CASE STUDY

MILITARY INTERVENTION AND DIPLOMATIC ENGAGEMENT IN LIBYA: A COLLAGE OF POLICY, FORCE AND LAW

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Introduction

In February of 2011, Colonel Muammar Qadhafi violently cracked down on Libyans protesting in Benghazi—Libya's second largest city. By the end of February, an armed conflict between Qadhafi's forces and opposition forces was well underway, with much of eastern Libya including Benghazi controlled by anti-Qadhafi forces. By Thursday, March 17, Qadhafi was preparing to retake the city of Benghazi, broadcasting that his forces would show "no mercy and no pity" to those who would not give up resistance. This likely would include a ruthless attack by Qadhafi's force on all Libyan citizens opposed to his regime, including women and children.

On March 19, a British-French led coalition launched an air campaign designed to protect the people of Libya against Qadhafi's forces. Ultimately, Qadhafi was captured and killed, and a transitional national authority assumed control of Libya.

Nine days after military operations had begun in Libya, President Obama described the operations in Libya to the American people from a podium at the National Defense University. President Obama noted that:

> Confronted by [Colonel Muammar Qadhafi's] brutal repression and a looming humanitarian crisis, I ordered warships into the Mediterranean. European allies declared their willingness to commit resources to stop the killing. The Libyan opposition and the Arab League appealed to the world to save lives in Libya. And so at my direction, America led an effort with our allies at the United Nations Security Council to pass a historic resolution that authorized a no-fly zone to stop the regime's attacks from the air, and further authorized all necessary measures to protect the Libyan people . . . We knew that if we waited—if we waited one more day, Benghazi, a city nearly the size of Charlotte, could suffer a massacre that would have reverberated across the region and stained the conscience of the world. It was not in our national interest to let that happen. I refused to let that

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> happen. And so nine days ago, after consulting the bipartisan leadership of Congress, I authorized military action to stop the killing and enforce UN Security Council Resolution 1973.[1]

U.S. Secretary of State Hillary Clinton declared American engagement in Libya to be "an unfolding example of using the combined assets of smart power, diplomacy, development, and defense to protect our interests and advance our values."[2] She could have appropriately added domestic and international law to her list of tools being employed.

This case study chapter provides an opportunity for students to examine the role law plays in decisions relating to highly complex operations—how it enables, shapes and constrains political-military options and policy approaches. Five key political-military decision points will be examined relating to the case of Libya. First, should the United States join France and Great Britain in using force to protect the people of Libya? Second, what is the extent of military force that could be used to accomplish this objective? Third, to what extent should Congress be involved in the decision to use force? Fourth, should the United States recognize the National Transitional Council as the legitimate government of Libya? Finally, should the United States and its allies seek a negotiated settlement if the military campaign failed to adequately protect civilians or to prompt a regime change?

Each section below will address one of these decision points. Each section will first place the applicable legal questions in the context of the civilian, policy and military questions faced by the key decision makers. Each section will then undertake a brief review of the applicable underlying legal principles and norms, as well as prior United Nations (UN) practice. Each section will conclude with a review of how the international and domestic law enabled, shaped or constrained the political and military decision-making process in the case of Libya.

Should the United States join France and Great Britain in using force to protect the people of Libya?

In seeking to determine whether or not the United States should join France and the United Kingdom in using force to protect the people of Libya, the President and his political and military advisors considered a number of questions. Was the use of force likely to succeed in protecting the people of Libya? Would this set a precedent for humanitarian intervention in other conflicts? Would it spark a full-blown civil war? Would military intervention lead to large-scale loss of life and cause more harm than good? How long would the campaign last? Would it become a protracted military conflict? A quagmire? What could be the unintended consequences of the intervention? Did the U.S. and its allies have sufficient military resources to successfully intervene? Would this intervention cause damage to the relations with other important powers, such as Russia and China? And, was there an international legal basis for the use of force?

The conventional underpinnings of sovereignty, political independence and territorial integrity require that states have a clear legal basis for using force against another state. While states have often used force without a clear legal basis, or in direct violation of international law, the United States and its key allies universally seek a legal basis before using force. The case of Libya was no exception.

Legality of Use of Force

War has been prohibited since the adoption of the 1928 General Treaty for the Renunciation of War (also known as the Kellogg-Briand Pact). Prior to this, the 1919 Covenant of the League of Nations had added certain conditions to the nineteenth century thinking that the use of military force was permissible. Following World War II, the United Nations Charter of June 26, 1945 (UN Charter) embodied a prohibition on the threat or use of force and created specific methods for ensuring that this prohibition be respected.[3] The regime for the use of force is thus found in the UN Charter, complemented by customary law and several declarations of the UN General Assembly.

Today, the general rule under international law is that the threat or use of force by one state against another is prohibited. This general prohibition covers all armed hostilities, whether or not a war has been declared. The exceptions are that the threat or use of force is allowed if: (i) used for a state's self-defense, (ii) authorized by the UN Security Council pursuant to Chapter VII of the UN Charter, or (iii) used for humanitarian intervention.[4]

Under customary international law, states have a right of self-defense. This enables states to resort to the use of force when "the threatened attack is imminent, no other means would deflect it and the action is proportionate."[5] A debate exists among policy makers as well as among the international legal community as to whether *pre-emptive* or *anticipatory* self-defense measures—taken in anticipation of a non-imminent or non-proximate attack—are legal. Although these measures are not provided for in the UN Charter, proponents of anticipatory self-defense measures refer to customary law as the basis for their legality.

While the practice of states has generally been opposed to anticipatory self-defense, the U.S. government has used this basis as a legal justification for recent military actions. For instance, in the wake of the 9/11 terrorist attacks on the territory of the United States, the Bush Doctrine of 2002 relied upon a right of 'pre-emptive self-defense' against potential adversary states, whether or not an imminent attack could be proven.[6] The legality of the Bush Doctrine has generally been rejected by international lawyers. More recently, the anticipatory right to self-defense has been relied upon to justify the legality of U.S. drones targeting terrorist suspects in Pakistan, Somalia and Yemen. The legality of these attacks has also been contested.

In addition to the use of force for self-defense, the UN Security Council can authorize military force under Chapter VII of the UN Charter. Resolutions adopted under Chapter VII are binding on all UN member states, as opposed to resolutions adopted

under other chapters of the UN Charter. Chapter VII is at the heart of the UN collective security system and authorizes the Security Council to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[7] This use of force is intended as a mechanism of last resort, and a number of conditions are required to be met before the Security Council can authorize military force.

First, the UN Security Council is required to determine that there is a threat to or breach of the peace, or an act of aggression. Second, the Security Council is required to find that other measures not involving the use of force are insufficient. The UN Charter notes that before resorting to military measures, the Security Council should try provisional measures that freeze the current situation or other non-military measures, such as "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[8] It is only if these non-military measures have proven to be inadequate, or are indeed inadequate, that the Security Council can proceed with authorizing force. Third, the military actions must be those "necessary to maintain or restore international peace and security"[9]—i.e., military measures chosen should be proportional to the aim of restoring peace and security. The use of force authorized is accordingly limited to the specific mandate spelled out in the Security Council's resolution.

The authorization of the use of force by the UN Security Council has evolved over time. For instance, the UN Security Council accepts today to authorize the use of force in what previously would be deemed internal affairs of a state and thus in violation of the UN Charter. Further, although it was initially envisioned that UN member states would provide armed forces to the UN for deployment, the practice has been for states to deploy their own military forces.

