

# Responsibility to Protect: Lessons from the military intervention in Libya 保護する責任：リビア介入からの教訓

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## 要 旨

2005年、国連首脳会合は、「保護する責任」の概念を支持する成果文書に全会一致で合意し、これにより、国際社会は、大量殺戮、戦争犯罪、民族浄化および人道に対する犯罪から人々を保護することを助ける責任を有することを確認した。この成果文書に基づき、2011年3月、国連安全保障理事会は、リビアのカダフィ政権による攻撃からリビア国民を保護するため、「保護する責任」の名のもとで、国連加盟国に対し、リビアへの軍事介入の権限を認める安保理決議に合意した。結果として、安保理決議に基づく軍事介入が、リビア国民の保護にとどまらず、カダフィ政権の排除及び体制転換に結びつくものであったことから、「保護する責任」の正統性に疑問が残ることとなった。

本論文は、安保理決議採択に向けた一連のプロセスを整理し、「保護する責任」の概念のもとで武力を行使することの正統性及び合法性を検討する。そのうえで、国家による人道に対する罪に対して、「保護する責任」の名のもとで国際社会が正統かつ合法的に対応するために、継続して検討すべき論点につき考察する。

## Introduction

Modern humanitarian intervention was conceived in the aftermath of the Cold War. It has particularly developed over the last two decades, as illustrated by Kaldor, the modality of wars has changed from ideological to identity-based; and between states to state - non state actors. More importantly violence is directed towards civilians (Kaldor, 1999). Further, there have been increasing cases of states either losing control over its territories or monopolizing the legitimate use of physical force, as well as intrastate violence and civil war. Such phenomena have raised moral concerns among the international community, which brought to the United Nations (UN) World Summit to agree in 2005 that the international community had a responsibility to assist states protect their civilians from genocide, war crimes, ethnic cleansing, and crimes against humanity (UNGA, 2005), following a report of the International Commission on Intervention and State Sovereignty (ICISS) established by the Canadian government. Since then, the responsibility to protect (RtoP) has become an utmost objective in conflict situations.

A serious violation of the responsibility to protect civilians occurred in mid-February 2011, when Libyan dictator Moammar al-Qaddafi responded with force to anti-government demonstrators, its own people. In response to this incident, the United Nations Security Council (UNSC) adopted a resolution 1973 that authorized member states to exercise military intervention in Libya based on the RtoP doctrine. Before that,

the concept of RtoP had never been understood as an obligation upon states or the international community to take action towards particular situations; rather, the concept was recognized only as “political rhetoric (Stahn, 2007; Chesterman, 2011)”. Military intervention in Libya, in this sense, can be regarded as a milestone in the RtoP doctrine and legitimizing humanitarian intervention.

With reference to two resolutions that reflect the international commitment to protect civilians in Libya (Resolutions 1970 and 1973), this paper will consider the legitimacy and legality of the use of force under the RtoP concept, and further explore if the RtoP doctrine can be justified as a response of international community to a systematic crime against humanity by the authority of one state.

### **1. The legitimacy and legality of the use of force under the RtoP concept**

“Responsibility to protect” is not a legal term, it does not stipulate an obligation to act in a specific way. However, it still invokes a responsibility to respond to a situation. Chesterman links the RtoP concept with Article 99 of the UN Charter, which gives the Secretary-General the right to “bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security,” and argues that “the significance of RtoP is not in creating new rights or obligations to do ‘the right thing’, rather, it is in making it harder to do the wrong thing or nothing at all (Chesterman, 2011)”. Thus, immediately after the 2011 incident in Libya, the UN Secretary-General Ban Ki-Moon called for an end to the violence, and he also appealed to the UNSC to take actions, insisting that it was “the first obligation” of the international community to ensure the immediate protection of civilians, and “the international community has the responsibility to step in and take protective action in a collective, timely and decisive manner (Ban, 2011).”

Alongside the Secretary General’s first call, the leaders of European countries like the UK, Germany, France, and Italy also condemned the regime’s violence and the European Union agreed in principle to impose sanctions (The Washington Post (a), 2011). The Arab League decided that Libya would be excluded from its meetings (The Washington Post (a), 2011). Libya’s own delegation to the UN also described the regime’s actions as genocide and asked for international intervention (The Washington Post (b), 2011). The United States (US) President Barack Obama, on the other hand, seemed a little cautious at the outset. In a statement in the late afternoon of February 23, he said that he “strongly condemn[ed] the use of violence” but did not mention Qaddafi (The Washington Post (a), (b), 2011).

