actually lead to more human rights abuses is outside the scope of this paper.

66 *Id* at 2–3.

67 *Ibid*.

68 *Ibid*.

69 *Ibid*.

70 Mead 'The Wilsonian world order has once again been postponed' The American Interest 5 October 2011 available at: http://blogs.the-american-interest.com/wrm/2011/10/05/the-wilsonian-world-order-has-once-again-been-postponed/ (last accessed 25 February 2013).

71 Note 56 above.

cannot wantonly violate this important principle.[72] Accordingly, humanitarian intervention is not always contrary to the Charter, especially when it is limited.[73] Reisman contends,

> since humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved [, it] is not only not inconsistent with the Purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter.[74]

According to Reisman, humanitarian intervention to prevent human rights abuses does not *per se* violate the prohibition on unlawful force.[75] In fact, he says, 'it is a distortion to argue that [limited humanitarian intervention] is precluded by Article 2(4)'.[76] However, the limited nature of an intervention has no bearing on its legality under article 2(4).

Reisman's interpretation relies on the fundamental assumption that one of the foundational aims of the Charter was the protection of human rights. Yet, while the drafters were concerned about human rights, they included no formal provision for the use of force to protect human rights. In fact, Reisman's view has been criticised on the ground that

> the intention of the drafters as discerned from the *travaux préparatoires* was to prohibit the use of force in the broadest possible terms [...] to suggest that armed attacks which do not seize territory [...] are not against the state's territorial integrity is to adopt a construction worthy of Orwellian Newspeak.[77]

The Charter was designed to prevent the use of force, not just conquest.

However, although armed humanitarian intervention, no matter how limited, is a violation of article 2(4), Reisman's point about limiting the scope of intervention could be an important political and pragmatic consideration regarding the use of force. By limiting the scope of intervention, the SC

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72 Reisman & McDougal 'Humanitarian intervention to protect the Ibos' *in Humanitarian intervention and the United Nations* 167 175–77; see also The responsibility to protect: the UN World Summit and the question of unilateralism 2006 *Yale LJ* 1157 (discussing Resiman's 'limiting' argument).

73 Reisman n 72 abovde at 175–77.

74 *Ibid*.

75 *Id* at 177.

76 *Ibid*.

77 Bhuta 'Paved with good intentions: humanitarian war, the new interventionism and legal regulation of the use of force' (2001) 25 *Melbourne UL Rev* 843.

could minimise the negative effects of this violation of sovereignty, and this may make intervention more acceptable, albeit still illegal. However, it is extraordinarily difficult to limit intervention when the state is the aggressor. It is almost impossible to imagine a scenario in which the crimes committed against a civilian population are so great, that the members of the UN need to intervene, yet the violent, indeed murderous, regime can remain untouched.

*Response to 'serious harm' and 'large scale loss of life'*

In order to invoke the R2P against a state, the host state must have breached its previously-defined obligation to protect its citizens. This bar is understandably very high, as intervention is extremely costly, dangerous, and potentially destabilising. Accordingly, the population must suffer 'serious harm, as a result of internal war, insurgency, repression or state failure'.[78] This serious harm includes 'large scale loss of life' or 'large scale ethnic cleansings'.[79]

'Serious' and 'large scale' are necessary limiting principles and respond to emerging custom and practice. The protection of human rights in international law is extraordinarily contentious and often invokes claims that western nations are improperly meddling in the affairs of others. However, some human rights are widely held to be innate, non-derogable, and '[i]mplied in one's humanity'.[80] Respect for life is chief among these core rights.[81] At least for those who embrace the Lockean notions of the origins of government, the state's basic function is to protect individuals from the deadly violence that characterises humanity in its non-governed state. If the state fails on a 'serious' and 'large scale' to provide this basic protection, then it has failed to achieve even the most basic of aspirations. Indeed, there is wide support for the belief that all nations should stop and refrain from committing acts that might compromise the right to life, especially when they are on a large scale. Some crimes, like genocide, are subject to universal jurisdiction, meaning that all states have an interest in punishing them.[82]

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78 Note 56 above at XI.

79 *Ibid*.

80 Henkin 'The age of rights' (1990) 941, reproduced in Martin *International human rights law and humanitarian law: treaties, cases, and analysis* (2006).

81 See The Universal Declaration of Human Right art 3; *The Right to Life*, Human Rights Education Associates, (last accessed 25 February 2013); Kass 'The right to life and human dignity' 2006 *The New Atlantis J of Tech and Society* 3.

82 ICCPR, listing the right to life as a non-derogable right; Frey 'Terrorism as a crime against humanity and genocide: the backdoor to universal jurisdiction' 2003 *UCLA J Int'l & Foreign Aff* 169 (discussing the universal jurisdiction of crimes against humanity

However, only extreme abuses of human rights face such widespread condemnation and could prevail over the still considerable presumption against intervention. As has been pointed out, sovereignty is a foundational component of the international system, and the international community should be hesitant to strip away this concept. Accordingly, by setting such high standards, the R2P at least partially mitigates fears that the SC might invade state sovereignty for anything but severe violations of human rights law. Despite these limitations, it remains true that the R2P principles seek to vest new power in the SC.

## LIBYA'S RESPONSE TO PROTESTORS

> If Libya goes up in flames, who will be able to govern it? Let it burn. (Muammar Gaddafi.)

Following a *coup d'état* in 1969, the oil-rich nation of Libya fell under the erratic, often tumultuous, control of Colonel Muammar el-Gaddafi.[83] During his rule, Gaddafi's regime funded rebel groups throughout the Middle East and Africa,[84] waged war with neighbouring states,[85] and bombed civilian targets, including Pan American Flight 103,[86] and the La Belle nightclub.[87] Likewise, Gaddafi's involvement in the domestic politics of other nations, along with his open alliance with authoritarian leaders such as Uganda's Idi Amin and Liberia's Charles Taylor, profoundly strained his relationship with the west.[88]

In addition to diplomatic alienation, Gaddafi's regime was despotic. Libyan law actually made political dissent illegal,[89] and, from 1972 until the collapse

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as a route to prosecuting other violations of bodily integrity, namely terrorism).

83 'Libya – revolution and aftermath' *NY Times* 22 November 2011 available at: http://topics.nytimes.com/top/news/international/countriesandterritories/libya/index.html (last accessed 25 February 2013).

84 Background Note: Libya, US Dep't of State available at: http://www.state.gov/r/pa/ei/bgn/5425.htm (last accessed 25 February 2013).

85 *Ibid*.

86 'The bombing of Pan Am Flight 103' *Wash Post* (1999).

87 'Flashback: the Berlin disco bombing (BBC 13 November 2001) available at: http://news.bbc.co.uk/2/hi/europe/1653848.stm (last accessed 25 February 2013).

88 Campbell 'Gaddafi was an obstacle to African unity' *Think Africa Press* 21 October 2011) available at: http://thinkafricapress.com/libya/gadaffi-was-obstacle-african-unity. (last accessed 25 February 2013).

89 Law 75 (1973); see Elijahmi 'Libya and the U.S.: Qadhafi unrepentant' (Winter 2006) *Middle East Quarterly* 5.

of the Gaddafi government, political parties were banned.[90] Anyone guilty of founding a party would be executed.[91] In many other aspects of life, the government consistently and harshly stymied internal dissent and stifled political speech.[92] In fact, in 2006 the Freedom of the Press Index listed Libya as the most censored state in the Middle East and North Africa.[93] Despite this foreign and domestic hostility, the Gaddafi regime remained in power until 2011.

**Protests and crackdowns**

On 15 February 2011, following the arrest of human rights activist Fethi Tarbel, and years of government repression, civilians in Benghazi embarked on a major protest campaign against Colonel Gaddafi's regime.[94] The movement grew rapidly and spread to the neighbouring cities of Bayda and Zintan.[95] It is unclear whether the protestors were armed or violent from the very beginning. However, both Gaddafi's regime and the rebels eventually resorted to violence.[96] In an attempt to crush the uprising, Gaddafi's '[s]nipers shot protesters, artillery and helicopter gunships were used against crowds of demonstrators, and thugs armed with hammers and swords attacked families in their homes'.[97] Gaddafi's forces were accused of being indiscriminate in their violence, launching artillery rounds into residential areas, and destroying civilian food warehouses in an attempt to kill and starve protesting civilians, whom Gaddafi referred to as 'rats'.[98] Security forces fired live ammunition into crowds, killing and injuring bystanders.[99]

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90 Law 71 (1972).