In addition to self-defense and the UN Security Council authorization of the use of force, a third basis for the legality of use of force is humanitarian intervention. Humanitarian intervention is most commonly defined as the use of force by one state beyond its borders for the purpose of protecting individuals in another state. This basis allows a state to prevent a humanitarian catastrophe, often a mass violation of human rights, through the military intervention in the affairs of another. Humanitarian intervention can also refer to the use of force legally authorized by the UN Security Council for humanitarian purposes. Humanitarian intervention without Security Council authorization is strongly contested as having neither a foundation in the UN Charter nor in customary law. Humanitarian intervention was the basis used to justify the NATO bombings in former Yugoslavia from March 24, 1999 to June 10, 1999 as a means of preventing a humanitarian catastrophe in Kosovo. The legality of this military action was debatable under international law because it was taken without the UN Security Council's authorization. Humanitarian intervention was also referred to as the basis for military action taken in Northern Iraq in 1991 to protect the Kurds and in Liberia in 1990 by ECOWAS, the Economic Community of West-African States.

Using Force in Libya

The United States did not consider intervening militarily in Libya without an authorization by the UN Security Council. Self-defense would not have been a possible legal basis in light of the facts involved, and policy makers were conscious that humanitarian intervention without approval by the UN Security Council would have lacked a solid legal foundation. Accordingly, through the U.S. Permanent Representative to the United Nations, Ambassador Susan Rice, the United States joined France, the United Kingdom and other members of the Security Council to negotiate an authorization for the use of force. This authorization, adopted on March 17, 2011, fulfilled the criteria for the legality of the use of force as set forth under Chapter VII of the UN Charter.

First, the UN Security Council found that the situation in Libya "continue[d] to constitute a threat to international peace and security" and thus decided to act under Chapter VII of the UN Charter. The Security Council emphasized "the deteriorating situation, the escalation of violence, and the heavy civilian casualties" as well as the "widespread and systematic attacks . . . taking place . . . against the civilian population."[10] U.S. Ambassador Susan Rice further emphasized the need "to protect innocent civilians" and that Qadhafi and his supporters "continue to grossly and systematically abuse the most fundamental human rights of Libya's people."[11]

Second, the UN Security Council initially resorted to non-military means by adopting UN Security Council Resolution 1970 (Resolution 1970) on February 26, a week after protests had turned violent in Benghazi.[12] This Resolution 1970 had adopted a number of measures to end the violence in Libya, falling short of the authorization of the use of force. These measures included imposing an arms embargo on Libya, as well as a travel ban and assets freeze on the family of Muammar Qadhafi and certain government officials. The resolution also referred the situation in Libya to the International Criminal Court (ICC) after February 15, the day of the first protests in Benghazi. It was only when Colonel Qadhafi threatened continued violence on Libyan citizens in Benghazi that the UN Security Council on March 17 authorized military force by adopting Resolution 1973. Even the day after this resolution was adopted, President Barack Obama emphasized that Colonel Qadhafi had a choice and that military action would not take place if Qadhafi abided by the conditions set forth in Resolution 1973, including the immediate implementation of a cease-fire and stopping the advance of troops on Benghazi.[13]

Third, UN Security Council Resolution 1973 specifically authorized member states, acting individually or through regional organizations, "to take all necessary measures" to protect civilians and civilian-populated areas under threat of attack in Libya, including Benghazi.[14] "All necessary measures" is the language employed by the Security Council to authorize the use of force under Chapter VII of the UN Charter. Thus, the UN Security Council authorized the use of force to protect Benghazi, as well as other civilian populated areas. In parallel, the international community was concerned that Qadhafi would employ his aircraft to bomb civilians and to strengthen his military positions by, for instance, smuggling in mercenaries, money and weapons. Thus, the

Security Council also authorized the use of force to enforce a no-fly zone which prohibited flights in Libyan airspace.

This enforcement of the no-fly zone entailed taking out Libya's integrated air and missile defense system, with a focus on removing radars and anti-aircraft sites around Tripoli and the Mediterranean coast. A United States flag officer first took command of combined military operations in Libya on March 19. The U.S. Africa Command, under General Carter Ham, organized a strike force (Joint Task Force Odyssey Dawn) from a group of U.S. and allied ships and aircraft already deployed to the Mediterranean or based nearby as part of their normal deployments. Vice Admiral Samuel Locklear commanded the Joint Task Force from aboard the flagship USS Mount Whitney in the Mediterranean. The strike force initially consisted of 11 U.S. ships—including an aircraft carrier, amphibious assault ships, destroyers, cruisers, resupply ships and submarines—as well as 14 more vessels from the U.S., U.K., Canada, Italy and France. NATO and U.S. airborne early warning had patrolled the central Mediterranean with increasing frequency in the previous weeks to begin building a picture of the activity in Libyan airspace.

In the five days between Saturday, March 19 and Thursday, March 24, U.S. and U.K. surface ships and submarines launched over 100 Tomahawk missiles on Qadhafi's anti-aircraft systems and troops near Benghazi, complemented by the air strikes of F/A-18 attack aircraft launched from the USS Enterprise. Electronic attacks from EA-18G Growlers and similar aircraft aided in disrupting Libyan anti-aircraft defenses and Qadhafi's command and control capabilities. By Thursday, March 24, 2011, NATO forces began Operation Unified Protector, commanded by General Charles Bouchard of the Royal Canadian Air Force. After a week-long transition, the U.S. Joint Task Force commander relinquished command of Operation Odyssey Dawn to the NATO commander on March 31, though most of the U.S. assets remained heavily involved throughout the operation.

The U.S. military operations did not involve the use of ground forces, although U.S. Marines flew A/V-8B Harrier aircraft from the USS Kearsarge to conduct close-in air strikes against ground forces and to provide search and rescue capabilities in the case of downed aircraft. The United States also introduced MQ-1 Predators and similar unmanned aerial vehicles into the operation in late April. These unmanned predator drones with hellfire missiles into Libya are a resource that only the U.S. could provide to the mission. The U.S. used few cruise missiles after the initial two weeks of attacks in March, but its aircraft continued to fly sorties from the USS Enterprise, as well as from Air Force bases and Naval Air stations around the Mediterranean.

The United States, as a permanent member of the fifteen-member UN Security Council, has veto power and could have defeated the Security Council's decision to use force in Libya. In the adoption of Resolution 1973, five countries abstained: Germany, Russia, China, India and Brazil. As permanent members, Russia and China could have chosen to veto the use of force in Libya. Germany was concerned that there would be large-scale loss of life and that implementation of Resolution 1973 would result in

"protracted military conflict." Brazil believed that humanitarian intervention would exacerbate the situation in Libya, "causing more harm than good to . . . civilians," and Russia warned against "unpredicted consequences" and expressed concern about who would enforce the measures and how they would enforce them. India was similarly concerned about implementation and unintended consequences, while China simply disagreed with a resolution that authorized force when peaceful means had not been exhausted.[15]

What is the extent of military force that could be used to protect the people of Libya?

In seeking to determine the extent of military force that could be used to protect the people of Libya, the President and his political and military advisors considered a number of questions. Would the coalition forces be able to use all the military assets in their arsenal? What would be the threshold for targeting Libyan military assets? Could they target Libyan assets throughout the country or only in the zone of conflict? Could they destroy artillery and tanks not in direct contact with the National Transitional Council (NTC) forces? Could they target forces engaged in logistic support? Could they target arms depots? Could they target Qadhafi and his top generals and advisors? Could they target communication facilities? Could they provide close air support for NTC forces engaged in offensive maneuvers? Could they provide weapons to the NTC forces? Could they deploy Special Forces to assist with training, targeting and operational activities? What are the precise rules of engagement? Could they deploy conventional ground troops if the situation required? Would they eventually be able to deploy peacekeepers? And, where do they find the legal authority to undertake these specific military activities?

When force is used pursuant to a UN Security Council resolution, the resolution often sets forth the purposes for which force may be used and, in some cases, authorizes or limits specific categories or classes of targets. Given the natural political operation of the Security Council, the operative paragraphs are never drafted with the precision desired by military officers and are frequently subject to varying interpretations. In the case of Libya, the authorization was unprecedented in its breadth and was interpreted vigorously by the coalition forces.

