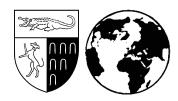
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Wings over Libya: The No-Fly Zone in Legal Perspective

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I. Introduction

On March 17, 2011, the United Nations Security Council adopted Resolution 1973, which imposed "a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians." Excluded from the scope of the ban are humanitarian flights, those evacuating foreign nationals from the country, and any other flights authorized by states enforcing the no-fly zone. Going beyond simply banning aerial activity, the Security Council further authorized "Member States that have notified the Secretary-General and the Secretary-General of the League of Arab States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance." The reference to "all necessary means" is the standard phrase the Security Council uses to authorize states to act militarily. Pursuant to the Resolution, states can operate alone, in an ad hoc coalition, through a regional organization such as NATO, or a combination thereof.

In addition to imposing a no-fly zone, Resolution 1973 demands a cease-fire and a "complete end to violence and all attacks against, and abuses of, civilians." Among the various measures sanctioned to achieve this latter aim, the Security Council granted member states permission to "take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack." The Resolution thus authorizes direct military action against Libyan armed and security forces in response to any operations that are placing, or might

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^{1.} S.C. Res. 1973, ¶ 6, U.N. Doc S/RES/1973 (Mar. 17, 2011). The resolution was adopted by a vote of ten to none, with five abstentions: Brazil, China, Germany, India, and Russia. For a summary of the debate on the resolution, see Press Release, Security Council, Security Council Approves 'No-Fly Zone' over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

^{2.} S.C. Res. 1973, *supra* note 1, ¶ 7.

^{3.} *Id*. ¶ 8.

^{4.} *Id*. ¶ 1.

^{5.} *Id*. ¶ 4.

place, the civilian population at risk.⁶ Such permission is indispensable to protecting civilians, for the greatest threat to civilians comes not from air attacks, but rather ground attacks directed against them or in which they might become collateral damage.

Two days after adoption of Resolution 1973, an ad hoc coalition of forces launched combat operations to enforce the zone and to obstruct the Libyan ground attacks that were endangering the civilian population. This Essay focuses on the no-fly zone facet of the Resolution's enforcement regime, while also situating the no-fly zone in the context of the overall operations in Libya. Part II provides a description of the legal basis for no-fly zones in general, together with a discussion of historical examples of such operations. As no-fly zones represent a unique form of international coercion, Part III assesses the legal parameters governing their maintenance, particularly those deriving from the law of armed conflict. Part IV concludes with an analysis of the Libyan no-fly zone in order to pull these two normative strands together and to identify Resolution 1973's unique features.

As will become apparent, the Libyan no-fly zone is unprecedentedly robust. In terms of geographical coverage, scope of the ban, and enforcement authorization, it is much broader than any previous no-fly zone. Moreover, maintaining the zone while conducting other combat operations to protect civilians creates a synergy that renders the military enforcement effort highly potent. But at the same time, it is essential to understand that, notwithstanding its aggressiveness, operations to police the zone are still governed by the law of armed conflict, albeit as applied in light of the Security Council's authorization. These factors make for an especially complex normative regime. But before turning to the Libyan no-fly zone, it is first necessary to examine the law governing such operations in general.

II. LEGAL BASIS FOR NO-FLY ZONES

At its most basic level, a no-fly zone is a three-dimensional piece of airspace, usually over another state's land or sea territory, in which aircraft may not fly. The mere launch of an aircraft from an airfield within the zone constitutes a violation. No-fly zones are generally implemented for the purpose of restricting the territorial state's military operations, either to protect the civilian population, as in the case of Libya, or simply to hinder its military activities.⁷ In essence, a

^{6.} Interestingly, the Security Council ruled out foreign occupation of Libya, albeit in a provision that does not necessarily prohibit the use of ground forces in operations short of occupation. S.C. Res. 1973, *supra* note 1, ¶ 4. In Resolution 1973, the Security Council additionally authorized an arms embargo and an accompanying right of States to conduct inspections of aircraft and ships reasonably suspected of carrying such arms either in the territory of a State or on the high seas. *Id.* ¶ 13. Transports suspected of carrying mercenaries to Libya are also liable to visit and search. *Id.* Not only are flights over Libya banned, but the Council has also prohibited States from allowing aircraft registered in Libya or owned or operated by Libyan nationals or companies, from landing, taking off, or overflying their territory. *Id.* ¶¶ 17-18. An asset freeze has been imposed. *Id.* ¶¶ 19-21. These measures complement those taken by the Security Council in Resolution 1970. *See* S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011). That resolution demanded an end to the violence, urged Libyan authorities to cooperate in the evacuation of foreign nationals and the delivery of humanitarian assistance, referred the situation to the International Criminal Court, imposed an arms embargo, banned travel by various Libyan officials, and froze certain assets. *Id.*

^{7.} No fly-zones must be distinguished from aerial blockades, which involve blocking entry or

no-fly zone constitutes a de facto "occupation" of a state's sovereign airspace.8