91 Elijahmi n 89 above.

92 See Gaddafi's response to mutiny by the Libyan Army in Tobruk in August 1980 (soldiers suffered arbitrary arrest and detention, executions and mutilations of political opponents on public television); Revolutionary Committees called for the assassination of Libyan dissidents in April 1980. 'Such people are charged with high treason because of their collaboration with Israelis and American and that it I the Libyan people's responsibility to liquidate such scum who are distorting Libya's image.'

93 '10 most censored countries' (2 May 2006) *Comm to Protect Journalists*.

94 'Timeline: Libya's civil war' *The Guardian* 19 November 2011.

95 'Libyan protests: your stories' BBC 20 February 2011.

96 See *eg* 'Libya: Muammar Gaddafi fires on his own people' *The Telegraph* 16 January 2012).

97 Meo 'Libya Protests: 140 massacred as Gaddafi sends in snipers to crush dissent' *The Telegraph* 20 February 2011).

98 'Clinton cites atrocities by Gaddafi forces' *Al-Jazeera* 14 April 2011.

99 'The Battle For Libya: killings, disappearances, and torture', 7 Amnesty Int'l May 2011 available at: http://www.amnesty.org/en/library/asset/MDE19/025/2011/en/8f2e1c49-8f43-46d3-917d-383c17d36377/mde190252011en.pdf (last accessed 25 February 2013).

Although reports of casualties vary, dozens of civilians are believed to have died during the first few days of the uprising.[100]

Over the course of the next few weeks, government forces[101] allegedly killed hundreds of civilians.[102] Protestors responded with violence. The rebels gained support and influence throughout Libya, and, by the end of February, Gaddafi had lost control of much of the country, including the major cities of Benghazi and Misrata.[103] The dictator vowed to retake these cities, destroy his 'enemies', and show 'no mercy or compassion' to these 'cockroaches'.[104] He promised that he would never surrender to the protesting 'traitors' and would 'cleanse Libya house by house' of these 'greasy rats'.[105] In short, he promised to turn Libya into a 'hell'.[106]

**UN response**

Gaddafi's heavy-handed crackdowns and bloody rhetoric prompted the United Nations to react. On 26 February 2011, the SC responded to what it characterised as a 'gross and systematic violation of human rights'.[107] Under article 41, it unanimously passed resolution 1970, imposing sanctions on Gaddafi's regime, and referring the crackdown to the International Criminal Court.[108] These sanctions included a travel ban, arms embargo, and a freeze on all of the Gaddafi family's assets.[109] However, resolution 1970 seemed to have little effect on Gaddafi's actions.

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100 Note 95 above; some statistics, including those cited in *Libya revolt: Gaddafi in crimes against humanity probe* BBC 3 March 2011 available at: http://www.bbc.co.uk/news/world-africa-12636798 (last accessed 25 February 2013). suggest that the number is in the hundreds; ICC chief prosecutor Luis Moreno-Ocampa believes that between five and seven hundred people were killed in February 2011, before the rebels took up arms, Moreno-Ocampo further admonished the regime citing his belief that 'shooting at protestors was systematic'.

101 Gaddafi also hired foreign soldiers to defend his government, including mercenaries from Ghana.

102 Some reports accuse Gaddafi of sending 'death squads' to patrol the streets and shoot people who tried to take the dead off the streets. See *eg* Chrisafis & Black 'After the air raids, Gaddafi's death squads keep blood on Tripoli's streets' *The Guardian* 22 February 2011.

103 Vandewalle *'Rebel rivalries in Libya' Foreign Affairs* 18 August 2011.

104 'UN Authorizes all necessary measures' in *Libya, USA Today* 18 March 2011.

105 *Libya Protests: Defiant Gaddafi Refuses to Quit,* BBC 22 February 2011.

106 'Libya will turn into hell, says Gadafy' *Irish Times* 2 September 2011.

107 UNSCOR 66th Session 6491st meeting at 1, UN Doc Res 1970 26 February 2011 (hereafter 'Resolution 1970').

108 *Ibid*.

109 *Ibid*.

Reports that Gaddafi's forces were continuing to attack civilians and were poised to retake Benghazi, ignited fears of retaliation. These fears prompted France and the United Kingdom to call for an intervention that would prevent the possible massacre of civilians.[110] Given Gaddafi's heated and violent rhetoric, others on the SC shared this fear.[111] On 17 March the SC responded to what it warned might constitute 'crimes against humanity', as well as the Arab League's call to protect civilians, by passing resolution 1973.[112] The resolution demanded an immediate ceasefire and authorised member states to establish a no-fly zone over Libya.[113] Notably, resolution 1973 also authorised member states to 'take all necessary measures to protect civilians'.[114] Resolution 1973 stated:

> Determining that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security,
>
> *Acting* under Chapter VII of the Charter of the United Nations,
>
> 1. Demands that the Libyan authorities comply with their obligations under international law, including international humanitarian law, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance
>
> 2. Authorizes Member States . . . to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas . . . while excluding a foreign occupation force of any form on any part of Libyan territory.

Therefore, the text of resolution 1973 clearly confers on member states the authority to 'take all necessary measures' to 'protect civilians' and implement these demands.[115] The 'all necessary measures' language is a term of art, and similar to past authorisations that have been treated as authority to use force.[116] Accordingly, while the resolution prohibits a 'foreign occupation force of any form on any part of Libyan territory', its language

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110 Cody *'France pleads for military intervention as Gaddafi forces attack Libyan rebels' The Wash Post* 16 March 2011.

111 *See* UN SCOR, 66th Session 6498th meeting UN Doc Res 1973 (hereafter 'Resolution 1973').

112 *Ibid*.

113 *Ibid*.

114 *Ibid.*

115 *Ibid*.

116 See UN SCOR, 45th Session 2963rd meeting at 2, Resolution 678 (November 29, 1990) (authorising all member states 'to use all necessary means' including force to end Iraq's occupation of Kuwait).

was clearly intended as an authorisation for the use force in Libyan airspace, on Libyan territory, and against the Libyan government.[117] Indeed, it would be well nigh impossible to carry out this mandate to protect civilians from Gaddafi and enforce a no-fly zone in Libya, without using force. Such actions clearly violate Libya's territorial integrity and would be illegal, absent sufficient SC authorisation or self-defence. Thus, the intervening states must be able to point to sufficient legal justification. Here they pointed to the above SC authorisation. Any intervention force must act within the bounds of resolution 1973, or risk violating international law.

**NATO action pursuant to Resolution 1973**

On 19 March, French, British, and American jet fighters began operations over Libya in an attempt to halt the advance of Gaddafi's forces against rebel strongholds.[118] From then on, the NATO forces 'hammered Libyan military positions' from the air.[119] In response to this international use of force, Gaddafi invoked the UN Charter, claiming that NATO's actions were acts of aggression that triggered Libya's inherent right of self-defence.[120] Even though the SC had authorised actions in Libya to protect civilians, the fact that many of NATO's actions were eventually aimed at the regime itself, might have actually triggered Libya's inherent right to self-defence embodied in article 51 of the Charter.

First, we must examine whether NATO actually violated resolution 1973. Russia and several other states accused NATO of using force outside the scope of the UN authorisation. However, the NATO rules of engagement only authorised forces to attack military targets that were deemed threats to civilians.[121] These rules did not authorise allied forces to support the rebels or to coordinate assaults with them.[122] In this way, the rules of engagement corresponded to resolution 1973's authorisation of the use of force limited to the protection of civilians. Unfortunately, the rules were problematic. The rebel forces were not cohesively organised or uniformed, so it was difficult to tell who was a rebel and who was a civilian protestor in a battle area. Moreover, an individual can seemingly change from being a rebel to a

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117 Resolution 1973 n 128 below.

118 'Explosions heard in Tripoli', CNN 20 March 2011 available at: http://edition.cnn.com/2011/WORLD/africa/03/19/libya.civil.war/ (last accessed 25 February 2013).

119 *Ibid*.

120 *Ibid.*

121 Coughlin 'Nato must target Gaddafi regime, says armed forces Chief Gen Sir David Richards' *The Telegraph* 14 May 2011.

122 *Ibid*.

civilian by dropping his gun. He can then take up arms at a later point and resume hostilities. Does this mean that NATO forces can defend him while his gun is on the ground, but then must stop once he takes it up again?[123] Although such a scenario seems absurd, NATO's rules of engagement would not have prevented this from occurring.

