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Faced with humanitarian crises such as those occurring in Syria and Mali today, and in Libya in 2011, the response of the international community has not been consistent and raises many questions, both as to its adequacy, and to its legal foundation. The failure of the international community to adequately respond to the severe humanitarian crises of the early 1990s, especially in Rwanda and in the former Yugoslavia, has led to the formulation of the "responsibility to protect" (RtoP), which expands the pre-existing notion of humanitarian intervention. Focusing on the humanitarian intervention in Libya in 2011, this paper examines the question whether the RtoP doctrine can be considered as a principle of international law, and to what extent it has evolved into a norm of customary international law

as a result of state practice and *opinio juris*. It argues that to date, the RtoP, in spite of its political and moral underpinnings has not reached this status, and that in legal terms, the Libyan intervention cannot be considered as a genuine implementation of this principle. This paper recognizes the potential evolution of this principle consistently with the dynamic nature of international law, and suggests a methodological approach to assessing the prospect for a progressive development and consolidation of the principles of humanitarian intervention and RtoP as legal norms, based on a set of criteria, including *necessity* and *proportionality* of a forcible intervention, and of the *coherence and consistency* necessary for the consolidation of international practice into a legal norm.

Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali

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Responsibility to protect Use of force Libya Syria Mali

Introduction

The responsibility to protect has been the subject of a continuous debate in the United Nations, among states and scholars, and within civil society. This debate has old roots, going back to the “humanitarian interventions” of the European Powers in the Ottoman empire in the second half of the 19th century and in the early part of the last century and to the controversy over the use of military force to protect Christians in foreign lands where their life and economic interests were endangered (Simms and Trim 2011). The question has acquired more urgency in the past twenty years with the severe humanitarian crises of the early 1990s, especially the genocide in Rwanda and the ethnic cleansing in former Yugoslavia.

The seeming failure of the international community to adequately respond to these disasters has led to the formulation of the concept that states have a responsibility to protect the basic human rights of their own people, and that the international community has a responsibility to step in when the state fails to do so. This second aspect is not so new as often maintained. It expands and brings under a new label the old idea that the international community, collectively or through the action of individual states, may forcibly intervene within the sovereign sphere of other states, which are unwilling or unable to stop humanitarian catastrophes involving mass murder, starvation and crimes against humanity (Boisson de Chazournes and Condorelli 2006). While the modern concept of the RtoP is broader than the old doctrine of humanitarian intervention, because it comprises the duty to prevent, to stop and to remedy, it is clear that the former includes the latter, at least in the form of *ultima ratio* intervention to stop atrocities.

In the post World War II period the doctrine of humanitarian intervention has been the object of intense debate and of divergent positions on the part of Europe and the United States. At the heart of this debate lies the tension between two fundamental principles of international law: on the one hand, the prohibition of the use of force, and, the obligation to respect and protect human rights, on the other. The concept of the responsibility to protect (hereafter RtoP) has been developed with a view to bridging this tension.

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The humanitarian intervention in Libya in 2011 and, by contrast, the prolonged inertia of the international community *vis á vis* the Syrian crisis, have revived the debate on the question whether the RtoP is becoming a rule or principle of international law, and in particular, if it is evolving into a norm of customary international law as a result of state practice and *opinio juris*. The failure of the international community to respond to the atrocities occurring in Syria has dampened some of the early enthusiasm kindled by the authorized use of force in Libya. It has re-opened serious doubts about the admissibility and pit falls about the use of military force for humanitarian purposes. Ultimately, it has confirmed the lingering ambiguities of the RtoP as a normative principle. This paper aims to discuss these ambiguities in light of international practice, including the oscillating practice of the United States and of European countries, and, suggests a methodological approach to assessing the prospect for a further evolution and consolidation of the principles of humanitarian intervention and RtoP as legal norms.

To this end, the paper first recalls the conceptual evolution of the RtoP, outlining also the international legal context in which it is developing (section 1). The authors then critically examine the intervention in Libya, assessing whether it can be considered as an implementation of the RtoP (section 2). The paper then proposes some criteria for assessing the further development of humanitarian intervention and RtoP as legal norms, taking into account also the role of the law of state responsibility for violation of obligations owed to the international community as a whole (section 3), and concludes by applying them to the intervention in Libya. The respective attitudes of the US and the EU with respect to these evolving concepts are highlighted as well.

1. International Legal Context and Conceptual Evolution of the Responsibility to Protect

1.1. The International Legal Context

In order to understand the international framework in which the normative discussion about RtoP takes place, it is essential, first, to clarify the notion of humanitarian intervention that is relevant for our discussion, and second, to consider the international legal context of the issues at stake.

As for the notion, we can define humanitarian intervention as the forcible intervention by a state or a group of states, including by military means, in the sphere of sovereignty of another state in order to bring an end to massive assaults on human rights that the territorial state is not able or willing to stop. Under this definition, the hypothesis of intervention by consent of the targeted state is not taken into consideration.