Lawful Targets

When a state uses force in self-defense, it must abide by the laws of war when determining which targets are legitimate. The state will often craft specific "rules of engagement" which identify under what circumstances a target may be destroyed. In traditional cases of self-defense, the rules of engagement were quite broad and limited only by the laws of war—as a state was fighting for its existence. In cases of pre-emptive self-defense, and in more nuanced situations, like the use of drones to kill enemy combatants in the war on terror, the rules may be more restrictive, governed in large part by proportionality. Political considerations may also play a role in the crafting of the rules of engagement, as while a target maybe permissible under the laws of war, its

destruction might undermine political efforts to reach a settlement, or might result in civilian casualties and erode public support for the overall military action.

When a state or coalition of states is authorized to use force by the Security Council, the scope of military activity is set forth in the relevant Security Council resolution. Working from the resolution, the implementing states craft specific rules of engagement consistent both with the laws of war and the parameters set forth in the Security Council resolution.

In some cases, the Security Council sets forth clear and robust parameters on the use of force. Most often this occurs when the Security Council is authorizing the use of force for collective self-defense, as when it authorized the use of force to defend South Korea, or to expel Iraqi forces from Kuwait. In both of these cases the coalition forces were able to attack the entire array of conventional targets. Importantly, however, they could only use force for as long as required to accomplish the objectives of the Security Council resolution. Thus, while the U.S.-led coalition in the first Gulf War could target military assets throughout Iraq, it did not have the authority, after Saddam's forces withdrew from Kuwait, to march on Baghdad and topple Saddam Hussein's regime. The Security Council resolution had limited the scope of the authorization to liberating Kuwait, and this did not include regime change in Iraq.

When the Security Council authorizes the use of force in the context of humanitarian intervention, the parameters for the use of force are often much more constrained, vague and difficult to decipher, and parceled out in numerous resolutions. Intervening forces are often authorized to use force to protect specific objectives, such as protecting humanitarian corridors, protecting explicitly designated safe areas, and defending themselves from attack. In Bosnia, for instance, over a year passed from the time Serbian forces first fired on peaceful demonstrators in Sarajevo until the Security Council authorized the use of force to deter attacks against safe areas. And, by the time the Dayton Peace Accords were signed nearly four years later, 33 separate resolutions provided piecemeal legal authorization for intervention in Bosnia, with the consequence that between 100,000–200,000 civilians were killed and over 2.2 million displaced.

Moreover, in the context of humanitarian intervention, the rules of engagement are often narrowed by the implementing forces, which fear being dragged into a civil war. For instance, despite Security Council authorization to use force in Bosnia, the international community was timid and tardy in the implementation of military intervention. In fact, General Michael Rose, who led the UN mission in Bosnia, specifically said that the UN "must . . . avoid all situations that involve the use of force . . . It is not part of our mission to impose any solution through force of arms."[16] As a result, NATO forces and UN peacekeepers turned a blind eye to numerous attacks by Serbian forces on civilians in designated safe areas, and when NATO did use force, it was characterized by pinprick airstrikes on unmanned tanks and airport runways, taking care not to target the grounded planes.

Using Force in Libya—Legitimate Targets

In the case of Libya, the Security Council acted swiftly to authorize the use of force coupled with a broad mandate to protect the people of Libya and to do so by targeting a wide array of military assets. The French-British led coalition quickly established rules of engagement that provided their military forces the maximum discretion permitted under the Security Council resolution.

Paragraph 4 of Security Council Resolution 1973 provided states with a broad legal mandate to protect civilians in Libya by authorizing "all necessary measures, notwithstanding paragraph 9 of Resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory."[17] The overarching purpose of Resolution 1973 was the protection of civilians, and there were five key ways that paragraph 4 authorized this protection: (1) a mandate to use "all necessary measures"; (2) protection of "civilian populated areas . . . including Benghazi"; (3) protection of areas "under threat of attack"; (4) an exception to the arms embargo under "notwithstanding paragraph 9 of resolution 1970"; and (5) exclusion of a "foreign occupation force" that still allows for limited presence on the ground.

By extended protection to civilians and "civilian populated areas . . . including Benghazi," Resolution 1973 permitted coalition forces to strike throughout Libya. According to the Geneva Convention, even if military personnel are present in an area, their presence does not "deprive [the] area of its civilian nature."[18] Thus, coupled with the Geneva Convention, three words—"civilian populated areas"—authorized states to use force to protect entire towns and villages in Libya, even if legitimate military targets existed within them, so long as civilians were present. The UN Security Council specifically included Benghazi as a protected area to make sure that the impending massacre planned by Qadhafi could be thwarted. This also had the longer-term effect of protecting Benghazi—the command and control center for the Libyan opposition—throughout the conflict.

An earlier draft of the resolution had limited protection to "civilians and civilian objects."[19] Upon the request of the Americans, Resolution 1973 broadened the scope of protection to include entire "civilian populated areas" of Libya and thus everything—not just "civilians and civilian objects"—within those areas. This authorized NATO forces to protect non-civilians, including the Libyan opposition forces, as long as they were within an area populated by civilians. Acting under this authority, NATO vigorously protected Benghazi and other "civilian populated areas" from Qadhafi's forces by conducting airstrikes in and around at least 35 towns and cities in Libya. NATO also interpreted this paragraph to allow it to deter attacks by the Qadhafi regime on the Libyan opposition and to provide close air support as the Libyan opposition moved from one town to the next.

Importantly, Resolution 1973 authorized force to protect civilian populated areas "under threat of attack." This language provided NATO the flexibility to preemptively stop attacks on civilians before they occurred. The military operations that NATO took

to protect civilian populated areas under threat of attack varied and reflected varying interpretation of how imminent the threat of attack is. NATO's implementation of this mandate can be divided into five categories of "threat of attack": (1) imminent threat of attack; (2) capacity to attack; (3) command and control; (4) incitement to attack; and (5) combat support role. Moving from category one to category five, the "threat" the targets pose to civilians reaches the fringes of the mandate, yet all targets were deemed necessary to protect civilians.[20]

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

The second category of targets gave Qadhafi the capacity to attack in the future and were necessary to destroy in order to prevent impending attacks against civilians. This category included weapons depots and ammunition bunkers, unmanned tanks and supply lines to Qadhafi regime forces. Also falling within the first and second categories were defensive measures taken by the U.S. and allied forces, as well as NATO forces to ensure that their mandate under Resolution 1973 could be safely carried out. Defensive targets included anti-aircraft facilities and guns, rocket launchers, surface to air missile launchers, and all other targets that could endanger pilots.

The third category of targets NATO interpreted to constitute a threat of attack during the operation were "command and control" or "communication" centers. NATO described command and control centers as facilities "used to coordinate such attacks by regime forces,"[21] and therefore their destruction was necessary to halt direct commands for attacks on civilians. Such facilities included Qadhafi palaces, headquarters and communication centers. Many observers interpreted attacks on these places as an indication that NATO was targeting the Colonel himself.

The apparent targeting of Qadhafi was one of the most controversial elements of the NATO campaign. At the beginning of the operation, NATO shied away from admitting that strikes on or near Qadhafi's compounds were aimed at killing the leader himself: "We don't want to kill him . . . but if he sees the bombing happening all around him, we think it could change his calculus,"[22] said one senior NATO diplomat. Following airstrikes on a residential compound in Tripoli that killed one of Qadhafi's sons and three of his grandchildren, NATO again denied that Qadhafi had been the target: "All NATO's targets are military in nature and have been clearly linked to the [Qadhafi] regime's systematic attacks on the Libyan population and populated areas. We do not target individuals," said Lieutenant General Charles Bouchard.[23] Although NATO officials remained hesitant to explicitly say that they were targeting Qadhafi, later in the campaign, NATO did argue that Resolution 1973 allowed for the targeting of Qadhafi because, "as head of the military, he is part of the control and command structure and

therefore a legitimate target."[24] Presumably, if Qadhafi was indeed giving orders to attack civilians, he would constitute a threat of attack to those civilians.

