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Arms and the responsibility to protect

Western and Chinese involvement in Libya



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COVER PHOTO: Ninety-third anniversary of the Republic of Tripolitania featuring celebratory scenes in a fairground atmosphere in the city of Mesallata, east of Tripoli. © IASON FOOUNTEN/UN PHOTO



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Foreword

SINCE THE START OF ITS REFORM AND OPENING-UP PROCESS IN THE 1980S, China has shown a gradual acceptance of international norms and has played a more active role in international policy formation. China's socialisation in international relations has not only contributed to its internal social transformation and the shaping of a new identity and interests, but it has also been instrumental in China's acceptance of some key co-operative measures for the delivery of international public goods, such as nuclear non-proliferation, peacekeeping, and regional security. In the pursuit of a more responsible role in global politics, China's broader trajectory has been informed by adaptation, learning, and action – although incremental – at global and regional levels in a direction more convergent with established norms, regional expectations, and international institutions, especially those of the United Nations. This is of great importance as competition for power and influence in an increasingly multipolar and competitive environment grows.

In the broader non-proliferation realm, since the mid-1990s the scope and frequency of China's trade of WMD-related materials have narrowed and declined. China has curtailed its export of sensitive weapons and technologies to Iran and improved its normative and procedural infrastructure covering strategic goods and technologies. It has signed and adhered to every major international arms control treaty dedicated to the non-proliferation of chemical, biological, radiological, and nuclear weapons and has joined major export control associations such as the Zangger Committee, Nuclear Suppliers Group, and Australia Group. China has also cooperated with international efforts such as the US-led Container Security Initiative (CSI), which aims to prevent the shipment of dangerous materials, especially nuclear-related devices.

On conventional arms transfers, the Chinese Government has been more cautious. The degree of accountability and transparency remains problematic. However, here too positive changes have occurred in awareness, capacity, and openness to dialogue by Chinese officials, think tank experts, and scholars. In particular, the policy community perceptions on the Arms Trade Treaty (ATT) initiative have changed substantially from initial lack of interest to support for the ATT process. Chinese official statements have changed in the past two years, from initial scepticism, to emphasising specific issues/objections to proposed treaty texts, to loosening up on those issues, to finally being constructive in finding a meaningful compromise. Although China abstained at the UN final vote on the ATT, which was agreed by the UN General Assembly (UNGA) on 2 April 2013, China played a constructive role in the run up to and during the two diplomatic conferences that led to the UNGA vote. Its abstention appeared to be based on procedural issues rather than the substance of the treaty text.

Over the past five years, working with a range of governmental actors, as well as think tanks and academics, Saferworld has helped to create an internal discourse in China

on conventional arms control issues and processes, deepening and expanding dialogue on effective international arms transfers, including the UN ATT process. While interacting with government officials and industry representatives, Saferworld has also established channels of communication and dialogue with the Chinese epistemic community in universities and research institutes, which has traditionally had limited engagement on arms transfer controls. By opening greater space within which to deepen awareness, research, and inform debate on the end-use impact of the global arms trade, the Chinese policy community has started to critically focus on this issue and provide alternative views.

It is certain that many concerns remain about China's engagement in conventional arms control. Although awareness and knowledge of the threats related to conventional arms proliferation have increased, the topic remains largely restricted to officials operating in the non-proliferation field. Independent research is very limited or non-existent, illustrating low levels of capacity and engagement on the issue. The restricted and limited knowledge pool on conventional arms means that policymakers have few expert resources to draw on. Similarly, there remains a dearth of high-quality analytical information and understanding from the external community – both government and think tanks – on Chinese thinking, policy positioning, and concerns relating to the ATT, and more broadly on conventional arms transfers. The degree to which we understand how Chinese decisionmakers and policy elites are linking conventional arms transfers to such issues as human rights, international humanitarian law (IHL), and the responsibility to protect (R2P) principles remains relatively small and the question is still insufficiently studied. As such, there is a critical need to engage Chinese officials, policy experts, and scholars in more knowledgeable, open, and constructive dialogue on the aforementioned issues and to also better understand what the adoption of the ATT will practically mean for China and other countries.

It is for these reasons that this research report is timely. It represents the first joint research project and publication between independent Chinese and UK scholars analysing the relationships between the ATT and the R2P principles within the context of the Libyan civil war. The key point of this exercise is to make research on the use and transfer of weapons a less obscure area of scholarship in China and to introduce an independent academic voice into the policy discourse. It offers a comparative reflection on Chinese and Western approaches, illuminating aspects that are often hidden in the established discourse on civilian protection and arms transfers. As the first of its kind in this area, the report is necessarily restricted in its reach but nevertheless offers serious, in-depth analysis of some of the critical issues linking norms, policies, and practices on the use and transfer of weapons in the Libya case and the implications for the recently agreed ATT.

At a time when Chinese think tanks close to the government suggest that China is keen to pursue a more active role in international policy processes and is potentially interested in signing the ATT, such joint scholarship and analysis is of crucial importance. There is an ongoing need to identify specific and pragmatic topics for further research and collaboration among Western and Chinese scholars in order to help raise awareness of the importance of conventional weapons control, particularly the ATT and working towards its coming into force and its effective implementation.

Bernardo Mariani

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Introduction

THE 2011 WAR IN LIBYA demonstrated some sharp differences between China and Western states such as the UK, France and USA with regard to the use and transfer of weapons. While the UN arms embargo on Libya was unanimously agreed, there were significant differences in terms of how to interpret it and implement it, and the scale and scope of actions beyond it. Western states used the doctrine of R2P to justify military intervention against the Qadhafi regime and the supply of weapons to rebel forces; the Chinese Government was critical of both of these actions, even though it has publicly committed itself to the R2P regime. More generally, the use and transfer of weapons goes to the heart of debates around state sovereignty and responsibility. The issues at stake in relation to the use and transfer of weapons under R2P include: what are states' rights and responsibilities when using and transferring weapons? Which actors are legitimate or appropriate recipients of weapons? What is the legitimate or appropriate end use of weapons? And what standards can states agree in relation to these issues?

This study explores Chinese and Western (primarily UK, French, and US) practices, laws, and policies in the Libya case. It discusses the different interpretations of UN Security Council (UNSC) resolutions (UNSCR) 1970 and 1973.¹ In particular, while the resolutions were framed in R2P terms, some states, including China, were concerned about the relationship between regime change and civilian protection; and there was no unanimity as to which actors were included in the category of 'civilians' and 'civilian population' or whether this allowed military support for the rebels. The paper then discusses the international military intervention and the deployment of military advisers, airdrops of weapons, and encouragement of proxy transfers to rebel forces by Western states, detailing Chinese objections to these practices. It then discusses Chinese arms transfer policy with regard to Libya, before asking what effect, if any, the recently agreed ATT could have had on Chinese and Western practice.

¹ UN Security Council Resolution 1970, S/RES/1970 (2011), 26 February 2011, [www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1970(2011)); and Resolution 1973, S/RES/1973 (2011), 17 March 2011, [www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973\(2011\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1973(2011)).

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Arms and the responsibility to protect

China and R2P

THE R2P REGIME, formalised at the UN 2005 World Summit, emerged as an attempt to use the UNSC to overcome failures to deal with genocide, war crimes, ethnic cleansing, and crimes against humanity.² It institutionalises the authority of the UNSC to declare mass atrocities within a state to count as a threat to international peace and security and thus mobilise Chapter VII powers.³ The Chinese Government formally endorsed the principle of R2P at the 2005 World Summit and voted in favour of UNSCR 1674 (2006) and 1894 (2009) concerned with the protection of civilians in conflict – demonstrating that it is willing to be part of the R2P regime. However, it also emphasises the principles of non-interference and mutual respect of territorial integrity in its foreign affairs – as seen in its veto of the 2007 UNSCR on Myanmar, which called for a halt to attacks on civilians and an end to human rights and humanitarian law violations against civilians in ethnic minority regions.⁴ Chinese Government support for R2P thus sits awkwardly with its other commitments to state sovereignty and non-interference, which also concern its own treatment of ethnic minorities within its borders. Along with the discomfort with several states about the use of force to protect civilians (discussed later), this suggests that while internationally recognised, R2P remains contested in the scope and practice of its application.