As to the legal context, two principles of international law, as already mentioned, are of direct relevance for this discussion, which are both enshrined in the first Chapter of the UN Charter, on the one hand the prohibition of the use of force (Article 2(4)), and the protection of human rights on the other (Article 1(3)). Both principles have also been incorporated in corresponding norms of customary international law. The International Court of Justice (ICJ) has confirmed the prohibition of force in several judgments (ICJ 1949: 4, ICJ 1986: 14, ICJ 2003) and it has been recognized in international practice and literature as a norm of *jus cogens*, or peremptory norm of international law (ICJ 1986: 90, Alexidze 1981, Ronzitti 1986, Hannikainen 1988).

As for human rights, it is generally accepted that all states have an international obligation to respect human dignity and to refrain from committing gross violations of human rights such as genocide, torture, slavery,

systematic racial discrimination or severe and widespread deprivations of the rights and freedoms of their citizens. The International Court of Justice (ICJ) has recognized this general obligation as an *erga omnes* obligation on several occasions (Francioni 2005: 271-272, ICJ 2004, 2007 and 2012). Moreover, it has been confirmed and specified in international and regional human rights conventions, and further clarified by the monitoring bodies of these instruments. However, these human rights treaties do not permit or even mention the possibility of the use of force by another state, nor by a regional organization or the UN, to enforce respect of these rights. In this regard, also the International Law Commission, in its Articles on State Responsibility (ILC 2001), insists that the response that states may give to grave violations of international obligations owed to the international community as a whole, including gross violations of human rights, must be “lawful” and consistent with the UN Charter (Francioni 2005: 272).

In legal doctrine, and in the practice of states, several approaches have been developed on how to reconcile these two seemingly conflicting norms. According to the first doctrinal strand, international legal positivism, humanitarian intervention is only permitted when authorized by the Security Council under Chapter VII. This conclusion is based on a textual reading of the UN Charter and of a restrictive interpretation of *opinio juris* and international practice. (Joffe 1994, Hehir 2008). At the other end of the spectrum, there are various natural law theories, arguing that, when the state collapses or becomes itself the perpetrator of massive human rights violations, others have the right and perhaps the duty to intervene. Therefore, according to this view, humanitarian intervention is legal, even without the authorization of the Security Council (Tesón 2003 and 2005). Between these two opposite approaches, there is a third doctrinal strand, the “realist-constructivist” theory, arguing that within the process of dynamic evolution of international law, the formal breach for humanitarian purposes of the UN Charter prohibition of force, can trigger a new practice legitimizing humanitarian intervention as a collective response by members of the international community acting as “trustees of the general interest” (Cassese 1999, Francioni 2005). Humanitarian intervention would then be legally permissible, if its purpose is to fulfill *erga omnes* obligations and to stop international crimes, even without the authorization of the Security Council (Picone 1995). The difference between the second and the third doctrinal strands, is that the second relies on a moral-political theory justification, while the third is based on a legal argument.

In sum, there is no clear-cut, generally accepted answer to the question whether or not humanitarian intervention is permitted under international law. More important for the purpose of the present discussion, no common understanding on this issue emerges from the practice and legal opinion of the United States, on the one hand, and Europe on the other hand.

The EU and its member states have generally favored the cooperation with the United Nations and a multilateral approach in addressing humanitarian crises (Krause and Ronzitti 2012, Ortega 2005). Ever since the run-up to the 2005 World Summit, EU member states have been among the most fervent advocates of the RtoP at the UN level. (Wouters, De Man and Vincent 2012: 259). After that, the EU institutions have reiterated their commitment to the RtoP at several occasions (EU Council 2005, 2008a and 2010). Moreover, the RtoP was included in the European Security Strategy (EU Council 2008b). The European Parliament has most actively supported the implementation of the RtoP referring to it in several resolutions, such as those concerning piracy, violence in the DRC and Libya (EP 2009a, 2009b and 2011). However, the EU has failed to formulate a clear strategy on how the RtoP should be implemented in practice and it has not taken the initiative to take up a role of leadership in this field. This is especially due to the fact that EU procedures in the field of external relations still require unanimity in its main policy decisions, in particular when the use of force is at stake. Germany’s abstention in the Security Council’s vote on the intervention in Libya clearly demonstrated the lack of consensus within the EU in this respect. Further, the French military initiative in Mali at the beginning of 2013 has highlighted the lack of

common purpose of the EU in a crisis that had potential repercussions in Europe but which fell conspicuously short of showing a united European front in confronting by force the atrocities and the security threat posed by the radical Islamists in the African country. In this regard, the recently published report of the Task Force on the EU Prevention of Mass Atrocities (2013) assesses the EU's capabilities in the area of mass atrocity prevention and makes some recommendations for the EU in view of the best use of its tools for early warning and responding to mass atrocities in a timely and effective manner.¹

Even before Mali, we have witnessed occasional interventions by individual EU member states in Africa, such as the UK intervention in Sierra Leone in 2000 and the French intervention in Cote d'Ivoire in 2003. But all these actions have occurred in conjunction with territorial state's consent and/or authorization by the UN.

