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The Constitutionality and Advancement
of International Humanitarian Ideals in Libya
by NATO and United States' Operations
Odyssey Dawn and Unified Protector

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I. INTRODUCTION

Today we face a Libya that has gone through drastic change, a Libya forged through events both disastrous and enlightening. The Libya of today can and should be questioned in terms of whether recent events have improved Libyan society. With that in mind, the authors explore the United States' domestic policy towards and military action in Libya, specifically the United States' and the North Atlantic Treaty Organization's (NATO) operations in Libya code-named Operation Odyssey Dawn and Operation Unified Protector, while drawing comparisons to the markedly similar NATO operation in Kosovo code-named Operation Allied Force in order to bridge a gap in the idea of when humanitarian intervention is necessary. The importance of this connection between Operation Allied Force and the joint Libyan operations is that during the Libyan operations the Obama Administration did attempt to avoid the constitutional and international law violations that were committed by the Clinton Administration in Kosovo. Thus, parallels can be drawn between Kosovo and Libya for the purposes of acknowledging what obstacles the current administration were able to, or attempted to, avoid in both the domestic and international arenas.

A comprehensive yet succinct overview of the entire Libyan operations by NATO and the United States follows in a four-part discussion. In Part II, we begin by giving a brief history of Libya. Continuing on in that section is a review of the events leading up to Operation Odyssey Dawn, which later evolved to become Operation Unified Protector. This is followed by a discussion of the deaths of Muammar al-Gaddafi and Ambassador J. Christopher Stevens. In Part III, the authors focus on President Obama's debatable lack of constitutional authority to submit armed forces to Operation Odyssey Dawn. In Part IV, the authors then discuss President Obama's violation of the War Powers Act.

This Article concludes in Part V by exploring and answering the question of whether the Libyan operations were justified under international law as a humanitarian intervention by using a modified criterion approach focusing on the development of a new ideal as to when humanitarian intervention is necessary.

II. HISTORICAL OVERVIEW OF LIBYA LEADING TO THE INITIATION OF OPERATION ODYSSEY DAWN

A. *A Brief History of Libya*

The history of the Great Socialist People's Libyan Arab Jamahiriya (Libya) is a complex, interwoven tale. Libya's history represents a richly diverse tapestry of cultural influences that has significant contextual importance to the current conflict. Thus, a thoughtful examination of the country throughout the past two millennia and beyond is pertinent.

The name Libya is derived from the Greek language. The Greeks termed it for the area of the easternmost part of the North Africa coast.¹ Colonists from Greece founded Cyrene, near the modern town of Benghazi, in about 630 B.C.² The surrounding area saw the expansion of the Hellenistic Empire under Alexander; after his death and the division of his Empire, control of Cyrene passed to the Ptolemy.³ In 96 B.C., Ptolemy Apion bequeathed, via apparent conquest, Cyrene and the outlying areas to Rome, solidifying Roman expansion in North Africa.⁴

Cyrene once again flourished under Roman rule.⁵ During the second century, North Africa played a pivotal role as the Roman Empire's "bread basket." It supplied over two-thirds of the grain consumed in Rome.⁶ This relationship also saw the establishment of *lex mancipiana*, a

1. JANE SOAMES NICKERSON, A SHORT HISTORY OF NORTH AFRICA: FROM PRE-ROMAN TIMES TO THE PRESENT LIBYA, TUNISIA, ALGERIA, MOROCCO 3 (1961). Note, however, that the Old Testament holds reference to Lehabim, which Biblical scholars assert are derivatives of the Rebu or Lebu of the Egyptian hieroglyphics, and that from them, Libya and the Libyans derived their name. See *Genesis* 10:13; see also SMITH'S BIBLE DICTIONARY 180 (1901); 10 G.B. RAMUSIO, DELLE NAVIGAZIONI ET VIAGGI (1563) (Venice) (Leo Africanus referring to conquest by Libs, the king of Mauritania, over the area).

2. NICKERSON, *supra* note 1, at 12. Cyrene's wealth attracted an invasion from Egypt. In 331 B.C., the Cyrenians sent a request to Alexander the Great in order to apply for his protection, after which it is said that Alexander made a visit to the Temple of Jupiter Ammon. *Id.*; see also BAYLE ST. JOHN, ADVENTURES IN THE LIBYAN DESERT AND THE OASIS OF JUPITER AMMON 198 (Putnam ed., 1849).

3. NICKERSON, *supra* note 1, at 12.

4. PHILLIP C. NAYLOR, NORTH AFRICA: A HISTORY FROM ANTIQUITY TO THE PRESENT 33 (2009); see also Nickerson, *supra* note 1, at 13.

5. NAYLOR, *supra* note 4, at 46.

6. Dennis Kehoe, *Private and Imperial Management of Roman Estates in North Africa*, 2 LAW & HIST. REV. 241, 241 (1984).

Roman law dealing specifically with tenancy agreements in North Africa.⁷ And, North Africa as a whole saw various transitions, both religious and political.⁸ The Arabs conquered Libya in the seventh century A.D., and in the centuries that followed, most of the indigenous peoples adopted Islam and the Arabic language and culture.⁹ Just as Kosovo came under the control of the Ottoman Turks in 1389, Libya was conquered in the mid-sixteenth century.¹⁰

A young United States also had dealings with areas that would one day comprise modern-day Libya. “Thomas Jefferson bore a longstanding grudge against the Barbary powers [i.e., Morocco, Algiers, Tunis, and Tripoli]. As early as November 1784, he expressed his wish of ‘cutting them to pieces by piecemeal.’”¹¹ The Barbary powers had been exacting tools and committing acts of piracy on American ships passing through the Mediterranean.¹² Once Jefferson was elected President of the United States, his administration seriously considered the overthrow of the Pasha of Tripoli. The American Consul in Tripoli at the time, James Cathcart, in a letter written to then-Secretary of State James Madison notes, “I not only contemplate the obtaining a permanent and honorable peace, but likewise dethroning the present Bashaw, and effecting a revolution in favor of his brother Hamet who is at Tunis, and thereby insure the United States the gratitude of him and his successors.”¹³

William Eaton, the American Consul in Tunis, who fervently believed in the necessity of removing the Pasha and placing the Pasha’s brother, Hamet, in power, was granted by Jefferson the role of leading 10 United States Marines, Hamet’s personal retinue, and an additional 400 men in attempt to foster a revolution against the Pasha.¹⁴ “The insurgents were composed primarily of Arabs loyal to or lent to Hamet by other Arab chieftains.”¹⁵ Eaton, along with the insurgents, attacked and took

7. *Id.*

8. *Id.* North Africa fell under the control of both the Vandals and Byzantium. The area is also credited with the spread of Christianity from the Middle East into Europe. Naylor, *supra* note 4, at 33, 55.

9. *A Country Study: Libya*, LIBRARY OF CONGRESS, <http://lcweb2.loc.gov/frd/cs/lytoc.html> (last visited Nov. 17, 2014).

10. *Id.*

11. Stephen F. Knott, *Thomas Jefferson’s Clandestine Foreign Policy*, 4 INT’L J. INTELLIGENCE & COUNTER INTELLIGENCE 337 (1990) (citing Letter from Thomas Jefferson to James Monroe (Feb. 6, 1785), in *THE PAPERS OF THOMAS JEFFERSON* 512, 640 (Julian P. Boyd ed., 1953)).

12. STEPHEN F. KNOTT, *SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY* 73 (2009).

13. Knott, *supra* note 11, at 338 (citing 9 ANNALS OF CONG. 704 (1807)).

14. *Id.* at 341.

15. *Id.*

control of the city of Derne in April of 1805.¹⁶ However, coinciding negotiations at the time resulted in a treaty between the Pasha and the Jefferson Administration that meant an end to any further United States need for a coup, and thus Eaton, Hamet and his retinue, and the 10 Marines were withdrawn, leaving the bulk of the 400 insurgents to fend for themselves.¹⁷

Libya remained part of the Ottoman Empire, although at times virtually autonomous, until Italy invaded in 1911.¹⁸ In 1912, Italy proclaimed unilateral sovereignty over Tripolitania and Cyrenaica, consecrated by an Italo-Turkish peace treaty signed in Lausanne.¹⁹ And in 1935, the colony of Libya was created, unifying the country.²⁰

In 1943, World War II brought further political upheaval to the country when Allied Forces defeated Italian Forces in Libya.²¹ Upon Italy's defeat in World War II, and the dismantling of the Italian colonial empire, Libya established monarchial rule.²² In 1969, then Colonel Muammar al-Gaddafi led a military coup, established power, and expelled the remaining Italians.²³

Gaddafi's new regime established a twelve-member Revolutionary Command Council (RCC) headed by Gaddafi, who became prime minister. In 1972, Gaddafi, disenchanted with the state of the RCC, issued an informal resignation.²⁴ The resignation, however, merely set the stage for Gaddafi's complete overhaul of the existing political structures, with him maintaining complete power.²⁵ Gaddafi ushered in a relative period of prosperity and infrastructure growth for Libya, fueled by oil revenues and his own Third Universal Theory.²⁶ The Third Universal Theory was meant as an alternative to capitalism and Marxism.²⁷ The Theory developed into Jamahiriya, "a country directly governed by its

16. *Id.*

17. *Id.* In his piece, Knott notes, with which these authors agree, "There are numerous interesting parallels between this first operation and subsequent American efforts to intervene in domestic affairs of foreign nations." *Id.* at 341-42.

18. *A Country Study: Libya*, *supra* note 9.

19. RUTH BEN-GHIAT, ITALIAN COLONIALISM, at xvi (Ruth Ben-Ghiat & Mia Fuller eds., 2005).

20. *Id.* at xvii. In 1937, mixed marital unions between Italians and colonized are prohibited, and prior to Italy's entry in World War II, the Italian government declared Northern Libya a regional district in its national territory. *Id.*

21. *Id.* at xviii.

22. *Id.*

23. *Id.*

24. ALISON PARGETER, LIBYA: THE RISE AND FALL OF QADDAFI 77-78 (2012).

25. *Id.*

26. DIRK VANDEWALLE, A HISTORY OF MODERN LIBYA 78 (2006).

27. *Id.* at 97.

citizens, without the intervention of intermediaries.”²⁸ However, as oil prices declined, so did growth, which led to slowly rising internal strife.