There are three key features of R2P.⁵ First, it is an obligation on a territorial state to protect its civilians from gross human rights violations and mass atrocities. The international community has a duty to assist states to fulfil this responsibility; and if a state fails in this responsibility, the international community must be prepared to take measures including the use of military force as sanctioned by the UNSC. Chinese support for R2P is dependent on any use of military force being approved by the UNSC. Second, the R2P regime includes not only military intervention but also other means to restore international peace and security, for instance, the referral of a situation by the Security Council to the International Criminal Court (ICC), as well as economic sanctions. And third, the R2P regime can only be triggered once a series of strict and cumulative conditions are fulfilled. Efforts to restore peace and security should be considered in line with the principle of proportionality, meaning that military intervention should always be the last resort.

² See International Coalition for the Responsibility to Protect, <http://responsibilitytoprotect.org/>; and Resolution adopted by the General Assembly, 60/1, 2005 World Summit Outcome, A/RES/60/1, para. 139.

³ ICISS (2001) *Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, pp. 33–34

⁴ UN Security Council (2007) “Security Council Fails to Adopt Draft Resolution on Myanmar, owing to Negative Votes by China, Russian Federation”, 12 January 2007, SC/8939, www.un.org/News/Press/docs/2007/sc8939.doc.htm.

⁵ See ICISS (2001) *Report of the International Commission on Intervention and State Sovereignty* (Ottawa: International Development Research Centre), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

The UNSC Libya Resolutions: regime change and civilian protection

Protests in Libya in early 2011 began in Benghazi and spread to other cities across Libya, including the capital, Tripoli. These were met with lethal force by the Qadhafi regime,⁶ and state security forces committed gross and systematic violations of human rights.⁷ The uprising soon turned into an armed conflict, especially once opposition forces gained access to weapons from abandoned military depots as army units began to defect.⁸ Following international outcry, the UNSC unanimously agreed Resolution 1970 in February 2011, establishing an embargo on the transfer of military equipment to Libya and economic sanctions against the Qadhafi government, and referring the case to the ICC on suspicion of crimes against humanity.⁹ Subsequently, the EU also imposed an arms embargo.¹⁰ A month later, UNSCR 1973 emphasised the responsibility of the Libyan Government to protect the Libyan population, and authorised states to take “all necessary measures” to protect the civilian population, including a no-fly zone but excluding a foreign occupation force.¹¹

UNSCR 1973 was a landmark in the development of R2P, as it was the first time that the Security Council invoked the responsibility to take collective action (known as the ‘third pillar’ of R2P) to mandate coercive measures to protect civilians at risk from imminent atrocities.¹² More generally, both UN Resolutions contain language that directly speaks to the R2P doctrine. UNSCR 1970 recalls the Libyan authorities’ responsibility to protect its population; condemns violence and use of force against civilians; deplores the gross and systematic violation of human rights; and considers that the attacks on the civilian population may amount to crimes against humanity. UNSCR 1973, meanwhile, deplores the failure of the Libyan authorities to comply with UNSCR 1970, and reiterates the authorities’ responsibility to protect the Libyan population. Between March and September 2011 the National Transitional Council (NTC) gained increasing recognition as the legitimate representative of the Libyan people and was accepted into the UNGA on 16 September. UNSCR 2009, agreed the same day, allowed the transfer of military equipment to the NTC as long as the Sanctions Committee was informed.

Under the terms of UNSCR 1973 and the principles of R2P, the goal of military action could not be to kill or exile Qadhafi or ensure rebel victory. As the International Commission on Intervention and State Sovereignty states, “Overthrow of regimes is not, as such, a legitimate objective [of R2P], although disabling that regime’s capacity to harm its own people may be essential to discharging the mandate of protection” and regime change may be an effect of military action.¹³ This is the coin on which the legality and legitimacy of the Libya intervention turns. Supporters of R2P as a rationale for military intervention claim that regime change was necessary in order to protect civilians – that it was a means to an end and therefore acceptable. As British Prime Minister David Cameron put it, Qadhafi headed an “illegitimate regime” and must “go now”.¹⁴ Gareth Evans, a key architect of the early R2P doctrine, simultaneously called Libya “a textbook case of the R2P norm working exactly as it was supposed to”, while acknowledging that NATO’s military action was “unequivocally committed to the rebel side, and to securing regime change” – claiming that “removal of the Qadhafi regime is not for any other reason than that this is the only way that civilians can be protected”.¹⁵ Professor Alex Bellamy concurs that R2P conditions were met to the

6 Human Rights Watch (2011) “Libya: Security forces kill 84 over three days”, 19 February 2011, www.hrw.org/en/news/2011/02/18/libya-security-forces-kill-84-over-three-days

7 UN General Assembly (2011) “General Assembly suspends Libya from Human Rights Council”, 1 March 2011, www.un.org/News/Press/docs/2011/ga11050.doc.htm

8 Human Rights Watch (2012) “World Report 2012: Libya”, www.hrw.org/world-report-2012/world-report-2012-libya

9 UN Security Council Resolution 1970, S/RES/1970(2011), www.sipri.org/databases/embargoes/un_arms_embargoes/libya/libya_2011/UNSC_res_1970

10 Council Decision 2011/137/CFSP: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:058:0053:0062:EN:PDF>

11 UN Security Council Resolution 1973, S/RES/1973(2011), operative paras.4, 6.

12 International Coalition for the Responsibility to Protect (2011) “Libya, Syria and the Responsibility to Protect (RtoP)”, 9 August 2011, <http://icrtopblog.org/2011/08/09/libya-syria-and-the-responsibility-to-protect-rtop/>

13 ICISS, *The Responsibility to Protect*, pp.35–6

14 BBC (2011) “David Cameron: ‘Gaddafi must go now’”, 28 February 2011, www.bbc.co.uk/news/uk-politics-12601851

15 Gareth Evans (2011) “Interview: The R2P balance sheet after Libya”, *e-International Relations*, September 2011, www.e-ir.info/wp-content/uploads/R2P.pdf, pp.40–1.

letter: the use of force was authorised by the UNSC, and was in relation to crimes that already exist under international law (war crimes). However, the use of force resulted in regime change, an outcome that was intended by those responsible for implementing Security Council decisions, even though the Security Council itself had not mandated it.¹⁶

However, UNSCR 1973 was not unanimously accepted. Five states – Brazil, China, Germany, India, and Russia – abstained on the vote, suspicious of the justifications given for intervention, wary of the politico-military interference in sovereign states' affairs, and sceptical of the effectiveness of military action in the name of saving lives. The Chinese Government claimed to be “deeply concerned about the safety of civilian lives and property during armed conflict”, “condemn[ed] acts of violence deliberately targeting civilians in situations of armed conflict”,¹⁷ and supported action to “halt acts of violence against civilians”.¹⁸ However, it had serious concerns about the implementation of 1973. It emphasised that responsibility for civilian protection lies with the government concerned and while outsiders can provide (unspecified) “constructive assistance”, they must “observe the principles of objectivity and neutrality”, respect state independence, sovereignty, unity, and territorial integrity, and not participate in regime change or involvement in civil war “under the guise of protecting civilians”, a view echoed by other states such as Brazil and South Africa.¹⁹

