doi:10.1017/aju.2017.73

SYMPOSIUM ON UNAUTHORIZED MILITARY INTERVENTIONS FOR THE PUBLIC GOOD

THE UNKNOWN UNKNOWNS OF HUMANITARIAN WAR

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The Libyan Debacle

On March 19, 2011, the United States, its European allies, and its Arab partners launched an eight-month intervention in Libya. This was said to be necessary because Mu'amar Gaddafi, Libya's longtime ruler, was responding to mass protests against his over forty-year dictatorial reign by waging war on his own people. As President Barack Obama explained, without international intervention "the calls of the Libyan people for help would go unanswered. The democratic values that we stand for would be overrun. Moreover, the words of the international community would be rendered hollow."[1]

Initially, this operation was "hailed as a model intervention."[2] With minimal losses and virtually no boots on the ground, the intervention prevented what many feared would be a humanitarian catastrophe. Six years later, however, it is widely recognized that the Libyan intervention was a failure. As President Obama put it, in a model understatement, "Libya is a mess."[3] Instead of transitioning into even a semifunctioning state, Libya has devolved into a lawless vortex of terrorists, refugees, human traffickers, and arms traders.[4] This was the result of a series of political miscalculations. As a report by the British House of Commons concluded:

> [T]he Government failed to identify that the threat to civilians was overstated and that the rebels included a significant Islamist element. By the summer of 2011, the limited intervention to protect civilians had drifted into an opportunist policy of regime change. That policy was not underpinned by a strategy to support and shape post-Gaddafi Libya. The result was political and economic collapse, inter-militia and inter-tribal warfare, humanitarian and migrant crises, widespread human rights violations, the spread of Gaddafi regime weapons across the region and the growth of ISIL in North Africa.[5]

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[1] Barack Obama, Remarks by the President on the Situation in Libya (Mar. 18, 2011).

[2] Ivo Daalder & James Stavridis, *NATO's Victory in Libya*, 91(2) FOREIGN AFF. 2 (Mar./Apr., 2012).

[3] Jeffrey Goldberg, *The Obama Doctrine*, THE ATLANTIC (Apr. 2016). Off the record, President Obama described the situation in Libya as "a shit show."

[4] Alan J. Kuperman, *Obama's Libya Debacle*, 94(2) FOREIGN AFF. 66 (Mar./Apr., 2015).

[5] House of Commons, Libya: Examination of Intervention and Collapse and the UK's Future Policy Options (Sept. 9, 2016).

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https://doi.org/10.1017/aju.2017.73 Published online by Cambridge University Press

The Libyan debacle demonstrates the dark sides of humanitarian war. It exposes the dangers inherent in the assumption that the moral impulse to protect civilians and prevent mass atrocities ought to override other considerations of policy, strategy, and economic cost that would otherwise affect and shape the decision to wage war. It shows that imagining *jus ad bellum* as a set of rules designed not for the maintenance of peace among states but for the promotion and protection of human security can cause greater insecurity and human victimization.

Responsibility to Protect and the Humanization of Jus ad Bellum

The intervention in Libya was based on a firm legal foundation.[6] Acting under Chapter VII, the UN Security Council adopted Resolution 1973 that authorized the use of force "to protect civilians and civilian populated areas" in Libya.[7] This was the first instance in which the Responsibility to Protect (RtoP) was invoked by the Security Council to justify authorizing an intervention for humanitarian purposes.

RtoP was developed to bridge a gap between the traditional state-centric rules of *jus ad bellum* and an emerging humanitarian conception of the purposes of this field of international law.[8] *Jus ad bellum* was conceived as a set of rules the purpose of which was to preserve interstate peace and prevent interstate war.[9] To many states and scholars, however, this understanding of the purposes of *jus ad bellum* became increasingly obsolete once intrastate conflicts and nonstate actors, especially terrorist networks, became a ubiquitous source of insecurity. Some also viewed this state-centric *jus ad bellum* as normatively antiquated. States, many scholars argue, are legal fictions the purpose of which is to serve, protect, and promote the interests, rights, and dignity of their citizens.[10] Accordingly, *jus ad bellum* should not aspire to preserve the sovereignty and survival of states, but rather should seek to protect the security and welfare of individual human beings.[11]