Except for those established during an international armed conflict, the only accepted legal basis for establishing no-fly zones in which forceful enforcement measures are employed is Security Council authorization pursuant to Chapter VII of the U.N. Charter. Absent such an authorization, a no-fly zone would amount to an unlawful "use of force" against the target state, in violation of Article 2(4) of the Charter.⁹

Under Chapter VII, the Security Council must first determine that a particular situation amounts to a "threat to the peace, breach of the peace, or act of aggression." The Security Council implicitly made this finding with regard to the Libyan crisis in Resolution 1970—which imposed non-forceful sanctions on Libya—by indicating that it was "[a]cting under Chapter VII." In Resolution 1973, the Council determined that "the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security." Doing so opened the door to taking forceful measures in response to events in Libya.

exit of aircraft to specified airfields or coastal areas under enemy control, primarily to prevent neutral aircraft from transporting goods and personnel to the enemy. Aircraft attempting to "breach" a blockade by crossing over a set line in the sky, including civilian and/or neutral aircraft, can be intercepted, forced to land, inspected and "captured"; those which resist become military objectives and are therefore liable to attack. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE ¶ 156 (2009) [hereinafter AMW Manual], available at http://www.ihlresearch.org/amw/manual/. The classic example of an aerial blockade is that imposed during the first Gulf War of 1990-91. On aerial blockades, see Michael N. Schmitt, Aerial Blockades in Historical, Legal, and Practical Perspective, 2 U.S. A.F. ACAD. J. LEGAL STUD. 21 (1991).

- 8. But the no-fly zones do not qualify as an occupation in law of armed conflict terms, an important point since Resolution 1973 prohibits occupation (a legal term of art). See S.C. Res. 1973, supra note 1, ¶ 4. In this regard, note that air supremacy over a country has been deemed by the European Court of Human Rights not to constitute "effective control" (while occupation always does) over an area such that human rights norms attach. See Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333, ¶¶ 71, 82.
- 9. U.N. Charter art. 2, para. 4. Note that the Definition of Aggression Resolution labels "the invasion or attack by the armed forces of a State of the territory of another State" an act of aggression. G.A. Res. 3314 (XXIX), Annex, art. 3(a), U.N. Doc. A/RES/3314 (Dec. 14, 1974). It could be argued that no-fly zones are permissible in response to a severe humanitarian crisis without an enabling resolution. However, the circumstances under which a humanitarian intervention not authorized by the Security Council may be lawful are unsettled. At the very least, massive loss of life must have occurred or be imminent; that which has occurred to date in Libya would not qualify. See FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 291-330 (3d ed. 2005). Humanitarian intervention must be distinguished from the "responsibility to protect" (R2P); whereas the former is a purported legal right, the latter is a moral (as distinct from legal) obligation, one that can only be fulfilled in accordance with a legal right to employ force, for example, pursuant a Chapter VII Resolution. The U.N. Secretary-General has characterized Resolution 1973 as affirming the international community's implementation of its responsibility to protect. Press Release, Secretary-General, Secretary-General Says Security Council Action on Libya Affirms International Community's Determination To Protect Civilians from Own Government's Violence, U.N. Press Release SG/SM/13454 (Mar. 18, 2011). On R2P, see G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Sept. 14, 2009) and documents referenced therein.
- 10. U.N. Charter art. 39.
- 11. S.C. Res. 1970, *supra* note 6, pmbl.
- 12. S.C. Res. 1973, *supra* note 1, pmbl.

Once a situation has been characterized as a threat to, or breach of, the peace, the Security Council may, under Article 41, "decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures."

The Security Council could establish a no-fly zone relying on its Article 41 authority alone, but since the Article only envisions non-forceful measures, such a zone could not be enforced militarily.

Where the Security Council decides that Article 41 measures have proven inadequate, or would prove fruitless, it may in accordance with Article 42 "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." Resolution 1973 specifically "recall[s]" Resolution 1970, which was based on Article 41, and notes that the situation is "deteriorating," thereby explicitly finding that Article 41 measures had not sufficed. Although Resolution 1973 does not explicitly cite Article 42, the reference to the deterioration of events in the country and the decision to resort to force to address matters, considered in light of the structure of Chapter VII, can only lead to the conclusion that Article 42 constitutes the legal basis for the Libyan no-fly zone operation.

A no-fly zone resolution, like any resolution contemplating the use of force, will generally designate who can take enforcement action. There are three possible alternatives. First, a U.N.-commanded and controlled force (i.e., "Blue Helmets") may be authorised to maintain the zone. In light of the complexity of mounting no-fly zone operations and the United Nations' limited military capabilities, this option is highly unlikely to be used. Second, the resolution may authorize "Member States" generally or specific states to enforce the zone. In the latter case, only those states so designated may act. In the former case, states acting on their own or in an ad hoc coalition may police the zone. Third, the Council may designate an international organization, either by name or in general, as an authorized enforcement entity. As noted earlier, in Resolution 1973 the Security Council opted for a combination of the second and third options. Despite Libyan claims to the contrary, ¹⁷ the establishment of a no-fly zone

Despite Libyan claims to the contrary, ¹⁷ the establishment of a no-fly zone by the Security Council can never be characterized as unlawful interference in a state's internal affairs. This is because Article 2(7) of the U.N. Charter, while reaffirming that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state," expressly states that the "principle shall not prejudice the application of enforcement measures under Chapter VII." Because no-fly zones qualify as Chapter VII enforcement measures, they do not, as a matter of law and regardless of the attendant facts, amount to unlawful internal intervention.