The use of force seems to be the key problem for the Chinese Government, in two ways. First, it opposed actions that went beyond the mandate of the resolution²⁰ and was explicitly opposed to “any attempt to wilfully interpret the resolutions or to take actions that exceed those mandated by the resolutions”.²¹ Second, it emphasised the importance of a political settlement in Libya through a ceasefire, dialogue, and negotiation, as a means to minimise civilian casualties.²² Similar concerns can be seen in the positions of other abstainers. Germany and Brazil, for example, abstained because they did not agree that military force could achieve the objective of halting violence against civilians.²³ The Russian Government abstained because of unanswered questions as to how the no-fly zone would be enforced, what the rules of engagement would be, and what limits would be placed on the use of force – a view echoed by the Indian Government.²⁴ These states – including China – abstained rather than voted against the resolution because of the position of the Arab League and African Union. However, as the Russian Government put it: “the passion of some Council members for methods involving force prevailed”.²⁵

In addition to concerns over the relationship of regime change to protection of civilians, there were issues around the definition of ‘civilians’, whether armed opposition actors are classified as civilians or combatants, and the subsequent scope of military action. UNSCR 1973 authorises “all necessary measures” to “protect civilians and civilian populated areas”. There are two ways to read the meaning of ‘civilian’ and ‘civilian population’ here. One reading includes armed elements of the opposition within the definition of the civilian population. In this view, civilians have taken up arms but are not formal combatants. On this reading, UNSCR 1973 authorises – but does not require – action to help the civilian population, including military assistance to armed

16 Bellamy AJ (2011) “The Responsibility to Protect and the Problem of Regime Change”, *e-International Relations*, September 2011, www.e-ir.info/wp-content/uploads/R2P.pdf, pp.20–2.

17 Li Baodong, Provisional Transcript of 6531st Meeting of the UN Security Council, 10 May 2011, S/PV.6531, www.un.org/ga/search/view_doc.asp?symbol=S/PV.6531

18 Li Baodong, Provisional Transcript of 6498th Meeting of the UN Security Council, 17 March 2011, S/PV.6498, www.un.org/ga/search/view_doc.asp?symbol=S/PV.6498.

19 Chinese Government, quoted in Bellamy, “The Responsibility to Protect and the Problem of Regime Change”, p.20.

20 Hong Lei (2011) Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference, June 30, 2011, www.fmprc.gov.cn/eng/xwfw/s2510/t836598.htm

21 Li Baodong, S/PV.6531, May 2011

22 Li Baodong, S/PV.6531, May 2011; Hong Lei (2011) Foreign Ministry Spokesperson Hong Lei’s Regular Press Conference, June 30, 2011, www.fmprc.gov.cn/eng/xwfw/s2510/t836598.htm

23 Provisional Transcript of 6498th Meeting of the UN Security Council, 17 March 2011, S/PV.6498, www.un.org/ga/search/view_doc.asp?symbol=S/PV.6498.

24 Provisional Transcript of 6498th Meeting of the UN Security Council, 17 March 2011, S/PV.6498, www.un.org/ga/search/view_doc.asp?symbol=S/PV.6498.

25 Provisional Transcript of 6498th Meeting of the UN Security Council, 17 March 2011, S/PV.6498, www.un.org/ga/search/view_doc.asp?symbol=S/PV.6498.

rebels who want to overthrow the Qadhafi regime.²⁶ However, such a reading, and the practice of external involvement, risks violating the principle of sovereign equality enshrined in Article 2 of the UN Charter.²⁷

A second way of reading the terms ‘civilian’ and ‘civilian population’ excludes those armed elements of the opposition. Members of an organised armed force under responsible command and with an internal disciplinary system constitute armed forces,²⁸ making them legitimate targets during hostilities. Civilians, meanwhile, should not be attacked as a target. However, civilians are not protected in cases where they participate directly in hostilities.²⁹ In this reading, therefore, armed elements of the population lost their status as civilians once they started to fight. While IHL defines civilians as “persons who are not members of the armed forces”, the International Committee of the Red Cross (ICRC) explains that “practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians” and points out that Additional Protocol II does not contain a definition of civilians or the civilian population.³⁰

The difficulty of interpretation in Libya is that while armed elements of the dissenting population were participating in hostilities, they were often only loosely organised. So while they were not formal combatants in the sense of belonging to a state military or well-established militia, they did participate in hostilities. Nonetheless, regardless of whether armed opposition fighters are to be classified as civilians or not, the protection of civilians does not necessarily or automatically mean that military action to promote regime change is the logical next step.

International military action against Libya

Resolution 1973 was an important turning point for the Libyan war. The ‘necessary measures’ taken included a no-fly zone, naval blockade, and air strikes by fighter jets and attack helicopters, as well as the deployment of military advisers and transfer of weapons to rebels. Military action began with a multinational coalition led by the USA, which was later transferred to NATO control on 31 March 2011 under ‘Operation Unified Protector’. The main contributors within the alliance were the USA, UK, and France, with forces and military equipment also committed by fifteen other states.³¹ According to NATO, more than 26,000 sorties were flown, 42 per cent of which were strike sorties, damaging or destroying approximately 6,000 military targets.³²

In addition to the concerns over the legality of the goal of military intervention and the definition of the civilian population, there are questions around human rights violations and the protection of civilians in the course of the war itself. There is evidence to suggest that the course of the war was informed by a conscious effort to minimise harm to civilians by NATO forces. For example, a decision was taken to deploy French and British attack helicopters for a more precise ground attack capability – but only in May 2011 once high-level bombing was failing to protect civilians.³³ NATO claimed to have cancelled two-thirds of intended strikes “because of the risk of casualties”,³⁴ and Human Rights Watch argued that “The relatively few civilian casualties during the seven-month campaign attests to the care NATO took in minimising civilian harm.”³⁵

²⁶ Zhu Wenqi (2012) “China and the International Law in the Shift of North Africa and Middle East”, *4 Chinese Legal Science* 2012, p.182.

²⁷ Leng Xinyu (2012) “The Libyan War and International Law”, in Zhao Baige (ed), *International Humanitarian Law in China*, People’s Publishing House, p.289.

²⁸ Additional Protocol II 1977 to Geneva Conventions 1949, Art. 43(1)

²⁹ Melzer N (2009) *Interpretative Guidance On the Notion of Direct Participation In Hostilities under International Humanitarian Law* (Geneva: International Committee of the Red Cross)

³⁰ ICRC (n.d.) “Rule 5: Definition of Civilians”, www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5

³¹ See Guardian Datablog (n.d.) “Nato operations in Libya” www.guardian.co.uk/news/datablog/2011/may/22/nato-libya-data-journalism-operations-country

³² NATO (2012) “NATO and Libya”, www.nato.int/cps/en/natolive/topics_71652.htm

³³ Norton-Taylor R (2011) “Apache helicopters to be sent into Libya by Britain”, *The Guardian*, 23 May 2011, www.guardian.co.uk/world/2011/may/23/apache-helicopters-libya-britain

³⁴ Shabi R (2012) “Nato accused of war crimes in Libya”, *The Independent*, 19 January 2012, www.independent.co.uk/news/world/africa/nato-accused-of-war-crimes-in-libya-6291566.html

³⁵ Human Rights Watch (2012) “NATO: Investigate civilian deaths in Libya”, 14 May 2012, www.hrw.org/news/2012/05/14/nato-investigate-civilian-deaths-libya

