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LIBYA: OUR FIRST COSMOPOLITAN WAR?

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The killing of Osama bin Laden provoked much cheering -- more than enough to drown out legalistic cavils from Human Rights Watch and a variety of international law scholars (notably more in Europe, than in the United States).

NATO, it seems, does not expect the same leniency toward its intervention in Libya. Though the government in Tripoli has claimed that members of Gaddafi's family have already been killed in airstrikes, NATO officials have repeatedly insisted they are not directly targeting Col. Gaddafi.

A different fate seems to be reserved for the Libyan dictator. On May 16—nearly two months after the start of NATO's air campaign—the Prosecutor of the International Criminal Court announced that he was seeking an indictment of Muammar Gaddafi for war crimes committed in the current conflict.

Having sent Navy SEALs to kill bin Laden, do we propose to deal with Gaddafi by unleashing fierce lawyers at the Hague? But perhaps that is too fanciful. It is not likely that NATO air strikes will deliver Gaddafi into the custody of the ICC.

Still, the ICC Prosecutor's announcement underscores one of the exceptional features of NATO's campaign. It is arguably the first military conflict—certainly the first fought by the leading participants from the West—fought under the legal supervision of the International Criminal Court.

The ICC's role in the background may explain the extraordinary restraint so far shown by NATO in its conduct of this conflict. Or perhaps the involvement of the ICC is merely a symptom of larger tendencies. It was a February decision of the UN Security Council that invited the Criminal Court to take jurisdiction over events in Libya. Any one of the leading NATO powers (the United States, Britain and France) could have vetoed that resolution but they all welcomed the intervention of the international prosecutor. The United States did insist on excluding itself (and other non-parties to the ICC treaty) from the resolution conferring special jurisdiction on the Court. Other NATO states supported wording that would cover their own forces in Libya.

Proximate and ultimate motivations may be disputed, but the consequences are clear. We are now fighting—or at least, conducting some sort of armed intervention—by very constraining rules.

NEW RULES FOR WARFARE

The Statute of the International Criminal Court, adopted at a conference in Rome in 1998, incorporates—usually verbatim—prohibitions formulated in previous international treaties on the conduct of war. Some provisions reflect long-established principles, codified at the Hague Peace Conference in 1899 and already then considered part of the ethic of professional soldiers. So, for example, it is a crime to kill enemy combatants who have already surrendered or to aim attacks at hospitals or “places where the sick and wounded are collected.”

Other crimes, which can be prosecuted by the ICC, reflect more recent and more ambitious standards of warfare. The most important are standards set out in Additional Protocol I to the Geneva Conventions, negotiated in the mid-1970s. The conference which adopted these standards was the first in which developing nations (or as they were then called, Third World

nations) formed the majority of participants. In the name of humanitarian concern, they imposed severe constraints on the advantages conferred by air power and other advanced weaponry—the advantages which less developed nations, of course, were less able to deploy. By contrast, guerrilla fighters were accorded new protections, even when they failed to observe customary and still acknowledged rules of war, such as the obligation not to conceal themselves among civilians.

Following API, the Statute of the ICC brings within the definition of “war crimes” not only attacks on civilians but intentional attacks on “civilian objects”—that is, buildings or equipment not directly related to military activity. Similarly, “destroying or seizing the enemy’s property” is a crime unless “imperatively demanded by the necessities of war.” The list of crimes does also include “utilizing” civilians “to render certain points, areas or military immune from military operations.” But such prohibited deployment of “human shields” does not relieve the attacker of responsibility for causing harm to civilians—or even to “civilian objects”: “intentionally launching an attack” causing harm to civilians or “damage to civilian objects,” remains a war crime, when such harm or damage “would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

What all of this means is that commanders must focus on limiting the enemy’s immediate military capacities, but not seek to impose larger costs on the opposing country or government in the conflict. Does NATO take this seriously? It seems to take these rules very seriously indeed.

At a parliamentary hearing on April 27—nearly six weeks into the conflict—Britain’s Defence minister, Liam Fox, was asked about possible judgments against British personnel by the ICC. He insisted that “we would set our assessment of acceptable civilian casualties as close to zero as was possible to be.” A British military aide at the hearing insisted that, when it came to decisions about “deliberate targeting,” “we address very carefully the issues of necessity, proportionality and legality ... that is done comprehensively throughout the NATO system. [The “legal advice” is] delivered at all levels by legal advisers and fundamentally back to the [UK] Attorney-General.”

While there has been very little reliable ground reporting on NATO air strikes, press statements from NATO give indications of the restraint. NATO communiqués constantly speak about military targets. Spokesmen insist that attacks on Gaddafi compounds are attempts to disrupt “command and control centers” of military operations, not to threaten political leaders in Tripoli. On May 10, General Claudio Gabellini, NATO’s chief operations officer for Libya, explained that air strikes against Gaddafi forces attacking Misrata were constrained by “the proximity of government forces to civilian areas.” On the same day, Reuters reported a NATO claim that in enforcing its arms embargo, NATO had hailed 884 vessels approaching ports in Libya—and “diverted” five of them. Thus it seems that the overwhelming bulk of seaborne traffic in and out of ports controlled by Gaddafi had not been “diverted.”