It was clear that Qaddafi had lost control of territorial integrity, and because of this fact, he could legally be described as no longer being the leader of the country (Cotler and Genser, 2011). Consequently, following the Secretary General’s appeal, the UNSC adopted Resolution 1970 on February 26, 2011, which imposed sanctions on Libya in the name of RtoP, including an arms embargo, travel ban and asset freeze, and referred

Qaddafi to the International Criminal Court on war-crimes charges. In defiance of this resolution, Qaddafi escalated his attack on the Libyan people. Finally, on March 12, the Arab League asked the UNSC to impose a no-fly zone over Libya in the hope of halting Qaddafi's attack on his own people.

The establishment of a no-fly zone means a military intervention, under which a ban is imposed on all flights of the Libyan government, though military flights by coalition forces are necessary to enforce the ban and to protect civilians. G8 member countries were divided over the issue (Broder, 2011). Germany was cautious because military intervention could result in an endless war; while Russia questioned whether the need for a no-fly zone had been established, and whether it had a strong legal basis (Broder, 2011). The US, whose military was already committed in Iraq and Afghanistan, was cautious about endorsing any action that could overstretch its capacity. For the same reason, the UNSC was also divided over a proposed draft resolution that called for a no-fly zone over Libya and authorized the use of force to halt the bombing of civilians by Qaddafi. Eventually, after the Qaddafi regime's continuous aggression, the UNSC adopted Resolution 1973 on March 17, establishing a no-fly zone and authorized "all necessary measures . . . to protect civilians and civilian populated areas under threat of attack" with abstentions from Russia, China, Germany, Brazil, and India. This resolution was significant in that "the Security Council helped bridge the gap between legitimate (ethically justifiable) and legal (legally authorized) intervention" (Doyle, 2011) in the name of RtoP.

The legality of humanitarian intervention often provokes a controversy between the contradictory norms of state sovereignty and of universal human rights. The maxim of international law expressed in the UN Charter is the concept of sovereign equality of all the UN member states (Article 2[1]), which establishes a substantial barrier against intervention by international community. The UN General Assembly Resolution 2625 also endorses the Charter Article 2[1], stressing that "no state or group of states has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state" and that armed intervention against the personality of the state is "in violation of international law." Doyle addressed this tension between the concept of RtoP and the UN Charter, arguing that the UN action against Qaddafi's regime should be considered in light of the UN Charter (Doyle, 2011). His point is that abuses of the UN Charter by member states, including the slaughter of civilians, do not automatically qualify as an "international threat" under the Charter.

However, at the same time, as Reisman argues, international law has installed a major imperative for intervention; that is, "internationally guaranteed human rights" (Reisman, 2004). The central concern of modern international human rights law is, according to Reisman's interpretation, how to transform regimes into governments whose methods of operation approximate human rights standards. In this view, the concept of RtoP reinforces the imperative for regime change. The approval of military

intervention in the name of the RtoP in Resolution 1973, in which sovereignty is understood as a concept associating with the state's capacity to provide effective protection to populations at risk, is therefore understood as a significant departure from traditional sovereign rights (Orford, 2011). The term "responsibility" would then mean that UN member states are conferred the power and authority to protect civilians.

The different positions of the Security Council members on the issue of no-fly zone over Libya nevertheless exposed its struggle to interpret these principles. The RtoP concept undoubtedly provided a normative authorization for certain kinds of interference. However, the constitutive question is that the conflict between these two principles—sovereign equality and RtoP—is indivisibly associated with the question of who decides what to be implemented by whom and to what extent. The recent interventions in Iraq and Afghanistan initiated by the US sparked a legal discord in the interpretation of the UNSC's authorization of the use of force. Those who advocate multilateralism raised their concerns about admitting the UNSC's authority to confer power to states, individually or collectively, or of agencies outside the UN to use force because it could mean returning authority to individual states to use force. This would go against the fundamental principle of the UN Charter, which was to give the authority of enforcement action to the UNSC (Mogami, 2007).