In the past two decades, there have been three notable examples of no-fly

^{13.} U.N. Charter art. 41.

^{14.} U.N. Charter art. 42. The zone is being enforced with both air and naval forces. The latter are particularly important in this situation as they can be used to monitor airspace over Libya and to enforce the ban over Libyan territorial waters or near the Libyan coast.

^{15.} S.C. Res. 1973, *supra* note 1, pmbl.

^{16.} S.C. Res. 1973, *supra* note 1, ¶¶ 4-5.

See Ian Black, Gaddafi Threatens Retaliation in Mediterranean as UN Passes Resolution, GUARDIAN, Mar. 18, 2011, available at http://www.guardian.co.uk/world/2011/mar/17/gaddafi-retaliation-mediterranean-libya-no-fly-zone.

^{18.} U.N. Charter art. 2, para. 7.

zones. The first two followed the Gulf War of 1990-1991, in which an ad hoc military coalition expelled Iraqi forces from Kuwait pursuant to Security Council Resolution 678. Soon after a cease-fire was confirmed in Security Council Resolution 686, Kurds in the north and Shias in the south revolted. Iraqi security forces responded brutally, in particular with helicopter attacks.²¹ In Resolution 688, the Security Council condemned the Iraqi onslaught and insisted that humanitarian assistance be allowed into the area.²² Iraqi forces were directed to withdraw from a "security zone" in the north, and a no-fly zone, maintained by U.S., U.K., French, and Turkish aircraft, was established north of the thirty-sixth parallel to ensure the security of the coalition forces and to preclude further attacks on Kurdish civilians. Known as Operation Provide Comfort, the no-fly zone continued until the launch of the Second Gulf War in March 2003, although it was redesignated Operation Northern Watch in 1996 when the French pulled out. In the south, Iraqi helicopter operations against Shia insurgents continued until August 1992, when Operation Southern Watch was established to enforce a no-fly zone south of the thirty-second parallel. In 1996, the zone was extended to the thirty-third parallel. It too continued until 2003.²³ Importantly, and unlike the Libyan no-fly zone, no Security Council resolution expressly authorized these operations in Iraq. Rather, the purported basis for both the northern and southern zones was a complicated extrapolation from Resolutions 678, 687, and 688.²⁴

The third notable no-fly zone was established over Bosnia and Herzegovina during that country's bloody ethnic conflict in late 1992. When an agreement to ban flights as a "confidence building measure" and to facilitate the safe delivery of humanitarian assistance proved ineffective, the Security Council, in Resolution 781, prohibited military flights in the area. The Resolution did not indicate whether it was adopted pursuant to Article 41 or 42 of the Charter, but since it did not authorize the use of forceful enforcement measures, either Article would have sufficed as an adequate legal basis. In response to continued Serb flights in the area, the Security Council adopted Resolution 816, which authorized member States, "acting nationally or through regional organizations or arrangements, to take . . . all necessary measures" to

^{19.} See S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

^{20.} S.C. Res 686, U.N. Doc. S/RES/686 (Mar. 2, 1991). The Iraqis formally accepted the cease fire terms in a letter to the President of the Security Council. Permanent Rep. of Iraq to the U.N., Letter dated Mar. 3, 1991 from the Permanent Rep. of Iraq to the President of the Security Council, U.N. Doc. S/22320 (Mar. 3,1991).

^{21.} See Human Rights Watch, Endless Torment: The 1991 Uprising in Iraq and its Aftermath vii (1992); George Bush, Letter to Congressional Leaders Reporting on Iraq's Compliance with United Nations Security Council Resolutions, 28 Weekly Comp. Pres. Docs. 1668, 1669 (1992).

^{22.} S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 15, 1991).

^{23.} Facts set forth herein on Operations Provide Comfort, Northern Watch and Southern Watch are based on the author's participation in the Iraqi no-fly zone operations.

^{24.} See RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 5-7 (2011). Although Resolution 688 was primarily responsive to the situation of the Kurds, it encompassed the "repression of the Iraqi civilian population in many parts of Iraq." S.C. Res. 688, supra note 22, pmbl. Therefore, it also provided the purported legal basis for the no-fly zone in the south.

^{25.} See Specific Decisions by the London Conference, Doc. LC/C7 (Final), Aug. 27, 1992, reprinted in 31 I.L.M. 1539 (1992). Implementing measures were decided upon the following month. U.N. Secretary-General, Report of the Secretary-General on the International Conference on the Former Yugoslavia, ¶¶ 103-09, U.N. Doc. S/24795 (Nov. 11, 1992).