Yet allegations of human rights violations and war crimes have been made against NATO, with claims that it classified some civilian sites as military targets³⁶ and that eight of the air strikes led to 72 civilian deaths.³⁷ *The New York Times* found “credible accounts of dozens of civilians” – between 40 and more than 70 – killed by NATO “in many distinct attacks”.³⁸ Allegations include NATO air strikes on two family compounds in Majer, a village 160km east of Tripoli, that killed 34 civilians and wounded more than 30, according to Human Rights Watch;³⁹ and NATO air strikes on Sirte in which 47 civilians were killed, according to a report by the Arab Organisation for Human Rights, Palestinian Centre for Human Rights, and International Legal Assistance Consortium.⁴⁰ The initial findings in relation to the Majer strikes “have raised questions about the legality of the attack under international humanitarian law”, according to an official familiar with the case.⁴¹ The allegations are compounded by NATO’s failure to acknowledge civilian casualties and refusal to investigate allegations.⁴²

These media and NGO reports were echoed in the report of the International Commission of Inquiry on Libya, established by the Human Rights Council in February 2011, which found that NATO “conducted a highly precise campaign with a demonstrable determination to avoid casualties”; nevertheless, civilian casualties and “targets that showed no evidence of military utility” were found on “limited occasions”, and the Commission recommended further investigations as it was “unable to draw conclusions in such instances on the basis of the information provided by NATO”.⁴³ Chinese Deputy Permanent Representative to the UN Ambassador Wang Min, expressed China’s “deep concern” at the claims of civilian casualties and targeting of non-military facilities contained in the International Commission of Inquiry’s report on Libya. In China’s view, “These events bear on the correct implementation of NATO’s mandate under the Security Council’s resolutions and on the authority and gravity of those resolutions”.⁴⁴

Deployment of military advisers

In addition to the no-fly zone, naval blockade, and air strikes, military advisers were also deployed to Libya during the conflict as part of the decision to back the NTC and work for the overthrow of Qadhafi.⁴⁵ Six members of the UK’s special forces E-Squadron were deployed in early March alongside two MI6 agents to the vicinity of Benghazi, allegedly to meet rebel leaders. However, they were caught and arrested having been found to be carrying weapons.⁴⁶ In April, unarmed plain-clothed British intelligence and military officials were sent to Benghazi to help the rebels organise themselves, and to help build capacity for an embryonic defence ministry and a command structure.⁴⁷ British Foreign Secretary William Hague claimed that UK policy did not constitute foreign occupation – expressly prohibited by UNSCR 1973 – because no combat troops were sent.⁴⁸ While the UK Government announced that it is “sending military advisers to Libya to help the rebels improve their organisation and

³⁶ Shabi, “Nato accused of war crimes in Libya”

³⁷ Human Rights Watch, “NATO: Investigate civilian deaths in Libya”

³⁸ Chivers CJ, Schmitt E (2011) “In Strikes on Libya by NATO, an unspoken civilian toll”, *New York Times*, 17 December 2011, www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?pagewanted=all&_r=0

³⁹ Human Rights Watch, “NATO: Investigate civilian deaths in Libya”

⁴⁰ Shabi, “Nato accused of war crimes in Libya”

⁴¹ Chivers and Schmitt, “In Strikes on Libya by NATO, an unspoken civilian toll”

⁴² *Ibid.*, and Human Rights Watch, “NATO: Investigate civilian deaths in Libya”

⁴³ International Commission of Inquiry on Libya, *Report of the International Commission of Inquiry on Libya*, 2 March 2012, UN Human Rights Council, A/HRC/19/68, www.ohchr.org/Documents/.../HRCouncil/.../A_HRC_19_68_en.doc

⁴⁴ Statement by Ambassador Wang Min, Deputy Permanent Representative of China to the United Nations, at the Security Council Briefing on the Libyan Issue, www.china-un.org/eng/hyfy/t930694.htm

⁴⁵ BBC (2012) “SAS on ground during Libya crisis”, 19 January 2012, www.bbc.co.uk/news/world-africa-16624401; Bureau of Investigative Journalism (2012) “Bureau Recommends: Special forces involvement in Libya”, 19 January 2012, www.thebureauinvestigates.com/2012/01/19/bureau-recommends-special-forces-involvement-in-libya/

⁴⁶ BBC (2011) “Libya unrest: SAS members ‘captured near Benghazi’”, 6 March 2011, www.bbc.co.uk/news/world-middle-east-12658054

⁴⁷ BBC, “SAS on ground during Libya crisis”.

⁴⁸ BBC, “SAS on ground during Libya crisis;” BBC (2011) “British military officers to be sent to Libya”, 19 April 2011, www.bbc.co.uk/news/uk-13132654

communications, but not to train or arm them”,⁴⁹ the BBC claims that authorisation was given for “the longer-term development of a ‘train and equip’ project”,⁵⁰ to be funded or directly carried out by Arab states such as Qatar, the United Arab Emirates (UAE), or Jordan, possibly with support of private security companies, according to *The Guardian*.⁵¹

British special forces were also sent into Libya via Qatar, in a joint UK-French-Qatari mission.⁵² By August soldiers from D Squadron 22-Special Air Service (SAS) were operating in small teams within Brega and Misrata and a training base in southern Libya, assisting in training and coordinating command and NATO air strikes.⁵³ Air strikes on a convoy carrying former regime members preceded the capture and killing of Qadhafi by NTC men on 20 October 2011; the role of special forces advisers in these is as yet unknown.⁵⁴ If foreign military advisers helped rebels achieve military victory, then their contribution would appear to be focused at least in part on the overthrow of Qadhafi.

Airdrops of weapons to rebels

The UK Government provided radios and other equipment alongside its special forces to coordinate air strikes; it claims not to have sent weapons. But “this made little practical difference since the SAS was operating closely with Qatar special forces who had reportedly delivered items such as Milan anti-tank missiles”,⁵⁵ as did France.⁵⁶ The French Government claimed to have airdropped assault rifles, machine guns, rocket-propelled grenades, and anti-tank missiles.⁵⁷ NATO Secretary General, Anders Fogh Rasmussen, claimed that NATO was not informed of the move, first learning of it once it was discussed in the media.⁵⁸ French military spokesman Col. Thierry Burkhard stated that light weapons had been provided to civilian communities to “protect themselves against Col. Qadhafi”.⁵⁹ Official statements justified the transfer of weapons as a means of protecting civilians, and thus in line with UN resolutions. However, French MPs were neither consulted nor informed about the deliveries, and they questioned whether the deliveries were approved by the UN.⁶⁰ The Russian Government described the French airdrops as a “crude violation” of the UN embargo.⁶¹ And even the NATO Secretary General admitted that the French Government had circumvented the embargo in order to supply weapons to rebel forces.⁶² Officially, China did not make strong criticism of French actions; rather, it affirmed the importance of not going beyond the terms of the UN mandate. However, a statement that the French arms drop was a violation of both UNSC resolutions was broadcast on Global Watch (CCTV’s daily international news commentary programme) by a representative of China Institutes of Contemporary International Relations, a research institute affiliated to the Ministry of State Security.⁶³

⁴⁹ UK Government “Libya Crisis: National Security Adviser’s Review of Central Co-Ordination and Lessons Learned”, p.27 www.number10.gov.uk/wp-content/uploads/2011/12/Lessons-Learned-30-Nov.pdf

⁵⁰ Mark Urban (2012) “Inside story of the UK’s secret mission to beat Gaddafi”, www.bbc.co.uk/news/magazine-16573516, 19 January 2012.

⁵¹ Wintour P (2011) “Libyan rebels should receive training funded by Arab countries, says Britain”, *The Guardian*, 6 April 2011, www.guardian.co.uk/world/2011/apr/06/libyan-rebels-training-funded-arab

⁵² Urban M “Inside story of the UK’s secret mission to beat Gaddafi”.

⁵³ Bureau of Investigative Journalism, “Bureau Recommends”; Urban, “Inside story of the UK’s secret mission to beat Gaddafi”.

⁵⁴ Urban, “Inside story of the UK’s secret mission to beat Gaddafi”.