Despite the severity of this problem, the process as described by AFRICOM commander General Carter Ham, lacked a systematic approach to distinguishing between civilians and rebels from the air.[124] While first admitting that the classification decision is extraordinarily difficult, especially for pilots in the air, General Ham stated that the allied forces 'do not provide close air support for the opposition forces. [The allied forces] protect civilians.'[125] However, General Ham described a classification process that was hardly precise enough to guarantee this promise. According to the General, when pilots encounter a situation where it is 'clear' to them that civilians are in danger,[126] they are allowed to engage the targets.

This statement is problematic for two reasons. First, it assumes that protecting civilians and supporting the rebels are mutually exclusive actions. However, they might easily coincide. For instance, if the rebels and Gaddafi's forces are fighting in a town in which civilians still live, government strikes against that town will 'clearly' endanger the lives of civilians. But any NATO intervention to stop the shelling of that town would also help the rebels. Secondly, since it is extremely difficult to tell a plainclothes rebel from a civilian, especially from the cockpit of a jet, it is unlikely that the situation on the ground was clear. Yet, in these uncertain scenarios, General Ham said that his pilots were instructed to be 'very cautious', but, at least in press releases and publicly available documents,[127] he provided no other guidance.[128] This statement is as troubling as it is

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123 According to the Red Cross's Guide 'Interpretive guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law' 2009 *Int'l Comm of the Red Cross*, it seems like this could actually be the case ('civilians lose protection against direct attack for the *duration* of specific act [that] amount[s] to direct participation in hostilities, whereas members of organized armed groups [ … ] lose protection against direct attack' for the duration of the conflict).

124 Foster 'Foggy rules of engagement' *National Review* 21 March 2011.

125 Rogin 'Rules of engagement are murky in Libya air war' *Foreign Policy* 21 March 2011.

126 According to General Ham, civilians are in danger if the Libyan forces are mounting an assault or preparing to mount an assault aimed on civilians. See Foster n 124 above.

127 See Lt Gen Charles Bouchard's Press Briefing on Events Related to Libya NATO 28 March 2011.

128 Capua 'General Ham ''strung''' *The American Thinker* 23 March 2011; General Ham's Testimony Before the Senate Armed Services Committee 7 April 2011).

unclear.[129] As shown above, most cases will be 'uncertain';[130] rebels live among, and often vacillate between looking like civilians and actually looking like armed rebels. If pilots are instructed merely to be 'very cautious', there is a significant risk of supporting the rebels and operating outside of the UN mandate.

However, despite the lack of clarity in the rules of engagement, it is difficult to imagine a more systematic way of determining a threat when so many civilians were involved in the violence. The information on the ground was imperfect, and the task of classifying rebels and civilians was enormously difficult. This seemingly inevitable murkiness resulted in NATO mission 'dovetailing' with the rebel operations.[131] NATO forces, perhaps mistaking rebels for civilians, often attacked military positions close to rebel positions.[132] Rebels began waiting for NATO air strikes to soften targets and then mounted assaults following the bombardments.[133] Over time, the rebel attacks and NATO strikes appeared to be more and more coordinated, until they began fighting essentially side by side.[134]

With the support of NATO, rebel forces gained ground against Gaddafi. On 20 August, National Transition Council fighters launched attacks on the capital.[135] This assault was coordinated and supported by NATO forces.[136] American forces provided intense aerial surveillance and intelligence to the advancing rebels, and paved the way for the rebel's assault by hitting military positions.[137] Additionally, prior to the assault, the UK and France

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129 NATO may have more precise, but classified, rules of engagement. However, since we can only judge the rules on available information, this paper will not assume that NATO used other rules.

130 The allegedly imprecise NATO bombing campaign that reportedly caused significant civilian casualties further highlights the difficulty of targeted bombing in Libya. See 'NATO fears Libya war crimes investigation by World Court' MSNBC available at: http://www.msnbc.msn.com/id/45252513/ns/world_news-europe/t/nato-fears-libya-war-crimes-investigation-world-court/ (last accessed 25 February 2013).

131 Lister *As Libyan conflict grinds on NATO'S mission shifts* CNN 19 August 2011.

132 *Ibid*.

133 *Ibid*.

134 NATO's Close Air Support Helps Libyan Rebels Advance, Dawn (August 9, 2011).

135 Dario Lopez 'Libyan rebels, NATO coordinate attacks' *The San Francisco Chronicle* 21 August 2011 available at: http://articles.sfgate.com/2011-08-21/news/29911034_1_zawiya-libyan-rebels-mustafa-abdel-jalil. (last accessed 25 February 2013).

136 *Id* (*quoting* Abdel-Jalil, the head of the rebel leadership council: 'We [the rebels] planned this operation with NATO.'

137 Schmitt 'Sharper Surveillance and NATO Coordination Aided Rebel Advance' *NY Times* 21 August 2011.

rebels for civilians, often attacked military positions close to rebel positions.[132] Rebels began waiting for NATO air strikes to soften targets and then mounted assaults following the bombardments.[133] Over time, the rebel attacks and NATO strikes appeared to be more and more coordinated, until they began fighting essentially side by side.[134]

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**Response from opposing states**

Resolution 1973 was passed with five abstentions.[140] Germany, Brazil, India, as well as permanent members Russia and China, questioned the haste with which the resolution had been passed, as well as the lack of intelligence on

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132 *Ibid*.

133 *Ibid*.

134 NATO's Close Air Support Helps Libyan Rebels Advance, Dawn (August 9, 2011).

135 Dario Lopez 'Libyan rebels, NATO coordinate attacks' *The San Francisco Chronicle* 21 August 2011 available at: http://articles.sfgate.com/2011-08-21/news/29911034_1_zawiya-libyan-rebels-mustafa-abdel-jalil (last accessed 25 February 2013).

136 *Id* (*quoting* Abdel-Jalil, the head of the rebel leadership council: 'We [the rebels] planned this operation with NATO.'

137 Schmitt 'Sharper Surveillance and NATO Coordination Aided Rebel Advance' *NY Times* 21 August 2011.

138 *Ibid* (quoting two unnamed sources): Norton-Taylor 'SAS Troopers Help Co-Ordinate Rebel Attacks in Libya' *The Guardian* 23 August 2011 available at: http://www.guardian.co.uk/world/2011/aug/23/sas-troopers-help-coordinate-rebels (last accessed 25 February 2013).

139 'Coordination With NATO Helped Rebels in Tripoli' *Seattle Times* 21 August 2011 available at: http://seattletimes.nwsource.com/html/nationworld/2015978260_libyanato22.html (last accessed 25 February 2013).

140 'Security Council approves ''no-fly zone'' over Libya, authorizing all necessary measures' UN Sec Council Dep't of Pub Info 17 March 2011 available at: http://www.un.org/News/Press/docs/2011/sc10200.doc.htm (last accessed 25 February 2013).

resolution 1973's mandate to end the conflict as soon as possible, the NATO-backed rebels refused to accept the African Union's peace proposals.[148] The rebels, likely emboldened by NATO support, refused to accept anything less than Gaddafi's ouster.[149] In a very real sense, the coalition forces were now committed to more than just protecting civilians – they were trying to change the Libyan regime as well.

The considerable backlash from powerful state actors suggests two things. First, that a norm was violated. States are still the primary actors in public international law and their perceptions of the rules are profoundly important. Here, Russia, China, and, perhaps not surprisingly, Venezuela's late Hugo Chavez, believed that the actions taken pursuant to resolution 1973 unjustly violated Libya's sovereignty.[150] Secondly, and related, there is a critical difference between violations of sovereignty, and the complete overthrow of a regime. Russia and China, by choosing not to exercise their individual right of veto, tacitly approved the initial, nominally limited intervention. Therefore, they agreed that Libya had violated international law and thereby forfeited its right to complete territorial integrity. However, based on Russia, China, and other countries' opposition to NATO's close involvement with the rebels, and the subsequent push for regime change, Libya did not completely give up its rights as a state. Resolution 1973 specifically limited itself to the protection of civilians. However, this mandate proved unworkable in the ensuing civil war. The 'dove-tailing' of the NATO mission with that of the rebels, highlighted a significant problem inherent in limited humanitarian intervention: absent clear, specific, and workable rules of engagement, intervention forces will not be able comply with these limitations on force. This lack of compliance is especially dangerous as humanitarian intervention is still an emerging principle. However, not only did NATO violate the resolution, but the resolution itself lacked sufficient legal justification.

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148 'Libyan Revolutionary Council rejects African Union's peace initiative' *The Guardian* 11 April 2011 available at: http://www.guardian.co.uk/world/2011/apr/11/libyan-rebels-reject-peace-initiative (last accessed 25 February 2013); 'Libyan rebels reject African Union Peace Plan' *Wall Street J* 12 April 2011 available at: http://online.wsj.com/article/SB10001424052748703841904576256952415295400.html (last accessed 25 February 2013).