In the 1980s and 1990s, Gaddafi’s Libya saw numerous international confrontations. On December 21, 1988, a bomb blew up a Pan Am commercial airplane over Lockerbie, Scotland, killing 270 people.²⁹ A similar attack in 1989 on a French UTA DC-10 flight over Niger killed 170 people.³⁰ International warrants were issued for the arrest and extradition of Libyan suspects in the case, but the government refused to surrender them. These actions taken in the aggregate, as well as a chemical weapons plant being built in Libya, led to a U.S.-backed issuance of U.N. sanctions against Libya in 1992.³¹ The eventual decision of Libyan officials to surrender the bombing suspects and to compensate the families of the victims led to a lifting of sanctions in 2003.³²

These reciprocal actions on behalf of the Libyan government led to a normalizing of relations between Gaddafi and the West. “As a result of the historic decisions taken by Libya’s leadership in 2003 to renounce terrorism and to abandon its [weapons of mass destruction] programs, the United States rescinded Libya’s designation as a state sponsor of terrorism on June 30.”³³ The 2007 Department of State report continued, “Since pledging to renounce terrorism in 2003, Libya has cooperated closely with the United States and the international community on counterterrorism efforts.”³⁴ Events that began in Tunisia in the last months of 2010 would pave the path for a complete reversal of relations between Gaddafi and the West and the proverbial dawn of the Arab Spring.

28. *Id.*

29. *Lockerbie Bombing: The Aftermath*, GUARDIAN (Aug. 21, 2009), <http://www.theguardian.com/uk/gallery/2008/dec/21/lockerbie-terrorism>.

30. Paul Reynolds, *UTA 772: The Forgotten Flight*, BBC NEWS (Aug. 19, 2003), http://news.bbc.co.uk/2/hi/uk_news/3163621.stm.

31. S.C. Res. 731, ¶ 1, U.N. Doc. S/RES/731, at 51 (Jan. 21, 1992); S.C. Res. 748, ¶ 3-5, U.N. Doc. S/RES/748, at 53 (Mar. 51, 1992); S.C. Res. 883, ¶ 1, U.N. Doc. S/RES/883 (Nov. 11, 1993).

32. Press Release, Security Council, Security Council Lifts Sanctions Imposed on Libya After Terrorist Bombings of Pan Am 103, UTA 772, U.N. Press Release SC/7868 (Sept. 12, 2009).

33. *Chapter 3: State Sponsors of Terrorism Overview*, U.S. DEP’T ST. (Apr. 30, 2007), <http://www.state.gov/j/ct/rls/crt/2006/82736.htm>.

34. *Id.*

B. Key Events and Decisions Leading Up to the Initiation of Operation Odyssey Dawn

On December 19, 2010, Reuters Africa reported youths rioting in the Tunisian provincial town of Sidi Bouzid.³⁵ In mid-January, riots were then reported in Algeria over unemployment and food.³⁶ On January 14, 2011, Gaddafi condemned protesters in Tunisia.³⁷ A day later, as the protests over freedom, unemployment, and a variety of civil issues spread, Tunisian President Zine al-Abidine Ben Ali was forced to flee Tunisia as protesters claimed victory.³⁸ The first of many uprisings in the Middle East and North Africa concluded as a success for protestors.

The day of January 17, 2011, saw fears growing in the Egyptian government that Tunisian-type protests would spread to its country.³⁹ Speculation across the world grew as to whether the Tunisian revolt, which was aided by means of mass media and the Internet, would spread. The end of January saw protests erupt in Egypt, Jordan, Lebanon, Palestine, and Yemen. Egypt's president resigned after eighteen days of mass protests throughout the country.⁴⁰

As shockwaves spread throughout the region, clashes finally erupted in Benghazi, Libya, on February 16, 2011, as protestors called for an end to Gaddafi's forty-year reign.⁴¹ Two hundred thirty people were reported killed in the fifth day of protests, as "[t]he most violent scenes so far of the wave of unrest sweeping the Arab world were seen as Gaddafi relied on brute force to crush what began last week as peaceful protests but now threaten his regime."⁴² As protesters mobilized into an all-out revolution, Gaddafi forces struck back. However, in early March,

35. *Witnesses Report Rioting in Tunisian Town*, REUTERS AFRICA (Dec. 19, 2010), <http://www.reuters.com/article/2010/12/19/ozatp-tunisia-riot-idAFJ0E6BI06U20101219>.

36. *Id.*

37. Matthew Weaver, *Muammar Gaddafi Condemns Tunisia Uprising*, GUARDIAN (Jan. 16, 2011), <http://www.theguardian.com/world/2011/jan/16/muammar-gaddafi-condemns-tunisia-uprising>.

38. Angeliqe Chrisafis & Ian Black, *Zine al-Abidine Ben Ali Forced To Flee Tunisia as Protesters Claim Victory*, GUARDIAN (Jan. 14, 2011), <http://www.theguardian.com/world/2011/jan/14/tunisian-president-flees-country-protests>.

39. Jack Shenker, *Mohamed ElBaradei Warns of 'Tunisia-Style Explosion' in Egypt*, GUARDIAN (Jan. 18, 2011), <http://www.theguardian.com/world/2011/jan/18/mohamed-elbaradei-tunisia-egypt>.

40. *Id.*

41. *Middle East Protests—Wednesday 16 February*, GUARDIAN (Feb. 16, 2011), <http://www.theguardian.com/news/blog/2011/feb/16/middle-east-protests-live-updates>.

42. Ian Black, *Libya on Brink as Protests Hit Tripoli*, GUARDIAN (Feb. 20, 2011), <http://www.theguardian.com/world/2011/feb/20/libya-defiant-protesters-feared-dead>.

President Obama issued a strong warning to Gaddafi—a full-out request for him to step down as Libya’s ruler.⁴³

Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, issued a March 3, 2011, statement announcing the opening of an investigation into the evolving situation in Libya.⁴⁴ The statement noted four incidents of potential crimes against humanity: February 15 in Benghazi; February 16 in Misratah, Al-Bayda, Derna, Zenten, and Ajdabiya; February 18 in Misratah; and February 20 in Tripoli and Az-Zawiyah.⁴⁵ The statement cited Gaddafi and his inner circle as the principal aim of the investigation noting, “[I]f forces under their command commit crimes, they could be held responsible.”⁴⁶

On March 7, 2011, the United States began humanitarian relief efforts pledging \$15 million to help with the refugee crisis in Libya. In a White House memorandum, citing to the Migration and Refugee Assistance Act of 1962, President Obama declared:

I hereby determine, pursuant to section 2(c)(1) of the Act, that it is important to the national interest to furnish assistance under the Act, in an amount not to exceed \$15 million from the United States Emergency Refugee and Migration Assistance Fund, for the purpose of meeting unexpected and urgent refugee and migration needs . . . related to the humanitarian crisis resulting from the violence in Libya.⁴⁷

After open conflict continued between the Libyan governmental forces and the rebels, the United Nations finally took notice and articulated its position. On March 17, 2011, the United Nations Security Council adopted Resolution 1973 in response to the situation in Libya.⁴⁸ In pertinent part, the Resolution expressed “grave concern at the deteriorating situation, the escalation of violence, and the heavy civilian casualties.”⁴⁹ Resolution 1973 also established “a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civi-

43. The President’s News Conference with President Felipe de Jesus Calderon Hinojosa of Mexico, 2011 DAILY COMP. PRES. DOC. 7 (Mar. 3, 2011) (“Colonel Qadhafi needs to step down from power and leave.”).

44. Luis Moreno-Ocampo, *Statement of the Prosecutor on the Opening of the Investigation into the Situation in Libya*, INT’L CRIM. CT. (Mar. 3, 2011), http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement%20of%20the%20prosecutor%20on%20the%20opening%20of%20the%20investigation%20into%20the%20situation%20in%20libya.aspx.

45. *Id.*

46. *Id.*

47. Presidential Determination No. 2011-8, 71 Fed. Reg. 14,271 (Mar. 7, 2011).

48. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

49. *Id.*

lians.”⁵⁰ Thus, the U.N. Security Council implored its Member States to initiate a no-fly zone over Libya.

On March 18, 2011, President Obama issued a press release. In it he noted:

[I]n response to a call for action by the Libyan people and the Arab League, the U.N. Security Council passed a strong resolution that demands an end to the violence against citizens. It authorizes the use of force with an explicit commitment to pursue all necessary measures to stop the killing, to include the enforcement of a no-fly zone over Libya.⁵¹

Coalition Forces launched Operation Odyssey Dawn on March 19, 2011.

C. *Operation Odyssey Dawn*

The dual goal of Operation Odyssey Dawn, as delineated by President Obama in a White House Press Release, was “protecting innocent civilians within Libya, and holding the Qaddafi regime accountable.”⁵² President Obama continued by stating that Resolution 1973 “authorizes the use of force with an explicit commitment to pursue all necessary measures to stop the killing, to include the enforcement of a no-fly zone over Libya.”⁵³ Jim Garamone, from the American Forces Press Services, asserted that officials said, “The goal of the military coalition is to prevent further attacks by regime forces on Libyan citizens . . . adding that the coalition also wants to degrade the ability of Moammar Gadhafi’s regime to resist a no-fly zone being implemented.”⁵⁴ The initial coalition forces were from the United States, France, Italy, the United Kingdom, and Canada.

On March 19, 2011, coalition forces launched 110 Tomahawk cruise missiles at Libya’s integrated air and missile defense systems along the Mediterranean Sea and near Tripoli.⁵⁵ Within five days, a no-fly zone was established and the coalition of nations grew to a total of 13 that conducted over 330 forays over Libyan airspace.⁵⁶ By the end of

50. *Id.* ¶ 6. The U.N. Security Council also issued an arms embargo to Libya and an asset freeze. *Id.* ¶¶ 13, 19.

51. Remarks on the Situation in Libya, 2011 DAILY COMP. PRES. DOC. 1-2 (Mar. 18, 2011), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201100182/pdf/DCPD-201100182.pdf>.

52. *Id.*

53. *Id.*

54. Jim Garamone, *Coalition Launches “Operation Odyssey Dawn,”* AM. FORCES PRESS SERVICE (Mar. 19, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=63225>.

