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pp. 105-112

Recommended Citation

Naime, Monica. "Libya and Resolution 1973: The Law of Politics." *Journal of Strategic Security* 5, no. 2 (2012) : 105-112.

DOI:

<http://dx.doi.org/10.5038/1944-0472.5.2.6>

Available at: <https://scholarcommons.usf.edu/jss/vol5/iss2/11>

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Abstract

This paper analyzes recent developments in the intervention in Libya from the perspective of international relations and international law. The evidence suggests that states decided to intervene in Libya prior to sanction from the United Nations Security Council's Resolution 1973. The implication from the Libyan example is that politics was the impetus for the formulation and implementation of law, and not the other way around. Law "happens" in a context, and this context is shaped and bounded by international politics. This article is intended to invigorate further research into how international politics influences the creation, interpretation, and application of international law.

Libya and Resolution 1973: The Law of Politics

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Abstract

This paper analyzes recent developments in the intervention in Libya from the perspective of international relations and international law. The evidence suggests that states decided to intervene in Libya prior to sanction from the United Nations Security Council's Resolution 1973. The implication from the Libyan example is that politics was the impetus for the formulation and implementation of law, and not the other way around. Law "happens" in a context, and this context is shaped and bounded by international politics. This article is intended to invigorate further research into how international politics influences the creation, interpretation, and application of international law.

Introduction

In effect, to follow, not to force the public inclination; to give a direction, a form, a technical dress, and a specific sanction, to the general sense of the community, is the true end of legislation.

—Edmund Burke, "Letter to the Sheriffs of Bristol."

In the spring of 2011, following the example of the uprisings in Tunisia and Egypt that led to the fall of those countries' leaders, Libyan citizens began a series of protests against their leader, Muammar Gaddafi. The authorities responded with brutal repression, and the demonstrations turned into a revolt that quickly spread to the east of the country and various parts of the west. The progovernment *Al-Zahf al-Akhdar* newspaper

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warned that the Libyan government would "violently and thunderously respond" to the protests, having appealed to the army and the air force in order to stop the rebellion.¹ This resort to military force triggered an international response that culminated with the passing of Resolution 1973 of the United Nations Security Council (UNSC) allowing an intervention in Libyan territory by states party to the North Atlantic Treaty Organization (NATO).

This article will address the issue of the influence of international politics in the legality of the Libyan intervention by evaluating the conditions in which the Libyan intervention was legitimized by the approval of UN Security Council Resolution (UNSCR) 1973. Second, the article will present an analysis of the voting and sanctioning of the resolution that allowed NATO's intervention. The goal of this article is to study the legal basis for the Libyan intervention and to recommend further research into the complex interaction between international politics and international law.²

Conditions for the Legitimization of the Intervention

In the UN debates leading up to Resolution 1973, states wanted to avoid the possibility of the intervention being perceived as an imposition of Western powers (the United States and its European allies), which was precisely what Gaddafi argued the intervention was when faced with its possibility.³ Thus, regional acceptance was set as a condition *sine qua non* for an intervention in Libya.

Libya is a member state of two important regional organizations: the Arab League and the African Union (AU). On March 12, the Arab League asked the United Nations to shoulder its responsibility to impose "a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in the Libyan Arab Jamahiriya."⁴

This request is unique in the history of the League, and was a very important argument for intervention by the Western powers, especially the United States. It was important that the intervention wasn't perceived as an imposition by "imperialist" countries, but as a *response* providing the help *asked for* by the region. This seminal event set the path for China and Russia—who traditionally oppose foreign intervention in internal disputes—not to veto the Security Council's resolution.

The relative absence of the AU in the debate on intervention, on the other hand, was evident; it reacted in a slow and limited way. While it did issue a statement expressing "deep concern" over the violence in Libya, the AU initially sought a diplomatic solution, and refused a military intervention.⁵ Consequently, the AU was brushed aside by Western powers, which were more interested in the request of the Arab League for intervention.

States clearly wanted to and were ready to intervene early on in Libya, but they didn't do it until they had the internationally recognized legitimacy to do so, both politically and legally. Politically, Western powers recognized the need for regional support. Legally, they needed a rule that allowed them to intervene—in this case, a resolution passed by the UNSC on the basis of Chapter VII of the UN Charter.⁶ The states that chose to constrain their actions until the adoption of UNSCR 1973 revealed how international norms are increasingly influential in the consideration of state action. The Libyan example provides some compelling indication that legitimization is an important concept for modern state interventions: for a state's intervention to have a large support from the international community, the existence of a legal basis for such actions is necessary.

The necessity of a legal foundation for forceful interventions is compelling because states were worried about their reputation as "law-abiders" and "defenders of human rights."⁷ This kind of reputation is very useful for governments to acquire as it confers international credibility, legitimacy, and political capital. While NATO member states could have acted on moral grounds, using justifications such as humanitarian intervention as the sole basis for intervention, they chose instead to garner legal legitimacy to justify their interests.

Voting and Sanctioning of Resolution 1973

In order to better understand the political context in which this resolution was approved and its implications, it is illustrative to analyze how the resolution was voted on and sanctioned.