^{26.} S.C. Res. 781, U.N. Doc. S/RES/781 (Oct. 9, 1992).

enforce the ban, provided that the measures were "proportionate to the specific circumstances and the nature of the flights." The result was NATO's Operation Deny Flight, which lasted through December 1995. Departion Deny Flight was very much a forerunner of the Libyan operation in the sense that it was expressly authorized by the Security Council (implicitly pursuant to Article 42) and allowed both individual states and international organizations to maintain the zone. Moreover, as with the Iraqi zones and now the Libyan zone, the well-being of the civilian population provided the justification for its establishment. Distinct from the Iraqi and Libyan operations, however, Operation Deny Flight did not extend to civilian aircraft.

During the three operations, force was employed repeatedly. ³² Coalition forces downed an Iraqi fighter in both northern and southern Iraq, and four Serbian combat aircraft were shot down over Bosnia-Herzegovina. All three operations faced ground fire against enforcement aircraft, and an American and a French aircraft were downed during Operation Deny Flight. Air-to-ground attacks were also regularly conducted as defensive measures. Tragically, in April 1994, two U.S. Air Force F-15s accidently shot down two U.S. Army Blackhawks in the northern no-fly zone over Iraq in a "friendly fire" incident. ³³ Despite these events, the degree of force used in the previous zones paled in comparison to what we are witnessing in Libya today.

III. LAW OF ARMED CONFLICT ISSUES IN CONDUCTING NO-FLY OPERATIONS

The enforcement of a no-fly zone contemplates the use of military force by one state against another, and therefore, the law of armed conflict governs any military measures taken to maintain them. That a no-fly zone may be established pursuant to a Security Council mandate has no effect on the applicability of the law of armed conflict, a point reiterated with regard to Chapter VII enforcement actions in a Secretary-General's Bulletin on the issue.³⁴ In particular, the principle

- 27. S.C. Res. 816, ¶ 4, U.N. Doc. S/RES/816 (Mar. 31, 1993).
- 28. On Operation Deny Flight, see *Operation Deny Flight, Allied Forces Southern Europe Fact Sheets*, NATO (July 18, 2003), http://www.afsouth.nato.int/archives/operations/DenyFlight/DenyFlightFactSheet.htm.
- 29. S.C. Res. 816, *supra* note 27, ¶ 4.
- 30. S.C. Res. 781, *supra* note 26, pmbl.
- 31. *Id*. ¶ 1.
- 32. Based on personal knowledge of author.
- 33. See 1 AIRCRAFT ACCIDENT INVESTIGATION BOARD REPORT, US ARMY UH-60 BLACK HAWK HELICOPTERS 87-26000 AND 88-26060, at 1-6 (May 27, 1994), available at http://www.dod.gov/pubs/foi/reading_room/973-1.pdf.
- 34. U.N. Secretariat, Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999), *reprinted in* 38 I.L.M. 1656 (1999). The official International Committee of the Red Cross (ICRC) commentary to the Geneva Conventions likewise provides that

[a]ny difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces.

INT'L COMM. OF THE RED CROSS, COMMENTARY TO THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean Pictet ed., 1960) (internal

of distinction, which requires that "Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives," applies fully, as do those rules which operationalize that principle, such as that of proportionality and the requirement to take "precautions in attack." Although no-fly zones raise a number of other law of armed conflict issues (such as delivery of humanitarian assistance), the seminal legal question is: when may an aircraft violating the zone lawfully be attacked?

If a state establishes a no-fly zone in the absence of a Security Council resolution, rules of attack apply within the zone in precisely the same manner as they would outside it. For instance, civilian aircraft violating the zone could not be engaged, as they would constitute civilian objects immune from attack. Similarly, attacks against ground-based defenses would have to consider the likelihood of incidental harm to the civilian population or civilian property (proportionality)⁴⁰ and would have to be conducted in a manner that minimized harm to that population to the extent feasible (precautions in attack).⁴¹ A Security Council-established zone limited to military aircraft, as in the case of Operation Deny Flight, would similarly require standard application of the law of armed conflict.

However, enforcement of a Security Council-authorized no-fly zone applying to all aircraft, such as that over Libya, necessarily alters the equation. A civilian aircraft violating a no-fly zone forfeits its civilian status and becomes a "military objective," because it is making an "effective contribution to military action" and its "destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage" to the states enforcing the no-fly zone. Were this not the case, the establishment of a no-fly zone prohibiting all flights would be meaningless.