For its part, the US has leaned heavily, at least until recently, on the doctrine of humanitarian intervention to justify resort to force in the territory of another state. From the 1965 invasion of the Dominican Republic, to the intervention in Grenada in 1983, the military action in Panama in 1989, and Haiti in 1994, the United States have used humanitarian intervention alone or in conjunction with other legal grounds – notably protecting the life of citizens abroad and collective self defense under regional security treaties – as a legal argument to advance a “flexible” interpretation of Charter Article 2 (4). The high water mark of this instrumental interpretation of the Charter is the 2003 invasion of Iraq, a precedent that plainly attest the risks of degeneration of the doctrine of humanitarian intervention and its potential for abuse in the geo-political game of power politics.²

Starting with the Libyan intervention, and even more clearly with the military action in Mali, there seems to be a shift in attitude, with European states, notably France, and to a certain extent the United Kingdom, more inclined to take a leadership role in military interventions, and the United States remaining on the side line in as a “leader from behind”. However, this renewed military activism concerns individual member states, normally motivated by special national interest and former colonial ties. The EU has nevertheless played an active role in supporting the humanitarian interventions in Kosovo by NATO in 1999, and by deploying EU military troops to the Democratic Republic of Congo in 2003, in the context of a broader UN effort. Moreover, the EU has been especially active in post-conflict reconstruction efforts in these and several other countries. This may well be a field – corresponding to the “responsibility to rebuild” as identified by the ICISS (2001) – in which the EU could take a more prominent leadership role.

In light of this problematic and oscillating practice, one cannot but agree with Hurd who concludes, “[t]here is no consensus over the legality of [humanitarian] intervention, in part because there is no consensus over the sources of international law more generally” (Hurd 2011: 311). Indeed, the persistence of different views within the international community on the formation of international law, and in particular on the interpretation and the normative role of state practice, does not facilitate efforts to clarify the legality of humanitarian intervention. However, since international law is continuously invoked to justify international decisions, especially decisions involving the use of force, such efforts are all the more necessary.

1 The report recommends that the EU should make explicit its commitment to preventing mass atrocities; it should cultivate expertise in the area of mass atrocity prevention and warning; the EU's warning-response system should be strengthened to improve early action against long and short-term mass atrocity risks; the EU should build on its strengths in structural and direct prevention by employing a mass atrocity lens across all its relevant activities, including its trade and development policies; the EU's capabilities to react quickly to mass atrocities should be improved, and the EU should cooperate more closely with other actors to prevent mass atrocities.

2 The divergence of views between the US and Europe on the admissibility of unilateral humanitarian intervention is reflected in a synthetic but exemplary manner in the debate between the (then) Oxford professor Ian Brownlie - denying the lawfulness of humanitarian intervention under international law - and the US professor Richard Lillich, an advocate of its legitimacy (Brownlie 1974, Lillich 1974).

1.2. Conceptual Evolution of the Responsibility to Protect

Several events have influenced the development of the RtoP. First, the genocide, which occurred in Rwanda in 1994, revealed the absence of political will of states to intervene and the lack of a sense of legal obligation to do so. Secondly, the inability of the UN peacekeeping force UNPROFOR to prevent the massacre at Srebrenica, Bosnia, in 1995 clearly pointed to the inadequacy of UN intervention. Thirdly, the NATO intervention in Kosovo in 1999 remains an example of unauthorized and still controversial regional intervention. In 2000 the Canadian government established the International Commission on Intervention and State Sovereignty (ICISS), aiming to propose ways to respond to gross and systematic violations of human rights. The ICISS report outlines what the RtoP should entail (ICISS 2001), identifying three aspects: the responsibility to prevent, the responsibility to react, and the responsibility to rebuild. Although the ICISS states that the Security Council should be the principal authority to decide on humanitarian intervention, it also mentions the possibility for the General Assembly to take such a decision. Moreover, regional organizations could, under certain conditions, undertake an intervention and seek retrospective legitimacy for such action from the Security Council. The report was welcomed by Secretary-General Kofi Annan, who urged the world to “move towards embracing and acting on the ‘responsibility to protect’” (UN 2005a: para 132).

In 2005, the World Summit endorsed the RtoP concept, even though its final acceptance had to overcome the opposition or reservations of many states,³ and in the end the definition and scope as laid down in its Outcome Document (UN 2005b: para 138) are far more restrictive than those proposed by the ICISS. The World Summit has expressed its “preparedness” to take measures based on Chapter VII, but neither did it recognize a “right” of humanitarian intervention outside of the Charter system, nor a “duty” to do so within the Charter system. The Security Council subsequently endorsed the Outcome Document (UN 2006: para 4). While UN Secretary-General Ban Ki-moon strongly supported the concept of the RtoP (UN 2009a), in a debate held in 2009, the General Assembly was very much divided. Nevertheless, the General Assembly took note of the Secretary-General’s report and decided to continue its consideration of the RtoP (UN 2009b).

