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THE LEGALITY OF THE NATO BOMBING IN LIBYA

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THE LEGALITY OF THE NATO BOMBING IN LIBYA

Abstract On 17 March 2011 the UN Security Council adopted Resolution 1973 authorizing member states to take forceful measures to protect Libyan civilians. Clearly NATO actions to protect civilians were within the mandate. But the authors claim that operations aiming at overthrowing the Qaddafi regime were illegal use of force. The overstepping of the mandate may have a negative effect on the credibility of the responsibility to protect in future gross human rights violations.

Key words: Libya, NATO, responsibility to protect, United Nations Security Council, use of force.

I. INTRODUCTION

The peaceful protests against the 42-year-old rule of Qaddafi started on 15 February 2011 when Libyans in the city of Benghazi gathered in demonstration against the arrest of a human rights campaigner. On 17 February, known as Libya's 'Day of Rage', Libyans in a number of towns and cities demonstrated for democratic change and respect for human rights.¹ The unarmed protesters were met with violent crackdowns by the Libyan authorities and the situation in Libya rapidly turned into a mass revolt.²

Within a few weeks, the demonstrators started an armed rebellion, gained control of several towns and cities and established a Transitional National Council. Government forces quickly responded, pushing the rebels back and retaking control of many of the areas previously under rebel control.³ The UN Office of the High Commissioner for Human Rights (OHCHR) reported about ill-treatment, beatings, injuries, rapes, torture, killings, enforced disappearances and arbitrary arrests of protesters including lawyers, human rights defenders and journalists.⁴ Reports further said that Libyan forces fired at random on protesters and bystanders from rooftops and tanks and used warplanes and helicopters to strike at demonstrators.⁵ The Libyan

¹ Institute for Security Studies, Peace and Security Council Report no 21 (April 2011).

² Human Rights Watch, 'Libya: Commanders Should Face Justice for Killings' (22 February 2011).

³ Institute for Security Studies, Peace and Security Council Report no 21 (April 2011).

⁴ OHCHR, 'Bahrain/Libya: UN Experts Urge Authorities to Guarantee Right to Protest without Fear of Being Injured or Killed; Pillay Denounces Violence by Security Forces in Libya, Bahrain and other countries in Middle East and North Africa' (18 February 2011).

⁵ OHCHR, 'Pillay Calls for International Inquiry into Libyan Violence and Justice for Victims' (22 February 2011).

authorities also used foreign mercenaries and there was a massive passage of weapons to Libyan territory.⁶ The Libyan government moreover attempted to restrict the broadcasting of the situation in the country by cutting off landlines and internet access and by restricting media coverage.⁷

Condemnations of the violent suppression by the Qaddafi regime mounted from both the UN and regional organizations, including the African Union, the Arab League, the Gulf Cooperation Council and the Organization of the Islamic Conference. On 22 February 2011 the UN High Commissioner for Human Rights,⁸ Navi Pillay, called for an immediate cessation of the human rights violations committed by Libyan authorities.⁹ On the same day the Arab League decided to suspend Libya from the organization,¹⁰ the UN Security Council issued a statement urging the Libyan authorities to 'meet its responsibility to protect its population'¹¹ and the Organization of the Islamic Conference uttered that it 'considers the ongoing coercion and oppression in Libya as a humanitarian catastrophe'.¹² On 24 February the African Union condemned 'the disproportionate use of force' against Libyan civilians.¹³ The situation in Libya combined with the calls for action from various regional organizations led the Security Council to unanimously adopt Resolution 1970 on 26 February.¹⁴ Acting under Chapter VII of the UN Charter the Council demanded 'an immediate end to the violence' and authorized measures short of armed force, including an arms embargo, freezing of Libyan assets, bans on travel for key Libyan leaders as well as referring the situation in Libya to the International Criminal Court (ICC).