149 McGreal 'Libyan Revolution Council rejects African Union's peace initiative' *The Guardian* 11 April 2011.

150 See *eg* 'Venezuela's Chavez strongly identifies with Ghadafi, sees cautionary tale in Libya's conflict' *The Wash. Post* 12 September 2011.

**Legal rationale under the Charter**

Chapter VII, article 42 of the Charter allows the SC to authorise the use of force to 'maintain or restore international peace and security'.[151] Accordingly, the SC in resolution 1973, stated that it had found 'a threat to international peace and security' in the Libyan Arab Jamahiriya.[152] However, the resolution did not explain how the situation in Libya threatened international peace and security.[153]

One frequently advanced claim is that the flow of refugees from Libya to surrounding states was potentially destabilising.[154] However, the flow of refugees has never been recognised as sufficient justification for invading another country. Moreover, it is not at all clear that the use of force in Libya encouraged civilians to remain in that country. In fact, a bombing campaign could ignite even further panic and create more refugees. Finally, this rationale would set an extremely dangerous precedent. If the SC is able to violate a nation's territorial integrity whenever large numbers of civilians leave a country, then famines, droughts, and natural disasters could divest a nation of its sovereignty.

As the SC must find a threat to international peace and security to authorise the use of force under the Charter, and Gaddafi created no such threat, the Council simply decided that a threat to international peace and security existed, without defining the threat.[155] If anything, by violently opposing the state, the rebels created a threat to international peace and security. Thus, if the SC had truly been concerned with suppressing a threat to peace and order, the most expedient – indeed the legal – decision would have been to support Gaddafi's regime in its fight against anti-government rebels. This approach would have quickly ended hostilities and restored order. Instead, the SC's discovery of a 'threat to international peace and security' merely pays lip service to the Charter's requirements. The true reason, whether it is to enforce the R2P, guard Libya's oil reserves, or any other rationale, would not constitute what is traditionally considered a threat to international peace

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151 Article 42, UN Charter.

152 Note 14 above.

153 States acting pursuant to the resolution had different ideas regarding the international implications. President Obama's Letter to Congress regarding American involvement in Libya pointed to the influx of refugees into neighbouring countries. According to President Obama, this flow of refugees created 'instability in Libya could ignite wider instability in the Middle East', *full text available at* http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya.

154 See *eg* Ross 'The UN's duty to Libyans' *The Guardian* 23 February 2011.

155 See Resolution 1973 n 111 above.

and security. In this way, the refugee and other rationalisation of 'threats to international peace and security' call to mind the situation where a politician steps down to 'spend more time with his family'. The proffered reason is clearly not the true one, and everyone seems to know it. Instead, the authorisation of force was grounded in something partially outside the confines of the Charter.

**Something else?**

Since taking power in 1969, Gaddafi consistently violated international law and, by fomenting and funding rebellion in other states, threatened international peace and security.[156] However, in 2011 the Libyan government clearly did not create a threat to international peace, security, and stability of the kind that justifies the use of force. Libya did not threaten acts of aggression against another state, nor did it interfere in the internal relations of another state. Rather, the SC, through NATO, was the entity which violated Libya's territorial integrity, the prohibition on the use of force, and preference for international stability.[157] Not only did this action violate the Charter, but it also appears that provisions of the Charter were used to help violate the fundamental prohibition on force. Since the Libyan situation did not threaten international peace and stability, there must be some other reason justifying the use of force.

*Protecting civilians: Libya*

The Libyan case presented to some an ideal opportunity to invoke the R2P.[158] There were numerous reports of government violence against civilian protestors;[159] violence that Gaddafi made no effort to hide.[160] In fact, his constant threats and sabre-rattling only confirmed these fears.[161] Also, a life of supporting rebellion, terrorism, and international conflict had left Gaddafi diplomatically isolated and his domestic political repression of the Libyan people made him anything but a sympathetic figure. These political factors, coupled with the number of revolutions during the Arab Spring movement,

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156 The Security Council passed resolutions against Libya in retaliation for the Lockerbie bombing but did not authorise invasion.

157 See Resolution 1973 at n 111 above.

158 'Impact of action in Libya on the responsibility to protect, International Coalition For the Responsibility to Protect' May 2011 available at: http://www.responsibilitytoprotect.org/RtoP%20in%20Light%20of%20Libya%20FINAL.pdf (last accessed 25 February 2013).

159 Joshi 'Libya unrest: violence against protestors backfires' BBC News 21 February 2011.

160 Levine 'Obama condemns Libyan violence, calls for international response' CNN 23 February 2011.

161 *Ibid.*

made it easier to see Gaddafi as yet another dictator on his way out. Indeed, if ever there were a situation justifying the invocation of the R2P, Libya was it.

*Responsibilities of Sovereignty*

The first principle relevant to the Libyan intervention is the concept that a sovereign has an obligation to protect its civilians from acts of violence. Under this framework, Libya had a duty to protect its civilians from 'serious harm, as a result of internal war, insurgency, repression or state failure'.[162] Proponents of the use of force in Libya, claim that the Gaddafi regime breached this duty when it harshly cracked down on the rebels and killed many civilians.[163] However, Gaddafi and his supporters could claim that he was under no duty to protect violent anti-government rebels from harm. Indeed, the ability to defend one's state from insurgency and anti-government violence, should be a fundamental component of sovereignty.[164] Given that states have an inherent right of self-defence against other states, it stands to reason that they also have the right to guard against domestic threats and protect stability. Thus, the deaths of rebels should not be counted against Gaddafi. Instead, the real focus should have been on true civilians – individuals who did not engage in or aid violence. However, whenever a state faces anti-government violence, especially when there is an organised armed rebellion or civil war, civilian casualties are inevitable. This difficulty is further compounded by the challenge of distinguishing civilians from rebels during civil wars – a problem with which NATO was also faced.[165] In fact, NATO has faced harsh criticism, and even war crimes accusations, in light of the large number of civilian casualties resulting from air strikes.[166] As mentioned above, there are many circumstances in which a state can legally cause the death of civilians. Partially in recognition of the difficulty of identifying and hitting only combatants during civil wars, the SC has resisted intervening in civil wars for humanitarian reasons.

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162 Quote 158 above.

163 *Ibid.*

164 Krasner 'The exhaustion of sovereignty: international shaping of domestic authority structures' Institut du Developpement Durable 2–3 (March 2003) available at: http://www.iddri.org/Activites/Conferences/krasner.pdf (last accessed 25 February 2013).

165 See *eg* 'Nato bomb 'kills nine Libyan civilians' as stray air strike is blamed on 'system failure'' *Daily Mail Online* 20 June 2011.

166 McElroy 'Libya: Nato to be investigated by ICC for war crimes *The Telegraph* 2 November 2011.

Despite these claims, the SC determined that Libya was under a duty to protect civilians, even in the face of internal strife and civil war. Resolution 1973

> [r]eiterated the responsibility of the Libyan authorities to protect the Libyan population and reaffirm[ed] that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians.[167]

The concept that civilians maintain certain rights during wartime, is a fundamental component of *jus in bello*; even though states can legally kill individuals during war, the existence of conflict does not give the state *carte blanche*. Concern for the violation of certain core human rights during wartime, can be found in prohibitions on the use of chemical or biological weapons against civilians, the Nuremburg Charter, the Genocide Convention, and other international humanitarian law instruments to which Libya is a party. In fact, the Geneva Convention guarantees even enemy soldiers certain fundamental rights during war. According to the UN Human Rights Committee, 'the right to life [...] is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation'.[168] Finally, proportionality in response to threats against the state, confirms that states have a duty to ensure that civilian casualties are not excessive even when responding to threats. Under this principle, the state's legitimate military objective must outweigh the cost in civilian and non-combatant lives. In light of these considerations, the SC determined that civilians should be protected, even in civil wars. It also found that Gaddafi had breached this obligation.

*Response to 'serious harm' and 'large scale loss of life'*

Even if we accept that sovereignty comes with obligations to protect citizens, the threshold constituting a violation of that duty must be very high. Sovereignty is a fundamental component of the international system and should not lightly be brushed aside. Thus, it would be very difficult to marshal support for violations of territorial integrity absent a very compelling reason. It is only logical that 'gross' and 'shocking' violations are much easier to react against than isolated incidents.

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[167] Press Release, Security Council n 14 above (emphasis removed).
[168] UN Cod HRI/GEN/1 (1982) at 5.