The reservations that emerged in the UN debates and the continuous hesitance among states to accept the existence of a responsibility, in the sense of a legal duty, to protect individuals against massive human rights violations, clearly demonstrates that to date, much uncertainty remains about the legal foundation underlying this new doctrine. We shall now turn to the question what lessons can be drawn from the 2011 intervention in Libya, both with regard to the implementation of the RtoP, and to its normative content.

2. The 2011 Intervention in Libya

2.1. Developments Leading to the Adoption of SC Resolution 1973

The human rights situation in Libya had been a concern of the international community for many years. In spite of its poor human rights record, Libya had been elected as a member of the UN Human Rights Council (HRC) in March 2010. In January 2011, the HRC considered a periodic report from Libya, which led several members of the Council, including the US and EU Member States, to recommend measures in relation to, *inter alia*, the

3 In particular, Algeria, Belarus, China, Cuba, Egypt, Iran, Pakistan, the Russian Federation, Venezuela, and even the United States, whose delegate, John R. Bolton, stated that his country would “not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law” (US 2005).

death penalty, torture, enforced disappearances and the freedoms of expression and association (UN 2011a).

Shortly afterwards, anti-government protests in Libya were brutally repressed by the armed forces, leading to a rapid escalation of the violence. In response to this situation, the Security Council adopted a first resolution deciding *inter alia*, to impose an arms embargo, to freeze Libyan assets abroad, and to refer crimes committed by members of the government of Colonel Muammar al-Qadhafi, and some of his family members, to the International Criminal Court (ICC) (UN 2011c). In the same month, the rebel groups proclaimed the Libyan Transitional National Council as their common representative body. Within a few weeks, the violence had further escalated and Colonel Qadhafi publicly announced his determination to kill all Libyans who had taken and would take up arms against the government. In the face of this humanitarian crisis, the Security Council adopted Resolution 1973 (UN 2011b), declaring a no-fly zone over Libya and authorizing the use of all necessary measures, including the use of force under Chapter VII of the Charter, to protect civilians. This resolution was adopted with abstentions from two permanent members of the Council, Russia and China, and from a number of other members including Brazil, India and Germany.

Following this resolution, a military intervention was carried out in several stages. After an initial action by the US, France and the UK, the *Operation Unified Protector* was launched under the umbrella of NATO. The legal basis of these interventions is primarily the authorization by the Security Council in Resolution 1973, stating, in its preamble, that it is acting on the basis of Chapter VII of the UN Charter (UN 2011b: Preamble, last para).

2.2. Resolution 1973 and the Responsibility to Protect

The authorization of the use of force to protect Libyan people against human rights violations by their own government has been welcomed by some states as evidence of the acceptance of the RtoP. Significantly, Secretary-General Ban Ki-moon, stated that “[r]esolution 1973 affirms, clearly and unequivocally, the international community’s determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government” (UN 2011d).

However, many scholars have drawn more cautious conclusions, pointing, on the one hand, to the extremely exceptional circumstances of the Libyan situation, enabling the Security Council to act (Bellamy 2011) and on the other hand, to the absence of any claim by the Council itself that it had acted on the basis of the responsibility *of the international community* to protect, as a normative concept (Chesterman 2011, Welsh 2011, Hehir 2012, Mohamed 2012).

As for the exceptional circumstances, the Libyan crisis indeed combined a number of factors, which are not likely to occur simultaneously in another situation again (Bellamy 2011: 265-266). First, the threat of committing mass atrocities against civilians was explicitly made by Qadhafi himself, making this threat imminent and unequivocal. Second, the time frame between the beginning of the violence and its escalation into an outright civil war was very short, leaving little time for extensive deliberations in the Security Council. Third, regional organizations played a significant role; the Gulf Cooperation Council (GCC), the Organization of the Islamic Conference (OIC) and the League of Arab States (LAS) all called for a no-fly zone. This clear position taken by several regional actors is likely to have paved the way for Russia and China not to veto the Resolution. These factual circumstances clearly facilitated the decision-making process in the Security Council.

Moreover, Resolution 1973 does refer to the RtoP, but only to its first element, namely the responsibility of the state to protect its own population, which is a perfunctory statement, since this responsibility is already part of the state obligations under the Charter and under international law (UN 2011b: Preamble). The decision not to mention the second element of the principle, namely the responsibility of *the international community* to protect these civilians, shows that this was not considered as the consensual normative basis of the intervention.

Another fact to be taken into account is the abstention, besides China and Russia, also of Germany, Brazil and India. One could argue that in view of the extreme importance attached by several states – in particular Russia and China – to the principles of sovereignty and non-intervention in internal affairs – the decision to *abstain*, instead of *voting against* Resolution 1973, could be seen as a significant step towards accepting the use of force to stop a humanitarian crisis. This could have been a valid argument in 2011 at the time of the adoption of Security Council Resolution 1973. But it loses much of its strength in light of the unfolding Syrian crisis, which, in spite of the immense and prolonged humanitarian tragedy it has produced, in many ways far worse than the one experienced in Libya, has met a stubborn refusal of Russia and China to acquiesce with another Security Council Resolution authorizing military intervention to save the life of civilians. There is general consensus today that the inaction of the Security Council, and especially the unwillingness of China and Russia to consent to the authorization of forcible intervention in the Syrian crisis is due, at least in part, to the destabilizing effects of the military campaign and the perceived *ultra vires* use of force in Libya, in the sense of having used military force and conducted the hostilities, not only to save the life of civilians and to facilitate a cease fire, but to effectively bring about a regime change (Ronzitti 2012), as has ultimately happened.