By May 15, General David Richards, Britain’s chief of defense staff, was quoted in the *Sunday Telegraph*, warning that NATO must “up the ante” or risk “Gaddafi clinging to power.” “At present, NATO is not attacking infrastructure targets in Libya,” he said. “But if we want to increase the pressure on Gaddafi’s regime then we need to give serious consideration to increasing the range of targets we can hit.”

Does this restraint simply reflect fear of condemnation by the International Criminal Court? The ICC has no police. Even if it tries to indict NATO officials, it cannot arrest them on its own. It would not be hard even for European governments to defy the ICC Prosecutor, if that seemed necessary. But European governments seem determined to show they are respecting ICC rules.

WHAT COMPELS COMPLIANCE WITH NEW CONSTRAINTS?

Quite apart from the hovering presence of the International Criminal Court, NATO seems inhibited by its determination to confine its operations within the bounds of the Security Council resolution authorizing intervention—Resolution 1973, which speaks only of protecting civilians. While there is room for dispute about interpretation of the resolution, it is generally agreed that it does not authorize outside powers to remove Gaddafi from power and install a new government. Attacks on military facilities are readily justified as reducing Gaddafi’s capacity to threaten civilians. Attacks on Libyan economic assets might increase pressure on the government to abandon the fight, but are much more removed from the ostensible mandate of protecting civilians.

Taking the UN resolution as the limit of NATO authority, however, presents all sorts of difficulties—some obvious, some less so. The most obvious is that, so long as the fighting continues, civilians remain at risk and it is claimed thousands have already died. With all its efforts to avoid “collateral damage” to civilians, NATO bombing has claimed some lives of bystanders. Gaddafi spokesmen insist the casualties include women, children and Muslim clerics. Meanwhile, Libyan government forces have used artillery to bombard rebel towns, seemingly with no concern to avoid civilian casualties.

The Security Council resolution specifically prohibits “occupation forces” which NATO spokesmen have treated as a prohibition against ground troops. The resolution also imposes an arms embargo, which NATO interprets as limiting aid to

rebel forces, excluding all but limited defensive equipment, such as body armor. NATO spokesmen indeed insist that NATO is not taking sides in what is plainly an ongoing war between government forces and rebels. Neither the United States nor the United Kingdom have actually recognized the rebel council in Benghazi as the rightful government of Libya (or even as the de facto governing authority in eastern Libya).

What makes these inhibitions all the more strange is that the Obama administration and the British and French governments have openly and repeatedly acknowledged that they do wish to see Gaddafi removed from power. Yet they still insist that this is not the aim of their military operations. Given the aim of removing Gaddafi, it is understandable that NATO has repeatedly rejected offers from Gaddafi for some sort of cease-fire or some agreement on limiting attacks. Gaddafi has been accused of continuing to launch attacks even while offering to stop the fighting.

But if Gaddafi can't be trusted now, how he can be trusted later, especially if civilian rebels remain in the field? How can NATO claim to have assured safety to civilians if it cannot remove Gaddafi from power? How can it hope to ensure Gaddafi's removal from power, if it insists on observing very constraining rules of engagement?

In most wars, continuation of fighting risks escalation of war aims and war methods. That provides an incentive for the weaker side to stand down earlier. Here, NATO seems to have tied its hands from the outset.

It may be that the Security Council resolution is merely a legal formality, behind which stands the fragility of the actual coalition. NATO leaders have pointed to the diplomatic value of the intervention's initial support from the Arab League. But only Qatar has supplied actual fighting personnel to the NATO campaign (and a rather token contribution, at that). More prominent Arab governments have expressed doubts and concerns about the widening and protracted NATO campaign. It is not obvious that keeping Qatar in the coalition adds very much. Kuwait's support for the toppling of Saddam Hussein in 2003 did not deter most Arab governments from denouncing the British and American involvement the subsequent fighting in Iraq.

There is, finally, President Obama's particular problem. At the outset of American intervention, the White House released a memo from the Office of Legal Counsel in the Justice Department, arguing that the operation would be very limited in scope and duration and therefore did not require authorization from Congress. The 1973 War Powers Act does acknowledge that presidents may be justified in committing U.S. forces to an external conflict for up to 60 days without congressional authorization. When the 60-day limit expired on May 20, the White House issued a letter insisting that U.S. involvement was too peripheral to count as a "war," since NATO had taken responsibility for strategic direction in April and most sorties since then have been flown by British and French pilots.

This posture encapsulates the oddness of the whole venture: the humanitarian crisis in Libya was, by this reasoning, sufficient to justify military intervention—but not sufficient to justify the level of commitment that might prove necessary for successful intervention. It is unusual in military history for nations to declare so openly that they regard a war as a mere speculative venture, which they are quite prepared to lose, if its costs exceed a certain low ceiling. But such self-imposed restraints may go in a package with the idea of "humanitarian war."