The fourth category of NATO targets were facilities used to incite attacks against the Libyan opposition. In August, NATO conducted a precision airstrike that hit three Libyan state television satellite transmission dishes in Tripoli. NATO's purpose was to "degrade [Qadhafi's] use of satellite television as a means to intimidate the Libyan people and incite acts of violence against them."[25] Thus, NATO determined that limiting Qadhafi's ability to incite attacks against civilians—by eliminating his ability to reach wide audiences—was necessary to prevent attacks against civilians. Despite NATO's purpose for targeting state-run media, this action received a lot of criticism from the international community, including UNESCO which deplored the targeting of media outlets, even if used for propaganda.

The fifth category of targets interpreted to pose a threat of attack were those struck while NATO played a combat support role for the Libyan opposition. When opposition forces advanced on Tripoli in August, they did so with close air support from NATO and in coordination with NATO command and control. NATO also provided some coverage for Libyan opposition forces to liberate the last remaining Qadhafi strongholds, including Sirte. When Libyan opposition forces arrived in Sirte in October, Tripoli had already fallen in August and Qadhafi was no longer in control of Libya. Thus, some argued that Qadhafi's forces no longer posed a threat of attack to civilians at this time. Reportedly, however, there were still civilians in Sirte under attack by Qadhafi's forces. A U.S. Air Force lieutenant general said that "loyalist gunmen in pickup trucks are terrorizing residents, killing some and intimidating many others."[26] The fact that this intervention may be legally uncomfortable likely has been outweighed by the international community's desire to bring about an end to the war.

Finally, the UN specifically excluded a "foreign occupation force." This does not however preclude all boots on the ground, only a certain type of presence on the ground. According to the Hague Convention IV, a "territory is considered occupied when it is actually placed under the authority of the hostile army"[27] and comes under the "effective control of hostile foreign armed forces."[28] Any foreign intelligence or military presence on the ground in Libya falling short of this did not constitute foreign occupation of the territory. An earlier draft of Resolution 1973 did not include any reference to exclusion of a foreign occupation force,[29] meaning that the drafters thought very carefully about including this clause. Some commentators interpret the inclusion of this phrase as expressing the intent of the Security Council to avoid a situation similar to Iraq.[30] While this phrase certainly set the tone that there would not be heavily-armed peacekeeping forces in Libya, it also represents clever drafting that allowed for some military presence on the ground. This phrase ultimately provided states fulfilling the mandate with a wider range of available measures to protect civilians as the conflict progressed. The United States did not put boots on the ground, although the British, French and Italians interpreted Resolution 1973 to allow them to legally deploy small numbers of military personnel to assist the Libyan opposition.

To what extent did Congress need to be involved in the decision to use force?

The domestic authorization of the use of force remains a contentious issue between the legislative and executive branches. The allocation of responsibility between Congress—to declare war—and the President—to act as the commander-in-chief—is seldom as clear cut as envisioned by the founding fathers. Efforts by Congress to clarify responsibilities and to constrain executive power, through the adoption of the War Powers Act, have had a limited impact. The evolving nature of the use of force, including increasingly effective air power, drone strike capabilities, and electronic warfare, further complicates these efforts. The case of Libya proved no exception to the tension surrounding the basis for domestic authorization of the use of force.

The President and his political and military advisors considered a number of questions to determine the extent to which Congress should be involved in the decision to use force to protect the people of Libya:

- Was there sufficient support within the Democratic caucus for the use of force?
- Was there sufficient bipartisan support?
- Would it be likely that Congress would adopt a resolution supporting or authorizing the use of force?
- Would it be politically wise to seek to share the responsibility (credit or criticism) for the results of the use of force?
- Was there a constitutional or legislative legal obligation to notify Congress, and/or seek Congressional authorization for the use of force?
- If it was not legally necessary, was it politically prudent for the President to seek formal or informal approval from the Congressional leadership?
- Would extensive Congressional involvement limit the President's ability to exercise his role as commander-in-chief?
- Would extensive Congressional involvement set a precedent for the infringement of Executive prerogatives?
- Would seeking the involvement of Congress delay UN action, fracture the coalition and allow Qadhafi to take Benghazi?
- Was there a risk Congress might cut off funding for the operation?

The Constitution and the War Powers Act

Under the United States Constitution, Congress has the authority to declare war, raise and support the armed forces, and control war funding, while the President has the authority to act as commander-in-chief.[31] While clear on their face, these powers leave a substantial gap in terms of military activities that fall short of war. To some degree, this gap has been closed by precedent, which permits the president to authorize the use of force in circumstances where it is in the national security and foreign policy interests of the United States, and where the military activities would not be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war.'

The difficulty arises when the President commits military force to a conflict and then over time commits more and more force, sliding into a full-scale conflict (war). The situation in Korea and Vietnam led Congress to adopt the War Powers Act (the Act) in 1973 as a means to "prevent another situation in which a President could gradually build up American involvement in a foreign war without congressional knowledge or approval, eventually presenting Congress with a full-blown undeclared war which on a practical level it was powerless to stop."[32]

From the perspective of Congress, the purpose of the War Powers Act is "to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations."[33] Neither President Nixon, who vetoed the Act before he was over-ridden by a joint resolution, nor any subsequent president, has accepted the constitutionality of the Act.

The Act contains three main sets of provisions. First, it provides that the President is obligated to consult with Congress when he introduces U.S. armed forces into existing or imminent hostilities. The term "hostilities" is not defined in the Act. When there has not been a declaration of war, the President must submit a report within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate. This report is to describe "(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement."[34]

Second, the Act provides for a termination of the use of the use of force within 60 calendar days of the time when the report is submitted (or required to be submitted),[35] unless Congress declares war, enacts a specific authorization for the use of armed force, or extends this sixty-day period for another 30 days.

Third, the Act allows Congress to direct the President to remove American armed forces abroad by concurrent resolution.

Since the Act's adoption, U.S. Presidents have submitted 130 reports to Congress informing them of the commitment of forces. In only one of these did the President actually cite to the provision in the Act which triggers the termination of the use of force within 60 calendar days.[36] President Ford invoked this provision when he notified Congress of the use of force to retake a U.S. merchant vessel seized by Cambodia.[37] Commonly, the President merely notes that his report is "consistent with the Act," rather than being submitted "pursuant to the Act."

With respect to Congressional authorization within the sixty-day timeframe, the Executive branch seems to have acted consistent with the Act to the extent that it believed this was politically feasible. For instance, when President Ronald Reagan sent a

force of Marines to participate in peacekeeping in Lebanon in 1982-1983, he notified Congress, but maintained he was not required to do so and that the deployment did not constitute hostilities—although approximately 1,600 U.S. Marines were equipped for combat on a daily basis.[38] As the military operations intensified, Congress relied upon the War Powers Act and authorized the Marines to remain in Lebanon for 18 months.[39] Similarly, in 1990-1991, President George H.W. Bush acted on UN resolutions authorizing the use of force to force Iraq to withdraw from Kuwait and requested congressional support for the military operations, resulting in a law authorizing Operation Desert Storm.[40] For his part, the President asserted that while he was seeking authorization, he did not require Congress to act. For their part, Congress specifically noted that legislation constituted specific statutory authorization within the meaning of the War Powers Act.

In instances where the President did not believe he had sufficient Congressional support, he relied upon various legal justifications to argue either that Congressional approval was not required as the activities did not amount to hostilities, or that Congress had somehow implicitly authorized the use of force. Some of these justifications have been quite tenuous. For instance, when President Clinton authorized the use of force for the Kosovo humanitarian intervention, he made a report to Congress "consistent with" the Act, but did not seek authorization, even though the air campaign continued past the sixty-day window. The Department of Justice's Office of Legal Counsel noted at the time that the fact that Congress had approved a bill funding the operation constituted implicit congressional authorization. This despite the fact that the War Powers Act specifically notes that authorization cannot be inferred from funding appropriations.