An attempt to reconcile these two contradictory principles can be recognized in the case of Libya. Resolution 1970 maintained "the Libyan authority's responsibility to protect its populations," and reaffirmed the UNSC's "strong commitment to the sovereignty, independence, territorial integrity and national unity" of Libya. The UNSC at this stage still tried to refer the situation to the International Criminal Court and to impose sanctions in accordance with the UN Charter, rather than conferring authority to individual member states or regional organizations. Despite authorizing member states to take all necessary measures through Resolution 1973, the UNSC again attempted to alleviate this problem by embracing the Arab League's calls for the imposition of a no-fly zone. By doing so, military intervention was associated with the maintenance of international peace and security in the region, and justification was shaped in line with the UN Charter. In this sense, therefore, neither the RtoP concept in general nor Resolution 1973 in particular has changed the standing prohibition on the use of force outside the UN Charter.

The question then remains as to who the agents of international humanitarianism are. From a legal perspective, as Libya did not attack any of the NATO member states, the legitimacy of NATO's involvement is questionable. For the maintenance of international peace and security, Chapter VIII of the UN Charter recognizes the existence of regional arrangements or agencies, which can be utilized by the UNSC. Although there are no clear criteria about what "regional arrangements or agencies" are, such arrangements or agencies are required to fully inform its activities to the UNSC under Article 54 of the UN Charter. Resolution 1973 also insisted that states or regional

organizations who take action shall inform the UN Secretary General and the Secretary General of the Arab League immediately of measures taken in their exercise. NATO, however, is not a Chapter VIII organization but a collective self-defense organization under Article 51 of the UN Charter, for the very rationale that it wanted to free its actions from prior authorization by the UNSC (Abass, 2011).

Resolution 1973, therefore, does not specifically refer NATO, and it was a clear indication that NATO was not intended as a beneficiary of a Resolution 1973 mandate (Abass, 2011). Rather, the Arab League was explicitly referred to as a primary beneficiary in Resolution 1973, by addressing “the States concerned in cooperation with the League of Arab States” as well as requesting the member states concerned to inform the Secretary-General of the Arab League as well as the UN Secretary-General of measures taken. Nonetheless, NATO has responded several times to UNSC resolutions and most likely will continue doing so; therefore, Resolution 1973 can be regarded as an effort to fill the gap between the law and practice.

## **2. Is RtoP genuinely about protecting innocent, unarmed civilians?**

Behind the necessity to map the legal basis for intervention in Libya is the constitutive question of justice regarding the RtoP concept. When Qaddafi’s atrocities in 2011 were first revealed, Obama was reluctant to intervene, making the point that the US would not take the lead in opposing Qaddafi. Even after Resolution 1973 was adopted, the US initially expressed great reluctance about being drawn into another armed conflict in a Muslim country (Bilefsky and Landler, 2011). Subsequently, Obama defended his decision, saying “there will be times when our safety is not directly threatened, but our interests and our values are (Obama, 2011).” In this part of the article, the moral aspect of the RtoP whether humanitarian intervention is a duty or benevolence will be discussed.

Walzer cites the Hebrew word *tsedakah*, which is commonly translated as “charity” but which comes from the same root as the word for “justice,” arguing that charity has to be governed by the demands of justice, and justice comes two-in-one in humanitarian intervention, particularly when it is for those without a state, living in a failed state, or in a state torn by civil war (Walzer, 2011). Additionally, given that there is no higher authority to which those people can appeal for help, he argues that humanitarianism should be considered in the context of a political project and be asked what justice is required in the two-in-one humanitarian intervention (Walzer, 2011).

Wars justified by moral claims of humanitarianism carry the problems of selectivity, political incentives, and cost-effectiveness (Bass, 2011). Specifically, while there are humans facing violence in many places, how one spot is chosen over another comes into question. A major reason for this stems from powerful political incentives to do humanitarianism on the cheap. From the experiences of humanitarian intervention such as in Somalia, Rwanda, Srebrenica, or recently in Iraq and Afghanistan, Western

leaders have learnt that once a one-sided slaughter becomes a two-sided war, it could be at risk of being imputed a moral equivalence, as when NATO leaders were accused of being the real war criminals for bombing Belgrade. Consequently, humanitarian interventions tend to use limited means while flirting with maximalist goals.