From the elements set out above, it seems to be quite clear that many ambiguities still surround the humanitarian justification for the Libyan intervention. Even the most supportive states of the intervention (in particular the US) have not explicitly justified their decision to support this intervention on the basis of a *normative duty*, which is the essence of the RtoP.

This leads to the question whether the Libyan precedent, even if it cannot be considered a genuine manifestation of the RtoP, does demonstrate, nevertheless, that military intervention has become an acceptable exception to the prohibition on the use of force in cases of compelling humanitarian necessity. This question will be considered in the next sub-section.

2.3. Resolution 1973 as Evidence of State Practice on Humanitarian Intervention

As mentioned above, since the beginning of the 1990s, the Security Council has, on several occasions, authorized the use of force with the aim to protect civilians in humanitarian crises. In some of these situations, military intervention was decided *with the consent* of the (interim-) government of the state concerned. This was the case in East Timor (1999) and Sudan (Darfur, 2006). In other situations the interventions were decided and carried out without the consent of the government. This occurred in Somalia (1992), where there was no government in place, Rwanda (1994), Bosnia (1992-1993), and in Libya, which was undertaken against the will of the ruling regime. Even though the consent of the government “is not legally significant when it is authorized under Chapter VII of the UN Charter” (Chesterman 2011: 280), the existence of such consent has in practice greatly facilitated the decision-making in the Security Council.

NATO's intervention in Libya is indeed an example of international state practice, authorized by the Security Council, of accepting derogation from the prohibition of the use of force in favor of the protection of human

rights, through humanitarian intervention. It is an even more significant example of such state practice, because it was decided against the will of the government in place. This state practice, as evidenced by the examples mentioned above, can be assessed in two distinct normative perspectives: on the one hand, the dynamic evolution of the law of the Charter concerning the justification for the use of force; and on the other hand, the progressive development of customary international law on the subject. We will consider the latter aspect of the question in the next section of this paper.

As for the first aspect, all we can say is that the Libyan precedent confirms a practice started by the Security Council with the first Gulf War (1991), whereby this UN body assumes a normative role, rather than a purely operational role, in dealing with international crises. This means that the Security Council becomes a law maker (as in the case of the constitution of international criminal tribunals under Chapter VII of the Charter) or an interpreter of the law, as in the Libyan case, in which it interpreted the law so as to hold that the killing of civilians by Qadhafi constituted a breach of the peace under Chapter VII of the Charter. An evolutionary and expansive interpretation of what constitute a threat or a breach of the peace may therefore justify authorization for collective intervention under Chapter VII even in situations of internal conflict or humanitarian catastrophes, which have no genuine repercussion on international peace. In the long run this expansive trend may lead also to the understanding that even the destruction of cultural and natural sites of outstanding universal value may be a factor in authorizing forcible action to protect them. In this respect, one must recall that, in this increasingly interconnected world, it was shocking for the international community that warlords in the ongoing conflict in Mali had intentionally destroyed sacred shrines in Timbuctu, a UNESCO world heritage site of outstanding universal value for humanity as a whole. This has led to a call by UNESCO Director General Irina Bokova for a stronger response to such barbarity, not only in terms of criminal prosecution,⁴ but also in the form of building “stronger ‘coalitions for culture’ through tighter coordination with all partners involved, including armed forces” (Bokova 2011).

The evolutionary interpretation of the Charter goes in the direction of a broader expansion of the power of the Security Council in the determination of the conditions that may trigger resort to force under Chapter VII to protect civilians from massive violations of human rights. As argued by Amnéus (2012: 161), a legal right has evolved permitting the Security Council to decide on military enforcement measures to protect civilian populations within a state. “This legal right has been formed by evolutionary interpretation and the informal modification of the UN Charter by subsequent practice of the Council, through its extensive interpretations and application of what constitutes ‘a threat to the peace’ under Chapter VII (Article 39) of the UN Charter”.

More controversial, and from a legal point of view more compelling is the second aspect of the question, that is whether a rule of customary law is also emerging permitting humanitarian intervention *without* the authorization of the Security Council. We turn now to the analysis of this question.