The story of how RtoP was conceived, articulated, and adopted by the United Nations during the 2005 World Summit need not be retold here.[12] Suffice it to say that RtoP is a normative framework that is intended to strengthen the resolve of the international community to protect civilians against atrocities. It provides criteria for determining when external intervention to protect human lives, including through the use of force, is legitimate. These criteria, which draw heavily on just war theory,[13] identify the crimes the perpetration of which constitutes a just cause for intervention.[14] These criteria also address the institution or entity that should authorize or undertake an intervention,[15] and specify that the purpose of intervention should be the protection of civilians and not the pursuit of ulterior political motives, such as regime change or territorial expansion.[16]

[6] Although it was launched in accordance with the rules of *jus ad bellum*, some have argued that the intervention violated international law when its objectives were expanded from the protection of civilians to become regime change. *See* Philippe Kirsch & Mohamed Helal, *Libya*, *in* The United Nations Security Council in the Age of Human Rights (Jared Genser & Bruno Stagno Ugarte eds., 2014).

[7] SC Res. 1973 (2011).

[8] *See* International Commission on Intervention and State Sovereignty, The Responsibility to Protect (2002) [hereinafter ICISS Report].

[9] Hans Kelsen, The Law of the United Nations 19 (1964).

[10] Alex Bellamy & Matt McDonald, *The Utility of Human Security: Which Humans? What Security? A Reply to Thomas & Tow*, 33 Security Dialogue 373, 375 (2002).

[11] Ruti Teitel, Humanity's Law 13 (2011).

[12] *See* Alex J. Bellamy, Responsibility to Protect (2009).

[13] James Pattison, *The Ethics of Humanitarian Intervention in Libya*, 26 Ethics & Int'l Aff. 271 (2011) (Discussions on humanitarian intervention "draw heavily on just war theory.").

[14] ICISS Report, *supra* note 8, at para. 4.19.

[15] *Id.* at para. 6.1.

[16] *Id.* at para. 4.33.

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One criterion that has received relatively little attention is the need to ensure that military intervention has reasonable prospects of success. Before the initiation of hostilities, the intervening power should consider whether the use of force would succeed in "halting or averting the atrocities or suffering that triggered the intervention in the first place. Military intervention is not justified if actual protection cannot be achieved."[17] In other words, this criterion defines what counts as "victory" in a humanitarian war.[18] Winning a humanitarian war means protecting the civilian population and preventing the perpetration of the crimes that necessitated the intervention. This formula, however, is both conceptually deficient and strategically dangerous, and could lead to outcomes, such as in Libya, that cause greater political and humanitarian harm.

The Conceptual Deficiency of the Definition of "Victory" Under RtoP

RtoP's definition of victory is conceptually deficient because it downplays the postintervention responsibilities of an intervening power. It fails to establish a sufficient nexus between the responsibility to prevent atrocities and the responsibility of an intervening power and of the international community to foster a postintervention environment that enables reconstruction and reconciliation in what are often war-torn and socially-fragmented societies. The authors of RtoP emphasized that "the responsibility to protect implies the responsibility not just to prevent and react, but also to follow-through and rebuild. This means that if military action is taken … there should be a genuine commitment to rebuild a durable peace, and promoting good governance, and sustainable development."[19] Nonetheless, the need to ensure the postintervention security and stability of the country in which intervention is undertaken was not included as part of the metrics for measuring the success of an intervention.

Despite an increasing scholarly interest in *jus post bellum*,[20] and in related issues such as transformative occupation and postconflict justice,[21] it is still unclear whether states or international organizations that intervene in a country for humanitarian purposes have postintervention legal obligations towards that country and what the content of these obligations might be. Moreover, the relationship between *jus ad bellum* and the postintervention obligations of an intervening state or organization remains indeterminate. That is, it is unclear whether the overall legality of an intervention is affected by the postintervention policies and practices of the intervening state or organization.[22]

The outcome of previous interventions, such as in Libya, demonstrates that a military victory that protects civilians but that leaves a failed state in its wake is ultimately an unsuccessful intervention. Planning and executing a successful intervention to protect civilians must not be limited to the military aspects of the operation or its humanitarian components, such as the provision of humanitarian assistance, but must also include a postintervention strategy that is suited to the political and socioeconomic realities of the country in which intervention is being undertaken.