Despite the implementation of measures pursuant to Resolution 1970 and the international condemnations, the Libyan government continued the brutalities against its own people and called on its supporters to attack the demonstrators.¹⁵ The regional organizations thus saw the need for stronger international pressure and by early March the Gulf Cooperation Council and the Organization of Islamic Conference endorsed a no-fly zone, followed on 12 March by the Arab League's call for a no-fly zone in combination with the establishment of safe areas.¹⁶

With columns of pro-government forces closing in on the rebel-held city of Benghazi in mid-March, the rebels' plea for military protection was augmented.¹⁷ On 17 March, speaking on a radio show in Tripoli, Qaddafi raised the levels of urgency of the situation. He threatened civilians living in areas that refused to comply with his rule, declaring 'We will come house by house, room by room . . . We will find you in your

⁶ OHCHR, Libya: "Stop the Massacre"—UN experts' (22 February 2011); The United Nations Office at Geneva, Address by Ms Kyung-wha Kang, United Nations Deputy High Commissioner for Human Rights (14 March 2011).

⁷ OHCHR, 'Libya: "Stop the massacre"—UN experts' *ibid.*

⁸ Hereinafter the High Commissioner.

⁹ OHCHR (n 5).

¹⁰ UN News Centre, 'Ban Strongly Condemns Qaddafi's Actions against Protesters, Calls for Punishment' (23 February 2011).

¹¹ UNSC/10180, SC Press Statement on Libya (22 February 2011).

¹² CNSNews, 'African Union, Recipient of Gaddafi Funds, Silent on Libya Bloodshed' (23 February 2011).

¹³ NEWS 24, 'AU Slams "Disproportionate" Force in Libya' (24 February 2011).

¹⁴ UNSC Res. 1970 (26 February 2011) UN Doc S/RES/1970.

¹⁵ Aljazeera, 'Defiant Qaddafi Vows to Fight on' (23 February 2011).

¹⁶ Washington Post, 'Arab League Asks UN for No-Fly Zone over Libya' (12 March 2011).

¹⁷ The Telegraph, 'Libya: Celebrations in Benghazi as UN Backs No-Fly Zone' (18 March 2011).

closets. We will have no mercy and no pity'.¹⁸ Later the same day the Security Council adopted Resolution 1973¹⁹ with ten votes in favour, none against and five abstentions (Germany and the four BRIC countries: Brazil, Russia, India and China). Again acting under Chapter VII, the Council authorized the use of 'all necessary measures', commonly understood as a license to use military force,²⁰ 'to protect civilians and civilian populated areas under threat of attack' in Libya and to secure the no-fly zone. On 19 March an ad hoc coalition of states—including the United States, the United Kingdom and France—began missile and aircraft attacks on Libyan government air defence and other military targets to enforce Resolution 1973.²¹ By the end of March, NATO, under Operation Unified Protector, had taken over the command of the international military operation in Libya.²²

The concept of the 'responsibility to protect' was endorsed and defined by the UN General Assembly at the World Summit in 2005.²³ It stipulates that the primary responsibility to protect civilians from genocide, war crimes, ethnic cleansing and crimes against humanity rests on the territorial state. If the territorial state is unwilling or unable to fulfil its responsibility then it is for the international community to act in its place, including by action of the Security Council. Resolution 1973 represents the first mandate by the Security Council for a military intervention based on the responsibility to protect against the wishes of a functioning government.

Shortly after Resolution 1973 was passed, disagreement emerged on the scope and limits of the mandate and already on the day the aerial attacks on Libya started, concerns were raised about military overreach. The Chinese government expressed regret at the American and European assault on Libya and Russia condemned the attack.²⁴ The African Union had rejected military intervention in Libya²⁵ and stressed that only dialogue and consultation could bring solutions in Libya.²⁶ On 2 November the Prosecutor of the ICC briefed the Security Council saying that the allegations of crimes committed by NATO and the National Transitional Council-related forces would be examined impartially and independently by the ICC's Office of Prosecution.²⁷

This article addresses whether the bombing carried out by NATO and its allies during the armed conflict in Libya was within the legal mandate provided by UNSC Resolution 1973. For the purpose of assessing the legality, the military operations will be divided into three phases. In phase one, NATO launched airstrikes at Qaddafi's forces attacking the rebels. Phase two covers NATO military operations during the alleged stalemate between the combating forces. Phase three concerns NATO airstrikes while the rebels

¹⁸ New York Times, 'As UN Backs Military Action in Libya, US Role Is Unclear' (17 March 2011).

¹⁹ UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

²⁰ E de Wet and M Wood, 'Collective Security' in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2008) para 15 available at <<http://www.mpepil.com>>.