The mere fact that an aircraft qualifies as a military objective, however, does not necessarily mean it may be attacked. In particular, the principle of

- citations omitted).
- 35. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (codifying the customary international law principle of distinction).
- 36. Id. art. 51(5).
- 37. *Id.* art. 57 (codifying the requirement of "precautions in attack"). For a restatement of the principle in a non-party state's official publications, see DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 8.1 (2007). This principle has been operationalized in law of armed conflict rules such as those prohibiting attacks on civilians, *see* AP I, *supra* note 35, art. 51, and civilian objects, *see* AP I, *supra* note 35, art. 52. Although the United States has not ratified Additional Protocol I, the rules governing attacks cited in this essay are generally deemed to be customary in nature and, therefore, binding on U.S. military forces.
- 38. The reader is cautioned that other rules of the law of armed conflict, such as those extending protection to medical and humanitarian aircraft, apply equally during enforcement of a no-fly zone.
- 39. Civilian objects are all objects that are not military objectives. AP I, *supra* note 35, art. 50(1). Military objectives are objects "which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." AP I, *supra* note 35, art. 52(2).
- 40. AP I, *supra* note 35, arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b).
- 41. Id. art. 57.
- 42. Id. art. 52(2).

proportionality prohibits attacks that "may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated." Therefore, even though violating aircraft are military objectives, they may be downed only if an attack on them would not be expected to cause excessive harm to civilians. This raises the issue of the status of any civilians aboard the aircraft in question—specifically, whether and how harm to civilian passengers during an engagement factors into the proportionality calculation.

An extreme view holds that civilians' presence on a violating aircraft need not be considered, because no-fly zones are a special case that by definition contemplates attacks against what would otherwise be civilian objects. A better, more nuanced position would treat any civilians on the violating aircraft as the functional equivalent of "human shields." This position, however, requires differentiating between those aboard the aircraft voluntarily and those aboard the aircraft involuntarily.

As to civilians on the aircraft voluntarily, there are two possible approaches. The first holds that civilians retain their civilian status, and therefore their deaths must be considered when assessing proportionality. Such an approach would often make the no-fly zone unenforceable, since the incidental deaths of any civilians aboard the violating aircraft could easily render an attack disproportionate. The second, better approach, one cognizant of the fact that the law of armed conflict represents a delicate balance between military necessity and humanitarian considerations, treats voluntary passengers as direct participants in hostilities, who may be attacked "for such time" as they so participate. Their participation in the zone's violation, as well as any intention of inducing enforcement forces to hesitate before attacking, would constitute direct participation. Of course, the enforcement forces would have no compelling reason to attack the individuals as such, but the fact of their direct participation means they need not be considered in the requisite proportionality calculation.

The case of those who are involuntarily aboard the aircraft presents a more difficult quandary, for they cannot be considered direct participants in hostilities. Again, two alternative approaches exist. The first would characterize them as civilians who count in the proportionality assessment, but would nonetheless "discount" the resulting harm on the ground that the party breaching the zone should not be allowed to benefit fully from its violation of the prohibition on using human shields.⁴⁷ Although this approach has prescriptive appeal, it is

^{43.} *Id.* arts. 51(5)(b), 57(2)(a)(iii), 57(2)(b).

^{44.} For a discussion of the treatment of human shields in the law of armed conflict that expands on the points made below, see Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292 (2009).

^{45.} See Michael N. Schmitt, Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance, 50 VA. J. INT'L L. 795 (2010).

^{46.} AP I, *supra* note 35, art. 51(3) provides that "[c]ivilians shall enjoy the protection afforded by this Section [on protection from the effects of hostilities], unless and for such time as they take a direct part in hostilities." The standard is discussed at length in INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (Nils Melzer ed. 2009). However, the Guidance has been the subject of considerable controversy. *See* Forum, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, 42 N.Y.U. J. INT'L L. & POL. 637 (2010).

^{47.} For a discussion of this approach, see PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE ¶ 45 cmt.7 (2010) [hereinafter AMW Manual Commentary],

difficult to imagine how it would be applied in practice. Under the second approach, those on the aircraft involuntarily would retain their full civilian protection, since the use of civilians as shields arguably does not "release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians." This approach best conforms to the military necessity/humanitarian considerations balance in that it would still permit violating aircraft to be attacked so long as the harm to such civilians was not excessive relative to the military advantage gained from maintaining the zone. Moreover, it comports most closely with the purpose of most no-fly zones, including that over Libya—the protection of civilians.

But these interpretations do not resolve situations in which the status of the individuals aboard an aircraft violating a no-fly zone is ambiguous. The law of armed conflict requires that when doubt exists regarding a person's status, "that person shall be considered to be a civilian." If enforcement forces have good reason to be uncertain as to whether civilians are aboard the aircraft voluntarily, they must treat them as civilians who factor fully into the proportionality calculation. However, this rule of doubt does not imply that any doubt whatsoever requires a presumption of civilian status; after all, doubt is a common incident of warfare. Rather, "The degree of doubt necessary to preclude an attack is that which would cause a reasonable attacker in the same or similar circumstances to abstain from ordering or executing an attack." So, the issue for the states enforcing the zone is less one of doubt as to status than it is one of reasonableness in concluding any civilians aboard the aircraft are there voluntarily.