⁵⁵ *Ibid.*

⁵⁶ BBC, “SAS on ground during Libya crisis”.

⁵⁷ AFP (2011) “French military air-dropped arms to Libya rebels”, 29 June 2011, www.france24.com/en/20110629-french-military-confirms-airdropping-arms-libya-kadhafi-rebel.

⁵⁸ Pop V (2011) “Libya weapons deals raise questions about Gaddafi aftermath”, *EU Observer*, 6 September 2011.

⁵⁹ Spencer R (2011) “France supplying weapons to Libyan rebels”, *The Telegraph*, 29 June 2011, www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8606541/France-supplying-weapons-to-Libyan-rebels.html

⁶⁰ An Vranckx, Frank Slijper and Roy Isbister (eds.) “Lessons from MENA. Appraising EU transfers of military and security equipment to the Middle East and North Africa” (Academia Press, Gent), November 2011, p.47

⁶¹ Al Jazeera (2011) “Russia criticizes France over Libya arms drop”, 20 June 2011, www.aljazeera.com/news/africa/2011/06/2011630201328581644.html

⁶² Pop V (2011) “Libya weapons deals raise questions about Gaddafi aftermath”

⁶³ CCTV (2011) entitled “France air-dropped 40 tonnes of weapons, Gaddafi’s envoy to the West for political settlement?” 2 July 2011, <http://news.sohu.com/20110702/n312259879.shtml>.

Despite the language of civilian protection, *Le Figaro* claimed the airdrops “were designed to help rebel fighters encircle Tripoli and encourage a popular revolt in the city itself”.⁶⁴ While rebels in the north found their path blocked, southern rebels coming via the Djebel Nefousa mountains were felt to have a better chance of reaching Tripoli and facilitating rebellion, “which could lead to Qadhafi’s overthrow”, and were supplied with weapons by the French Government.⁶⁵ Such a policy would go beyond the immediate protection of civilians, and moves towards facilitating regime change. While UNSCR 1973 allows for a wide range of actions to further the mission to protect civilians, the French move was not copied by other states. The UK Government, for example, said it would not follow suit, given concerns as to whether it was permitted under UNSC Resolutions.⁶⁶ The UK Foreign Office claimed to be ‘aware’ of the reports of the French airdrops but that the UK was not doing the same,⁶⁷ suggesting disagreement between European states as to the legality or legitimacy of such an action.

Encouragement of proxy transfers

Alongside the direct supply of weapons by the French Government, the US Government seems to have encouraged Qatar and the UAE to supply weapons by proxy. A US State Department spokesman told reporters that the two UNSCR 1970 and 1973, taken together, “neither specified nor precluded providing defence material to the Libyan opposition”.⁶⁸ *The New York Times* claims the US gave its blessing to Qatari supply of foreign-made (including French- and Russian-designed) weapons including machine guns, automatic rifles, and ammunition, providing “little oversight of the arms shipments”.⁶⁹ The UAE Government, meanwhile, asked for permission to ship US-produced weapons that the US had supplied for the Emirates’ use. According to *The New York Times*, “the administration rejected that request, but instead urged the Emirates to ship weapons to Libya that could not be traced to the United States”.⁷⁰ Such a practice of deniable, covert transfers via proxies allowed the US Government to avoid becoming directly involved in a ground war. However, it still represents a significant degree of involvement in the war while, at the same time, presenting the possibility that weapons transfers that were approved or encouraged by the US could be re-transferred and end up in the hands of unauthorised end users.

About-turn: weapons suppliers become arms embargo enforcers

A notable feature of the war in Libya is the about-turn by states that had previously supplied weapons to the Qadhafi regime. Previous UN and EU embargoes were lifted by 2004 after Libya abandoned its WMD programmes and supplies were resumed enthusiastically. As Stockholm International Peace Research Institute (SIPRI) researcher Pieter Wezeman puts it, “part of the process of inclusion was acceptance of Libya as a buyer of arms, which has implicated the supplier countries in the sustained oppressive military rule”.⁷¹ A significant proportion of Libyan stocks were “sourced by fully-authorised exports from the EU and other countries” according to one expert study.⁷²

64 *Le Figaro*, cited in Al Jazeera (2011) “France confirms arming Libyan rebels”, 29 June 2011, www.aljazeera.com/news/africa/2011/06/201162913557645830.html

65 *Le Figaro* (2011) “Exclusive: French Military In Libya Arming Tribal Insurgents South of Tripoli”, 29 June 2011, <http://plus.lefigaro.fr/note/exclusive-french-military-in-libya-arming-tribal-insurgents-south-of-tripoli-20110629-493954>

66 BBC (2011) “Libya conflict: France air-dropped arms to rebels”, 29 June 2011, www.bbc.co.uk/news/world-africa-13955751; AFP (2011) “France gives Libya rebels arms but Britain balks”, 29 June 2011, www.google.com/hostednews/afp/article/ALeqM5gst8wAKgJwnMvBWIT19EQ1Zpylmg?docid=CNG.041943dc452c61a507ee986061b49f2d.1031

67 Spencer, “France supplying weapons to Libyan rebels”

68 Lutfi Abu-Aun (2011) “Russia: arming rebels is a ‘crude violation’”, Reuters, 30 June 2011, www.reuters.com/article/2011/06/30/us-libya-idUSTRE7270JP20110630

69 James Risen, Mark Mazzetti and Michael S. Schmidt (2012) “US-approved arms for Libya fell into jihadis’ hands”, *New York Times*, 5 December 2012, www.nytimes.com/2012/12/06/world/africa/weapons-sent-to-libyan-rebels-with-us-approval-fell-into-islamist-hands.html?_r=0

70 *Ibid.*

71 Pieter D. Wezeman (2011) “Libya: Lessons in controlling the arms trade”, March 2011, www.sipri.org/media/newsletter/essay/march11

72 Vranckx et al, *Lessons from MENA*, p.36

In fact, in the 2011 war, states “that once supported Colonel Muammar Qadhafi’s regime [were] . . . attacking the forces they were marketing and delivering arms to only weeks before”.⁷³ For example, at the Libdex arms fair in November 2010, UK companies were marketing Jernas short-range air defence systems, which, if they had been delivered, “would have been major obstacles in enforcing the no-fly zone”.⁷⁴ Many other deals did go through, for armoured all-wheel vehicles and armoured personnel carriers; armoured vehicles built by a UK-based firm were seen in action in Libya during the uprising.⁷⁵ Such deals were supported by the UK Government, through the Defence and Security Organisation and the embassy in Tripoli.⁷⁶ The about-turn was perhaps most pronounced in the case of France. Having supplied military equipment under a 2007 Franco-Libyan Memorandum of Understanding to modernise existing Libyan equipment and purchase new weapons,⁷⁷ President Sarkozy was one of the first leaders to denounce the regime and call for military action.⁷⁸ And in the military action, French Rafale combat aircraft – which France had attempted to sell to Libya – were used to bomb Libyan howitzers, which themselves had been due to be refurbished by an Italian company under a contract signed in 2010.⁷⁹ The about-turn was made visible again when, in the aftermath of the 2011 war, long-term defence cooperation agreements were signed between France and Libya.⁸⁰

The Russian Government had been a larger supplier of military equipment to Libya than EU Member States. While it abstained on UNSCR 1973, it voted in favour of UNSCR 1970, supported sanctions against Libya, and did not veto the resolution to allow use of force. In this, a presidential decree of March 2011 banned the export, sale, delivery, and transfer of military equipment from Russia to Libya,⁸¹ with Russia standing to lose almost \$4bn in arms agreements as a result.⁸² So while Russian military supplies had helped maintain the Qadhafi regime, the Russian Government voted in favour of the arms embargo and took measures to implement it domestically once the crisis erupted. A further presidential decree lifted the embargo on 6 May 2012,⁸³ resuming the military relationship, as EU states also did.