55. *Id.*

56. Karen Parrish, *Pentagon Tallies Coalition Actions in Libya*, AM. FORCES PRESS SERVICE (Mar. 23, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=63269>. On March 23, 2011, NATO began to assume responsibilities in Libya; the operation was renamed Operation Unified Protector. Nicole Ameline, *NATO Operations Under a New Strategic Concept and the*

March, NATO assumed full operational control. The mission itself was retermed Operation Unified Protector.

D. Operation Unified Protector

In the ensuing month of the NATO-controlled operation, various airstrikes were carried out across Libya. These airstrikes were aimed at military structures, convoys, and military personnel.

NATO confirmed they were not targeting nonmilitary structures or specific individuals themselves.⁵⁷ A NATO spokesman said: “NATO airstrikes have targeted Qadhafi forces across the country intent on launching attacks against civilians and civilian centres. Our strikes have destroyed targets across the country, but especially near Zintan and Yafran”⁵⁸ The briefing noted, “In Tripoli NATO aircraft struck command and control buildings responsible for directing attacks against civilians.”⁵⁹ In response to attacks aimed at specific people in Gaddafi’s leadership and family, it asserted, “NATO is not targeting specific individuals but genuine military targets, with care and precision and will continue to do so.”⁶⁰ In regard to NATO attacks leading to civilian deaths, NATO officials reiterated important advice, stating, “We have warned all civilians to stay away from military sites and equipment—and [we] would like to repeat that advice today.”⁶¹

However, forces loyal to Gaddafi began making strides against rebel forces in numerous regions. Human Rights Watch confirmed the use of cluster munitions in civilian populated areas, as well as rocket mortars during these attacks against rebel forces. Peter Bouckaert, Emergencies Director at Human Rights Watch found, “Libyan government forces have repeatedly fired mortars and Grad rockets into residential neighborhoods in Misrata, causing civilian casualties.”⁶²

With the increase in use of force against civilians and the general progression of forces loyal to Gaddafi, NATO’s actions effectively retracted previous statements that NATO was not targeting nonmilitary

EU as an Operational Partner, NATO PARLIAMENTARY ASSEMBLY (Nov. 15, 2011), <http://www.nato-pa.int/default.asp?SHORTCUT=2592>.

57. Oana Lungescu, *Press Briefing on Libya*, N. ATLANTIC TREATY ORG. (May 3, 2011), http://www.nato.int/cps/en/natolive/opinions_72998.htm.

58. *Id.* Speaking specifically on an actions operation sent to destroy seventeen ammunition stores along with armored personnel carriers and other armored vehicles.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Libya: Indiscriminate Attacks Kill Civilians*, HUMAN RIGHTS WATCH (Apr. 17, 2011), <http://www.hrw.org/en/news/2011/04/17/libya-indiscriminate-attacks-kill-civilians>.

structures or individuals themselves. The Associated Press reported on May 12 that there was “a new round of NATO airstrikes early Thursday that hit Col. Gadhafi’s fortified compound in Tripoli. Just hours beforehand, the Libyan leader had appeared on state TV for the first time since his son was killed nearly two weeks ago.”⁶³

Adding to international condemnation of the Gaddafi regime, on June 27, 2011, the International Criminal Court (ICC) issued an arrest warrant for Gaddafi.⁶⁴ Specifically, the warrant cited to “alleged criminal responsibility for the commission of murder and persecution of civilians as crimes against humanity from 15 February 2011 onwards.”⁶⁵ The warrant continued to speak on the events that surrounded the Arab Spring.

The ICC noted:

[F]ollowing the events in Tunisia and Egypt which led to the departure of their respective Presidents in the early months of 2011, a State policy was designed at the highest level of the Libyan State machinery and aimed at deterring and quelling, by any means, including by the use of lethal force, the demonstrations of civilians against [Gaddafi’s regime] which started in February 2011.⁶⁶

The warrant paid particular attention to acts by Gaddafi’s government from February 15 through 28, 2011, and cited Gaddafi as a coperpetrator of the crimes of murder as a crime against humanity and persecution as a crime against humanity.⁶⁷

As international air support continued to match rebel movements, numerous former Gaddafi strongholds began to fall in the ensuing months. On August 18, 2011, the rebel forces seized a major oil refinery in the city of Zawiyah.⁶⁸ By the end of August, rebel forces had taken Tripoli.⁶⁹ Centralizing focus on the apparent capture of Gaddafi, rebel

63. Diaa Hadid & Maggie Michael, *Pressure Mounts on Gadhafi within Libya’s Capitol*, WASH. TIMES (May 12, 2011), <http://www.washingtontimes.com/news/2011/may/12/nato-strikes-libyan-capital-after-gadhafi-appears/?page=all>.

64. Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Case No. ICC-01/11, Warrant of Arrest for Saif Al-Islam Gaddafi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1099329.pdf>.

65. *Id.* at 3.

66. *Id.* at 4.

67. *Id.* at 6.

68. Jeffrey Delviscio, Rogene Fisher Jaquette & Lori Moore, *Timeline Col. Muammar el-Qaddafi*, N.Y. TIMES, http://www.nytimes.com/interactive/2011/02/24/world/middleeast/20110224_qaddafi_timeline.html (last visited Dec. 3, 2014).

69. *Id.*

forces located his enclave.⁷⁰ A *New York Times* article details the fallen leader's final moments:

In a cellphone video that went viral on the Internet, the deposed Libyan leader is seen splayed on the hood of a truck and then stumbling amid a frenzied crowd, seemingly begging for mercy. He is next seen on the ground, with fighters grabbing his hair. Blood pours down his head, drenching his golden brown khakis, as the crowd shouts, "God is great!"⁷¹

In what can be termed as a prophetic statement, journalists for the *New York Times* noted, "The conflicting accounts about how [Gaddafi] was killed seemed to reflect an instability that could trouble Libya long after the euphoria fades."⁷²

As hostilities dwindled, reports of alleged war crimes committed by both Gaddafi supporters and the rebel forces finally began to filter out of the country. Upon investigating Gaddafi's last stand, Peter Bouckaert, Emergencies Director at Human Rights Watch, reported, "We found 53 decomposing bodies, apparently Gaddafi supporters, at an abandoned hotel in Sirte, and some had their hands bound behind their backs when they were shot."⁷³

Operation Unified Protector officially ended on October 31, 2011, 226 days from commencement of Operation Odyssey Dawn. In its final mission statistics, NATO confirms that at its peak Operation Unified Protector deployed approximately 8,000 troops, 260 air vessels, and 21 naval ships.⁷⁴ Actions included over 26,500 sorties with the destruction of 5,900 military targets.⁷⁵ The total figures for casualties remain outstanding, with a range of 10,000-50,000.⁷⁶

On September 11, 2012, in the power vacuum born from a lack of centralized administrative authority, the U.S. diplomatic mission in Benghazi was attacked. Individuals attacked the main mission complex and subsequently attacked a second annex site where U.S. personnel had

70. *Id.*

71. Kareem Fahim, Anthony Shadid & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES (Oct. 20, 2011), <http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html>.

72. *Id.*

73. *Libya: Apparent Execution of 53 Gaddafi Supporters*, HUM. RTS. WATCH (Oct. 24, 2011), <http://www.hrw.org/news/2011/10/24/libya-apparent-execution-53-gaddafi-supporters>.

74. *Operation UNIFIED PROTECTOR Final Mission Stats*, N. ATLANTIC TREATY ORG. (Nov. 2, 2011), http://www.nato.int/nato_static/assets/pdf/pdf_2011_11/20111108_111107-fact-sheet_up_factsfigures_en.pdf.

75. *Id.*

76. Seumas Milne, *If the Libyan War Was About Saving Lives, It Was a Catastrophic Failure*, GUARDIAN (Oct. 26, 2011), <http://www.theguardian.com/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure>.

been evacuated. U.S. Ambassador Stevens and three other U.S. personnel were killed in the attacks.⁷⁷ After a flurry of talking points and inadequate intelligence reports, the Obama Administration made a concrete and firm declaration that the attacks were preplanned and orchestrated:

As of September 28 [2012], the U.S. intelligence community had concluded publicly that the incident was a “deliberate and organized terrorist attack carried out by extremists,” and that, “It remains unclear if any group or person exercised overall command and control of the attack, and if extremist group leaders directed their members to participate. However, we do assess that some of those involved were linked to groups affiliated with, or sympathetic to, Al Qaeda.”⁷⁸

III. AUTHORITY TO MAKE WAR

On March 18, 2011, President Obama informed the United States of the necessity of the “use of force with an explicit commitment to pursue all necessary measures to stop the killing, to include the enforcement of a no-fly zone over Libya.”⁷⁹ The official start date for that use of force in Libya was the following day, March 19, 2011, with commencement of Operation Odyssey Dawn and the launch of over 100 Tomahawk cruise missiles into Libya.⁸⁰

On March 21, 2011, in a letter that mirrors former President Clinton’s letter to Congress regarding U.S. and NATO operations in Kosovo, President Obama issued a statement to Daniel K. Inouye,

77. Luke Harding, *Chris Stevens, US Ambassador to Libya, Killed in Benghazi Attack*, GUARDIAN (Sept. 12, 2012), <http://www.theguardian.com/world/2012/sep/12/chris-stevens-us-ambassador-libya-killed>.

78. CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL 33142, LIBYA: TRANSITION AND US POLICY 4 (2012) (citing statement by the Director of Public Affairs for the Director of National Intelligence Shawn Turner, September 28, 2012). Initially, there were rumors that the attacks were sporadic acts of violence, ignited by the release of an anti-Islamic video. These rumors were fostered in part by the Obama Administration. See *What They Said, Before and After the Attack in Libya*, N.Y. TIMES (Sept. 12, 2012), http://www.nytimes.com/interactive/2012/09/12/us/politics/libya-statements.html?_r=0. However, the President himself had insinuated later that the attacks were terror-related. See Remarks on the Attack on the U.S. Mission in Benghazi, Libya, 2012 DAILY COMP. PRES. DOC. (Sept. 12, 2012). Whatever the impetus for the attacks on the U.S. Embassy, Libya remained unstable and hostile after U.S. and NATO operations. On August 26, 2012, two weeks before the attacks, the U.S. State Department had issued a warning to all U.S. citizens noting that non-state-sponsored and intermilitia conflict could erupt at any time or any place in Libya, and to avoid travel. *Travel Warning—Libya (August 26, 2012)*, EMBASSY U.S., COTONOU, BENIN (Aug. 26, 2012), <http://cotonou.usembassy.gov/en-twlibya082612.html/>. The authors note that the original travel warning has been arbitrarily removed from the State Department’s online reference system; however, the same travel warning was somehow overlooked on the U.S. Embassy’s website for Benin.