Equally important in shaping tactics regarding no-fly zone enforcement is the requirement to take precautions in attack. The law of armed conflict insists that "constant care . . . be taken to spare the civilian population, civilians and civilian objects." This broad exhortation is the source of multiple rules. To begin with, every feasible step must be taken to "verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection." The requirement is especially relevant in the no-fly context because of the possibility that an aircraft may be mistakenly present in the prohibited airspace, for instance due to navigational error. Depending on the circumstances, the rules of engagement (ROE) adopted by the enforcing states may require attempting to establish radio contact with a violating aircraft, conducting visual identification thereof, or taking other steps to establish the nature of the aircraft before engaging it. ⁵³

The precautions-in-attack requirement also compels an attacker to

available at http://www.ihlresearch.org/amw/manual/. The prohibition on using human shields is at AP I, *supra* note 35, art. 51(7).

^{48.} AP I, supra note 35, art. 51(8). It is unsettled whether this rule is customary in nature.

^{49.} Id. art. 50(3).

^{50.} AMW Manual Commentary, *supra* note 47, ¶ 12(a) cmt. 4.

^{51.} AP I, *supra* note 35, art. 57(1).

^{52.} *Id.* art. 57(2)(a)(i).

^{53.} See INT'L INST. OF HUMANITARIAN LAW, RULES OF ENGAGEMENT HANDBOOK 1 (Dennis Mandsager ed., 2009) ("ROE are issued by competent authorities and assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives. . . . [T]hey provide authorisation for and/or limits on, among other things, the use of force, the positioning and posturing of forces, and the employment of certain specific capabilities."). On ROE in no-fly zones, see Michael N. Schmitt, Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement, 20 LOY. L.A. INT'L & COMP. L. REV. 727 (1998).

consider feasible "means and methods" (i.e., weapons and tactics) that could limit civilian harm.⁵⁴ By way of illustration, an attempt to force an aircraft with civilians aboard to land should be made before attacking it. Similarly, the ROE would typically mandate an escalated use of force prior to shooting the aircraft down, such as firing warning shots or creating disruptive jet wash in front of the aircraft.⁵⁵ And if the crash of a violating aircraft could kill civilians on the ground, it should, when possible, be downed at a point where such harm can best be avoided.

The requirement to use means-and-methods precautions in attack attaches only when civilians are likely to be affected. There would be no legal obligation, for example, to use escalated force if the aircraft was clearly violating the zone, its passengers were combatants or direct participants, and harm to persons on the ground was unlikely. Similarly, the rules on precautions in attack are subject to the caveat of feasibility. Feasibility is defined as "that which is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations." In particular, it is appropriate to consider the threat posed to the intercepting aircraft (or other enforcement platforms, such as warships) when deciding upon measures to enforce the zone. For example, a requirement to visually identify an aircraft which has launched from a military airfield and which displays the flight characteristics (e.g., rate of climb and speed) of a fighter would generally be infeasible.

Although any use of force during no-fly zone enforcement is subject to the law of armed conflict, when the operation is conducted pursuant to a Security Council authorization, the general wartime rule that any combatant or military objective may be lawfully attacked is tempered by the scope of the authorization. In other words, while the use of force between states initiates an "armed conflict" to which law of armed conflict limitations pertain, the enforcing states may not enjoy the full corresponding range of belligerent rights. In particular, absent specific authorization such as that in Resolution 1973, attacks on military assets are only permissible to the extent necessary to enforce the no-fly zone. Most importantly, airfields and air defenses may not be attacked unless used, or about to be used, to resist imposition of the zone. By the same logic, aircraft approaching the zone may only be attacked once they penetrate it, even in cases where it is apparent that they intend to do so.

This limitation should not be interpreted too narrowly, however. For instance, if an airfield is regularly used to launch violating aircraft, it would be a reasonable application of the "all necessary means" authorization to crater its runways so as to prevent further launches. Likewise, if enemy surface-to-air missiles are fired at enforcement aircraft, attacks to end such firings need not be limited to the individual sites involved, but could extend more broadly to related

^{54.} AP I, *supra* note 35, art. 57(2)(a)(ii).

^{55.} Indeed, the law of armed conflict requires warnings of an attack which may affect civilians, whenever circumstances permit. *Id.* art. 57(2)(c).

^{56.} AMW Manual, *supra* note 7, ¶ 1(q); *see also* Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Amended Protocol II) art. 3(10), May 3, 1996, S. Treaty Doc. No. 105-1 (1997) (defining "feasible precautions"); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) art. 1(5), Oct. 10, 1980, 1342 U.N.T.S. 171, S. Treaty Doc. No. 105-1 (1997) (same). Several states articulated this position upon ratifying AP I. *See, e.g.*, Letter from Christopher Hulse, Ambassador of the U.K. to Switz., to the Swiss Gov't (Jan. 28, 1998), *available at* http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2.

components of the integrated air defense system.⁵⁷ And an aircraft that takes hostile action or demonstrates hostile intent against enforcement aircraft may be engaged on the basis of individual and unit self-defense even while outside the zone.⁵⁸ However, the point remains that there must be a close nexus between any enforcement actions and maintenance of the no-fly zone. Should the force policing the zone wish to take additional forceful measures, it would have to secure further authorization from the Security Council in the form of a Chapter VII resolution.

