Professor Paust's recent JURIST op-ed about the War Powers Resolution was mentioned in an article from the JURIST website regarding the conflict in Libya.


The Libya Conflict

Background

The current conflict in Libya arose out of protests beginning February 15, 2011, in the eastern city of Benghazi. The protest came as part of a wider protest movement that had spread throughout the Middle East and North Africa, affecting Tunisia, Egypt, Bahrain, Algeria, Iran, Sudan, Oman, Yemen, Morocco, Jordan, among others.

In Libya, several hundred protesters rallied in opposition to the arrest of a prominent human rights activist. This protest was broken up by security forces, but over the following week the protest movement escalated into an uprising aimed at removing the government of Libyan leader Muammar Gaddafi, who has ruled the country since the 1969 overthrow of the monarchy. On February 23, Benghazi fell under the control of protesters after the defection of prominent military officers stationed in the city. In a bid to end the unrest, the government announced constitutional reforms and warned of civil war if the protests continued. Shortly after, 230 protester deaths were reported, prompting the UN to accuse the Libyan government of committing crimes against humanity. The UN Human Rights Council soon followed suit in condemning the actions of Gaddafi's government and warned of civil war if the protests continued. 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International Intervention

Following weeks of escalating violence, the international community began to consider action against Gaddafi's government. The UN Security Council voted unanimously on February 27 to impose sanctions on Gaddafi's government, including an arms embargo, travel ban and the freezing of assets, and voted to refer the situation to the International Criminal Court (ICC). Resolution 1970 also received support from Libya's delegation itself, which had renounced Gaddafi. Although Libya is not a signatory to the Rome Statute, which created the ICC, the Security Council voted that it should nonetheless be subject to its investigation. In late June, the ICC issued arrest warrants against Gaddafi and key members of his government for crimes against humanity.
Sanctions did not quell the violence however, and in March the Arab League called for a no-fly zone over Libya to prevent military action against civilians. The UN Security Council complied the following week, imposing a no-fly zone over the country with Resolution 1973. The resolution called for a ceasefire between the Libyan government and rebel forces, banned all flights in Libyan airspace except those for humanitarian purposes, and authorized UN member states to take "all necessary measures ... to protect civilians and civilian populated areas under threat of attack ... while excluding a foreign occupation force of any form on any part of Libyan territory."

On March 19, American, British and French military forces, in conjunction with NATO, carried out operations against Gaddafi's forces. According to JURIST Guest Columnist Curtis Doebbler, this use of international force against Libya was a violation of international law because Resolution 1973 failed to comport with Article 42 of the UN Charter, which requires a determination that "measures not involving the use of force" have failed. The military effort has resulted in an effective stalemate between Gaddafi's forces and those of the NTC, with the western portion of the country under Gaddafi's control, and the eastern portion under that of the NTC.

US Involvement and the War Powers Resolution

The US military was in strategic command of the international effort in Libya at first, with the launch of Operation Odyssey Dawn on March 19, 2011. Operation Odyssey Dawn officially ended on March 31, with the US handing over control of the effort to NATO. According to opponents of US involvement in the Libya conflict, the launch of these operations activated the War Powers Resolution, which limits the ability of the president to continue military operations without the authorization of Congress.

The War Powers Resolution, codified at 50 USC § 1541 et seq., was passed in 1973 over the veto of President Richard Nixon. The resolution requires the president to notify Congress within 48 hours of committing US armed forces to military action, and provides that armed forces must be withdrawn from the conflict after 60 days, followed by a 30 day withdrawal period, absent congressional authorization for continued hostilities. The functioning of this resolution in the context of Libya has been explained in more detail by JURIST Contributing Editor Michael Kelly.

Despite informing Congress of the military action, President Barack Obama has not received congressional authorization for continued involvement in the conflict, arguing that authorization is not necessary due to the limited role US forces are playing in the international military operation. Within a week of the initiation of hostilities against Gaddafi's forces in Libya, US Representative Justin Amash (R-MI) introduced legislation requiring the immediate halt of US military action. Citing Article I, Section 8 of the Constitution, Amash argued that the bill would "enforce the constitutional requirement that Congress approve of an offensive military operation."

On June 15, several members of Congress filed a lawsuit in the US District Court for the District of Columbia against Obama for allegedly circumventing congressional authority by increasing military strikes against Libya. The lawsuit argued that Obama is in violation of Article 1, Section 8, which grants Congress the power to declare war, in addition to violating the War Powers Resolution. The suit came shortly after House Speaker John Boehner (R-OH) sent a letter to Obama warning that he would be in
violation of the War Powers Resolution on June 19 and demanding an explanation for continued operations.

Following this, and the passage of a resolution by the House calling for withdrawal of forces deployed without congressional approval, Obama released a report to Congress attempting to explain the continued air strikes in Libya. The report, "United States Activities in Libya," argued that the US military is merely providing support as is required by several international treaties and does not have enough participation in the conflict to activate the War Powers Resolution. Another argument as to why Obama is not limited by the War Powers Resolution has been made by JURIST Guest Columnist Jordan Paust. The report explained:

The President is of the view that the current US military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because US military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision. US forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. US operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of US ground troops, US casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.

According to a report by the New York Times, this rationale for continued military action divided the Obama administration, with Pentagon general counsel Jeh Johnson and Caroline Krass, the acting head of the Office of Legal Counsel, telling Obama that they believed that US activities in Libya constituted "hostilities," and White House counsel Robert Bauer and State Department legal advisor Harold Koh arguing that US activities did not amount to "hostilities." A week later, the House rejected a resolution that would have provided congressional approval, but also rejected a resolution that would have defunded the military effort.