79. Remarks on the Situation in Libya, *supra* note 51.

80. *Libya Attacks Under Way—Saturday 19 March Part 2*, GUARDIAN (Mar. 19, 2011), <http://www.theguardian.com/world/blog/2011/mar/19/libya-no-fly-zone-live-updates>.

President Pro Tempore of the Senate, and to John Boehner, Speaker of the House of Representatives. The letter opened:

At approximately 3:00 p.m. Eastern Daylight Time, on March 19, 2011, at my direction, U.S. military forces commenced operations to assist an international effort authorized by the United Nations (U.N.) Security Council and undertaken with the support of European allies and Arab partners, to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya.⁸¹

President Obama's letter reiterated the message from the Security Council: "to take all necessary measures to protect civilians and civilian populated areas under threat of attack in Libya."⁸² The letter concluded:

For these purposes, I have directed these actions, which are in the national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive. I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution. I appreciate the support of the Congress in this action.⁸³

As did President Clinton almost a dozen years prior, President Obama directly relied upon the independent authority of the President as the Commander in Chief of the United States Armed Forces under Article II of the United States Constitution as the legal basis for his unilateral decision to send American forces into hostilities in Libya.

In an examination of the two Presidents' letters, there are some stark similarities and notable differences. Both President Clinton and President Obama cited their constitutional authority under Article II to conduct such actions. Both President Clinton and President Obama stated that the report was part of their efforts to keep Congress "fully informed" as is "consistent" with the War Powers Resolution. However, in order to avoid the appearance of committing U.S. forces indefinitely, President Obama decidedly confirmed that the current engagement would be "rapid, but responsible,"⁸⁴ as opposed to President Clinton's statement that "[w]e cannot predict with certainty how long these

81. Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, 2011 DAILY COMP. PRES. 193 (Mar. 21, 2011), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201100193/pdf/DCPD-201100193.pdf>.

82. *Id.*

83. *Id.*

84. *Id.*

operations will need to continue.”⁸⁵ President Obama was also clear to insinuate a transfer of control of the operation.⁸⁶

Like NATO’s Operation Allied Force in Kosovo, which similarly did not employ the use of ground forces, Operation Odyssey Dawn can be termed an imperfect war because not all members of the United States Armed Forces were authorized to conduct hostilities.⁸⁷

The nature and extent of the Libyan engagement corresponds with this determination that Operation Odyssey Dawn is properly labeled an imperfect war. Operation Odyssey Dawn maintained clear and specific limited political objectives. As articulated by the Security Council, and later by U.S. and NATO officials, the goal of the operation included (1) all necessary measures to protect civilians and (2) establishment and continued enforcement of a no-fly zone in Libyan air space.⁸⁸

Additionally, the risks associated with the Libyan engagement indicate that the United States fought an imperfect war. It can be said with a good degree of certainty that even though President Obama articulated national security concerns in his statement to Congress, there was no risk that U.S. sovereignty might be lost or even that its power would substantially decline from a loss in such an imperfect war. As with the Kosovo conflict, the risk to American forces was different from that in a perfect war. U.S. and coalition forces fought from the air because they were not willing to risk lives during Operation Odyssey Dawn. As a result, there was a much smaller chance of U.S. troops sustaining casualties. Finally, as with Operation Allied Force, Operation Odyssey Dawn lacked a clear definition of victory, which is the hallmark of an imperfect war.

Because the Libyan engagement meets the definition of an imperfect war as discussed in *Bas v. Tingy*,⁸⁹ President Obama could not act unilaterally by merely relying on his constitutional authority under Article II of the U.S. Constitution. Just as it has been noted with President Clinton, President Obama required congressional consent through either a formal declaration of war or statutory authorization to begin Operation Odyssey Dawn.

85. Campbell v. Clinton, 52 F. Supp. 2d 34, 38 (D.C.C. 1999).

86. Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, *supra* note 81.

87. *Id.*; see also Michael Hahn, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351, 2362 (2001).

88. Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, *supra* note 81; see also Garamone, *supra* note 54; Lungescu, *supra* note 57.

89. *Bas v. Tingy*, 4 U.S. 37 (1800) (opinion of Washington, J.).

IV. OPERATION ODYSSEY DAWN WAS UNCONSTITUTIONAL AND VIOLATED THE WAR POWERS RESOLUTION

President Obama had to fulfill three requirements in order to comply with the War Powers Resolution. First, he had to consult with Congress before introducing United States Armed Forces into hostilities.⁹⁰ Second, he had to present a written report on the situation within forty-eight hours to the Speaker of the House and President Pro Tempore of the Senate.⁹¹ Third, he had to remove the United States Armed Forces from the hostilities within sixty calendar days after submitting the initial report unless Congress had declared war or had enacted specific authorization for the use of United States Armed Forces.⁹² It can be argued that President Obama, just like President Clinton,⁹³ failed to meet the last requirement.

The first of the three requirements can be easily met because President Obama and his Administration maintained open communications with Congress throughout the so-called “Arab Spring.” His report, made within forty-eight hours to the Speaker of the House and the President Pro Tempore of the Senate, was “consistent with the War Powers Resolution” and thus satisfies the second requirement.

However, his ability to satisfy the third and final requirement came under debate even prior to the sixty-day mark. On April 6, 2011, jurists Bruce Ackerman and Oona Hathaway noted the “Constitutional Clock” began ticking against President Obama on March 19, 2011.⁹⁴ In their article, they stated, “[T]he [Obama] administration has become ‘evasive and vague,’ as Rep. Brad Sherman put it . . . about the need to comply with the resolution’s time schedule.”⁹⁵ The Yale jurists confronted the administration’s definition of the conflict by noting, “the administration suggested on March 24 that ‘time-limited, scope-limited military action’ isn’t the sort of thing the Constitution had in mind when giving Congress the power to declare war.”⁹⁶ The Yale jurists continued by exploring the

90. 50 U.S.C.A. § 1542 (1973).

91. *Id.* § 1543(a).

92. *Id.* § 1544(b).

93. Gerald G. Howard, Comment, *Combat in Kosovo: Ignoring the War Powers Resolution*, 38 HOUS. L. REV. 261, 283-84 (2001).

94. Bruce Ackerman & Oona Hathaway, *The Constitutional Clock Is Ticking on Obama’s War*, FOREIGN POL’Y (Apr. 6, 2011), http://www.foreignpolicy.com/articles/2011/04/06/the_constitutional_clock_is_ticking_on_obamas_war.

95. *Id.*

96. *Id.* (referring to the idea that the Libyan engagement was neither a perfect nor imperfect war).

political and historical significance of failing to comply with the third and final requirement of the War Powers Resolution.⁹⁷

Under the War Powers Resolution, “[o]nly express legislative support for combat operations may be regarded as constitutionally sufficient.”⁹⁸ President Obama’s “Constitutional Clock” expired on May 20, 2011. Congress did not give express legislative support for combat operations by May 20. However, it appeared that the administration held detailed discussions on this particular issue.

In a letter to Senate and House leaders John A. Boehner, Nancy Pelosi, Harry Reid, and Mitch McConnell to update them on the United States’ military actions, President Obama asserted:

The initial phase of U.S. military involvement in Libya was conducted under the command of the United States Africa Command. By April 4, however, the United States had transferred responsibility for the military operations in Libya to the North Atlantic Treaty Organization (NATO) and the U.S. involvement has assumed a supporting role in the coalition’s efforts. Since April 4, U.S. participation has consisted of: (1) non-kinetic support to the NATO-led operation, including intelligence, logistical support, and search and rescue assistance; (2) aircraft that have assisted in the suppression and destruction of air defenses in support of the no-fly zone; and (3) since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO-led coalition’s efforts.⁹⁹

President Obama was alluding to the change from Operation Odyssey Dawn to Operation Unified Protector.

That, then, raises two issues: (1) whether the U.S.-led Operation Odyssey Dawn and the NATO-led Operation Unified Protector should be considered a single engagement for examination under the War Powers Resolution and if so (2) whether the continued U.S. actions in Libya fall under the purview of War Powers Resolution. President Obama’s likely position on these two issues would be to conclude no on the former, thus negating the latter. Furthermore, if the engagement is to be considered

97. *Id.* The Yale jurists noted, “President Bill Clinton won congressional approval for a targeted appropriation in support of his Kosovo campaign during the 60-day window established by the resolution.” The authors strongly disagree that this action on the part of President Clinton by any means establishes any satisfaction of the third and final element of the War Powers Resolution, and thus find the use of this by the Yale jurists to be in error. See Jason Reed Struble & Richard A.C. Alton, *The Legacy of Operation Allied Force: A Reflection on its Legality Under United States and International Law*, 20 MICH. ST. INT’L L. REV. 293 (2012).

98. Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1174 (2001).

99. *President Obama’s Letter About Efforts in Libya*, N.Y. TIMES (May 20, 2011), <http://www.nytimes.com/2011/05/21/world/africa/21libya-text.html>.

continuous, it is presumed President Obama's statement would seek out to deny the latter as well.

The thorough examination of Operation Allied Force helps to explain how the first element—that of continuity—can be answered in the affirmative. The Libyan conflict did not undergo any formative goal changes during the transition from Operation Odyssey Dawn to Operation Unified Protector. President Obama indicated in his March 21, 2011, letter his desire for the transition,¹⁰⁰ and NATO maintained the same delineated goals once it gained operational control over the engagement.¹⁰¹ Operation Allied Force, on the other hand, was a NATO operation from its commencement, and this factor did not diminish the necessity for President Clinton to adhere to the War Powers Resolution. If the Libyan engagement should be considered a single engagement—which the authors believe it should be—then does the U.S. involvement at May 20, 2011, constitute military actions requiring adherence to the War Powers Resolution?