China has not been a major supplier of weapons to Libya. Its stated policy is that it will transfer military equipment to enhance the defensive capability of the recipient state and will not transfer arms to non-state actors as a matter of policy. However, the Chinese Government was itself subject to controversy when allegations surfaced that in July 2011 officials from the Qadhafi regime travelled to China to try to purchase weapons worth at least \$200m.⁸⁴ Chinese Foreign Ministry Spokesperson Jiang Yu confirmed that “the Qadhafi regime sent personnel to China in July to contact with some individuals of relevant Chinese companies without the knowledge of the Chinese Government. The Chinese companies did not sign military trade agreements with the Libyan side, let alone export military products to them”.⁸⁵ Further, the government states that “Chinese companies have not provided military products to Libya through direct or indirect means since the adoption of Resolution 1970”.⁸⁶ However,

⁷³ Wezeman, “Libya: Lessons in controlling the arms trade”

⁷⁴ *Ibid.*

⁷⁵ Vranckx et al, *Lessons from MENA*, p.39

⁷⁶ *Ibid.* p.38

⁷⁷ *Ibid.* p.37

⁷⁸ Wezeman, “Libya: Lessons in controlling the arms trade”

⁷⁹ *Ibid.*

⁸⁰ Defense Industry Daily (2012) “The French connection: Libya seeking arms deals”, 4 March 2012, www.defenseindustrydaily.com/the-french-connection-libya-seeking-arms-deals-04417/

⁸¹ Al Jazeera (2011) “Russia bans arms sales to Libya”, 10 March 2011, www.aljazeera.com/news/europe/2011/03/20113107287576160.html

⁸² RT.com (2011) “UN sanctions on Libya to cost Russia US\$4bn”, 27 February 2011, <http://rt.com/news/russia-arms-export-libya/>

⁸³ RIA Novosti (2012) “Russia lifts embargo on arms supplies to Libya”, 7 May 2012, http://en.rian.ru/military_news/20120507/173297633.html

⁸⁴ Smith G (2011) “China offered Gadhafi huge stockpiles of arms: Libyan memos”, *The Globe and Mail*, 2 September 2011, www.theglobeandmail.com/news/world/china-offered-gadhafi-huge-stockpiles-of-arms-libyan-memos/article1363316/

⁸⁵ Foreign Ministry Spokesperson Jiang Yu’s Regular Press Conference on September 5, 2011, www.fmprc.gov.cn/eng/xwfw/s2510/2511/t857039.shtml

⁸⁶ *Ibid.*

Omar Hariri, head of the NTC military committee, claimed to be “almost certain that these guns arrived and were used against our people.”⁸⁷

In the Libya case, the Chinese Government stated publicly its commitment to following UNSC resolutions and exercising control over military exports – as it has done in the past.⁸⁸ This makes explicit the implicit ban on exports under China’s domestic Arms Export Regulations when a UN arms embargo is in place.⁸⁹ In general, while there are Chinese concerns over the standard of evidence required before accusations are made against it, there is also acknowledgement that a lack of transparency generates misunderstanding with the West.⁹⁰

Implications of the Arms Trade Treaty

The Libya war raised a series of questions concerning weapons transfers prior to and during the uprising and conflict. To what extent could these have been answered by the ATT, agreed at the UN in April 2013? The ATT was adopted by a majority vote of 155 states (with 22 abstentions⁹¹ and 3 votes against) in the UNGA, after years of diplomatic negotiation and civil society activism, and two failed UN attempts at agreeing an ATT by consensus.⁹² Its goal is to establish a common international set of standards for regulating international arms transfers, and to prevent and eradicate the illicit trade in weapons, in order to contribute to international and regional peace, security and stability, reduce human suffering and promote international cooperation, transparency, and responsible action.⁹³ The treaty opened for signature on 3 June 2013 and was signed by 67 states on the first day; it will come into force once it has been ratified by 50 states. States that sign but do not ratify the treaty will not be legally bound by it, but should not take actions that undermine the treaty. States that neither sign nor ratify will not be bound by the treaty; but proponents hope that it will have a wider effect beyond its signatories by creating international norms based on responsible transfers.

The ATT reflects some of the existing obligations under international law to which states are subject and establishes standards based on some of the existing good practice in national export controls. The wording of the treaty is weaker than civil society activists had been advocating, and some existing national and regional control mechanisms have much stronger provisions. However, the treaty establishes baseline standards that, if implemented rigorously, would be expected to contribute to the reduction of human suffering as a result of arms transfers. For example, Article 6 of the treaty spells out certain key prohibitions based on international law, including the requirement that states must not authorise transfers of weapons to destinations under a UN arms embargo (Article 6.1). So had the ATT been in force at the time of the Libya crisis, the UN arms embargo would have served as the primary legal prohibition on transfers. However, this would not resolve the dispute, discussed above, over which actors the embargo was understood to apply to. Without a legal judgment as to whether the provisions of UNSCR 1973 allowed exemptions to the arms embargo, this would remain a matter of national interpretation.

In addition, and directly relevant to R2P concerns, under Article 6.3 of the ATT states are forbidden to transfer weapons if they know they would be used in the commission of crimes against humanity, grave breaches of the Geneva Conventions, attacks against

⁸⁷ Smith, “China offered Gadhafi huge stockpiles of arms”.

⁸⁸ Foreign Ministry Spokesperson Jiang Yu’s Regular Press Conference; for previous statements, see e.g. Statement by Ambassador Wang Min at the Review Conference of the Program of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, 28 August 2012, www.china-un.org/eng/hyfy/t964992.htm

⁸⁹ Regulations of the PRC on the Administration of Arms Exports, Article 5. This is broadly formulated and open to interpretation, but states that transactions should not constitute a threat to the peace and security to the region and world.

⁹⁰ See China Arms Control and Disarmament Association and Saferworld (2012) *The Evolution of EU and Chinese Arms Export Controls*, March 2012 www.saferworld.org.uk/downloads/Final%20Report%20ACADA-Saferworld%20-%20English.pdf, pp.37–38.

⁹¹ The Angolan delegation accidentally hit the wrong button, which registered it as abstaining; it later changed its vote to a Yes.

⁹² The first Diplomatic Conference in July 2012 ended in failure when the US asked for more time on the final day. The second conference in March 2013 failed to achieve consensus after Iran, North Korea and Syria blocked the adoption of the treaty by consensus, which pushed it into the General Assembly for a vote.

⁹³ UN General Assembly (2013) Draft Decision on the Arms Trade Treaty, 27 March 2013, A/CONF.217/2013/L.3, [www.un.org/disarmament/ATT/docs/ATT_text_\(As_adopted_by_the_GA\)-E.pdf](http://www.un.org/disarmament/ATT/docs/ATT_text_(As_adopted_by_the_GA)-E.pdf).

civilians or war crimes. Given the referral of the Qadhafi regime to the ICC on suspicion of large-scale crimes against humanity, and its past record of systematic failure to protect human rights, an effective ATT could have restricted arms transfers to the Libyan regime during the crisis of 2011. However, an exporting state has to have “knowledge at the time of authorisation” that the equipment would be misused in this way, so this prohibition could only have been put into effect once systematic violent repression of protests and attacks on civilians had started. As discussed below, taking a decision not to transfer weapons, pursuant to the application of a risk assessment, would probably have been a more appropriate course of action. In addition, it should be noted that Article 6.3 does not cover all war crimes, for example those under customary international law (in which states not party to a particular convention are still bound not to violate its provisions) – an exclusion made at the insistence of the US Government. Yet even in its current form, the provisions on IHL go beyond what China includes as war crimes in its regulations (see below) – raising important legal and implementation questions for the Chinese Government if it were to sign the ATT.