This scope and magnitude of civilian killings in Libya sparked significant controversy, both legally and factually. The intelligence on the ground in Libya was not wholly reliable; often reports were based on individual accounts or those of NGOs as NATO could not have troops on the ground.[169] Given the difficulty of distinguishing rebels from civilian protestors, it is likely that many rebel deaths were counted as civilian deaths, and *vice versa*. Moreover, the possibility that the rebels were indiscriminate in their attacks, coupled with the likelihood of collateral damage from NATO bombings,[170] means that some deaths might end up being erroneously attributed to Libyan forces. However, at the time the SC approved the use of force in Libya, it seemed to have little doubt that Gaddafi was inexcusably killing civilians.[171] Accordingly, resolution 1973 'condemn[ed] the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions'.[172]

Despite the SC's clear determination that mass civilian casualties had occurred, the nature of rebellion makes it very difficult to tell which actions are illegitimate uses of violence and which are proper exercises of intrastate force. However, the Libyan example might provide a new and important limiting principle on the use of force: the state's attitude toward civilian casualties.

*Response to civilian targeting*

Determining whether a state has breached its responsibility in responding to anti-government violence is extremely contentious and difficult. States can defend themselves against violent insurgencies, and it would seem to be impossible to avoid collateral damage. Moreover, violent rebels, bent on overthrowing a government and attempting to provoke international intervention, might also kill civilians, either accidentally or by design. Are deaths caused by these rebels to be attributed to the state? Should a state lose its sovereignty because it suffered a large terrorist attack or invasion in which civilians died? The R2P suggests that the answer to both of these is, on occasion, yes. However, territorial integrity is a fundamental component of international law, and given that significant civilian casualties might not

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169 'Civilian cost of NATO victory in Libya' *RT* 20 October 2011 available at: http://rt.com/news/libya-nato-civilian-deaths-323/ (last accessed 25 February 2013).

170 See Garcia-Navarro 'Libyans: NATO bombing raids also killed civilians' *NPR* 26 October 26 2011.

171 Since this paper analyses the decision factors, it is important to limit the inquiry to *ex-ante* considerations.

172 Resolution 1973 n 111 above.

always be the result of state abuse or neglect, the threshold requirement of 'serious harm' is not always adequate. Indeed, international humanitarian law allows for civilian casualties, provided that civilians are not targeted and the casualty numbers are not 'excessive'. There should be an alternate limitation placed on the use of force. Based on the SC's recent actions, tactics and intentions seem to matter.

*Response to avowedly indiscriminate violence*

These are not the words of a responsible political leader; these are the words of a dictator out of control.[173]

Gaddafi's response to the rebellion not only caused large numbers of civilian casualties, but it was also marked by a callous disregard for civilian life. While it remains unclear whether Gaddafi actually intended to kill civilians, his rhetoric and tactics showed that the he did not care who died while he defended his crumbling regime. First, Gaddafi's remarks and public statements denigrated and dehumanised the protestors, civilians, and the rebels alike. Not only were his comments dehumanising, but they could also be interpreted as calling for mass killing and violence against civilians. Promising to 'cleanse Libya house by house' of these 'animals' and 'cockroaches',[174] Gaddafi showed minimal concern for civilian life. This 'cockroach' terminology is especially troubling given that this was the same terminology used in Rwanda during the 1994 genocide.[175] Moreover, Gaddafi threatened to crack down even more harshly if he began losing power, destroying Libya and turning it into a 'hell'.[176] These statements, and others like them, illustrate that Gaddafi was not concerned about proportionate or calculated responses that would minimise the civilian death toll. Accordingly, world leaders, including those who advocated the use of force in Libya, found these comments very troubling.[177]

Secondly, these comments are even more disturbing when viewed in light of the regime's tactics. Gaddafi's forces, especially the Khamis Brigade, used what Amnesty International called 'inherently indiscriminate' tactics.[178] In

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173 Australian Foreign Minister, Kevin Rudd 'Gaddafi is a dictator out of control' *Sydney Morning Herald* 23February 2011.

174 'Libya protests: defiant Gaddafi refuses to quit' BBC 22 February 2011.

175 See 'Past genocides, genocide intervention' available at: http://www.genocideintervention.net/educate/genocide (last accessed 25 February 2013).

176 Note 106 above.

177 'President Obama defends use of force against, Gadhafi, Libya announces cease fire after UN vote' PBS News Hour 18 March 2011.

178 Note 99 above.

fact, some accounts even claimed that the targeting of civilians was intentional. These tactics were widely discussed and criticised in the media and in accounts from NGO monitoring groups. For instance, according to an Amnesty International report:

> al-Gaddafi forces committed serious violations of international humanitarian law, including war crimes, and gross human rights violations [...] They deliberately killed and injured scores of unarmed protestors [...] launched indiscriminate attacks and attacks targeting civilians [...] They used inherently indiscriminate weapons such as personnel mines and cluster bombs in residential areas.[179]

In addition to these wanton acts of violence, Gaddafi's forces fired live rounds into crowds of unarmed protestors, and isolated civilian populations from food and water.[180] Comments from SC members suggest that these tactics played a role in their decision and pushed them to authorise the use of force.[181] The SC would have been sympathetic to a regime, however undemocratic or un-free, in its legitimate, proportionate attempts to maintain order and put down anti-government violence. Indeed, as seen with the NATO strikes in Libya, there is always a risk of civilian deaths during rebellions and military strikes. However, the SC could not condone or allow attempts that specifically targeted civilians or evinced a blatant disregard for human life.

Civilian targeting as a criterion for the use of force stems from three major considerations. First, article 2(4) is the 'cornerstone' of the UN Charter and a fundamental component of the international legal system. Any derogation from this norm should not be taken lightly and should only be allowed for severe violations. Secondly, mindset matters in determining, not only the moral culpability of an actor, but more importantly, in predicting future actions. As with the concept of *mens rea* in criminal law, a state's intentions and considerations matter when assigning moral blame. This idea of intent also shows up in another duty inherent in state sovereignty: the responsibility to prevent genocide. Under the Genocide Convention, the act of killing is modified by 'deliberately' and 'intended' to do a particular thing.[182] These

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179 *Ibid*.

180 *Id* at 35.

181 'Security Council authorizes ''all necessary measures'' to protect civilians in Libya' UNNews Centre 17 March 2011; 'UN Security Council authorizes military action against Qaddafi' Bloomberg 17 March 2011.

182 *Bosnia and Herzegovina v Serbia and Montenegro* ICJ (judgment 26 February 2007).

limitations highlight the severity of the crime, and limit its application to severe violations of the specific duty. Since sovereignty is so important to the international system, the SC is reluctant to strip a state of that right, absent a strong showing of blameworthiness and abuse. The importance of intention and public statements regarding civilian deaths, is also shown from the actions of some violent non-state actors. Surprisingly, even the Pakistani Taliban publicly called for an end to civilian casualties in conflict.[183] This move suggests that even the Taliban, recognises the dangers of losing public support, or facing harsher crackdowns if they continue to kill civilians openly and intentionally. While actions usually do speak louder than words, Gaddafi's bloody and volatile rhetoric left little doubt that he would continue to kill civilians.

Thirdly, the Charter requires that the use of force be a last resort, used only after other steps fail or would fail.[184] If a state deliberately or recklessly kills civilians, it is unlikely that other means can be used to prevent the killings. Thus, if a state by its actions or rhetoric proves that it will kill, wantonly or indiscriminately, a large number of civilians, then this 'last resort' requirement is more easily met.[185]

Looking at the Libyan intervention, one can discern three principles that could have guided the use of force. The first two principles come directly from the R2P. However, these two principles taken alone would be too broad. They would allow the SC to strip a nation of its sovereignty despite its proportionate and legitimate efforts to combat an insurgency or repel an invasion. Moreover, it would fail to explain why the SC does not intervene in places like Syria. Admittedly, the SC cannot intervene in every incident of mass violence, so there should be an additional factor that determines when intervention should occur. Thus, some sort of *mens rea* requirement is needed. The reckless or intentional targeting of civilians provides such a limitation.

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183 Anwar 'Pakistan Taliban to end attacks that kill civilians, news Says' Bloomberg Business Week 3 January 2012 available at http://www.businessweek.com/news/2012-01-03/pakistan-taliban-to-end-attacks-that-kill-civilians-news-says.html (last accessed 25 February 2013); 'Taliban says stop civilian deaths, but actions speak louder' *MSNBC* 8 November 2011 (while the sincerity of these actions is obviously questioned, these statements clearly demonstrate the importance of intentions, appearances, and perceptions)

184 Article 42, UN Charter.

185 Of course, the Charter's last resort requirement refers to stopping threats to peace and stability, not stopping civilian death.