In the face of episodic Executive intransigence, specific members of Congress have often sought judicial relief. The courts, however, traditionally view this issue as a non-justiciable political question. For instance, in 1999, Representative Thomas Campbell and colleagues filed a case in the Federal District Court for the District of Columbia arguing that the President had violated the War Powers Act by continuing operations in Kosovo after the sixty-day window. The court ruled in favor of the President, holding that the plaintiff slacked legal standing to bring the suit as they had ample alternatives, other than bringing the matter before the courts, to prevent the President from continuing with the use of force in Kosovo, such as curtailing funding, adopting a law to prevent the use of force in a particular conflict, and impeaching the President for acting in disregard of Congressional authority. This decision was affirmed by the U.S. Court of Appeals for the District of Columbia.[41]

Authorizing the Use of Force in Libya

In the case of Libya, the President made an initial determination that he had constitutional authority to use force because it was in the national interest and the military activities would not be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring prior specific congressional approval under the Declaration of War Clause of the Constitution.

The President based his determination on the advice of the Department of Justice's Office of the Legal Counsel.[42] The Office of Legal Counsel advised that U.S. national interests were served by preserving regional stability and by supporting the UN Security Council's credibility and effectiveness and that the combination of these two national interests "provided a sufficient basis for the President's exercise of his constitutional authority to order the use of military force."[43]

The Office of Legal Counsel also determined that the proposed military operations would not be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' as it did not entail "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."[44] Specifically, it was not anticipated that ground troops be deployed, the mission was limited to protect civilians, and there was no preparatory bombing planned in advance of a ground invasion. In making this conclusion, the Office of Legal Counsel relied on a number of instances in which U.S. Presidents had approved the use of military force without congressional approval. These included military operations in Somalia in 1992, Bosnia in 1995, Haiti in 1994 and 2004, and Yugoslavia in 1999.

On March 19, 2001, President Obama ordered the use of American armed forces in Libya. He did not seek congressional authorization. Two days later, on March 21, he sent the Speaker of the House of Representatives and the President pro tempore of the Senate a letter notifying Congress that military operations in Libya had commenced. President Obama noted that:

> [a]s part of the multilateral response authorized under UN Security Council Resolution 1973, U.S. military forces, under the command of Commander, U.S. Africa Command, began a series of strikes against air defense systems and military airfields for the purposes of preparing a no-fly zone. These strikes will be limited in their nature, duration, and scope. Their purpose is to support an international coalition as it takes all necessary measures to enforce the terms of UN Security Council Resolution 1973. These limited U.S. actions will set the stage for further action by other coalition partners.[45]

President Obama noted in the last paragraph of his letter that he was providing this report as part of his efforts to keep Congress fully informed "consistent with" the War Powers Act.

Interestingly, prior to the commencement of military operations, Senator John McCain introduced a resolution calling for the President to implement a no-fly zone and to prepare a strategy for removing Qadhafi from power in Libya. Conversely, Representative Ron Paul introduced a resolution requiring the President to seek specific statutory authorization for the use of force, in particular to enforce a no-fly zone. Neither resolution was adopted.

As to the question of whether President Obama would need to seek congressional approval after 60 days, his administration was divided. The acting head of the Office of the Legal Counsel, Caroline Krass, and Pentagon General Counsel Jeh C. Johnson argued that the military operations in Libya amounted to hostilities, thus requiring congressional authorization, while the White House Counsel, Robert Bauer, and U.S. State Department Legal Adviser Harold Koh supported the view that the operations in Libya did not amount to hostilities. President Obama chose not to seek Congressional authorization, adopting the argument that the use of force in Libya did not amount to hostilities.

Interestingly, the White House did not follow the traditional process for securing legal advice on the use of force. Normally the Office of the Legal Counsel would solicit the views of the Department of Defense and State Department and any other relevant actors and then make a determination and provide that determination to the President. In the case of Libya, the President sought informal advice from the Office of the Legal Counsel and asked that the other relevant agencies also submit their views to him.[46]

On June 3, the House of Representatives adopted a resolution sponsored by the Speaker of the House, John Boehner, (268 to 145) referencing the War Powers Resolution and requesting that the President describe to the House of Representatives within 14 days why he had not sought authorization by Congress for the use of military force in Libya.

In response, on June 15, the Obama administration submitted to Congress a document asserting that the since the April 4 transfer of operations to NATO, the U.S. military involvement had been limited to a supporting role and did not constitute hostilities, and therefore did not require Congressional authorization. The report noted the limited role of the U.S. military in the present case by emphasizing that the:

> U.S. military operations [in Libya] are distinct from the kind of 'hostilities' contemplated by the Resolution's 60 day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.[47]

On June 28, State Department Legal Advisor Harold Koh testified before the Senate Foreign Relations Committee on the question of "hostilities." Mr. Koh noted that "[b]ecause the War Powers Resolution represented a broad compromise between competing views on the proper division of constitutional authorities, the question whether a particular set of facts constitutes 'hostilities' for purposes of the Resolution has been

determined more by interbranch practice than by a narrow parsing of dictionary definitions."[48] After the passage of the law in 1973, former State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin R. Hoffmann had noted that "hostilities" did not necessarily include "situations where the nature of the mission is limited," "where the exposure of U.S. forces is limited," and "where the risk of escalation is therefore limited."[49]

Mr. Koh then compared the Libyan situation to a number of others where the U.S. administration had employed U.S. forces without a finding that hostilities had occurred, including in Lebanon and Grenada in 1983, Somalia in 1993, and the Persian Gulf in 1987-88. Mr. Koh noted that the Libyan mission was even more limited than in these situations: (1) the mission was limited, (2) the exposure of the United States' armed forces was limited, (3) the risk of escalation was limited, and (4) the military means were limited.[50]

According to Mr. Koh, the United States' mission was limited because "U.S. forces are playing a constrained and supporting role in a NATO-led multinational civilian protection operation, which is implementing a UN Security Council Resolution tailored to that limited purpose." He argued that the exposure of the United States' armed forces was limited as members of the U.S. military were not involved in "active exchanges of fire with hostile forces" or "significant armed confrontations or sustained confrontations of any kind with hostile forces." He noted that there had been no "U.S. casualties or a threat of significant U.S. casualties," referring back to the rationale of the adoption of the War Powers Act as linked to the safety of U.S. troops.[51]

According to Mr. Koh, the risk of escalation was limited as "U.S. military operations have not involved the presence of U.S. ground troops, or any significant chance of escalation into a broader conflict characterized by a large U.S. ground presence, major casualties, sustained active combat, or expanding geographical scope." He contrasted Libya to other situations where the administration had deemed that there were no hostilities and yet in which there was a greater risk of escalation. The military means used were limited as the violence inflicted by U.S. forces had been "modest in terms of its frequency, intensity, and severity." He explained "the bulk of U.S. contributions to the NATO effort has been providing intelligence capabilities and refueling assets," and that "American strikes have been confined, on an as-needed basis, to the suppression of enemy air defenses to enforce the no-fly zone, and to limited strikes by Predator unmanned aerial vehicles against discrete targets in support of the civilian protection mission."[52]

He concluded by noting that whatever were the views on the way in which the War Powers Act was construed, it was in the United States' best interests to approve limited military action in Libya.[53]

Congress, rather expectedly, held a range of views on whether force should be used; the legality of the use of force in Libya; and on how Congress should respond to the

assertions of the President that the military activities post April 4 did not constitute hostilities.

Those in favor of the intervention prepared Senate and House resolutions[54] invoking the War Powers Act and declaring the military operations to be "hostilities," but authorizing the use of force, pursuant to the Act, for 6 months and 12 months respectively. These resolutions did, however, prohibit the introduction of ground troops.[55] Neither of these bills was adopted.