Where express prohibitions are not relevant, the ATT requires states to subject arms transfers to a criteria-based national assessment. States are to assess whether proposed transfers would contribute to or undermine peace and security, or be used to commit or facilitate serious violations of IHL or international human rights law (IHRL), or acts of terrorism or transnational organised crime. If there is an “overriding risk” (Article 7.3) that these negative consequences would occur as a result of a transfer, a state must not license it.⁹⁴ Further, they must take into account the risk of “serious acts of gender-based violence or serious acts of violence against women and children” (Article 7.4); and assess the risk of, and take measures to prevent, diversion (Article 11.1). However, there remains an inherent ambiguity in the application of Article 7 of the ATT, given that, while the term ‘overriding’ could be interpreted as a threshold of risk beyond which arms exports should not be authorised, it could also be interpreted as allowing the weighing of the impact of arms exports on human rights and IHL against their potential contribution to peace and security. Some regional mechanisms, such as the EU Common Position, already make several of the ATT ‘risk factors’ – with the exception of gender-based violence – mandatory under national law for member states without requiring their offsetting against concerns relating to peace and security.

National arms transfer risk assessments could have had ramifications for both state and non-state armed actors in the Libya case. Arms transfers to the Qadhafi regime prior to and during the 2011 crisis could have been refused on human rights, international law, and other grounds. As Pieter Wezeman of SIPRI says, it is important to assess how prior policies of arms supply “risk emboldening authoritarian regimes and how commercial and national interests may blind governments to the repercussions involved in arms trade”.⁹⁵ That is, the violations of IHL that were committed by the Qadhafi regime, which precipitated the arms embargo and military intervention, were carried out largely using imported weapons, including from Russia, France, and Italy, the latter two of which were already legally bound by an EU Common Position.

The provisions of the EU Common Position are on the whole stricter than those of the ATT, so the ATT would not subject EU Member States to higher levels of control; in this regard, EU support for the ATT was predicated on the argument that the ATT would be a ‘floor’ for arms transfer control and not a ‘ceiling’. The Russian Government, meanwhile, abstained from the vote and is unlikely to sign the treaty, meaning it will not be bound by the provisions of the export risk assessment, although it is already bound by the express prohibitions discussed above. Russia is a member of the OSCE, which has guidelines for international arms transfers, and is part of the Wassenaar Arrangement, which has some export control agreements associated with it. However,

⁹⁴ The language of “overriding” risk was a US preference that went against the wishes of many NGOs and States, who preferred language of “substantial” or “clear” risk. See ATT Legal Bloggers (2013) “The President scrubs up pretty well”, 20 March 2013, <http://armstradetreaty.blogspot.co.uk/2013/03/the-president-scrubs-up-pretty-well.html>

⁹⁵ Wezeman, “Libya: Lessons in controlling the arms trade”.

these are not legally binding arrangements, meaning that Russia currently sits outside of any international legal agreements concerning conventional arms trade regulation. The most optimistic assessment is that in the longer term, an internationally agreed and rigorously implemented ATT would increase the political cost to states – even those that have not signed – of acting in disregard of the treaty's provisions.

National assessments under the ATT could also have applied in relation to arms transfers to non-state armed groups and the risk of serious violations of IHL or IHRL. Allegations of violations of human rights and international and humanitarian law by rebels include arbitrary arrest, torture, and execution of former members of state security forces, suspected Qadhafi loyalists, and foreign nationals, particularly Sub-Saharan Africans believed to support Qadhafi. In addition, if Qadhafi had been deliberately killed in captivity, this would likely have constituted a war crime.⁹⁶ There are thus grounds under Articles 6 and 7 to have made very restrictive decisions on transfers to non-state armed groups in Libya. Further, the ATT requires states to assess the risk of diversion, take preventative measures, which may include not authorising the export, and consider taking mitigation measures such as confidence-building measures (Article 11.2). The risk of diversion regarding the French airdrop of light weapons was made clear when a rebel spokesman said it was not clear whether rebel forces or civilians were in possession of them, highlighting questions about the security of weapons once delivered.⁹⁷ However, as noted above, there is an ambiguity in Article 7 of the ATT, which could be interpreted as allowing states to make decisions in favour of arms transfers if they are believed to make an overriding contribution to peace and security.

Criteria-based assessments are also a way round the question of whether transfers to non-state actors should be prohibited, over which there is disagreement between China and Western states. The disagreement between major international powers as to appropriate responses to the conflict in Libya stemmed from a different understanding of the cause of conflict and of constructive solutions to it, which itself contributed to the impasse over responses to the current crisis in Syria. The Chinese (and Russian) Government views the conflicts in Libya and Syria as a problem of non-state armed groups challenging the authority of the regime, while Western states see the regime as the problem. However, part of what the Chinese Government is responding to is also the propensity of Western states to go to war under the guise of humanitarianism. As seen in its response to the two UN resolutions on Libya, while the Chinese Government has publicly recognised the gravity of the situation, it does not view the use of force as the best solution. And the Chinese (and Russian) repeated veto of and/or abstentions on UN resolutions on Syria – while criticised internationally⁹⁸ – are represented as in part a response to Western support for regime change via support for non-state actors.⁹⁹ To a degree, the dispute over the arming of non-state actors is a convenient fiction for both sides given their respective domestic and foreign policy concerns around separatism and terrorism. But there is also a basic difference in terms of orientation to the international system and the question of state sovereignty.

The Chinese Government has a policy of not transferring weapons to non-state actors, in part because of the Taiwan issue and its struggle with separatist groups.

It would thus have been unlikely to transfer weapons to dissenting forces in Libya even if it had voted in favour of military action in the UNSC. Some states interpreted the lack of explicit agreement prohibiting weapons transfers to armed non-state actors to mean they were free to make their own decision. The Chinese Ministry of Foreign Affairs, meanwhile, took a more conservative interpretation, seeing hardly any room

⁹⁶ ICRT to P (n.d.) "The Crisis in Libya", www.responsibilitytoprotect.org/index.php/crises/crisis-in-libya#violence; Amnesty International (2011) "The Battle for Libya: Killings, Disappearances and Torture", www.amnesty.org/en/library/info/MDE19/025/2011.

⁹⁷ Spencer, "France supplying weapons to Libyan rebels".

⁹⁸ See e.g. Amnesty International (2013) "UN resolution on Syria will do little to stop massive abuses", 15 May 2013, www.amnesty.org/en/news/un-resolution-syria-will-do-little-stop-massive-abuses-2013-05-15

⁹⁹ Li Weijian (n.d.) "China's motivation for its veto on the UN Syria resolution", www.sis.org.cn/en/zhuanti_view_en.aspx?id=10124

to expand the meaning of “all necessary measures” to include arms transfers to rebels. In this view, neither customary international law nor domestic Chinese regulations would permit the transfer or sale of weapons to rebels in Libya. This is consistent with the International Court of Justice verdict on US arms transfers to and training of Nicaraguan rebels in 1986, which ruled that this breached the principle of non-use of force under customary law.¹⁰⁰ In this case the Chinese Government acted in line with customary law, which the US delegation to the ATT negotiations refused to include in the treaty text, as discussed above. In terms of domestic regulations, the Chinese Arms Export Regulation is based on factors of *jus ad bellum* such as self-defence and non-interference, observance of which allows China to avoid a breach of Nicaragua norms.