**Transnational terrorism**

The importance of attitude with regard to civilian life is reaffirmed and features prominently in the second major challenge to the UN Charter: transnational terrorism. Terrorist attacks by non-state actors present a significant challenge to an international legal system that relies on territorial borders and regards states as its principal actors. With the advent of new technology, terrorist attacks have become increasingly lethal and organised. While the SC's response to violence by a state that results in civilian casualties has been mixed, terrorism, transnational or otherwise, is universally condemned. This response fits into the R2P paradigm that compels states to protect civilians, but the universality of its condemnation also suggests terrorism has unique attributes that make it especially abhorrent.

Terrorism is more than just indiscriminate: it specifically targets civilians and often measures success in terms of the quantum of civilian death. Civilian targeting is the most concerning part of terrorism to many world leaders.[186] The threat of widespread casualties among intentionally targeted civilians, has compelled states to take active measures to destroy cells and organisations, confirming the importance of civilian protection and the relevance of *mens rea*. While it is clear that terrorism is condemned for the civilian casualties it causes, and especially because it intends to cause them, it is also in the response to terrorism that we see intention and the responsibility to protect civilians playing a significant role. The United States' targeted killing campaign in response to 11 September 2001 illustrates the importance of preventing, but also the significance of attitude towards, civilian death.

## AMERICAN RESPONSE TO AL-QAEDA: TARGETED KILLINGS

**The 9/11 attacks**

On the morning of 11 September 2001, nearly 3 000 civilians in the United States died at the hands of an anti-government group, al-Qaeda. Starting at 8h46, al-Qaeda operatives crashed two hijacked Boeing 767 passenger jets into the World Trade Center in New York City. Within just two hours, the burning towers collapsed, injuring and killing thousands. That same morning, two additional groups of al-Qaeda operatives hijacked and crashed

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[186] See *Condemnations of terrorism* Council on American-Islamic Relations available at: http://www.cair.com/Portals/0/pdf/September_11_statements.pdf (last accessed 25 February 2013) for a compilation of statements condemning terrorism.

jets into the Pentagon and another crash-landed in a field in Pennsylvania after civilian passengers stormed the cockpit.[187]

These coordinated attacks were not merely indiscriminate: they purposefully targeted non-combatants and civilians. 2 606 people were killed in New York City alone.[188] Most of these, and all 246 passengers on the four hi-jacked flights, were civilians. Shortly after the attacks, the United States invaded Afghanistan. This action was widely seen as a legitimate exercise of self-defence against a nation that harboured the architects of the 9/11 attacks. In fact, shortly after the attacks, the UN SC passed two resolutions, resolutions 1368 and 1373, 'reaffirming the inherent right of individual or collective self-defence'.[189] The SC condoned this use of force to respond to a terrorist anti-government group's 'armed attack'.[190] However, this invasion did not entirely remove the al-Qaeda threat, and American forces continued to hunt down al-Qaeda operatives through a targeted killing campaign.

**Targeted killings**

'Targeted killings are premeditated acts of lethal force employed by states in times of peace or during armed conflict to eliminate individuals outside their custody'.[191] These acts range from car bombs to drone attacks.[192] Targeted killings are intensely controversial, yet they are frequently used by the United States. The New American Foundation claims that President Obama has authorised more than 225 strikes, killing at least 1 100 militants.[193] The United States' targeted killings campaign has primarily focused on al-Qaeda, AQAP, and Taliban operatives in Afghanistan and Pakistan. Most recently, the United States used drones to kill Anwar al-Awlaki in Yemen, and a Navy Seal raid to kill Osama bin Laden in Pakistan.[194] These strikes are subject to

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187 For more information on the 9/11 attacks see 'Nat'l Comm'n on Terrorist Attacks Upon the US' 2004 The 9/11 Commission Report available at http://www.9-11commission.gov/report/911Report_Ch4.htm (last accessed 25 February 2013).

188 Accused 9/11 Plotter Khalid Sheikh Mohammed Fact New York Trial, CNN available at: http://edition.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html (last accessed 25 February 2013)

189 See 'Security Council condemns, ''in strongest terms'' terrorist attacks on United States' 9 December 2001. *UN Security Council Press Release*, 4370th meeting SC/7412

190 Murphy 'Terrorism and the concept of ''armed Attack'' in article 51 of the UN Charter' (2002) 43 *Harv Int'l LJ* 41 45.

191 Masters 'Targeted killings' *Council on Foreign Relations* 30 April 2012.

192 *Ibid*.

193 'The year of the drone' 2012 *New America Foundation* available at: http://counterterrorism.newamerica.net/drones (last accessed 25 February 2013).

194 Sacks 'Osama Bin Laden raid: White House Counterterrorism Adviser talks Al-Qaeda, drones one year later' *Huffington Post* 29 April 2012.

much debate, particularly because they are against individuals who are neither in the theatre of conflict, nor in states that have attacked the United States. Likewise, the targets are generally not subjects of an SC resolution authorising force.

**Legal rationale**

The Obama administration justified targeted killings by stating that the United States is engaged in 'armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific September 11, 2001 attacks, and may use force consistent with its inherent right of self-defense'.[195]

The official position of the United States is that international law allows it to attack targets, namely high-value al-Qaeda members, in other states outside the theatre of war if that country is unable or unwilling to address the threat itself.[196] However, this rationale is extremely controversial.[197] Even before the Charter, anticipatory self-defence had to follow the *Caroline* requirements of immediacy, imminence, and overwhelming necessity. Following the Six Day War, in which Israel pre-emptively attacked Egypt, scholars began to interpret article 51 as allowing force in anticipatory self-defence. However, the SC still required that armed attacks be imminent and the response necessary.[198] While the targeted al-Qaeda members posed a threat, it is not clear how imminent it was or what 'imminent' means in the context of terrorist attacks. Likewise, there is an additional problem with the 'armed attack' requirement when the United States begins targeting members of groups like AQAP that did not exist during September 2001 and could not have launched an armed attack against the United States.[199] Moreover, the raid that killed Osama bin Laden in Pakistan, was widely condemned because the United States violated Pakistani sovereignty without even notifying its leaders. Similarly, in the *Case Concerning Military and*

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195 Koh 'The Obama Administration and international law' (delivered at the Annual Meeting of the American Society of International Law in Washington, DC on 25 March 2010 available at http://www.state.gov/s/l/releases/remarks/139119.htm (last accessed 25 February 2013).

196 Masters n 192 above.

197 See Jakob Kellenberger, President of Int'l Red Cross, Address at 27th Annual Current Problems of International Humanitarian Law on 4 September 2003 (describing difficulty of consensus on the limits of self-defense against terrorists in host states).

198 N SCOR Mtg 2,288 S/Res/487, Resolution 487 (1981).

199 Wittes 'Updating the AUMF – a discussion Lawfare 28 November 2010 (9:18 AM) available at: http://www.lawfareblog.com/2010/11/updating-the-aumf-a-discussion/; (last accessed 25 February 2013); Cronogue 'A new AUMF: defining combatants in the War on Terror' (2012) 22 *Duke J Comp. and Int'l L* 377 382.

*Paramilitary Activities in and Against Nicaragua*,[200] the ICJ showed that it disfavours assertions of inherent self-defence to justify the use of force. Despite these legal issues, the SC has consistently allowed the United States to engage in targeted killings.

**Response from states and IGO's**

The use of targeted killings is discouraged in international law. The former UN special rapporteur complained that 'if other states were to claim the broad-based authority [...], to kill people anywhere, anytime, the result would be chaos'.[201] The United States' elastic interpretation of self-defence 'would diminish hugely the value of the foundational prohibition contained in article 51'.[202] States have not been allowed to violate the territorial integrity of others simply because rebels are located therein. In the *Armed Activities on the Territory of the Congo case*, the ICJ ruled that Uganda had no right to use force in the Democratic Republic of the Congo, even though armed rebels were attacking it from the DRC.[203] Instead, Uganda had to show that the DRC government was working with the rebels, and, as they could not show this, Uganda's cross border raids were classified as illegal. Like Uganda, in the *Armed Activities case*, the United States offered no evidence that Pakistan or Yemen were either arming or working with the terrorists.[204]

Even though the use of force against host states and targeted killings are discouraged, the UN has seemingly condoned – some may even say supported – the United States' targeted killings campaign against al-Qaeda operatives in Yemen and Pakistan. Indeed, in passing resolutions 1368 and 1373, the SC reminded the United States of its ability to act in self-defence and use force against terrorists. Though the SC pointed to article 51's language as the source of this right, its interpretation of this right is informed, shaped, and, ultimately, decided by the same three principles at work in Libya.