A final issue of much import to those actually enforcing a no-fly zone is that, although captured aircrew may normally be held as prisoners of war until "cessation of active hostilities," because the operation has been authorized by the Security Council, the state against which the no-fly zone is imposed would arguably be required to immediately return any captured personnel. This conclusion derives from Articles 2(5) and 25 of the Charter, which require all member states to respect the decisions of the Security Council and provide assistance in the execution of its decisions. Somewhat paradoxically, the target state remains bound by these obligations even though it is the subject of the enforcement operations. Continued detention of any captured aircrew would be contrary to these obligations.

IV. THE LIBYAN NO-FLY ZONE

In light of the foregoing general principles governing no-fly zones, Resolution 1973 is a robust and carefully crafted no-fly zone authorization. Its interpretation requires sensitivity to how the various provisions relate to each other, since the military operations underway in Libya today are the product of this interplay.

There is absolutely no question that the no-fly zone is lawful. Like that over Bosnia-Herzegovina but unlike those over Iraq, it was expressly authorized by the Security Council following a finding of a threat to the peace and after non-forceful measures failed to ensure international peace and security. Because of the phrase "acting nationally or through regional organizations or arrangements," the Libyan no-fly zone may be enforced, like Operation Deny Flight, by aircraft or other military forces from any state or security organization. It was thus lawful when, on the first full day of operations, French aircraft began policing the zone unilaterally rather than as a component of a NATO operation; France was not required to await implementation of NATO command and control.

Participation requires no approval from the Security Council, although

^{57.} Of course, the rules of proportionality and the requirement to take precautions in attack would limit whether and how such attacks may be conducted.

^{58.} All states have the right to defend themselves and their units in the face of a hostile act. The United States and numerous other countries further claim the right to act defensively in response to a demonstration of "hostile intent." *See, e.g.*, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01B, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, at encl. A, ¶¶ 2(a), 3(a), 3(f) (June 13, 2005); INT'L INST. OF HUMANITARIAN LAW, *supra* note 53, at 3-4.

^{59.} Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

^{60.} U.N. Charter art. 2, para. 5; id. art. 25.

^{61.} U.N. Res. 1973, *supra* note 1, ¶ 4.

^{62.} David D. Kirkpatrick, Steven Erlanger & Elisabeth Bumiller, *Allies Open Air Assault on Qaddafi's Forces*, N.Y. TIMES, Mar. 20, 2011, at A1.

participants are required to notify the U.N. Secretary-General and Secretary-General of the Arab League before joining the effort. ⁶³ The Resolution also requests that participants keep the Secretary-General apprised of actions being taken. ⁶⁴ Similarly, while the Resolution calls for coordination and cooperation with the United Nations and Arab League, there is no corresponding requirement to seek their consent as to any particular tactics or ROE used to enforce the flight ban—such decisions are left entirely to the enforcing states.

Resolution 1973 also confirms that any state can (and should) act in support of the operation, for instance by providing over-flight and basing rights to enforcing states. Even absent such a provision in the Resolution, assistance—or at least non-support of Libyan government forces—would be required as a matter of U.N. Charter law. Article 2(5) of the Charter specifically provides that "[a]ll Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." Similarly, Article 25 provides that "Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." In other words, any support to the Libyan government in violating the no-fly zone (or taking other actions inconsistent with the Resolution) would be unlawful. It is also arguable that any state asked to provide assistance to enforce the zone (short of providing armed forces) would have to comply with such a request.

The most significant aspect of Resolution 1973, and that which most sharply distinguishes it from previous no-fly zones, lies in the fact that it contemporaneously authorizes military action beyond the maintenance of a no-fly zone to protect civilians and civilian "populated areas." Pursuant to this provision, states may conduct military operations against the Libyan armed forces, including ground and naval forces, to the extent those forces represent a threat the civilian population. The reference to the protection of "populated areas" is especially important; it allows for the defense of cities and other areas held by rebel forces even if the Libyan armed forces are not directly targeting the civilians therein, since any Libyan assault would inevitably place civilians at risk. Moreover, the authorization permits attacks on Libyan security forces that, while not directly engaged in attacks on civilians or areas populated by civilians, are supporting, or reasonably could be expected to support, such attacks, even far from the battlefront.

Effectively, the provision removes the requirement of a nexus between airstrikes and the no-fly zone. The air- and sea-launched attacks on airfields, air defenses, fielded forces, and strategic targets conducted by U.S., U.K., and French forces soon after establishment of the zone might not have been justified solely on the basis of the no-fly zone itself. Without the provisions authorizing the protection of civilians, it is at least arguable that enforcing states would have had to await Libyan resistance to the air enforcement operation, or at least a clear

^{63.} S.C. Res. 1973, *supra* note 1, ¶ 8.

^{64.} *Id*. ¶¶ 4, 8.

^{65.} *Id*. ¶ 9.