Showing its concern and condemning the acts on the Libyan population, just prior to Resolution 1973, the Security Council unanimously adopted Resolution 1970 on February 16, 2011. Resolution 1970 establishes, among other provisions:⁸

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- International Criminal Court (ICC) referral: "Refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court."⁹
- Humanitarian assistance: "All Member States [...] shall facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya [...]."¹⁰
- Asset freeze: "All Member States shall freeze without delay all funds, other financial assets, and economic resources which are on their territories, which are owned or controlled, directly or indirectly," by Gaddafi, certain members of his family and high functionaries."¹¹
- Arms embargo: "All Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya of arms and related materiel of all types [...]."¹²

This resolution set the path to Resolution 1973, of March 17, which allowed the intervention in Libya.¹³ Resolution 1973 was passed with ten votes in favor and five abstentions, its main contents being:

- Denunciation of the flagrant and systematic violation of human rights, humanitarian law and refugee law, asking for an immediate cease-fire
- Authorization of the use of force under Chapter VII of the UN Charter, as to ensure a no-fly zone and protect civilian population
- Authorization to States to take "all necessary measures" to have these measures enforced

The countries that abstained in the voting were China, Russia, India, Brazil, and Germany. Their arguments were the following:¹⁴

- China: "China has always emphasized that, in its relevant actions, the Security Council should follow the United Nations Charter and the norms governing international law, respect the sovereignty, independence, unity and territorial integrity of Libya and resolve the current crisis in Libya through peaceful means."¹⁵
- Russia: "Unfortunately, [...] a whole range of questions raised by Russia and other members of the Council remained unanswered. Those questions were concrete and legitimate and touched on how the no-fly zone would be enforced, what the rules of engagement would be and

what limits on the use of force there would be. Furthermore, the draft was morphing before our very eyes, transcending the initial concept as stated by the League of Arab States. Provisions were introduced into the text that could potentially open the door to large-scale military intervention."¹⁶

- Germany: "We have very carefully considered the option of using military force—its implications as well as its limitations. We see great risks. The likelihood of large-scale loss of life should not be underestimated. If the steps proposed turn out to be ineffective, we see the danger of being drawn into a protracted military conflict that would affect the wider region."¹⁷
- Brazil: "It is our view that the text of resolution 1973 (2011) contemplates measures that go far beyond [the League of Arab States] call. We are not convinced that the use of force [...] will lead to the realization of our common objective—the immediate end to violence and the protection of civilians. We are also concerned that such measures may have the unintended effect of exacerbating tensions on the ground and causing more harm than good to the very same civilians we are committed to protecting."¹⁸
- India: "The Council has today adopted a resolution that authorizes far-reaching measures under Chapter VII of the United Nations Charter, with relatively little credible information on the situation on the ground in Libya. It is of course very important that there be full respect for the sovereignty, unity and territorial integrity of Libya. The financial measures that are proposed in the resolution could impact directly or through indirect routes the ongoing trade and investment activities of a number of Member States, thereby adversely affecting the economic interests of the Libyan people and others dependent on these trade and economic ties."¹⁹

It's not a coincidence that the so-called "BRIC" (Brazil, Russia, India, and China) countries, along with Germany, abstained from the vote in the UNSC. They are all economic powers with special interests in Libyan oil contracts.²⁰ Their choice of abstention, rather than an exercise of their right to veto, showed that they were probably more concerned with avoiding a direct confrontation with Libya than with rejecting the measures laid down in the resolution. In this case, states voted or abstained according to their political interests in Libya, but once the international community felt the need to intervene, it did.

Interestingly, when approving Resolution 1973, the United Kingdom representative stressed the fact that NATO forces were ready to act; however, there was no reference to NATO anywhere in the text of Resolution 1973.²¹ This omission was not likely an accident of drafting even though all Security Council members knew that NATO was the most likely entity to intervene. Anthony Aust, ex-legal counselor to the permanent mission of United Kingdom to the UN, stated, "Sometimes these resolutions are [deliberately] not clear. They are ambiguous because it is the only way to avoid a veto."²² The resolution's call for the international community of states to act was, in reality, intended for NATO, but for the resolution to be approved, an explicit reference to the regional arrangement was omitted.

Conclusion

In this short analysis, the evidence indicates that states had already decided to intervene in Libya before the UNSC Resolution 1973 was sanctioned. The complexity of the passage of this resolution shows that law "happens" in a context, and this context is shaped and bounded by international politics. The current events and the passivity of the UNSC in the situation in Syria also point in this direction.

International law should not be considered as independent of international politics, nor vice versa. There is a two-way street through which they communicate. A better understanding of the interrelationship between the two and their relative impact on the geopolitics of modern statecraft is needed. Hypotheses that deserve further investigation, on the basis of the Libyan example, are whether international law constrains, to some extent, international political discourse and decision making, or whether if, once political consensus is reached, the pressure to legitimize that action results in the "formation" of suitable international law (e.g., UNSCR 1973).

Further research is needed to advance our understanding of how international politics influences the creation, interpretation, and application of international law. One possible approach would be through Robert Gilpin's application of realist thinking to contemporary international relations. This research is especially relevant at a time where issues on "humanitarian intervention" are potentially on the rise as justifications for intervening in the affairs of states.

About the Author

Monica Naime is currently a graduate student of international law at the Graduate Institute of International and Development Studies (Geneva) as a recipient of a scholarship from the State of Mexico. Her research interests focus on critical approaches to international law. She holds a degree in international relations from Mexican Autonomous National University (UNAM) and in law from the Autonomous Technological Institute of Mexico (ITAM), magna cum laude. She has worked at Mexico's Federal Attorney General's Office as a research assistant of the National Institute of Criminal Sciences (INACIPE). She has recently contributed to the *Mexican Yearbook of International Law* and was awarded the 2012 ex-ITAM Research Award for her work on unilateral acts of states. The author may be reached for comment at: monica.naime@graduateinstitute.ch.

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