[17] *Id.* at para. 4.41.

[18] "Victory" is an elusive concept. Despite the frequent use of the term by policymakers and pundits, scholarship in the areas of security and strategic studies has not provided a precise or systematic definition of the concept of victory. *See* WILLIAM C. MARTEL, VICTORY IN WAR (2d ed. 2011). Some legal scholars have recently examined the meaning of victory and the legal implications of the various understandings of this concept. *See* Gabriella Blum, *The Fog of Victory*, 24 EUR. J. INT'L L. 391 (2013).

[19] ICISS Report, *supra* note 8, at para. 5.1.

[20] *See generally* JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE (Carsten Stahn & Jann K. Kleffner eds., 2008).

[21] Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AJIL 580 (2006).

[22] Just war theorists, such as Michael Walzer, have suggested that a war launched for just causes could become unjust if the postwar behavior of a belligerent leads to unjust outcomes. *See* Gary J. Bass, Jus Post Bellum, 32 PHIL. & PUB. AFF. 385 (2004).

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The Strategic Dangers of the Definition of "Victory" Under RtoP

RtoP's definition of victory is also strategically dangerous. War, even humanitarian war, is a political act. Any intervention to protect civilians against a tyrannical regime or a murderous militia is a form of foreign involvement in an armed conflict or a political crisis. It will have domestic (within both the intervening state and the state in which the intervention is undertaken), regional, and global ramifications.

At the domestic level, international intervention will affect the course of the crisis. An intervention, even if only through nonforceful measures, may tip the balance of power between warring parties.[23] The intervening states may be allied to one or more of the belligerents and may seek to assist those parties, or a belligerent may indirectly benefit from the intervention because its adversary was attacked by the intervening powers. This could embolden a belligerent on the battlefield or lead it to become more intransigent in negotiations with the other parties to the conflict.

Foreign intervention also has regional ramifications. Any intervention, even if supported by the international community, will naturally raise the apprehensions of neighboring states. These concerns will be especially pronounced if relations between the states executing the intervention and the neighboring states are antagonistic, or if a neighboring state has special interests in the state that is subjected to the intervention. Indeed, armed intervention, even if for humanitarian purposes, may have the unintended consequence of creating a political incentive for neighboring states to intervene, including clandestinely, to protect their interests, surrogates, or allies in the state in which an intervention was undertaken.[24]

Humanitarian wars could also have systemic effects by affecting the interests of a Great Power. An intervention against an ally of a Great Power could prompt that state to get involved in the conflict, either directly or indirectly, to support its ally.[25] Moreover, if an intervention leads to the removal of a regime that was allied with a Great Power, then the latter might seek to destabilize the postconflict political situation to ensure that its interests in that country are preserved. An intervention might also enable a Great Power to expand its political or physical footprint in a region at the expense of another Great Power that considers that region to be part of its sphere of influence.[26] This might induce the Great Power that suffered a strategic loss due to the intervention to retaliate either by threatening an ally of the intervening state or by encroaching on an area that the intervening state considers to be of strategic importance.[27]

[23] During the Balkan Wars of the mid-1990s, the Security Council imposed an arms embargo on the warring parties that indirectly favored the Bosnian Serbs and adversely affected the Bosnian Muslims. *See* James Phillips, *Lift the Arms Embargo on Bosnia*, HERITAGE FOUNDATION (July 18, 1995).

[24] The 2003 U.S. invasion of Iraq is an example of this dynamic. The invasion, which was partially justified on humanitarian grounds, removed the barbarous regime of Saddam Hussein, but also created a strategic vacuum that allowed Iran to expand its influence in the region. *See* Suzanne Maloney, *How the Iraq War Has Empowered Iran*, BROOKINGS INSTITUTION (Mar. 21, 2008).

[25] Although no direct intervention was undertaken against the Assad regime in Syria, the assistance extended by the United States and its allies, including Turkey, Saudi Arabia, and Qatar, to the Syrian opposition was partially responsible for prompting Russia and Iran, each for its own strategic purposes, to intervene in support of the regime. *See* Roy Allison, *Russia and Syria: Explaining Alignment with a Regime in Crisis*, 89 INT'L AFF. 795 (2013).