In his May 20, 2011, letter, President Obama clarifies three elements of the U.S. military's continued actions in Libya: "non-kinetic support," support of the no-fly zone, and the use of drones (unmanned military assault aircraft).¹⁰² There was no actionable change in President Obama's military strategy from March 19, 2011, to May 20, 2011. As President Obama confirmed in his initial March 21, 2011, report, ground forces had not been deployed; this fact had not changed at the sixty-day cutoff point.¹⁰³ Furthermore, continued support of the no-fly zone required "suppression and destruction" of Libyan air defenses.¹⁰⁴ This represents military incursions that still required the commitment of U.S. Armed Forces to the conflict. The President confirmed this when he detailed the continued use of drones. Because the nature and extent of the Libyan engagement had not changed since March 19, 2011, it can be argued that the continued U.S. involvement beyond May 20, 2011, is a violation of the War Powers Resolution.

President Obama's unilateral commitment of U.S. Armed Forces to Operation Odyssey Dawn and later Operation Unified Protector to the Libyan engagement essentially mirrors President Clinton's unilateral

100. Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, *supra* note 81.

101. Garamone, *supra* note 54. It should be noted that NATO further escalated the use of sight specific attacks by attempting to engage and terminate specific individuals in the Gaddafi regime.

102. *President Obama's Letter About Efforts in Libya*, *supra* note 99.

103. *Id.*

104. *Id.*

commitment of U.S. Armed Forces to Operation Allied Force and the Kosovo conflict. Thus, President Obama violated not only the War Powers Resolution because he failed to stop an air war that went beyond the Resolution's sixty-day clock, but also the Constitution because he exceeded his authority when he introduced United States Armed Forces into hostilities without congressional approval.

V. OPERATION ODYSSEY DAWN CANNOT BE LEGALLY JUSTIFIED UNDER INTERNATIONAL LAW AS A HUMANITARIAN INTERVENTION

The U.S. and NATO military engagement in Libya was grounded in valid concerns for human rights. But, as alluded to before, "there is no clear international law permitting humanitarian intervention in cases short of genocide."¹⁰⁵ In wake of Operation Allied Force in Kosovo, the Independent International Commission on Kosovo issued a comprehensive report that found:

Experience from the NATO intervention in Kosovo suggests the need to close the gap between legality and legitimacy. The Commission believes that the time is now ripe for the presentation of a principled framework for humanitarian intervention which could be used to guide future responses to imminent humanitarian catastrophes and which could be used to assess claims for humanitarian intervention. It is our hope that the UN General Assembly could adopt such a framework in some modified form as a Declaration and that the UN Charter be adapted to this Declaration either by appropriate amendments or by a case-by-case approach in the UN Security Council. We also suggest a strengthening of the level of human rights protection contained in the UN Charter—aware of course of the political problems of implementing such a change.¹⁰⁶

105. KATHARINA PICHLER COLEMAN, *INTERNATIONAL ORGANISATIONS AND PEACE ENFORCEMENT: THE POLITICS OF INTERNATIONAL LEGITIMACY 200* (2007) (noting that Article 8 of the 1951 International Convention on the Prevention and Punishment of the Crime of Genocide arguably enjoins international military action against genocide); Jonathan I. Charney, Editorial Comments, *NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT'L L. 834, 836 (1999) (humanitarian intervention is not an exception to the United Nations Charter's prohibitions on the use of force); U.N. Charter art. 51. See Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 488 (2006) (cross-border military force may be used in self-defense).

106. INDEP. INT'L COMM'N ON KOSOVO, *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* (2000).

Our proposed principled framework includes three threshold principles, which must be satisfied in any legitimate claim to humanitarian intervention. These principles include the suffering of civilians owing to severe patterns of human rights violations or the breakdown of government, the overriding commitment to the direct protection of the civilian population, and the calculation that the intervention has a reasonable chance of

This report brought to light the continued need for striking a balance between respecting another nation's sovereignty and stopping humanitarian crises. In light of this need, the International Commission on Intervention and State Sovereignty (ICISS) presented a report titled *The Responsibility To Protect*.

The *Responsibility To Protect* doctrine consisted of two main criteria. First, "State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself."¹⁰⁷ Second, "Where a population is suffering serious harm . . . and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect."¹⁰⁸

These principles were later adopted by the United Nations and manifested themselves as follows:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations¹⁰⁹

The military engagement in Libya does not fit with the traditional definition of self-defense. The Security Council did give apparent authorization to member states, "to take all necessary measures . . . to

ending the humanitarian catastrophe. In addition, the framework includes a further eight contextual principles which can be used to assess the degree of legitimacy possessed by the actual use of force.

Id. at 5.

107. *The Responsibility To Protect*, INT'L COMMISSION ON INTERVENTION & ST. SOVEREIGNTY (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

108. *Id.* at xi.

109. U.N. GAOR, 60th Sess., U.N. Doc. A/60/L.1, ¶¶ 138-139 (Sept. 15, 2005).

protect civilians and civilian populated areas under threat of attack.”¹¹⁰ This is an important distinction from NATO’s Operation Allied Force in that the Security Council appears to authorize the Libyan engagement. This authorization was lacking in President Clinton’s decision to commit U.S. military forces to the Kosovo conflict.¹¹¹ However, the Security Council authorization concerning Libya was not based on self-defense in that no coalition forces were attacked prior to the engagement.¹¹²

In light of *The Responsibility To Protect*, the authors find the notion that as soon as crimes against humanity are committed, the international community should step in, to be simplistic and vague. Thus, in examining the international legality of the Libyan engagement, a modified six-criterion balancing test will be employed to evaluate the legitimacy under customary international law of the unilateral humanitarian intervention taken in Libya by U.S. and NATO forces during Operation Odyssey Dawn and Operation Unified Protector: (1) necessity, (2) proportionality, (3) purpose, (4) nature of the actors, (5) maximization of the best outcomes, and (6) likelihood of destabilization. The first five of these criteria were developed by international jurist Ved P. Nanda over two separate, yet related, articles. They have been hybridized by the inclusion of insight by jurist Jean-Pierre L. Fonteyne.¹¹³ The authors have added the final criterion as a necessary element in the discussion of international humanitarian intervention. If a majority of the criteria are met, then arguably the

110. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

111. See Ved P. Nanda, *NATO’s Armed Intervention in Kosovo and International Law*, 10 U.S. AIR FORCE ACAD. J. LEGAL STUD. 1, 9 (2000). In the months before the NATO bombing in Kosovo, China and Russia appeared ready to veto any call for U.N. intervention, as well as any mandate that conferred upon NATO such a right. Richard A. Falk, *Kosovo, World Order, and the Future of International Law*, 93 AM. J. INT’L L. 847, 850 (1999).

112. President Obama asserts national security interests in his March 21, 2011, letter; this does not, however, rise to the level of a claim for self-defense under international norms. Furthermore, this also illustrates the expansion of the role of NATO as a military service provider for the United Nations. See Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, *supra* note 81.

113. Ved P. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti—Revisiting the Validity of Humanitarian Intervention Under International Law*, 20 DENV. J. INT’L L. & POL’Y 305 (1992); Ved P. Nanda et al., *Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia—Revisiting the Validity of Humanitarian Intervention Under International Law*, 26 DENV. J. INT’L L. & POL’Y 827 (1998); see also Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter*, 4 CAL. W. INT’L L.J. 203, 258-67 (1974) (employing a three-prong analysis of the substantive, procedural, and preferential criteria of humanitarian intervention under customary international law). Thus, Nanda’s five criteria are combined with Fonteyne’s three-prong analysis and *The Responsibility To Protect*, and now include the authors’ added “potential for destabilization” criteria.

Libyan engagement was *legally* justified under the doctrine of humanitarian intervention.¹¹⁴

A. *The Necessity Criterion*

The “necessity” criterion assesses “whether there was genocide or gross, persistent, and systematic violations of basic human rights.”¹¹⁵ If there was, then arguably the intervention was necessary.

Both the Security Council and President Obama laid out the need of humanitarian intervention in Libya. The Security Council in issuing Resolution 1973 referred to arbitrary detentions, enforced disappearances, torture, and summary executions in its Resolution 1973.¹¹⁶ President Obama highlighted these concerns from the Security Council in his March 21, 2011, letter to Congress.¹¹⁷ Thus, there is evidence of human rights violations occurring, satisfying in part the necessity criterion.

However, in Resolution 1973, the Security Council specifically noted “that widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population *may* amount to crimes against humanity.”¹¹⁸ Referring to the necessity of Operation Odyssey Dawn, President Obama said that it was intended “to *prevent* a humanitarian catastrophe and address the *threat posed* to international peace and security.”¹¹⁹

The importance of these latter statements is that they show there was an international fear of gross human rights violations, not that genocide or gross, persistent, and systematic violations of basic human rights actually were occurring or had previously occurred. President Obama and the Security Council’s use of preemptive language causes an automatic failure of Nanda’s second element—the necessity criterion.

114. This Article does not explore whether military action in Libya was *morally* justified. Instead, it explores the *legality* under international law of U.S. and NATO’s use of force during Operation Odyssey Dawn and Operation Unified Protector.

115. Nanda et al., *supra* note 113, at 827. The necessity criterion can be detailed as including two, and depending upon the jurist possibly three, elements: the fundamental character of the human rights violations, the exceptionally large scale of those violations, and possibly the potential immediacy of those violations.

116. S.C. Res. 1973, *supra* note 110.

117. Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, *supra* note 81 (“[Gaddafi’s] illegitimate use of force not only is causing the deaths of substantial numbers of civilians among his own people, but also is forcing many others to flee to neighboring countries, thereby destabilizing the peace and security of the region.”).

118. S.C. Res. 1973, *supra* note 110 (emphasis added).

119. Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, *supra* note 81 (emphasis added).

Yet, it is noteworthy to point out that if Fonteyne's "possible immediacy" criterion is taken into consideration, then the necessity criterion might be satisfied.