^{66.} U.N. Charter art. 2, para. 5.

^{67.} Id. art. 25.

^{68.} S.C. Res. 1973, *supra* note 1, ¶ 4.

^{69.} Kirkpatrick, Erlanger & Bumiller, *supra* note 62, at A1. The characterization of these attacks in the media as an element of the no-fly zones is somewhat misguided as a matter of law.

indication that the Libyan forces intended to oppose it.⁷⁰ The broader authorization to use force removes any possible doubt as to the legitimacy of the strikes.

As to Resolution 1973's no-fly provisions, unlike the case of Operation Deny Flight but like those over Iraq, the prohibition is not limited to military aircraft. As a consequence, civilian aircraft that intentionally violate the zone become military objectives, subject to the other relevant rules of the law of armed conflict such as proportionality and precautions in attack. However, it must be cautioned that, because the Resolution cites the protection of civilians as its foundational purpose, it is implicitly targeted against military aircraft. Overly aggressive enforcement against aircraft carrying civilians who are not directly participating would be incongruent. ROE crafted for aircraft enforcing the zone need to take special cognizance of this purpose, for instance by imposing escalated steps to ensure the identification and intentions of suspected violators. It should be further noted that the ban applies equally to any aircraft flown by rebel forces. This is an important factor operationally, for it removes the requirement that enforcement aircraft distinguish among military aircraft in the zone, a requirement that would be especially difficult to implement.

Tellingly, the no-fly zone extends throughout the country, not just over areas in which the fighting is taking place or in which civilians are at particular risk, as was the case for the zones over Iraq. Combined with the "protection of civilians" authorization, the broad geographical scope of the zone reveals the extent to which Resolution 1973 is targeted at crippling the Libyan government's ability to operate militarily, rather than merely preventing aerial attacks on civilians.

Finally, it is important to dispense with one issue that surfaced upon the Libyan regime's spurious declaration of a unilateral cease-fire the day after adoption of the Resolution. A cease-fire, even though demanded by the Resolution, has no bearing on continuation of the no-fly zone. The zone's avowed purpose is the protection of the civilian population. So long as it is reasonable to conclude that the civilian population remains at risk, the zone may be continued indefinitely, subject, of course, to the political will and military capacity of the enforcing states. In this regard, recall that Operations Northern and Southern Watch were maintained for years out of concern that Iraqi forces might again turn their arms on the Kurds and Shias.

V. CONCLUSION

The no-fly zone now being enforced in Libya is the most robust no-fly zone authorized by the Security Council to date. Resolution 1973 applies the no-fly zone to civilian as well as military aircraft, extends it throughout Libya, and, most importantly, couples it with an authorization to use military force to protect the civilian population. There are historical precedents for some of these facets of the Libyan no-fly zone, but they have never been combined in such a potent form

^{70.} Certain statements by organs of the Libyan government could reasonably be interpreted as just such a threat. For instance, a Ministry of Defence issued a statement to the effect that "[a]ny foreign military act against Libya will expose all air and maritime traffic in the Mediterranean to danger, and civilian and military facilities will become targets." Karen DeYoung & Colum Lynch, *U.N. Council Opens Door to Strikes in Libya*, WASH. POST, Mar. 18, 2011, at A1. Thus, military action in advance of the enforcement was arguably a "necessary means" to establishment of the zone.

before.

Nevertheless, the enforcement of the Libyan no-fly zone is subject to the law of armed conflict. In particular, the principle of distinction serves to ensure enforcement forces take appropriate account of humanitarian considerations. This principle must fully inform the ROE which govern the engagement of aircraft believed to be violating the zone, as well as actions taken to safeguard aircraft policing the zone. The sole departure from archetypal application of the law of armed conflict is the transformation of civilian aircraft that violate the zone into military objectives and the characterization of civilians involved in violations as direct participants in hostilities.

In addition to the law of armed conflict, enforcement of the Libyan no-fly zone, like any Security Council-authorized no-fly zone, is also constrained by its constitutive Security Council resolution. Although any use of force by or against enforcement aircraft creates an armed conflict as a matter of international law, the normal belligerent right to employ force against any "enemy" forces is constrained by the requirements set forth within the four corners of the resolution. Absent other Security Council authorization, any use of force to maintain the no-fly zone would have to exhibit a clear nexus with no-fly zone enforcement. In the Libyan case, the authorization to use force to protect the civilian population enables enforcing states to use force more broadly, but it simultaneously indicates that enforcing states should be especially careful to avoid civilian collateral damage as they do so. Despite the characterization of Resolution 1973 by some commentators as a poorly disguised attempt to force regime change, the Resolution is a complex and carefully crafted document that authorizes a robust no-fly zone within the ambit of the U.N. Charter and the law of armed conflict.

^{71.} Seumas Milne, *There's Nothing Moral About Nato's Intervention in Libya*, GUARDIAN, Mar. 23, 2011, *available at* http://www.guardian.co.uk/commentisfree/2011/mar/23/nothing-moral-nato-intervention-libya.