Led by Dennis Kucinich, those opposing the intervention prepared a bill directing the President to cease all military operations in Libya. The bill was withdrawn by the House leadership on the day it was scheduled for a vote when it appeared it might have the necessary votes to pass. The House Republicans then prepared a resolution prohibiting funding for the conflict in Libya, beyond resources necessary to support America's allies, such as search and rescue, refueling and intelligence.[56] This bill failed to gather the necessary votes to pass. Ten Congressmen, including Dennis Kucinich, also filed a case in the United States District Court alleging the President was acting in violation of the War Powers Act.[57] The Court, with some rather harsh language, rejected the case for lack of standing.

Should the United States recognize the National Transitional Council as the legitimate government of Libya?

In seeking to determine whether the United States should recognize the National Transitional Council as the legitimate government of Libya, the President and his political and military advisors considered a number of questions. Would recognition of the NTC promote a quicker resolution of the conflict? Would recognition of the NTC irreversibly commit the United States to regime change? Did the NTC actually represent the "people" of Libya? Would recognition of the NTC possibly fracture the Libyan opposition by favoring one geographic group within the opposition? Did the U.S. fully understand the nature of the NTC, was it more Islamist or radical than the U.S. knew? Would failure to recognize the NTC put pressure on the international coalition given that so many other states had recognized the NTC? Would recognition affect control over Libya's frozen assets? And, what were the legal requirements for government recognition and the legal consequences flowing from such recognition?

While the question of the recognition of governments is primarily a political question, there are some basic legal parameters that seek to regulate if, when and how governments are recognized. In the case of Libya, the legal considerations seemed to take an inordinate degree of influence. This may have been a case of overly cautious legal deference or a case of political indecision seeking temporary sanctuary behind the walls of international law.

The Law of Government Recognition

In the conduct of diplomatic relationships, states are faced with two types of decisions relating to recognition: whether to recognize a foreign state and whether to recognize a foreign government.

Under international law, a state possesses (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states.[58] When a delimited territory meets these four criteria, this territory can be recognized as a state. Although the law is clear on the criteria for state recognition, recognition is also governed by policy considerations. For instance, the recognition of Kosovo, Palestine or Georgia's breakaway regions of South Ossetia and Abkhazia is not straightforward, despite concise legal criteria for statehood.

By contrast, the recognition of a government entails recognizing a group that exercises sovereign power over a state as that state's organ of government. In the majority of instances, transfers of government are instantaneous and easy to determine. Former governments are replaced by new governments pursuant to democratic elections. However, in certain circumstances, transfers of government can be protracted, particularly when the previous government refuses to cede control or when an attempted coup leads to a civil war.[59] In this situation, governments are faced with the decision of whether to recognize the new group as a government, or whether to continue to recognize the former regime.

International law only provides one condition for government recognition: the requirement that a government effectively control that state's territory.[60] American case law further provides that if a group is in effective control of a state, the United States would be required to treat that group as the government of the state. Although the United States would still be "free to withhold formal recognition" of the group, it would be "obligate[d] … to treat [the group] as a government of" the state.[61]

Effective control means that a government exercises control over all or most of the territory and population of a state.[62] Control over a state means the power to govern the administration and policies of that state. In a civil war where two or more governments are competing for power, the question of effective control is relative.[63] The question is not which government has centralized authority over the state, but rather which government is in actual control of the population and territory on the ground. According to international legal scholar Hans Kelsen, effective control requires governmental efficacy and efficacy requires the habitual submission of the population.[64] Thus, effective control is inherently tied to the legitimacy of the government in the eyes of the public. The United States has not articulated a more detailed definition of effective control.

A state may derogate from the requirement of effective control to continue to recognize a government where such government has been forced into exile, for instance pursuant to foreign military intervention or a coup d'état. A state may also decide to

impose additional conditions on the recognition of foreign governments. Politics plays a large role in government recognition: the recognition or the non-recognition, as the case may be, of a new government is intrinsically linked to domestic policies and political interests, with the law providing a loose legal regime.[65]

In the 1970s, the U.S. State Department issued statements attempting to deemphasize the use of recognition as a political tactic. Instead of using recognition as a political tool when governments changed, the United States began to focus on whether it sought to institute diplomatic ties with new governments. Thus, in response to questions about recognition in the mid-1970s, the U.S. Department of State indicated that "[t]he question of recognition does not arise: [the United States is] conducting [its] relations with the new government."[66] These statements aligned with an international trend of recognizing only foreign states and not governments. For instance, the United Kingdom has officially refused to recognize governments since 1980.[67]

The U.S. government has refrained from pronouncing itself on government recognition on a number of occasions, including when the Haitian government underwent several changes in the 1990s, or when Peruvian President Alberto Fujimori illegally seized power in 1992 and used fraudulent elections to maintain power in 2000. However, in some circumstances where two competing governments have contended for power within another state, the United States has touched upon the question of recognition.

Examples of U.S. recognition or non-recognition of governments include situations where a foreign state created a new government pursuant to military intervention. The United States refused to recognize the government that Soviet Russia established in Afghanistan in 1979 and the government of Heng Samrin in Kampuchea (then Cambodia) installed by the Vietnamese military in 1979.

The U.S. has also continued to recognize former governments that were elected democratically but subsequently ousted, or new governments that were never handed over power after elections had taken place. The United States refused to recognize the military government that ousted President Jean-Bertrand Aristide from Haiti in 1991. In Honduras, following the military coup that ousted democratically elected President José Manuel Zelayain June 2009, the U.S. announced that it would only recognize Zelaya's government as the legitimate government of Honduras. When subsequent elections—scheduled before the ouster took place—led to the election of President Porfirio Lobo in November 2009, the United States recognized the legitimacy of the new government of Honduras.[68] Finally, in March 2011, the U.S. recognized President Alassane Ouatarra as the rightful President of Côte d'Ivoire instead of Laurent Gbagbo after Ouatarra had been provisionally declared the winner by the Ivorian electoral commission in December 2010.[69]

In each case, an understanding of both domestic and international politics is key to assessing why the recognition took place. For instance, the continued recognition in 2009 of Zelaya's government was deemed important for international politics and had the support of a regional organization, the Organization of American States, which had

suspended Honduras' membership. Furthermore, this continued recognition in practice had a limited effect since new elections had been scheduled five months after the coup d'état. As another example, the recognition of Ouattara's government in March 2011 was deemed necessary to break the military stalemate and provide diplomatic support to the UN Operation in Côte d'Ivoire and French armed forces, who successfully ousted the incumbent President from Abidjan the next month.

Recognizing the National Transitional Council

On the day the U.S. adopted Resolution 1970 leveling non-military measures against Qadhafi's regime—February 26, 2011—President Obama remarked on the phone to German Chancellor Angela Merkel that "when a leader's only means of staying in power is to use mass violence against his own people, he has lost the legitimacy to rule and needs to do what is right for his country by leaving now."[70] In addition to describing the military operations in his address to the nation on March 28, President Obama spoke of consulting with the Libyan opposition on the type of political efforts necessary to pressure Qadhafi.[71]

Within the first month of military operations in Libya, two governments—France and Qatar—recognized the NTC as the sole legitimate representative of the Libyan people. This was followed by a number of official declarations recognizing the NTC in April (by The Maldives, Italy, The Gambia), May (by Jordan and Senegal), and June (by the United Kingdom, Spain, United Arab Emirates, Germany, Panama, Austria, Latvia, Denmark, Bulgaria, Croatia, and the Czech Republic).