Caitlin Buckley, in her piece analyzing the Libyan operations in the context of a possible international intervention in Syria, notes the key concerns with satisfying the necessity criterion: "Even before the resolution had been approved, the legality of the intervention had been put to question."¹²⁰ She goes on to state, "The allegation was that the Security Council and NATO had intervened in a civil war, not genocide, and since Libya had not threatened its neighbors or any other country, the Security Council was in violation of its own charters."¹²¹

Thus, if the concern Buckley points out could indeed be validated—that of an internal civil war versus the possibility of genocide or other systematic violations of human rights—Fonteyne's "possible immediacy" element would also be negated.

B. *The Proportionality Criterion*

The next criterion to be examined is that of proportionality. The "proportionality" criterion examines "the duration and propriety of the force applied."¹²² The maxim of this criterion is that of the ends justifying the means; in other words, to ensure that the means used to achieve the goal of humanitarian intervention do not stretch beyond what was necessary.

With the Kosovo conflict, the passing years have borne the fruit of NATO's intervention, thereby allowing for a conclusion on whether the intervention was legally and morally justified. On the other hand, the Libyan engagement might be officially over, but its implications are still emanating and affecting the region. Thus, outside of that mere issue there exists enough evidence to discuss the armaments used and the targets of the operation.

Delineated by the Security Council and reiterated by President Obama, the main objectives of the Libyan engagement were the "use of

120. Caitlin A. Buckley, *Learning from Libya, Acting in Syria*, J. STRATEGIC SECURITY, Summer 2012, at 81, 87.

121. *Id.*

122. Nanda et al., *supra* note 113, at 827. The elements of proportionality include no unnecessary force, no unnecessary affectation of the authority structures of the states that intervened, and no unnecessary duration. *See also* Fonteyne, *supra* note 113, at 262 ("[E]mploy only the amount of troops reasonably necessary to accomplish the objective, so as to reduce to a minimum infringement upon the territorial integrity and political independence of the State intervened in." (citing Richard B. Lillich, *Forcible Self-Help by States To Protect Human Rights*, 53 IOWA L. REV. 325, 349-50 (1967))).

force with an explicit commitment to pursue all necessary measures to stop the killing [of civilians], [and] to include the enforcement of a no-fly zone over Libya.”¹²³ President Obama assured Congress and the American people that ground forces were not to be used; consequently, the Libyan engagement would mirror Operation Allied Force in that it was an air campaign.

The United States Air Force launched B-2 Spirits, F-15E Strike Eagles, and F-16CJ Fighting Falcons to support Operation Odyssey Dawn.¹²⁴ And several weapons made their debut in the Libyan engagement, including the USS FLORIDA (SSGN-728), a guided missile submarine; the Block IV Tomahawk cruise missile (TLAM-E); the Eurofighter Typhoon jet; and the EA-18G Growler, a warfare plane meant to disrupt communications and other electronics.¹²⁵ By May 17, 2011, over 7,000 sorties were flown, of which 2,700 were strike missions.¹²⁶

These strikes were conducted against ammunition storages, armored vehicles, and command and control centers.¹²⁷ Establishment of the no-fly zone required specific targeting of the Libyan government’s anti-aircraft defenses. The *Washington Post* reported U.S. officials confirming that U.S. Predator drone aircraft were being used to assault dug-in loyalists.¹²⁸

Under the purview of the Security Council resolution authorizing all steps necessary to establish a no-fly zone and protect civilians, it can be argued that U.S. and NATO operations were proportional to the task at hand, meaning that the force used was necessary to achieve the objectives outlined. But there exist two remaining elements of the proportionality criterion that must be examined—unnecessary affectation of authority structures and unnecessary duration.

The latter, unnecessary duration is quantifiable if not qualifiable. The joint operations lasted a total of 226 days. The issue presents itself as to whether this period of 226 was of unnecessary duration. That depends on the operation’s goals. If the goal was the ouster of Gaddafi

123. Remarks on the Situation in Libya, *supra* note 51.

124. *U.S. Air Force Aircraft Strike Libya*, U.S. AIR FORCE (Mar. 20, 2011), <http://www.usafe.af.mil/news/story.asp?id=123247707>.

125. John Reed, *The New Weapons of Operation Odyssey Dawn*, DEFENSE TECH (Mar. 21, 2011), <http://defensetech.org/2011/03/21/the-new-weapons-of-operation-odyssey-dawn/>.

126. *Press Briefing on Libya*, N. ATL. TREATY ORG. (May 17, 2011), http://www.nato.int/cps/en/natolive/opinions_74411.htm.

127. *Id.*

128. Michael Birnbaum & Joby Warrick, *NATO Steps Up Bombing in Libya*, WASH. POST (May 10, 2011), http://www.washingtonpost.com/world/nato-steps-up-bombing-in-libya-rebels-report-gains/2011/05/10/AF8GsehG_story.html.

by either surrender or death, then arguably the joint operations were of a necessary duration because they concluded 10 days after his death. However, it was made clear that the goal of the operations was to put an end to the open hostilities of the Gaddafi regime against his people. This could also be deemed as a necessary time period, because with his death his regime no longer existed.

The unnecessary affectation of authority structures can be analyzed more concretely. As reported on May 12, 2011, NATO airstrikes apparently began targeting Gaddafi and his fellow authority figures.¹²⁹ This would be a violation of the element regarding unnecessary affectation of authority structures. These allegations, if true, would also render these direct assaults outside of the scope of the Security Council Resolution and President Obama's outlined goals.

As with the elemental breakdown of proportionality, the need to satisfy each element is required to satisfy the whole criterion. Though an argument can be made that the force used was necessary, the direct assaults on Libyan authority structures means that the elements cannot be met. Thus, the Libyan engagement would fail the proportionality criterion.

C. *The Purpose Criterion*

The "purpose" criterion explores "whether the intervention was motivated by humanitarian considerations, self interest, or mixed motivations."¹³⁰ It can be stated with affinity that Operation Odyssey Dawn was launched with the idea of humanitarian considerations. The main objectives as repeated by President Obama and NATO of Operation Odyssey Dawn and Operation Unified Protector were protecting innocent civilians within Libya and the establishment and maintenance of a no-fly zone.¹³¹ Yet, the altruistic interests cannot overshadow the apparent motivations of the United States and NATO.

Just as President Clinton deemed national security interests as an important charge in his decision to initiate Operation Allied Force, President Obama also outlined several extenuating factors. These factors included national security,¹³² threats to international peace,¹³³ and a domino effect. President Obama described this domino effect:

129. Hadid & Michael, *supra* note 63.

130. Nanda et al., *supra* note 113, at 827.

131. Remarks on the Situation in Libya, *supra* note 51.

132. Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya, *supra* note 81.

But in Libya, we saw the prospect of imminent massacre, we had a mandate for action, and heard the Libyan people's call for help. Had we not acted along with our NATO allies and regional coalition partners, thousands would have been killed. *The message would have been clear: Keep power by killing as many people as it takes.* Now, time is working against Qaddafi. He does not have control over his country. The opposition has organized legitimate and credible Interim Council. And when Qaddafi inevitably leaves or is forced from power, decades of provocation will come to an end, and the transition to a democratic Libya can proceed.¹³⁴

The President illustrated a concern that other Arab leaders suffering political upheavals in the Arab Spring would follow Gaddafi's example and begin to engage rebels militarily. Libya essentially was to be used as an example. This raises a valid question as to why Libya, and not countries with similar civil rebellions and reluctant leaders, such as Sudan, Yemen, or Bahrain. This further alienates Operation Odyssey Dawn as being a purely altruistic engagement.

Also in contravention of President Obama's use of Libya as an example for other similarly situated leaders, Buckley notes concerns over why Libya should serve as that exemplar: "because violence was simultaneously being perpetrated in many other countries such as Yemen, Bahrain, and Syria-where Western powers were not intervening militarily."¹³⁵ Buckley also postulates, "[S]ome accused the West of a double standard, and asserted that the intervention supposedly intended to protect dissidents was actually intended to protect oil interests."¹³⁶

Yet, Operation Odyssey Dawn at its most basic levels did exercise a valid purpose in protecting civilian lives and humanitarian intervention, even if it was not its sole purpose. The outlying factors, though conclusive and persuasive, cannot fully eliminate this central purpose. As such, the purpose criterion can be met.

133. *Id.*; Remarks at the Department of State, 2011 DAILY COMP. PRES. DOC. 7 (May 19, 2011), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201100368/pdf/DCPD-201100368.pdf>.

134. Remarks at the Department of State, *supra* note 133 (emphasis added). President Obama appears to be echoing Fonteyne's concern about the inaction being seen as justification. See Fonteyne, *supra* note 113, at 269 ("As long as the world community appears to be unable or unwilling to promptly respond in a collective manner to those dramatic situations where the very nature and existence of man are threatened, individual initiatives by concerned States will have to be relied upon if a viable world order is to be maintained.").

135. Buckley, *supra* note 120, at 87.

136. *Id.*

D. The Nature of the Actors Criterion

The “nature of the actors” criterion appraises whether the humanitarian intervention was “collective or unilateral.”¹³⁷ The widest margin of differences between Operation Allied Force and Operation Odyssey Dawn lies with the nature of the actors. While it is clear that NATO’s Operation Allied Force was unilateral, in that it lacked consent from the Security Council, it is thus alternatively clear that Operation Odyssey Dawn was collective. Security Council Resolution 1973 outlined the engagement and establishment of a no-fly zone in Libya.¹³⁸ The Resolution cited to calls from the United Arab League for intervention in Libya.¹³⁹ But intervention does not gain in legality by simply being a collective action.¹⁴⁰

Even further concern was raised, however, that U.N. support of NATO operations had marked implications with regard to the United Nations’ and NATO’s relationship. Buckley states in her piece, “Critics also pointed out that NATO, by taking the rebel side in a civil war, had become an armed service provider for the UN and other allies, thus straying from its core mission to protect its members’ territory and population.”¹⁴¹ Thus, critics contend, NATO was becoming the military branch of the United Nations, in contravention to NATO’s own role.

E. The Maximization of Best Outcomes Criterion

The final criterion, “maximization of best outcomes,” reviews “whether the intervention maximized the best outcome.”¹⁴² The short-term outcomes were destructive and unfortunately predictable after the annihilation of a central authority structure. With the apparent lack of any centralized governmental authority, numerous violent incidents aimed at international targets in Libya arose. Further, with the at-times unchecked spread of weaponry flowing out of Libya, the entire region became immediately unstable.