CAN THERE BE VICTORY IN COSMOPOLITAN WAR?

It may all seem logical from a certain perspective—a comforting perspective for human rights advocacy groups and a broad current of opinion gaining strength in Europe. Legal analysts for the International Committee of the Red Cross in Geneva insist that international humanitarian law—the term they prefer for describing the accumulating body of rules supposed to govern the conduct of armed conflict—should be seen as merely a branch of international human rights law. As the world now has treaties guaranteeing every person basic rights against his (or her) own government, so the world has rules and standards that guarantee constraint in warfare.

What is supposed to be true for all wars might seem especially appropriate for a war authorized by the United Nations on humanitarian grounds. Just as police operate under constraints in quelling domestic disturbances, so, on this view, in a humanitarian intervention, military operations must remain bound by carefully limited rules of engagement.

And so we end up with an armed intervention that is not fought like a war. If it is a humanitarian intervention, however, it must be acknowledged to have been a preemptive intervention. After rebel risings in February, it was feared that Gaddafi would unleash massacres on civilians in Benghazi and other rebel strong-holds. But he had not yet done so (at least on any large scale) when the intervention began in late March. NATO intervention did not put an end to conflict and casualties. Quite the contrary.

Estimates of Libyan casualties since the start of NATO intervention range from 2,000 to 10,000 in only two months. To put those figures into perspective, the most reliable estimates put the civilian death toll for six years of fighting in Iraq (2003- 2009) at about 100,000, in a country with six times the population of Libya. In proportionate terms, the Libyan conflict has, in two months, achieved a level of fatalities that is between one quarter and one half of what Iraq endured over six years. If the

conflict in Libya continues much longer, it will not look like a clear, clean victory for humanity, even if NATO claims to be scrupulous in its adherence to humanitarian rules of combat.

But the humanitarian toll in Libya is far from the only consideration. Domestic police can afford to exercise restraint, because most of the population is assumed to be generally law-abiding, or at least compliant with police directives. The world cannot be assumed to show a similar degree of compliance with international law or the pronouncements of UN bodies. What happens in Libya will inevitably affect the calculations of governments in future conflicts. A long, inconclusive struggle will make NATO think twice before mounting such an intervention in the future. More importantly, it may generate still stronger doubts in other countries about NATO's future resolve.

American authorities may think they are holding to special constraints here, because it is "only" a humanitarian mission. The distinction may not seem at all so clear to others—even in NATO countries. The Statute of the International Criminal Court, for example, makes no distinction between rules that apply in well-meaning interventions as compared with other conflicts. What we have embraced in Libya is a set of rules that make effective war-making very difficult.

There is a fundamental point in the background, which seems to exert some gravitational influence, even if it is rarely acknowledged. Much as we would welcome respect for human rights around the world, the world in which we now live is not organized to protect the rights of humanity at large. National governments wield decisive force in our world. The United Nations and the International Criminal Court have no force of their own. They remain, in terms of force projection, entirely parasitic on the forces of member states. In our world, the protection of human rights depends on the strength of states which respect human rights—and their first priority must be protecting the rights of their own citizens. In the last resort, that may require war. War is not a police intervention but a struggle between states or at least between political communities. War is not merely an effort to disarm opponents but to coerce them, for which many tools may be relevant.

To see how far we have come from traditional understandings, one need only glance at the UN Charter. True, it seems premised on the highly optimistic assumption that, notwithstanding the veto power granted to each of its five permanent members, the Security Council will be able to order decisive action to suppress "breaches of the peace" and even "threats to the peace." But the framers of the Charter still assumed that dealing with threats required a good deal of force. The Council was authorized to enforce "blockades" by air, sea and land, without any stipulation that civilians must not be hurt. The Council was authorized to unloose an international bomber force, without any stipulation that bombs must not impose civilian casualties (let alone "damage to civilian objects").

Our current notions seem to reflect the cosmopolitan notion that we must care about everyone equally. In 2005, one of the leading theorists of cosmopolitan ethics, David Held of the London School of Economics, defined it this way: "Humankind belongs to a single moral realm in which each person is regarded as equally worthy of respect and consideration." If you take this seriously enough, you will find it very hard to fight a successful war.

It is ironic—but hardly a mere coincidence—that Prof. Held served as the dissertation advisor for Saif al-Islam Gaddafi, while the dictator's son was writing about global governance at the London School of Economics. Libya provided the LSE with some \$2 million while the younger Gaddafi was there.

At the start of the current conflict, the LSE announced that it would take no more funding from the Gaddafi government. It remains to be seen whether the influence of cosmopolitan pieties—which no doubt made it much easier for an institution like LSE to embrace support from a mad dictator like Gaddafi—will be as easily curtailed, when western armed forces face more serious challenges than Gaddafi's Libya.

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