*Protecting civilians: United States*

The attacks on 11 September 2001 resulted in massive civilian casualties. However, what made these attacks shocking, was the intentional targeting of

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200 *Nic v US* 1986 ICJ 14 27 June.

201 Alston n 11 above.

202 Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution: Study on Targeted Killings, par 41* UN Doc A/HRC/14/24/Add 6 (28 May 2010).

203 *Dem Rep Congo v Uganda* 2005 ICJ 116 19 December.

204 *Id* at 146.

civilians working in downtown New York City and the use of commercial aircraft. The devastation showed that transnational terrorism is an extreme threat to civilian lives and would legitimately have triggered the United States' responsibility to protect its civilians from such extreme violence. Through resolutions 1373 and 1368, the SC initially condoned the use of transnational force against these actors, and has consistently failed to voice opposition to the targeted killings campaign. This mix of encouragement to act in 'self-defence', coupled with a subsequent refusal to condemn the targeted killings program, shows that the SC is allowing greater use of force to protect civilians from terrorism than originally envisioned in the Charter.

*Responsibility of sovereignty*

Unlike in Libya, in transnational terrorism the home country is not attacking civilians. However, the R2P would still impose on the United States an obligation to protect its citizens from 'serious harm'. If it proves to be 'unwilling or unable to halt or avert' these threats, then the UN can apparently step in.[205] It is clear that a sovereign would have the responsibility to protect its citizens from violence under the R2P framework. As early as 1981, Israel also argued that states have a 'duty' – not merely a right – to protect their citizens from outside attacks; a duty that sometimes requires the use of transnational force.[206] 'The government of Israel, like any other government, has the basic duty to protect the lives of its citizens' from armed attack.[207] Of course, this duty only takes effect during specific and limited scenarios.[208] While the NATO intervention was designed to protect civilians in the target country, the American transnational strikes were designed to protect civilians at home. Thus, both actions were designed to fulfil this duty.

*Response to 'serious harm' and 'large scale loss of life'*

The death toll on 11 September 2001 was catastrophic. While there is no set standard for 'serious' or 'large scale' these numbers should clear any reasonable hurdle. The targeted killings campaign is waged under the presumption that civilians still face a similarly serious threat of violence. While one could question whether such a threat still truly exists, it seems that the SC accepts this premise.

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205 Note 5 above.

206 While the Security Council did not approve of the strike against Iraq, it did so largely because it was not a valid exercise of self-defense *ie* not in response to an armed attack or a threat of armed attack or necessary. Resolution 487 (1981) S/RES/487.

207 36 UN SCOR, 2280–288 mtgs (1981).

208 And since the R2P is not 'law', it is unlikely a failure to take proactive steps would be treated as a violation.

It is under this scenario that the American targeted killings campaign finds its greatest political support. The case of Uganda clearly shows that a state cannot attack another state merely to eliminate anti-government rebels. It can only cross into a state that is actively supporting those rebels. Further, the use of targeted killing is generally discouraged outside the theatre of war and is at best an extremely questionable use of self-defence under article 51. Despite these rules, the United Nations SC seems to condone the United States' use of force. As targeted killing is normally questionable, but is being supported here, there must be something different about the response to 11 September 2001 and al-Qaeda.

**Indiscriminate and directed violence against civilians**

This difference seems to be not only the threat to civilian life, but also the mindset of the actors regarding that threat. Al-Qaeda's tactics, actions, and public statements, leave no doubt that they intentionally target civilians and deliberately engage in acts of terrorism. The intentional killing of civilians on 11 September 2001 was so abhorrent, that the United States was allowed to not only attack Afghanistan to kill the perpetrators, but also to overthrow the regime that supported them and to maintain an offensive campaign in Yemen and Pakistan – all under the principle of self-defence.

By specifically targeting civilians, terrorism is shocking to the conscience of mankind and widely condemned. In fact, terrorism is one of the most universally condemned acts in international law. Comments from world leaders suggest that terrorism is a unique type of threat that compels all states to fight it.[209] The National Security Strategy of the United States of America, terms the targeting of civilians during acts of terrorism a 'direct violation of one of the principal norms of the law of warfare'.[210] Moreover, the SC has adopted several resolutions condemning terrorism and exhorting other states to eliminate funding and supplies for these groups. In fact, to say that terrorism is widely condemned, is to risk stating the obvious. The odious nature of terrorism is clearly its blatant disregard for human life and its intentional targeting of civilians. This fact has been reaffirmed in official comments, press releases, use of force authorisations, and congressional comments.[211] Clearly, the intentional killing of civilians seems to separate

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209 Note 187 above.

210 National Security Council White House at 15 September 2002 available at: http://www.whitehouse.gov/nsc/nss.html (last accessed 25 February 2013).

211 UN Security Council on Afghanistan Embassy of the United States-Brussels 17 April 2012).

terrorists from mere rebels, and could explain why Obama is granted *carte blanche* by the UN to engage in transnational attacks to eliminate terrorists.

**'Targeted' v indiscriminate killings**

Gaddafi's actions should be compared, not to al-Qaeda's, but to Obama's. In comparing American drone strikes to Gaddafi's crackdowns, key distinctions emerge. The problem is that the main legal difference, when viewed in the context of the Charter's prohibitions, suggests that Obama violated the Charter while Gaddafi did not. The principal prohibition on state action is found in article 2(4), which absolutely prohibits transnational conflict. Gaddafi respected this prohibition; Obama did not. Thus, a strict application of the Charter would condemn the United States, but would also condemn the SC's authorisation of force in Libya. However, the opposite occurred: the SC supported Obama's transnational violence, but condemned Gaddafi's intrastate violence. The reason for this different treatment is, again, the intent of the target.

Obama's use of force was designed to limit civilian casualties and intended only to eliminate combatants. As the name implies, targeted killings are aimed at a specific individual or group. The United States' targets have all been alleged terrorists; none of the targets has been civilians. While these 'targeted' strikes have killed civilians when they missed their targets, or when civilians have surrounded the targets, these civilian deaths have been collateral. Moreover, the administration has publicly expressed its desire to limit civilian casualties and contends that its tactics are as precise, targeted, and individual as possible. The administration's tactics and rhetoric stand in stark contrast, not only to those of al-Qaeda, but also to those of Gaddafi. Indeed, the targeted nature of the American violence is the chief difference between Gaddafi's prosecution of anti-government violence and Obama's.

**DEAD ARTICLE**

The two preceding case studies show that in Lybia, the SC authorised the use of force absent a threat to international peace and security, and tolerated – even encouraged it – with regard to the American transnational strikes in Yemen and Pakistan. These uses of force were designed to protect civilians from being targeted on a large scale. However, article 2(4) clearly and explicitly prevents intrastate force against the territorial or political integrity of another state. Thus, despite the justifications offered, the prohibition in article 2(4) is being openly violated.

As explained, the prohibition on the use of force absent threats to international peace and security, or in self-defence, was intended to be absolute. It allowed for no derogation, not even for humanitarian reasons. Indeed, the fundamental purpose of the UN was to prevent the use of transnational force. In light of this fact, it is particularly worrying that in Libya a UN organ used its authority to violate this article. The fact that this rule is being violated without any international response, and that the violators face no condemnation or punishment, shows that article 2(4) is no longer fully applied. Instead, the SC is using its authority to authorise the use of force in situations that are not actual threats to international peace and security. Indeed, rather than following article 2(4)'s rules on the use of force, the SC appears to be following a different set of principles. Based on the SC's recent actions, it appears that the body is creating its own criteria regarding the use of force in response to civilian threats.

**A NOTE ON CRITERIA**

In addition to showing that a state, or group of states, is violating article 2(4)'s prohibition on the use of force, I contend that the international responses to these violations are diametrically opposed to what one should expect under the Charter's legal framework. The character of these responses suggests that either a new set of principled considerations have emerged for the use of force, or that article 2(4) is simply no longer in force and the SC is acting on an unprincipled basis.

I contend that, based on the preceding two cases, the SC's actions can be attributed to an identifiable – if still rather crude – framework. Judging from the authorisation of the use of force in Libya, and the significant tolerance of the American targeted killings campaign, it seems that the principles informing SC authorisation, reflect those advanced by the R2P. Both actions demonstrate concern for the widespread loss of human life, as well as the notion that the sovereign should protect civilians from this harm. However, the SC's actions differ from the R2P in one important respect, which could help to answer why the SC appears reluctant to intervene in Syria. In both cases, the SC members looked to the aggressors' mindset with regard to the killings. Specifically, in both cases the entity against whom force was allowed either explicitly targeted civilians, or was avowedly indiscriminate in its violence. This *mens rea* requirement could serve to limit the scope of this new principle and ensure that force is only authorised when the one killing civilians is not acting proportionately and discriminately.