3. Assessing the Evolution of Customary Law on Humanitarian Intervention

Almost fifteen years have passed since the NATO Alliance resorted to military force in Kosovo without Security Council authorisation. In the aftermath of that controversial military campaign a debate ensued over whether

⁴ The intentional destruction of Timbuctu is already a war crime under existing international law and this has been confirmed by the chief prosecutor of the International Criminal Court Fatou Bensouda.

the event marked a turning point in the law on humanitarian intervention and a departure from the strict conditions established in the UN Charter for the permissible use of force in international relations. One view was that even though the intervention could be justified on compelling moral and political grounds, Kosovo should not be considered a precedent for eroding the norms of international law on the prohibition of force and the principles laid down in the Charter (Simma 1999). Other influential scholars argued instead that although the non authorised NATO intervention constituted a breach of the UN Charter, such breach could be seen as evidence of the emergence of a new doctrine of humanitarian intervention that would legitimize the use of force to impede a state from committing, or allowing the commission of atrocities, when the Security Council is incapable because of the veto to respond to the crisis (Cassese 1999: 23). Other authors took the view that, in principle, the breach of the existing rules of international law on the prohibition of force could lead to a transformation of the law so as to become more consistent with the fundamental commitment of the UN Charter to human rights, but concluded that, on factual and legal grounds, the NATO intervention lacked the basic requirement of *opinio iuris* for the emergence of a new norm of international law (Francioni 2000 and 2005). Over a decade from these events, what progress can we find in the evolution of international law on this matter?

From a technical - legal point of view, two elements must be considered in addressing this question. The first element is the inclusion in the Articles on State Responsibility, adopted by the International Law Commission in 2001, of a provision that contemplates the right to adopt countermeasures by states other than the “injured state” in situations’ where the wrongful act consists of a breach of an international obligation which is owed to the international community as a whole (ILC 2001: Art. 48 (1:b)). The second element is the already discussed elaboration of the RtoP doctrine.

The first element has been rather neglected in the abundant literature on humanitarian intervention. But its relevance to the topic under discussion cannot be downplayed. The international wrongful acts to which any initiative of humanitarian intervention aims to respond constitute grave breaches of human rights such as genocide, ethnic cleansing, massacres of civilians, mass starvation and crimes against humanity. These are by definition breaches of obligations “owed to the international community as a whole”. The ILC’s codification of the law on state responsibility makes it clear that such breaches of international law are not the exclusive concern of the state or states which are directly injured – for example as national states of individuals who are victim of the abuses perpetrated by the target state. On the contrary, it assumes that they are a collective concern of the international community as a whole and, therefore, any state other than the injured state(s) can be an agent for the enforcement of the international responsibility arising from the breach of such obligations. This provision gives substance to the idea of *erga omnes* obligations inaugurated by the International Court of Justice in its 1970 judgment in the *Barcelona Traction Case* (ICJ 1970) and later reinforced by the idea of an aggravated responsibility for international crimes, as elaborated by the seminal work of Rapporteur Ago and as finally included in the ILC Articles under the extenuated heading of “serious breaches of obligations under peremptory norms of general international law”(ILC 2001: Art. 40-41). The problem with the provision of article 48, however, is that it is an incomplete normative construct: it entitles any state other than the injured state to “invoke” the international responsibility of a state committing or allowing the commission of atrocities in its territory but it does not go as far as to recognize a right – let alone a duty - to “enforce” that responsibility by forcible measure, including the use of force. Significantly, Article 48 para 2 provides that any state other than the injured state may claim from the responsible state:

- a) cessation of the internationally wrongful act, and assurances and guarantees of non repetition; and
- b) performance of the obligation of reparation in accordance with the preceding articles.

No mention is made of forcible countermeasures against the responsible state. On the contrary, Article 50 of the ILC Articles reiterates that countermeasures adopted against the responsible state shall not affect “the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations”. If we consider that the ILC Articles were adopted shortly after the NATO intervention in Kosovo and in the wake of an extensive debate about the permissibility of the use of forcible intervention to stop massacres in situation where the UN Security Council was unable or unwilling to intervene, we cannot help to conclude that customary international law, as seen by the ILC in 2001, did not consider the threat or use of force as a legitimate countermeasure to stop a state from committing large scale atrocities.

And then comes the second element: the RtoP doctrine. As we have seen in the preceding sections, this doctrine emerged from the disturbing dilemma experienced at the time of the Bosnian massacres, the East Timor large scale killings and the Kosovo crisis, whether to strictly adhere to the precept of the prohibition of force, with the risk of letting atrocities continue, or accept a breach in the rule prohibiting force, as well as in the principle of sovereignty, and recognize an entitlement and a duty of the international community to protect against massive assaults on human rights. Like the abovementioned provision of Article 48 of the ILC Article, it is fair to say that also the RtoP reveals an unfinished project. Beyond the rather vague and inconclusive statements of the UN Secretary General (UN 2009a) on the means to enforce the RtoP, it remains clear that neither in the Outcome Document nor in the ensuing debates in the General Assembly, resort to forcible measures to stop humanitarian tragedies is considered as a legitimate option outside of the Charter system and in the absence of Security Council authorisation. So, we are back to square one: what can we do in the case in which the Security Council is not capable of taking action because of the veto of one or more of its permanent members as in the present situation of Syria with the prolonged humanitarian tragedy affecting thousands of civilians in that country?