Recognition by the United States was deemed important to enable the NTC to access assets belonging to the Libyan government. The UN Security Council in Resolutions 1970 and 1973 had required UN member states to impose a freeze on assets belonging to the Libyan government. In response, the United States had adopted U.S. Executive Order 13566 which blocked property found in the U.S. owned by Qadhafi, Qadhafi's family and the government of Libya.[72] As a result, the U.S. froze at least $30 billion in Libyan government assets found in the United States. If the NTC could be considered the government of Libya, it could have a legal claim to the Libyan government's assets—once unfrozen—found in the U.S.

Nonetheless, the U.S. government continued to withhold recognition of the NTC. It was not clear whether this decision was driven by legal or political reasons. The United States emphasized the complexity of the legal considerations for government recognition. For example, the U.S. Ambassador to Libya, Ambassador Gene Cretz, remarked in late April that "[o]n the question of recognition, we continue to look at all the issues with respect to Libya . . . Recognition remains a legal and an international obligation issue that we're still studying, and we have not made a definitive determination on that question." Ambassador Cretz noted the legal difficulties of recognition by emphasizing that it is "a complicated issue, and . . . we're a very legalistic country . . . I'm not a lawyer, so I can't get into the complexity of it. But there are issues

with respect to what constitutes a government, what constitutes precedence in United States history for recognition."[73]

Indeed, as of July 2011, when pressure to recognize the NTC was at its height, the NTC did not effectively control the territory of Libya. The opposition forces were only in control of the east of Libya and the territory of the Nafusah mountains. Much of the centre as well as the south of Libya remained under Qadhafi's control. The difficulty of recognizing the NTC as the government of Libya without that group exercising effective control was emphasized by a number of international lawyers at the time, including those present at a June meeting of the Secretary of State's Advisory Committee on Public International Law at George Washington University Law School. John Bellinger III, U.S. State Department Legal Advisor from 2005 to 2009, noted that since the NTC did not control all of Libya, the question became whether the U.S. would recognize the NTC as the government of the part of Libya that it controlled. Edwin Williamson, U.S. State Department Legal Advisor from 1990 to 1993, indicated that the question could then become whether the U.S. can recognize the eastern part of Libya as a state, which brings us back to the requirements for recognition of state as opposed to recognition of a government.[74]

Building on this discussion, the Legal Adviser to the U.S. State Department, Harold Koh, noted during a Senate hearing in June that "[a]s a general rule, we are reluctant to recognize entities that do not control entire countries because then they are responsible for parts of the country that they don't control . . . And we are reluctant to de-recognize leaders who still control parts of the country because then you're absolving them of responsibility in the areas that they do control."[75] Harold Koh's latter point refers to another legal complication. Since international human rights obligations are binding on states and the governments that represent them, recognition can have the unintended consequence of absolving Qadhafi of his human rights obligations. Furthermore, as another legal complication, recognition of the NTC would not automatically enable the United States to deliver the frozen assets to the NTC. Although the U.S. President had the legal authority to unfreeze the assets in the same manner that the assets were frozen, his decision remained subject to competing claims for the assets from the Qadhafi government. Thus, until the NTC was in effective control of the territory, the U.S. government continued to be subject to the risk of competing legal claims over frozen assets belonging to the Libyan government.

Faced with the increasing number of recognitions by other states, political pressures, and the heightened need for financing the opposition, the U.S. considered the options it had available to it relating to government recognition.

First, the U.S. could recognize the NTC as a *political interlocutor*. This would include governmental statements that the NTC is a "legitimate political interlocutor," or "valid interlocutor." These recognitions have no legal effect.[76] Instead, such recognition allows states to show political support to the NTC and to send diplomatic representatives or envoys to Libya. This type of recognition also allows a state to open a representative office in Libya and the NTC to open a representative office in the state according

recognition. However, neither these envoys nor the representative offices can be granted formal diplomatic status that would violate that state's obligations towards Libya under the Vienna Convention on Diplomatic Relations.[77]

The United States accorded this type of recognition to the NTC by noting in May that Assistant Secretary of State for Near Eastern Affairs Ambassador Jeffrey Feltman's visit to Libya "is another signal of the U.S.'s support for the NTC, *a legitimate and credible interlocutor* for the Libyan people."[78] The next month, the United States viewed the NTC "as *the legitimate interlocutor* for the Libyan people during this interim period."[79] Although the legal consequences are non-existent, these statements were intended to signal the U.S.'s increased support to the opposition group.

Second, the U.S. could recognize the NTC as a *representative of Libya's people*. This type of recognition has legal consequences, albeit limited in scope. For instance, the French government, the first to accord recognition on March 10, recognized the NTC as "the legitimate representative of the Libyan people."[80] A number of other countries used this terminology, too. As legal scholar Stefan Talmon notes, the recognition of a group as representing that state's people is in essence the recognition of "a local *de facto* government."[81] Accordingly, this recognition can take place in parallel to continuing to recognize the *de jure* government of Libya. It "leaves intact the international legal status of the incumbent Qadhafi government as the government of Libya."[82] This has the resulting legal consequences that the *de jure* government "remains the only authority that can legally dispose of Libyan state assets abroad (as opposed to frozen assets of the Qadhafi family), can accredit ambassadors, and validly transfer title to state-owned natural resources such as oil and gas."[83] For instance, when sending a diplomat to Libya in March 2011, France noted that this diplomat was "not an ambassador because we have not formally recognized a state through the Transitional National Council."[84] Other countries that accorded this type of recognition include Qatar, the Maldives, Gambia, Senegal, Turkey, Jordan, Spain, and Germany.

Third, the U.S. could recognize the NTC as the *de jure* government *representing the state of Libya*. This type of recognition is signaled by the wording of the recognition and has a number of legal consequences. For instance, on April 4, 2011, Italy noted that it recognized the NTC "as the country's only legitimate interlocutor on bilateral relations" and subsequently remarked that it recognized the NTC "as holding governmental authority in the territory which it controls."[85] France also decided to recognize the NTC as the government of Libya when it claimed that the NTC was "the only holder of governmental authority in the contacts between France and Libya and its related entities."[86] The United Arab Emirates also accorded this type of recognition.[87]

The U.S. finally decided to grant the NTC full recognition as the *de jure* government of Libya on July 15, 2011. The U.S. first agreed to accord limited recognition to the NTC with other members of the Libya Contact Group at a meeting in Istanbul, Turkey. This meeting of thirty-two countries declared that until an interim authority was put in place, countries of the Libya Contact Group would "deal with" the NTC as "the legitimate governing authority in Libya" as part of the Libya Contact

Group.[88] The Libya Contact Group chose to use the verb "deal with" rather than "recognize" to encompass the different types of recognition the countries had previously accorded the NTC. This terminology was also acceptable to those states that did not officially recognize governments. Although a number of other states in the Libya Contact Group had recognized the NTC in some capacity before this announcement, a number of other states in the Libya Contact Group had not, including Japan, Bahrain, Lebanon, Morocco, Norway, Sweden, Greece, Kuwait, Malta, Canada, and Australia.

Immediately following this conference, the U.S. decided to extend full recognition to the NTC as the government of Libya. U.S. Secretary of State Hillary Clinton announced:

> [U]ntil an interim authority is in place, the United States will recognize the NTC as the legitimate *governing authority for Libya*, and we will deal with it on that basis. In contrast, the United States views the Qadhafi regime as no longer having legitimate authority in Libya. We still have to work through various legal issues, but we expect this step on recognition will enable the [NTC] to access additional sources of funding.[89]

At this point in time, the legal impediment of lack of effective control was set aside to accord full recognition to the National Transitional Council. Although the U.S. government recognized that legal issues remained, the politics were such that recognition of the NTC as the *de jure* government of Libya was deemed necessary.[90]

Could the United States and its allies seek a negotiated settlement if the military campaign failed to adequately protect civilians or to prompt a regime change?