137. Nanda et al., *supra* note 113, at 827.

138. U.N. SCOR Res. 1973, *supra* note 26.

139. *Id.*

140. See Fonteyne, *supra* note 113, at 266-67 (“[C]ollective operations should be preferred over individual measures. While it is true that intervention does not gain in legality by being collective rather than individual, there is nevertheless a presumption that collective action is more likely to ensure the relative purity of the intentions required from the intervenors.”).

141. Buckley, *supra* note 120, at 87.

142. *Id.*

1. International Violence in Libya

After the fall of the regime, the United Kingdom's Ambassador was targeted, along with the International Committee of the Red Cross, by various rebel groups or lone insurgents.¹⁴³ These attacks were coupled with the destruction of religious buildings, assassinations of former regime security officials, and the overall persistent armed conflicts between rival militias.¹⁴⁴

In the aftermath of the operations, the interim regime relied heavily on local militias for security. Even subsequent to the attack that led to Ambassador Stevens' death, the Libyan authorities were able to solely rely on independent militias for security in Benghazi.¹⁴⁵

In early 2013, Italy's consul to Benghazi was targeted as well.¹⁴⁶ The consul, Guidon de Sanctis, was traveling in a bulletproof convoy from his workplace at the consulate to his residence. The consul's car was shot at while stopped at an intersection.¹⁴⁷ It was hit by several bullets that were reportedly fired from another car and aimed directly at where the consul and his driver were sitting.¹⁴⁸ No one was hurt in the incident because the bullets failed to penetrate the armored transport vehicle.

2. Regional Instability

The short-term effects reach well beyond the internal struggles noted above, both U.S. governmental and international organizations had immediate concerns about the proliferation of weaponry supplied to Libya's rebels as well as the lack of ability of the transitional Libyan government to keep tabs on those stockpiles. Blanchard notes in his Congressional Research Service report, "Libya's borders and hundreds of suspected weapons sites remained loosely secured, although limited efforts to secure them have begun, with the support of the United Nations Support Mission in Libya, the United States, and other governments."¹⁴⁹ The proliferation of small arms, man-portable air defense missile

143. Blanchard, *supra* note 78, at 4.

144. *Id.* at 4.

145. *Id.*

146. *Italian Consul in Libya Escapes Gun Attack*, AGENCE FRANCE-PRESSE (Jan. 12, 2013), <http://www.rawstory.com/rs/2013/01/12/italian-consul-in-libya-escapes-gun-attack/>. Though no direct basis was given for the attack, it is again unsurprising the former colonial ruler's consul was attacked as tension between the two countries is predicated on over a century of mistrust.

147. *Id.*

148. *Id.*

149. Blanchard, *supra* note 78, at 2.

systems, and other various heavy weapons gave the international community valid concerns.¹⁵⁰

Those same concerns were also noted when some stockpiles rested beyond Libya's borders.¹⁵¹ International leaders and experts in counter-terrorism and arms trafficking expressed immediate concern about the operation's long-term implications for security in not only Libya, but also the greater region, as government officials in neighboring countries shared these concerns of regional instability.¹⁵²

The U.S. government also conceded that “[m]ost security experts expect that unexploded ordnance, explosive remnants, and looted weaponry will present a domestic and regional challenge for many years.”¹⁵³ Further, “Officials in the United States and Europe have expressed concern about the potential for violent extremists to benefit from conditions in Libya.”¹⁵⁴ Thus, there is evidence that the U.S. government had indirectly begun to question whether the operation maximized the best outcome.¹⁵⁵

The events that later unfolded provide even more support that the operation failed to maximize the best outcome. As early as November 2011, military leaders from Mali, Niger, Mauritania, and Algeria met in concert amid concerns of the fallout from Libya.¹⁵⁶ In connection with those concerns, Mali's Defense Minister, Natie Plea, stated, “Now, more than ever our sub-region is facing serious security challenges.”¹⁵⁷ Plea also noted, “This is reflected in particular by the increased proliferation of weapons of all [calibers] following the Libyan crisis . . . seizing the arsenal for terrorism is a real source of concern for our countries.”¹⁵⁸

Reports had noted, “Thousands of combatants originating from Mali and Niger, mostly ethnic Tuareg who supported slain former Libyan leader Moamer Kadhafi, have returned to their respective countries with a wide range of weapons.”¹⁵⁹ This is confirmed by the U.N. Security Counsel's Report of the Secretary General on the Situation in Mali.¹⁶⁰

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Sahel Army Chiefs Weigh Regional Security Risks After Libya*, RELIEFWEB (Nov. 21, 2011), <http://reliefweb.int/report/libya/sahel-army-chiefs-weigh-regional-security-risks-after-libya>.

157. *Id.*

158. *Id.* The presumed terror reference is to Al-Qaeda in the Islamic Maghreb.

159. *Id.*

160. U.N. Secretary-General, Rep. of the Secretary-General on the Situation in Mali, U.N. Doc. S/2012/894, at 2 (Nov. 29, 2012).

In mid-January 2012, a Tuareg movement known as the Mouvement national pour la libération de l'Azawad (MNLA), along with Islamic armed groups including Ansar Dine, Al-Qaida in the Islamic Maghreb (AQIM) and the Mouvement pour l'unicité et le jihad en Afrique de l'Ouest (MUJAO), in addition to deserters from the Malian armed forces, initiated a series of attacks against Government forces in the north of the country. The Tuareg rebellion was emboldened by the presence of well-equipped combatants returning from Libya in the wake of the fall of the regime there.¹⁶¹

The NATO Civil-Military Fusion Centre (CFC) issued several reports on the regional threats imposed by the fall of the Libyan central authority. The CFC noted, "The European Union's (EU) counter-terrorism coordinator, Gilles de Kerchove, stated in August 2011 that AQIM had 'gained access to weapons, either small arms or machine-guns, or certain surface-to-air missiles.'"¹⁶² The CFC confirms this: "[O]ne of AQIM's commanders, Mokhtar Belmokhtar, said in an interview with Mauritania's private news agency *ANI*, that the group had obtained weapons as a result of the Libyan conflict."¹⁶³ Then in late November 2011, William Hague, Foreign Secretary for the United Kingdom, officially asserted that the fighting in Libya had created the potential for further disruptions in the region.¹⁶⁴

The CFC also detailed the potential for instability caused in Algeria: "Libyan weapons, including shoulder-fired missiles, were discovered by Algerian security forces near the Libyan border on 18 February 2012."¹⁶⁵ The CFC concluded that this discovery reinforces the concerns that the smuggling of weapons out of Libya is in fact occurring.¹⁶⁶

In an earlier report from January 2012, the CFC noted:

The fall of Moammar Gaddafi and his government marked a turning point for Libya. As the country seeks to rebuild infrastructure and establish a government that represents the people, security continues to be a large underlying issue that threatens to undermine national and regional development efforts. During the conflict, thousands of weapons were left

161. *Id.*

162. Erin Foster-Bowser & Angelia Sanders, *Security Threats in the Sahel and Beyond: AQIM, Boko Haram and al Shabaab*, Civil-Military Fusion Centre, Mediterranean Basin Team, RELIEFWEB 2 (Apr. 2012), http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_38_18.pdf (citing Agence France-Presse).

163. *Id.*

164. *Id.*

165. *Id.* at 3.

166. *Id.*

unguarded. These weapons ranged from ammunition and small arms; to surface- to-air missiles and chemical weapons.¹⁶⁷

As detailed above, the “issue”—that of unguarded stockpiles of weapons—had begun to create a ripple effect in nearby countries.

In March 2012, President Amadou Toumani Touré was ousted in a coup by Malian soldiers because of his inability to effectively deal with the newly armed rebel factions in Mali. The rebel factions acquired those arms through the Libyan conflict.¹⁶⁸ What is more discouraging, from a diplomatic point of view, is that prior to President Touré’s ouster, U.S. and Malian relations were excellent.¹⁶⁹ Their relationship had been based on the shared goals of strengthening democracy in the region and reducing poverty in Mali.¹⁷⁰ Mali had maintained a stable, democratically elected government for almost twenty years.¹⁷¹ Effectively, the United States contributed to the downfall of a budding and stable partner in the region.

In regard to the Syrian civil war, reports have indicated a massive weapons flow from Libya to the Syrian opposition. On June 21, 2013, based upon evidence gathered in the war torn country, including flight-control data and interviews conducted with various official and unofficial sources, the *New York Times* reported that the collection of information “offers a profile of a complex and active multinational effort, financed largely by Qatar, to transport arms from Libya to Syria’s opposition fighters.”¹⁷²

In a shocking bit of truthfulness that exemplifies the paradoxical nature of the current Libyan government, Fawzi Bukatef, a Libyan diplomat, confirmed nongovernmental control of weaponry shipments, when he said, “They collect the weapons, and when they have enough they send it . . . [t]he Libyan government is not involved, but it does not really matter . . . the Libyan influx appears to account for at least a

167. Angelica Sanders, *Unsecured Libyan Weapons: Regional Impact and Possible Threats*, RELIEFWEB 1 (Jan. 2012), http://reliefweb.int/sites/reliefweb.int/files/resources/20120118_CFC_MedBasin_Thematic_Unsecured_Libya_Weapons%5B1%5D.pdf.

168. *Mali’s President, Ousted in Coup, Steps Down*, N.Y. TIMES (Apr. 8, 2012), http://www.nytimes.com/2012/04/09/world/africa/mali-president-amadou-toumani-toure-resigns-after-coup.html?_r=0.

169. *U.S. Airlift of French Forces to Mali*, U.S. AFR. COMMAND (Jan. 24, 2013), <http://www.africom.mil/Newsroom/Article/10206/us-airlift-of-french-forces-to-mali>.