Due to such risks, at the outset of Qaddafi's violence against his people, some could argue that humanitarian intervention is only supererogatory, particularly when the costs are excessive both in terms of soldiers' lives and resources (Lango, 2010). This is also a reason why Walzer believes that humanitarian intervention needs to be considered in line with the two-in-one criteria. In order to assess the value of humanitarian intervention in Libya, it should be asked whether the interveners were acting justly and respectfully toward the Libyan people who required protection.

The above-mentioned ICISS report also advocated that any form of a military intervention initiated under the premise of RtoP must fulfill six criteria in order to be justified as an extraordinary measure of intervention, and it includes right intention, i.e., the primary purpose being to halt or avert human suffering (Lango, 2010). Contrary to this criteria, as Evans' rightly assessed, the UNSC consensus regarding when and how to apply RtoP in February and March 2011 had "evaporated in a welter of recrimination" about how NATO carried a mandate to protect civilians, when it became apparent that the intervention would settle for nothing less than regime change (Evans, 2012).

The difficulty of implementing RtoP is that there seems to be little, if any, criteria to distinguish between preventing assault against innocent civilians, which is what RtoP is for, and supporting Libyan rebels, which RtoP is not intended to provide. And some could defend the offensive nature of such effort for the reason that regime change would be the only way to effectively protect civilians, given Qaddafi's appallingly inhumane acts of violence (Findlay, 2011). The concept of RtoP, however, was envisioned neither as pro-democracy nor anti-democracy, and in line with Walzer's two-in-one criteria, regime change cannot be justified as it is an ideological, not humanitarian, project (Walzer, 2011). As a consequence, the events in Libya left a serious question whether the concept of RtoP was used not only to protect civilians but also to remove Qaddafi, which links to a regime change.

The result of Libyan case reflects on a factor slowing an international response to the present crisis in Syria (Rodrigues, 2012). Despite a rapidly climbing death toll, as many as 30,000 or more (Solomom, 2012), the Security Council remains almost completely paralyzed, due to Russia and China exercising the veto. One of the main reasons why Russia and China are vetoing any Security Council resolutions is because of the linkage between the RtoP doctrine and the subsequent regime change in Libya (Rodrigues, 2012). If the RtoP doctrine to be justified as a means to respond to protect innocent civilians from their own government, it is inevitable for the international community to further elaborate the modernity of implementing the doctrine through robust debate.

One response to this issue was initiated in November 2011, when Brazil circulated a document, titled “Responsibility while protecting: elements for the development and promotion of a concept” to the UN General Assembly (UNGA, 2011). In this document, Brazil argues that the RtoP concept needs a complementary set of principles and procedures. The key proposals of the Brazilian paper are for a set of fundamental principles to be fully debated and taken into account before the Security Council mandates any use of military force. It also recommends establishing enhanced monitoring and review processes throughout the entire length of the authorization which would enable such mandates are implemented to ensure responsibility while protecting.

Renewed consensus on the use of force in the name of RtoP in the cases of crimes against humanity by the authority of a country is going to be hard to achieve: it will certainly come too late to be very helpful in solving the present crisis in Syria. However, if the international community does not want to repeat the regrettable memories of Rwanda, Srebrenica or Kosovo, then, we are now facing the challenge in defiance of the UN Charter and every principle of a rule based international order, avoiding either a total and disastrous inaction in the face of mass atrocity crimes, or an action being taken to stop them without authorization by the Security Council.

## **Conclusion**

When the concept of RtoP first emerged in 2005, it was regarded as political rhetoric and did not impose any obligation upon UN member states. Resolutions 1970 and 1973, which authorized sanctions by the UN member states and regional organizations and the establishment of a no-fly zone over Libya, can be seen as milestones in the international commitment to justice in the name of RtoP, rather than a mere philanthropy. This led to in-depth questions regarding what “responsibility” means to the international community, both in light of legality and morality. One answer is that humanitarian intervention should be considered carefully in line with the two-in-one criteria of justice and morality. However, in situations where there are no agreements on what justice requires, and in situations where humanitarian intervention inescapably requires political choice, the implementation of “justice” tends to stem from arbitrary judgment by major power. The case of Libya highlights the need for further development of the additional principle and procedures in multilateral endeavors when any use of military force is mandated.

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