However, these 'new criteria' raise a number of questions relating to legality, legitimacy, and accountability for the SC. Is the SC overreaching itself and acting outside of the Charter, or is it merely operating under its own interpretation of its powers under the UN Charter? Moreover, does the SC have the authority to make these kinds of interpretations? If not, is it breaking the 'law'? I submit that, regardless of how these questions are answered, the SC is an indispensable component of the current international legal system. Moreover, whether or not it is acting 'illegally' by examining new considerations regarding the use of force, there is little recourse against or check on it. Prospects for punishing, altering, or even dissolving the SC falls well outside the scope of this article. Therefore, instead of criticising or supporting the actions of the SC from a legitimacy standpoint, I have sought to analyse its actions with respect to the use of force absent threats to international peace and security, with the goal of extrapolating a new framework for SC authorisation of the use of force.

## LEGITIMACY PROBLEMS

These two cases not only show that the prohibition on force is being openly violated, but, with the SC's approval of the use of force in Libya absent any threat to international peace and security, it appears that a political organ of the UN is actually using its authority to violate these principles. While it is clear that the SC is reaching beyond its mandate, it is unclear what can be done about it. In fact, the Charter contains no provisions for holding the SC accountable, or for any form of review of its actions.[212]

To appreciate fully the SC's actions in Libya, as well as the problems they pose, a hypothetical example is helpful. Assume that in the year 2012, a pro-Gaddafi movement comprising of former government officials retakes Libya. Libya could then bring a cause of action before the ICJ against the SC for violations of the UN Charter and unlawfully calling for acts of aggression against a sovereign state.[213] The case against the SC would be rather damning. Libya clearly did not pose any threat of aggression against another state. Moreover, there was no other threat to international peace and stability. In fact, the NATO bombing campaign, executed pursuant to an SC resolution, was the action that violated territorial integrity. If pressed to find a true threat to international peace and security that would allow the use of

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[212] Henkin *International intervention, human rights: an agenda for the next century* (1993) 384

[213] This hypothetical is inspired by the events surrounding the Lockerbie case and Libya's response to Security Council action. It also assumes that the UNSC submits itself to the ICJ's jurisdiction.

force, the SC would not have leg to stand on under the Charter. After all, if the Taliban's assistance of al-Qaeda was illegal because it violated American sovereign territory, should not NATO's assistance of anti-governmental rebels in Libya be similarly treated?

What would happen next? Normally, the ICJ would call on the SC to enforce its decisions when member states do not comply,[214] so how could the ICJ sanction or punish the SC? All of these questions highlight serious concerns regarding accountability and whether the SC can be checked at all.

**THE LIMIT OF LAW?**

The above questions regarding the accountability of the SC as well as the significant level of autonomy afforded it as an interpretive organ, also explain why the SC has the potential to succeed where other organs have failed: establishing, albeit informally, new criteria for the use of force in the face of new and extreme threats to civilian, non-combatant lives.

This approach to analysing the SC's new informal 'criteria' comes with a significant caveat regarding the legal authority of the SC to respond to issues that fall outside the scope of Chapter VII. The SC is a political and not a legislative organ; it has no legal power to create law. However, while the SC cannot make laws, its resolutions are legally binding on all members. Members follow the resolutions out of a sense of legal obligation, or *opinio juris*. UN resolutions on the use of force authorise states to use 'force against the territorial integrity' of another state, an action that would otherwise be illegal. Generally, states accept these resolutions as legitimate, and these legally binding resolutions shape the international perception of what is 'legal'. Thus, not only do these resolutions affect state behaviour, but they also have precedential value and shape future action.

Despite the SC's ability to affect state action with regard to the use of force, its authority is legally limited by the Charter to threats to international peace and security. Thus, I suggest that the SC is operating outside its authority as a political organ under the Charter and is in effect functioning like a legislative organ through its reinterpretation of when force can be authorised. By taking on its new role, the SC is raising enormously important questions of legitimacy, especially considering the 'democratic deficit' claims, and the political nature of SC membership and voting patterns. These issues deserve in-depth attention; however, based on current practice it seems unlikely that

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[214] UN Charter art 94.

the power of the SC will be 'reigned' in or checked in any way other than internally. For this reason, I have dealt with legitimacy problems only tangentially when analysing the SC's new 'criteria' for the use of force.

## CONCLUSION AND PROPOSAL

The Libya and United States paradigms show that the SC is working informally toward new criteria for the use of force. These criteria impose new obligations on sovereign nations and more readily allow the use of force. In these ways, they violate the two fundamental principles of the UN Charter. However, it seems that these departures from the Charter might be necessary responses in a world where civilians face such severe threats of violence at the hands of their own states as well as terrorists in other states. As Kofi Annan suggested, we have to make a choice between upholding non-intervention, and stopping the next Rwanda. It seems the SC has taken a step toward the latter.

While greater than originally existed, the new obligations on sovereignty might not be unduly burdensome as they would merely prevent states from engaging, or allowing others to engage in, acts of violence against their civilians that cause 'serious harm'.[215] While we can question the standard by which we judge these violations, it seems very difficult to argue that these obligations are unreasonable. Indeed, the 'serious' standard ensures that only grave violations will be met with force. However, the SC seems to have added an additional limiting factor to the use of force, one that is more demanding than the R2P.

Whereas the R2P criteria could allow the use of force in response to acts that only accidentally kill civilians, the SC might have added, or would do well to add, the additional requirement that the state is not acting proportionately and discriminately. Thus, states are only allowed to use force if the civilian deaths are the result of violence that wantonly disregards or deliberately seeks out civilian casualties. In this way, the new criteria only allow force when it is clear that civilian casualties will significantly increase unless action is taken. Moreover, it goes to the moral culpability and despicable nature of the act to which we are responding. Indeed, Assad's more calculated rhetoric in Syria might have gone a long way in garnering, or at least maintaining, Russian and Chinese support.

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[215] Again, leaving aside the question of legitimacy and accountability.

In addition to these factors, the SC should take every reasonable step to limit the extent of intervention in a sovereign state, and clearly set out the rules of engagement. Reisman's point is well taken that the extent of the intervention matters a great deal in practical terms. Legally, limited incursions, while they might violate the absolute prohibitions in article 2(4), are also important. First, they are a nod to the principles of sovereignty and non-intervention espoused in the Charter, since they do not completely destroy a state's ability to use force. For instance, NATO intervention in Libya spanned the country and led to the overthrow of a regime. Moreover, nations that oppose the Libyan intervention oppose the depth of the intervention most strongly. This perceived overstepping compelled Russia to criticise NATO and call into question the 'start of a slippery slope towards military action'.[216] Humanitarian interventions pose several practical difficulties in limiting the scope of intervention. Questions such as who exactly is a 'civilian' make it especially difficult to narrow the focus to civilian protection alone. For these reasons, states must be vigilant and keep in mind that the principles of non-intervention and the right of territorial integrity remain important, even if not fundamental, considerations in our international system.

The continued implementation of these new criteria will be difficult. The SC is overthrowing, or at least radically altering, the system from which it derives its power. Moreover, the SCl may begin to be seen as a 'world police force', meddling in the affairs of states. Perhaps most significantly, the SC faces major questions regarding the legitimacy of these actions, and, as we have seen in Libya, a more flexible stance on intervention could have profoundly negative effects on international peace and stability. Additionally, the members of the SC are political actors beholden to domestic political pressures as well as self-interested considerations that mitigate against humanitarian intervention. However, some crimes and state actions are too gross, too extreme, and too shocking to ignore. These new criteria are a beginning step in allowing the SC greater flexibility to respond to extreme human rights abuses – a stark contrast to the rigidity of the old system. The world is changing and with it new norms of sovereignty and the paramount importance of human rights have begun to alter the international political and legal landscape. President Obama summed up the dilemma of intervention well when he said:

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[216] 'Syria unrest: Russia pulled two ways' BBC News 16 December 2011.

> [t]he use of force is not our first choice. It is not a choice I make lightly. But we cannot stand idly by when a tyrant tells his own people that there will be no mercy'.

Whether these new intervention criteria will actually end up preventing human rights abuses, or create more disorder and increase violence against civilians remains to be seen.