170. *Id.*

171. *Id.*

172. C.J. Chivers, Eric Schmitt & Mark Mazzetti, *In Turnabout, Syria Rebels Get Libyan Weapons*, N.Y. TIMES (June 21, 2013), <http://www.nytimes.com/2013/06/22/world/africa/in-a-turn-about-syria-rebels-get-libyan-weapons.html?pagewanted=all>.

portion of the antitank weapons seen in the conflict this spring.”¹⁷³ The reports go on to note that blacklisted or extremist groups—mostly labeled as terrorists groups by the United States—“have little trouble acquiring the weapons once the arms enter Syria, often buying them directly from [sanctioned] groups.”¹⁷⁴

3. Refugees

An ancillary element, refugees, also emerged following the aftermath of the end of the Gaddafi regime. The International Organization for Migration (IOM) produced a comprehensive report of the migration totals directly linked to the NATO operations, the ensuing civil war, and the failure of the transitional government to effectuate civil authority in an appropriate time frame.¹⁷⁵

In March 2013, the IOM spokesman, Jumbe Omare Jumbe, detailed the alarming conditions and numbers of Chadian migrants being forced to return to Chad from Libya.¹⁷⁶ Migrants stated that Libyan authorities had told them to leave the country for basic immigration violations such as lack of proper visas.¹⁷⁷ However, the underlying sentiment of the returning Chadians was the belief that new Libyan authorities suspected them of being mercenaries.¹⁷⁸

The *Pan-African News Wire* reports Jumbe contending: “This has been corroborated so many times since the beginning of the war in Libya. The opposition, who is now the new government in Libya was

173. *Id.*

174. *Id.*

175. Christine Aghazarm, Patrice Quesada & Sarah Tishler, *Migrants Caught in Crisis: The IOM Experience in Libya*, INT'L ORG. MIGRATION (2012), http://publications.iom.int/bookstore/free/MigrationCaughtinCrisis_forweb.pdf. This report details the destructive impact of massive migration in the region caused by the Libyan conflict. The report also speaks to the flood of rebel fighters returning home, an issue highlighted earlier:

The crisis in Libya poses other security challenges for the region as it is compounded by the effects of food insecurity and the continued regional fallout of the crisis in Côte d'Ivoire and, most recently, the political coup in Mali. In addition, for many years, Libya had hosted Tuareg rebels (numbers unconfirmed) who were fighting in Mali and Niger. Some were incorporated into Gaddafi's southern battalions while others reportedly received support from Libya to conduct cross-border operations. The return of armed fighters, mainly in Mali and Niger but also in Chad, is a major security concern for the subregion.

Id. at 27.

176. Lisa Schlein, *Libyan Rebels Expel More Africans from Other Countries*, PAN-AFR. NEWS WIRE (Mar. 27, 2013), <http://panafricannews.blogspot.com/2013/03/libyan-rebels-expel-more-africans-from.html>.

177. *Id.*

178. *Id.*

saying it in the media that the Africans, Sub-Saharan Africans, are helping the previous Government of Colonel Gadhafi.”¹⁷⁹ Chadians targeted for deportation are placed in detention centers, where they can remain anywhere from one month to one year.¹⁸⁰ More troubling, however, is the fact that a vast majority of these detention centers are not run by the Libyan central authority, but by militias with no official links with Libya’s central government.¹⁸¹

The passage of time is a true referee of the maximization of best outcomes criterion. Arguably in the short term, this criterion has not been satisfied, as evidenced by the ensuing international incidents in both Libya and the region. Given that, it would appear the centralized actions in Libya by U.S. and NATO forces assisted in creating an open-ended armed conflict with constant violence as one side struggles to gain control. While someday that conflict may end, as of now it remains open with no clear resolution in sight.

F. Potential for Destabilization Criterion

Do the needs of the many outweigh the needs of the few?¹⁸² This question, predicated upon simple logic, has dire effects any way it is answered. The “potential for destabilization” criterion suggests that prior to collective action the international community needs to rationalize the act of intervention. Specifically, what will most likely occur if the pieces are set in motion?

In an internal conflict such as Libya prior to Operation Odyssey Dawn, innocent individuals were dying and being subject to various forms of warfare. That is the nature of military conflict throughout man’s history: innocents will suffer, and some, at times many millions, will die for what appears to be arbitrary reasons.

The potential for destabilization criterion came about as a means of statistically looking at a military humanitarian intervention. To save lives, you must destroy lives. The general aim in most military conflicts

179. *Id.*

180. *Id.* If the conditions of the facilities are ignored, this process of detention for an extensive period of time is standard practice in many countries, including the United States, when deportation proceedings are placed against individuals. Thus, the time frame, though at first may seem excessive, it must be placed in context and in context is not an aberration internationally.

181. *Id.* Once again, surprisingly enough, many detention centers in the United States are privately run and staffed with government contractors. Thus, the issue that the Libyan government itself is not directly in charge of these in and of itself is not alarming. However, the lack of apparent government oversight should be of concern.

182. *See* STAR TREK II: THE WRATH OF KHAN (Paramount Pictures 1982). During his moment of sacrifice, Spock says: “Don’t grieve, Admiral. It is logical. The good of the many outweighs . . .,” to which Kirk replies, “the good of the few.”

is to minimize the destruction while optimizing the end results so as to achieve the necessary goal in its most prudent and effectual manner.

The United Nations alludes to the statistical analysis in its adopting of *The Responsibility To Protect*. “We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a *case-by-case* basis.”¹⁸³ Thus, some analysis will be performed prior the initiation of collective action. What will the analysis include? An examination of the short-term results of the Libyan conflict under the potential for destabilization criterion provides insight.

First, the international community must be satisfied that it has exhausted all plausible nonmilitary actions.¹⁸⁴ *Plausible* is the key word; if actions such as sanctions had no effect on curtailing possible or ongoing human rights violations, then they would not be deemed plausible. If sanctions had an effect, and could possibly be foreseen to end the human rights violations, then they could be construed as plausible. When discussing plausibility, the United Nations refers specifically to the “inadequacy” of peaceful means.¹⁸⁵

The issue presents itself as this: nonmilitary actions are usually not a quick fix, while military actions usually resolve pressing situations much quicker. Hence, military actions have an appeal when hard decisions must be made quickly. It is this approach which the potential for destabilization criterion seeks to quell: that a quick fix is the right fix. If there is a chance that nonmilitary actions will secure the same result, those nonmilitary factors should prevail.

This argument, however, stalls when the severity of the human rights violations being committed is extreme. As a result, the international community will be hard-pressed to sit idly by and allow sanctions or other nonmilitary actions to run their course while genocide continues to be committed.

Secondly, under the potential for destabilization criterion, the international community must take into account the quantifiable results of eradicating central governmental authority. The conflicts in Libya, Syria, and Iraq vary from that in Rwanda where genocide occurred. In Libya, Syria, and Iraq, although the root cause of each conflict was

183. U.N. Doc. A/60/L.1, *supra* note 109, ¶ 139 (emphasis added).

184. This is similar to the notion that one must exhaust all administrative remedies prior to proceeding with a federal lawsuit or international dispute resolution request.

185. U.N. Doc. A/60/L.1, *supra* note 109, ¶ 139. Also note, the United Nations' use of peaceful means is a misnomer, because there will always be incidental suffering linked to actions like sanctions, either through food shortages or local unrest. Hence, the authors prefer the terminology nonmilitary over peaceful.

different, each had at its core a desire to oust a leader, whether by internal forces, as was seen in Libya and Syria, or external forces, as was seen in Iraq. As such, in these types of conflicts the end goal is usually achieved by cutting off the head so that the body dies.¹⁸⁶ For instance, in Libya, NATO operations quickly ended after the death of Gaddafi.¹⁸⁷

Rwanda, however, arguably presented a much more complex scenario, because there was no “head” attached to a “body” that would allow for pinpoint execution of international goals through a single intervention, given that genocide was committed against Tutsis by Hutu extremists who were encouraged by military leaders.¹⁸⁸ Thus, it can be recognized that the ultimate failure to intervene in Rwanda by the international community may have been contributed to by the lack of a clear-cut directive, other than the need to end the violence. After all, military interventions are much easier to rationalize when an end result is foreseeable.

It can be argued, however, that any military intervention in Rwanda would have had a less destabilizing effect than such actions would have had in Libya because of the destructive consequences that result from compromising a country’s central authority structure. And this is centrally important to the entire discussion of humanitarian intervention. If the international community wishes to engage in a military action that could possibly result in the abrupt end of a government, they need to take into account all likely consequences before intervening.

In the absence of a central government, practical procedural safeguards cannot be put in place to protect civilians from internal threats. In Libya, it has been quite clear that without a central government domestic terrorism has been fostered. With increasing attacks aimed at both international and domestic targets, weaponry and better-trained insurgents escape into neighboring countries.

In short, whether the potential for destabilization outweighs the benefits of ending current human rights violations in a country requires evaluating whether waiting for plausible nonmilitary actions to work their course offers a better alternative to destabilization. There is no simple answer because the reality is that many individuals may die while waiting for nonmilitary actions to effectuate a beneficial result; however, the ensuing blood-stained victory of a military action and the destructive

186. Hadid & Michael, *supra* note 63.

187. See *Operation UNIFIED PROTECTOR Final Mission Stats*, *supra* note 74.

188. See generally Jennifer Gorskie, *The Limits of Humanitarian Intervention: Genocide in Rwanda*, 43 HARV. INT’L L.J. 589 (2002).

wake will not lead to a safe world or a more stable life for those who do survive.

Because one of the central pillars of the operation in Libya evolved into the ouster of Gaddafi, the U.S. and NATO operations arguably fail the potential for destabilization criterion. The short-term has shown the disastrous effects of removing a central government abruptly.

VI. CONCLUSION

This Article has tracked both the domestic and international implications of the jointly run U.S. and NATO operations in Libya. There is evidence to support that violations of both international and domestic law occurred. Specifically, President Obama violated his authority under the Constitution when he committed the U.S. Armed Forces to Operation Odyssey Dawn and thus, in conjunction, violated the War Powers Resolution. Even though President Obama did attempt to rectify similar violations by previous administrations, none of his administration's actions proved sufficient.

In addition, humanitarian intervention in the Libyan conflict cannot be justified under international law. Although the United States and NATO received approval from the United Nations, the approval alone, in and of itself, does not render such action justifiable under international law. The myriad of goals, the use of power, the destruction of authority structures, and the nature of the initial conflict itself support a conclusion that the U.S. and NATO operations were not justified under international law.