No satisfactory answer can be given yet to this question on the basis of substantive rules of international law. The rules on the prohibition of force and the Charter system of Chapter VII giving to the Security Council the monopoly on the use and authorization of the use of force remain unaffected by the moral and political claims of humanitarian intervention and RtoP, notwithstanding the preeminent role that human rights have as fundamental principle of the UN Charter. What we can do, however, is to try to address the question at a “procedural” level, that is by indicating a method and a process through which the two above “incomplete” projects of Article 48 and of RtoP may be brought to completion.

In this perspective, the first step to be taken consists in making every possible effort as scholars and practitioners of international law to the effect that the principle enshrined in Article 48 of the ILC Draft does not fall into oblivion or, even worse, is simply treated as an idealistic and utopian expression of an imagined international community which, when confronted with the hard reality of international politics, dissolves to leave on the ground only the states and their national interests. The idea that certain wrongful acts constitute a breach of obligations owed to the international community as a whole represents a fundamental departure from the old structure of international law as a law of mere coexistence and marks the evolution of the international legal order toward a law of interdependence and moral and intellectual solidarity. It is hard to conceive that such evolution may be blocked today in the face of the social, economic and cultural context of globalisation. It would be inconsistent with the widening awareness that human rights represent the new cosmopolitan language that drives change in many traditional societies, that the sphere of criminal justice transcends the boundaries of the state, and that the preservation of certain global environmental and cultural goods require concerted action for the preservation of the material and spiritual welfare of humanity. If this is true, then the idea that the fundamental interests of the international community may be served also by the individual or

collective action of states, which are not directly and subjectively injured by the conduct of a transgressor state can find support and practical concretisation in a dynamic and expansive interpretation of Article 48 of the ILC Articles on State Responsibility.

But this is not enough. Because it is clear that the main objection to the adoption of forcible countermeasures outside the constitutional scheme of the UN Charter is the potential destructive effect on the guarantees of peace and security set out in the Charter and the likelihood of abuses of humanitarian intervention. It is to counteract this risk that we need a set of criteria to employ in determining the conditions under which a departure from the formal path of international legality may be legitimate and desirable in order to stop or impede the unabated continuation of humanitarian catastrophes. It should be noted that forcible intervention can also be legitimate when systematic violations of human rights are committed by armed groups, including rebel movements, and the state is not willing or able to prevent or stop these violations.

The first and most important criterion in this respect is that of *imperative necessity*. This requirement must be understood in two dimensions. The first is the factual dimension, i.e. as the exhaustion of alternative options to save the lives of innocent people, such as diplomatic and economic sanctions. In the Libyan case the element of necessity became evident when, as we have seen in section 2, all efforts deployed at finding a diplomatic solution and the pressure exerted by the wide ranging economic sanction did not stop, but rather exacerbated the brutality of the governmental repression and killing of civilians. The second dimension is legal, i.e. the necessity of overcoming the legal obstacle of the Security Council inability to act, the general prohibition of the use of force and the principle of sovereignty and non intervention. This second dimension of necessity can be ascertained also in light of the efforts deployed, prior to the resort to force, by intervening states to link their action to the Security Council and to make every attempt to secure authorization.

The second criterion for evaluating whether a formally “illegal” military intervention for compelling humanitarian reasons can strategically contribute to the progressive development of international law is the condition of *coherence*. In our perspective, the rationale for allowing an exceptional derogation from the prohibition of force rests in the fundamental commitment to remedying the deficiency of international law with regard to the effective protection of human rights. Advocates of this commitment and of humanitarian intervention should be expected to up-hold and practice it consistently in different occasions and different parts of the world. This is not to say that states convinced of the desirability of improving the performance of international law in relation to humanitarian crises should regularly intervene in all human tragedies of the world. It simply means that proponents of humanitarian intervention should avoid contradicting their professed commitment to the virtue of improving the law by acts or omissions that amount to support or actual complicity with governments that commit massive violations of human rights within their sphere of authority. This is not only a moral requirement: it is a *legal* requirement to the extent that the constitutive process of a new customary norm of international law the elements of *opinio iuris* and consistency of practice are needed. One cannot see how a sense of lawfulness of non authorised acts of humanitarian intervention could be born out of a practice of states that, in their own interest support or condone the same massive violations of human rights by other states against which the new permissive rule of humanitarian intervention could be invoked.

A third criterion to gauge the legitimacy of the use of force to stop massive violations of human rights is the principle of *proportionality*. This principle would require that the use of force be strictly limited in scope and intensity to 1) what is absolutely necessary to achieve the stated goal of protecting the life and security of innocent victims, and 2) to set a precedent to promote the objective of improving the overall legitimacy of the international system by permitting an exceptional recourse to force to halt unacceptable atrocities. This

criterion would not be met were the use of force be so excessive as worsen, rather than improve, the plight of the victimized population or go beyond the legitimate objective of enforcing human rights, to pursue a policy of regime change, occupation or partition of the target country. The monitoring and implementation of the principle of proportionality, ultimately would fall upon the Security Council, in cases in which resort to force occurs under UN authorization, or upon a specific acting organisation, such as NATO, and, in case of unilateral intervention, upon the intervening state, which would remain accountable for the legality of its use of force under the proportionality principle.