In seeking to determine whether or not the United States and its allies could pursue a negotiated settlement if the military campaign failed to adequately protect civilians or to prompt a regime change, the President and his political and military advisors considered a number of questions. If the limited air campaign failed to either sufficiently protect civilians, or prompt a regime change, would it be necessary for the UN and its allies to commit ground troops? As an alternative to ground troops, would it be in the interests of the UN to seek a negotiated solution with Qadhafi? In the event the air campaign was largely but not completely successful, would it be possible to reach an exile agreement with Qadhafi that would have allowed for a transfer of power to the NTC? If the military facts on the ground required, would it be possible to reach an agreement for the bifurcation of Libya, with the NTC controlling the eastern half and Qadhafi controlling the western half? And, were there any legal restrictions to seeking a negotiated settlement with Qadhafi, especially in light of his indictment by the International Criminal Court?

While there are no clear legal prohibitions on negotiations with individuals whom the United States alleges have committed atrocities, there can be substantial political costs to seeking negotiations with someone indicted by an international tribunal. The operation of international criminal tribunals largely outside the political realm makes it

very difficult to manage their interaction with the process of conflict resolution. In the case of Libya, the indictment of Qadhafi by the International Criminal Court constrained the ability of the UN and its allies to contemplate a negotiated settlement.

International Justice

The International Criminal Court is a permanent international criminal court, established in July 2002 to prosecute perpetrators of genocide, crimes against humanity, war crimes, and acts of aggression.[91] The ICC is intended to prosecute those who bear the greatest responsibility for the most serious crimes of concern to the international community. The ICC, like other international criminal tribunals before it, indicts senior officials in certain situations of ongoing conflict, which can in turn complicate negotiations with these officials. This includes, for instance, the International Criminal Tribunal for former Yugoslavia that indicted former Bosnian Serb politician Radovan Karadžić and General Ratko Mladić in 1995, as well as former President of Serbia and Yugoslavia Slobodan Milošević in 1999 for genocide, crimes against humanity and violations of the laws and customs of war. This also includes the Special Court for Sierra Leone, whose Prosecutor indicted Charles Taylor in 2003 for war crimes and crimes against humanity committed during the conflict in Sierra Leone. Although the ICC has indicted the President of Sudan, Omar al-Bashir, for genocide, crimes against humanity and war crimes committed since 2003 in Darfur, Bashir remains in power as President of Sudan and governments continue to negotiate with him as such.

International law does not prohibit negotiating with those alleged to have committed atrocities. In fact, investigations or prosecutions by the International Criminal Court can be suspended for 12 months if agreed to by the UN Security Council. This deferral by the Security Council can enable negotiations to take place in a conflict or post-conflict setting with an individual who is alleged to have committed grave crimes. In this case, the Security Council acts under Chapter VII of the UN Charter and therefore this deferral is intended to be used in times of threat to or breach of the peace.[92] After 12 months, if the negotiations are not completed, the Security Council can choose to once again defer the investigation or prosecution. In addition, the ICC Prosecutor is provided with a certain degree of discretion within the parameters of the Rome Statute (which created the ICC) to choose whom to indict. The Prosecutor may for instance choose to forego prosecution if this prosecution is not in the interests of justice.

Amnesties in negotiations may be provided as a bargaining chip. An amnesty "immuniz[es] persons from criminal prosecution for past offenses."[93] During political negotiations, amnesties can be offered to provide incentives for human rights violators to step down from power and promote peace. Amnesties have been offered in a number of countries as a way of putting an end to conflict, including in Haiti, South Africa, and the former Yugoslavia. However amnesties cannot be provided in every situation. Amnesty laws are generally permissible when combined with other transitional justice mechanisms, except where international treaties or customary law mandate prosecution.[94] Amnesties offered for genocide and the "grave breaches" provisions of the 1949 Geneva Conventions are illegal under international law.[95] Although debate exists regarding

whether an amnesty for crimes against humanity or war crimes would be legal,[96] in practice, UN policy is moving toward the exclusion of amnesties that interfere with the right of victims to an effective remedy, or that restrict the right to know the truth.[97] Furthermore, the wording of "[t]he Rome Statute's Preamble suggests that deferring a prosecution because of the existence of a national amnesty would be incompatible with the purpose of the [ICC], namely to ensure criminal prosecution of persons who commit serious international crimes."[98]

It is relevant to note that the ICC does not have jurisdiction over every situation. The ICC can exercise jurisdiction over nationals of state parties to the Rome Statute and over the territory of state parties.[99] However, not all states are state parties to the Rome Statute. In this case, the ICC can exercise jurisdiction over the nationals and the territory of a non-state party in only one situation: when the UN Security Council decides so. The Security Council's authority is based on Chapter VII of the Charter of the United Nations applicable in times of threat or breach of peace, rather than on treaty law. The ICC Prosecutor to whom the case is referred then decides whether to initiate an investigation. The ICC Prosecutor's assessment depends on whether "[t]he information available . . . provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed,"[100] whether the case would be admissible under the principle of complementarity whereby the ICC is a mechanism of last resort,[101] and whether "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[102]

The International Criminal Court and Libya

Libya is not a state party to the Rome Statute. Jurisdiction in this case was provided by the UN Security Council, which decided in February 26 to refer the situation in Libya since February 15 to the ICC Prosecutor, Luis Moreno-Ocampo.[103] The one prior case where the Security Council had decided to refer the situation of a non-state party to the ICC was the situation in Darfur, Sudan in 2005, which resulted in the indictment of the President of Sudan, Omar al-Bashir.[104] The ICC Prosecutor announced two weeks later that he had decided to open an investigation into alleged crimes against humanity committed in Libya against peaceful protestors.[105] The Prosecutor identified individuals who had commanded and controlled forces that allegedly committed these crimes, including Qadhafi and his ministers involved in security and foreign affairs.

On May 16, 2011, the ICC Prosecutor requested the issuance of three arrest warrants for Qadhafi, his son Saif Al Islam Qadhafi, and head of intelligence Abdullah Al Sanousi. These three arrest warrants were then issued by the ICC on June 27. By ensuring politics on the UN Security Council were aligned, an international court was able to assert jurisdiction over Qadhafi and issue an arrest warrant for him in the space of four months. Qadhafi's indictment was a non-military measure that could be used to put pressure on Qadhafi's regime and help build the political and moral case for military intervention.

Nonetheless, the ICC's involvement also limited the political options available for policy makers to negotiate the end of the conflict. Indeed, in July at the time of a military stalemate between Qadhafi's forces and the opposition forces, British Foreign Secretary William Hague indicated that a political settlement was being considered, by which Qadhafi would relinquish power but could remain in Libya. The Prosecutor's office of the ICC promptly responded that Qadhafi had to be arrested and handed over. Accordingly, in this situation, the ICC's involvement limited the availability of impunity as an option to cease the military conflict. Furthermore, the ICC's jurisdiction includes all actors engaged in hostilities and can extend beyond those individuals initially envisioned. The ICC Prosecutor has indicated for instance that NATO troops would be investigated for alleged breaches of the laws of war[106] and that the manner in which Qadhafi was killed by fighters in October may have been a war crime.[107] This is not the first time NATO actions could be investigated by an international criminal tribunal: NATO's 1999 bombings against former Yugoslavia could similarly have been the subject of an investigation before the International Criminal Tribunal for former Yugoslavia had the prosecutor found that there was a basis for investigation.

Conclusion

The capital city of Tripoli fell to anti-Qadhafi forces on August 21, and opposition forces marched on Qadhafi's hometown of Sirte four days later. The fight for Sirte ended on October 20 with the capture of the town and the death of Qadhafi. The case of Libya demonstrates the extent to which the law plays a role in enabling, shaping and constraining complex military and diplomatic operations. The law underpinned a number of decisions made at the policy level regarding military and diplomatic engagement. Although prior military operations can provide guidance for decision-making in future military operations, the application of the law to each case will be unique. The Libyan case study provides an example of how the law and politics intertwined to achieve the U.S. government's objectives of protecting the Libyan people against violent attacks by their leader.

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