Humanitarian considerations such as war crimes and crimes against humanity, meanwhile, are rooted in *jus in bello* and are not included in the regulation and thus are not covered by Chinese law. China has ratified the Geneva Conventions and Additional Protocols I and II, which are at the core of IHL and protect those who do not, or no longer, participate in hostilities; but there is no specific legislation for the punishment of breaches. While there are two, limited, provisions in Chinese criminal law for the punishment of war crimes (regarding ill-treatment of prisoners of war and attacking civilian populations), Chinese domestic legislation does not have a clear answer to what constitutes war crimes or how to punish them. However, Chinese regulations do include arms embargoes under Security Council resolutions, which are usually concerned with violations of IHL. It is also not clear whether state organs could apply international laws in China. A pragmatic response would be for the National People’s Congress to indicate expressly in specific acts of legislation whether relevant rules originating from international conventions should be applied directly.¹⁰¹ Overall, China lacks a test to tell whether war crimes should be considered during the arms export licensing process. This raises questions about the scope under Chinese law to implement Article 6.3 of the ATT were it to sign and ratify the treaty.

Western states do not, in general, base their weapons transfer policy on the state or non-state identity of the recipient. In the case of EU Member States, this happens via the EU Common Position. In addition, through the EU Joint Action on Small Arms, member states have committed to supply small arms and light weapons only to governments – meaning that EU states’ policy on small arms should to this extent resonate with Chinese policy on weapons transfers in general. In practice, however, questions remain. The French Government recognised the Libyan NTC in March 2011; but the NTC was only admitted to the UNGA as the representative of the Libyan people in September 2011, raising questions about the legality of such transfers prior to this date. Even if not illegal, it goes against the spirit of the EU Joint Action, through which, according to SIPRI, “[t]he sale of military-style small arms to sub-state or non-state groups is not permitted and the EU Member States have renounced this form of military assistance as an instrument in their foreign and security policy”.¹⁰² Given the dispute over the scope of the embargo on Libya, transfers to non-state actors “may well create precedents that will eventually undermine global commitment to embargoes”.¹⁰³

A third way in which a rigorous application of the criteria of the ATT could have been applied in the Libya case relates to transfers between NATO allies, given that the legality of military action was contested, and that allegations arose of harm to civilians and possible violations of IHL during the conflict. As previously noted, there are prohibitions under international law on transferring weapons if there is knowledge that they will be used to commit war crimes, crimes against humanity, and other serious violations of IHL. And where these prohibitions are not relevant, the ATT requires states to conduct a risk assessment (which EU Member States must already

¹⁰⁰ International Court of Justice (1986) “Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits)”, 27 June 1986, para.228

¹⁰¹ See e.g. General Principles of the Civil Law of the People’s Republic of China, 12 April 1986, www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm.

¹⁰² SIPRI (2004) “EU Joint Action on Small Arms”, <http://archives.sipri.org/contents/expcon/eujointact.html>

¹⁰³ Vranckx et al, “Lessons from MENA”, p.48

do under the EU Common Position). These prohibitions and risk assessment requirements could have played a role in assessments of intra-NATO transfers in relation to the decision to prosecute an air war. While efforts were made to avoid civilian casualties, questions remain as to possible violations of IHL, suggesting that the risk assessment was more relevant than the express prohibitions.

While Western states claim to assess applications on a case-by-case basis, the wider system of open licences and defence cooperation agreements makes the application of a case-by-case approach harder, and transfers between NATO allies are generally considered low-risk because of the political and military relationships between members. For example, transfers between the USA and UK have been increasingly streamlined through the 2011 exemption from the International Traffic in Arms Regulations (ITAR) for UK companies, the 2012 US-UK Defence Trade Co-operation Treaty, and use of Open General Export licences.¹⁰⁴ Nonetheless, there are questions to be raised about the future application of ATT provisions and risk assessment criteria to transfers between Western states that already have regulations that are supposed to prevent arms exports where there is a clear risk that they would contribute to violations of IHL. One potential benefit of the ATT could be to open up Western states' decisions to effective international scrutiny: there is wide variation in the quality and extent of arms transfer reporting undertaken by Western states. While, as noted above, the language of the treaty is rather weak in this area, the challenge for civil society will be to push states to provide comprehensive information – and to make it public – so that civil society as well as other states parties can assess whether they are fulfilling their obligations.

The ATT will face a challenge in addressing the issue of covert and proxy transfers because, by their nature, those involved want to keep them secret and deniable. States are unlikely to stop engaging in this practice regardless of the existence of the ATT, and it is difficult to hold states to account when information is withheld. Proxy arms transfers are a long-standing method of covert involvement in conflict in the developing world. Even if EU Member States, the US, and UAE (a key Middle Eastern proxy in the Libya case) were all to ratify the ATT, the challenge will be for civil society, parliaments, and other states to be able to hold them to account for transfers to which they do not want to admit.

¹⁰⁴ See Department for Business, Innovation and Skills (n.d.) "Exporting military goods to the United States", www.gov.uk/exporting-military-goods-to-the-united-states.

3

Conclusion

THE ATT CANNOT, and is not designed to, prevent the problems to which R2P claims to be a solution. It will neither prevent nor solve humanitarian crises in its own right. Rather, its proponents see it as a human security initiative that could serve as one instrument for preventing weapons getting into the hands of those who would violate IHL and IHRL. The war in Libya has been a significant moment in the evolution of R2P and in the debate over arms transfers and their control, showing serious points of divergence in policy and practice between states. It is worth noting that the Chinese, European, and US Governments do not envisage any changes to their arms export policy or practice as a result of the ATT. For them, the ATT is about encouraging controls in those states that do not currently have any. Chinese policy discourse emphasises that the avoidance of humanitarian crises caused by weapons depends not only on an ATT but also on whether major powers would implement international law in good faith. This is true and applies to China – itself a growing international arms exporter – as well as Western states and Russia.

The Libya war raises uncomfortable questions for European states, especially those at the forefront of pushing for the ATT. The UK, France, and Italy were significant suppliers of weapons to the Qadhafi regime when the character of its rule was clear and risk assessments could have led to far more restrictive policy. European actions thus helped create the problem to which they then responded with the embargo, military action, and aid to rebels. Diplomatically, improving European arms transfer practice – putting one's own house in order first – could open space for more nuanced discussion of Chinese policy and practice. The Chinese Government was not responsible for arming the Qadhafi regime, voted in favour of UNSCR 1970, and acted in line with customary law by not transferring weapons to non-state actors. However, the Libya war also raises questions about Chinese policy and practice. For example, it is not clear that Chinese law currently allows the Chinese Government to implement key elements of IHL through the express prohibitions in Article 6 of the ATT. More broadly, the principles governing Chinese arms export controls remain vague and rather broad. In practice, Chinese weapons and ammunition have made their way to non-state and unauthorised end users, predominantly as a result of re-transfer and diversion, raising questions for the Chinese Government regarding licensing decisions and end-use monitoring and control. And there is an ongoing lack of transparency in Chinese arms transfer reporting. In terms of R2P, Chinese Government statements about the provision of “constructive assistance” in crisis situations beg the question of what exactly this involves, and of the possibilities for political settlement when one side is much better armed and engaging in war crimes against the population.

One way the ATT could contribute to broader acceptance of genuinely common international standards of both arms transfers and R2P is through discussion of cases such

as Libya, in which there are serious, legitimate disagreements between major powers around weapons transfers and the use of force. Questioning the use of force is not the same as leaving Qadhafi to get on with his repressive and violent rule. But it does suggest that further political discussion is needed about the principle and practice of R2P as a civilian protection regime and the implications for the development of IHL. The debate about R2P and Libya has taken on extra significance with the ongoing war in Syria. A significant part of the impasse over international action on Syria – where no substantive action has been taken by the UNSC, let alone the application of R2P – is a result in part of the differences between China and Russia on the one hand, and the US, UK and France on the other, as regards how UNSCR 1973 was implemented in Libya. Serious discussion is needed to diminish the ongoing mutual suspicion for which the Libyan and now Syrian populations are paying the price.