[26] The Kosovo War entailed Western intervention in a region that Moscow considers to be within its sphere of influence. For Russia, this war was one of multiple factors that contributed to a marked deterioration of U.S.-Russian relations. *See* Vladimir Brovkin, *Discourse on NATO in Russia During the Kosovo War*, DEMOKRATIZATSIYA (Fall 1999).

[27] The 2008 Georgia War was, at least partially, a Russian response to the expansion of Western/U.S. influence in Eastern Europe, the Balkans, and some of the former Soviet Republics, areas that Russia considers part of its sphere of influence. *See* George Friedman, *Georgia and Kosovo: A Single Intertwined Crisis*, STRATFOR (Aug. 25, 2008, 8:28 PM).

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In addition, states whose interests were damaged by an intervention undertaken for humanitarian purposes may retaliate by challenging the interests of the intervening states in other areas of global governance. Indeed, although scholars often depict the international legal order as a fragmented system, in reality there is considerable political linkage between various international legal regimes.[28] In response to an intervention that adversely affected its interests, a Great Power or another powerful state might seek to harm the interests of the intervening states in a range of other issue-areas, such as trade, migration, security cooperation, or environmental protection.

It is now recognized that, in addition to contributing to Libya's state of political anarchy due to the lack of a postintervention strategy, the intervention in Libya had an adverse regional impact. Algeria, Egypt, and Tunisia are now contending with a surging flow of arms and terrorists from Libya,[29] and Mali is facing an insurgency that is armed and manned from Libya.[30] Moreover, as Ramesh Thakur noted, "Syrians have paid the price of NATO excesses in Libya."[31] Because the intervening powers overstepped the bounds of Security Council Resolution 1973 and made regime change the objective of the operation, many influential UN member states rejected calls for international intervention to protect civilians in Syria.

RtoP and the Unknown Unknowns of Humanitarian War

Remedying the conceptual deficiency and strategic dangers inherent in RtoP's definition of victory, which have been tragically demonstrated in Libya, requires recognizing and planning for the unknown unknowns of humanitarian war.[32] These are the domestic, regional, and international chain reactions, contingencies, and consequences of consequences that will inevitably occur as a result of intervention.[33]

Naturally, it will be impossible to fully predict the effects of war across time and space. The decision to wage war, including humanitarian war, is always taken in a fog of uncertainty. Nonetheless, states or international organizations contemplating intervention to prevent atrocities must not only prepare for military operations that succeed in protecting civilians, but must also develop plans for postintervention peacebuilding. Moreover, the decision to wage humanitarian war must not be based solely on the prospect of succeeding in protecting civilians. The potential impact of intervention at the domestic, regional, and global levels must be examined. Humanitarian wars that save lives but that cause greater regional or global insecurity are unsuccessful interventions.

Instead of counseling statespersons to consider the unknown unknowns of war, RtoP and the humanitarian understanding of *jus ad bellum* on which it is based could lead states to act without adequately preparing and planning for the political effects of intervention and without considering the strategic costs of war, all of which could wreak greater human and state insecurity. By highlighting the dark side of humanitarianism, however, this essay is not intended to justify complacency in the face of human tragedy. Rather, the purpose is to encourage the exercise of prudence and to introduce the corrective voice of realism to offset the "exuberance of utopianism"[34] that often marks the call to wage humanitarian war.

[28] On issue-linkage between regimes, *see* Ernst Haas, *Why Collaborate? Issue-Linkage and International Regimes*, 32 World Pol. (Apr. 1980).

[29] *See* Marc Lynch, The New Arab Wars 182–84 (2016).

[30] Scott Shaw, *Fallout in the Sahel: The Geographic Spread of the Conflict from Libya to Mali*, 19 Can. Foreign Pol'y J. 199 (2013).

[31] Ramesh Thakur, *R2P after Libya and Syria: Engaging Emerging Powers*, 36 Wash. Q. 61, 70 (2013).

[32] The phrase "unknown unknowns" was popularized by Donald Rumsfeld during a press conference on February 12, 2002. *See* Errol Morris, *The Certainty of Donald Rumsfeld*, N.Y. Times (Mar. 25, 2014, 9:00 PM).

[33] *See* Francis J. Gavin & James B. Steinberg, *The Unknown Unknowns*, Foreign Pol'y (Feb. 14, 2012).

[34] E.H. Carr, The Twenty Years Crisis 10 (1964).

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