Conclusion

The application of the above criteria to the Libyan intervention and to the practice evolved suggests the following conclusions.

As to the element of *necessity* for the armed intervention, it can be considered satisfied, independent of the overriding effect of Security Council authorisation. The exhaustive deployment of efforts to find a peaceful solution to the crises becomes clear when we consider that the UN Secretary General had sent a Special Envoy to Libya to seek a settlement and end the hostilities; the African Union had sent a mission to Libya with concrete proposals for starting a dialogue between the Government and the rebels; South Africa, as well as Turkey, with the support of Russia, had made several attempt to mediate, without results; the Organisation of Islamic Conference had intervened with proposals for a political solution. The Security Council itself had stressed in the need for a political solution respectful of the “legitimate demands of the Libyan people”. All this was to no avail. No reasonable alternative to recourse to forcible intervention seemed to be available.

The second requirement, i.e. *proportionality*, raises more questions. First, the rationale for intervention and the stated purpose of Resolution 1973 were “to protect civilians and civilian populated areas under threat of attacks” (UN 2011b: para 4) by means of a “ban on all flights in the air space of the Libyan Arab Jamahiriya in order to protect civilians”(UN 2011b: para 6). The use of force by the NATO coalition went beyond this narrow objective. It did not remain confined to the seeking of a cease fire: it involved extensive bombing of land targets, even in the absence of an actual or potential danger posed by these land targets to the life of civilians (Vierucci 2012). More important, the overall objective of the war soon became the crushing of the Libyan regime, which involved substantial aid to the rebels and eventually culminated in the summary execution of the Libyan leader. Perhaps, it would have been difficult to find a different solution with a government whose members had been indicted by the International Criminal Court for international crimes. Yet, this excess of force unavoidably weakens the element of innocence implied in the characterisation of the intervention as “humanitarian”.

Finally, the element of *coherence*, or if we prefer of *consistency* is totally lacking in light of the sequence of events surrounding the Libyan conflict. The Syrian humanitarian catastrophe is going on unabated, with tens of thousands of victims, mostly civilians and almost a million of displaced persons whose fate remains uncertain. In this situation, the Security Council has not authorized a humanitarian intervention, nor has any initiative based on the virtuous idea of the RtoP been forthcoming after two years of relentless killing and human misery. This is all the more discouraging from the point of view of a *coherent* and progressive development of international law, because the Syrian conflict is not disconnected from the Libyan crisis: it is part of the same movement traversing the Arab world and aimed at reforming their states in the sense of freeing them of tyrannical governments and of establishing democratic institutions and conditions of human freedom.

Nor should we be tempted to see an element of continuity and consistency in the recent authorisation by the Security Council to intervene in Mali. Even if the humanitarian considerations for such intervention are real and compelling in light of the documented atrocities committed by the radical Islamists that have occupied the North, the military action undertaken by France occurred with the consent of the Malian government and with the blessing of the Security Council and the EU. Therefore, it cannot be considered as a confirmation of the legitimacy of the Libyan intervention. On the contrary, it can rather be seen as proof of its flaws, if not of its ultimate failure. The Libyan war of liberation started with a split within the EU – with Germany refusing to participate in the military campaign - and ended with the killing of the US ambassador on September 11, 2012, the attempted killing of the Italian Consul in Benghazi in January 2013, the transfer of much of the heavily armed Qadhafi's militia in neighbouring Mali where another security and humanitarian crisis has since been festering.

All this considered we cannot share the triumphant views expressed in literature about the Libyan intervention as a “constitutional moment” signalling the consolidation of the doctrine of humanitarian intervention and RtoP (Powell 2012, Hilpold 2012). No real progress has been made so far in the legalisation of the use of force in the name of humanity. The road to be taken has been indicated by Article 48 of the ILC and by the elaboration of the RtoP doctrine. But the journey toward a progressive reform of the international system remains long and unpredictable.

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THE PROJECT

In an era of global flux, emerging powers and growing interconnectedness, transatlantic relations appear to have lost their bearings. As the international system fragments into different constellations of state and non-state powers across different policy domains, the US and the EU can no longer claim exclusive leadership in global governance. Traditional paradigms to understand the transatlantic relationship are thus wanting. A new approach is needed to pinpoint the direction transatlantic relations are taking. TRANSWORLD provides such an approach by a) ascertaining, differentiating among four policy domains (economic, security, environment, and human rights/democracy), whether transatlantic relations are drifting apart, adapting along an ad hoc cooperation-based pattern, or evolving into a different but resilient special partnership; b) assessing the role of a re-defined transatlantic relationship in the global governance architecture; c) providing tested policy recommendations on how the US and the EU could best cooperate to enhance the viability, effectiveness, and accountability of governance structures.

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