²¹ BBC, 'Libya: US, UK and France Attack Gaddafi Forces' (20 March 2011).

²² NATO, *NATO and Libya – Operation Unified Protector* (2011).

²³ UNGA Resolution 60/1 (24 October 2005), paras 138 and 139.

²⁴ The Guardian, 'Libya Attacks under Way – Saturday 19 March Part 2' (19 March 2011).

²⁵ NEWS 24, 'AU rejects military intervention in Libya' (11 March 2011).

²⁶ African Union, press release 'The African Union Deeply Concerned about the Situation in Libya' (23 February 2011).

²⁷ UNSC 6647th meeting, 2 November 2011, UN Doc S/PV.6647.

advanced on territories controlled by Qaddafi's forces. The article does not discuss whether NATO violated international humanitarian law.

We argue that NATO actions to protect civilians were clearly within the mandate. But operations aiming at overthrowing Qaddafi, including support to the rebels' advancement in phase three, violated the mandate and were an illegal use of force. The overstepping of the mandate may have undermined the credibility of the responsibility to protect in future humanitarian crises.

II. THE LEGALITY OF THE MILITARY OPERATIONS

A. NATO Halting Attacks by Qaddafi's Forces

In phase one of Operation Unified Protector NATO and its allies launched a number of airstrikes at various ground-based devices, systems and heavy artillery of the Qaddafi regime, as well as enforcing the no-fly zone. The rebels showed a low level of military effectiveness at the time. However, allied air attacks against government forces surrounding Benghazi and other rebel-held cities, as well as masses of loyalist forces within, reinforced the rebels.

Constituting the legal mandate of the military operation in Libya, UNSC Resolution 1973 paragraph 4 authorized UN member states 'to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi'. The reference to 'all necessary measures' means that NATO enjoyed wide discretion in its choice of forcible means. The only specifically excluded measure in paragraph 4 is the deployment of 'a foreign occupation force' on Libyan territory.

But, importantly, paragraph 4 establishes a distinction between the authorized measures and the objective to be achieved. The authorization 'to take all necessary measures' is directly linked to the protection of 'civilians and civilian populated areas . . . , including Benghazi'. Only military measures directed at achieving civilian protection are legally recognized through the mandate in paragraph 4. Military measures taken in pursuance of other aims will represent a breach of paragraph 4 and will amount to an unlawful 'threat or use of force' against the targeted state under the UN Charter Article 2(4).

Paragraph 4 decides that the objective of protection comprises 'civilians and civilian populated areas . . . , including Benghazi'. International humanitarian law defines 'civilians' in international armed conflicts as all those who do not participate in the armed forces of any party or are members of militias belonging to a party to the conflict.²⁸ There is, however, no agreed definition of 'civilians' in non-international armed conflicts.²⁹ But it is accepted in both international and non-international armed conflicts that civilians are not protected against attacks 'for such time as they take a direct part in hostilities'.³⁰ Similarly, civilians taking direct part in hostilities should

²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, art 50(1).

²⁹ J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) vol 1, 19.

³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art 51(3) and Protocol

not be considered protected under Resolution 1973.³¹ Therefore only Libyan non-combatants, i.e. residents of Benghazi or other areas of Libya who do not fight with the armed forces on either side of the conflict, enjoy protection under the term 'civilians' in Resolution 1973.

The objects of protection under paragraph 4 also include 'civilian populated areas'. An ordinary reading of the phrase indicates that it is about protecting specific geographical areas. This understanding coincides with that of the French representative in the Security Council meeting adopting Resolution 1973 who stated that the resolution authorizes member states to resort to all necessary measures 'to protect civilians and territories'.³² The reference to 'civilian populated areas' is thus about protecting geographical zones populated by civilians, including towns and cities. Regardless of whether attacks on such inhabited territories are being directed at civilians or at military objects recognized as legitimate under international humanitarian law, the mandate of paragraph 4 allows for protection. This widely extends the mandate, permitting NATO and its allies to also protect cities and towns held by rebel force as well as protecting rebel forces present in such areas.

The mandate of paragraph 4 finally includes the protection of the city Benghazi. As a populated territory the city already enjoyed protection under the term 'civilian populated areas'. Nevertheless, by making a particular reference to Benghazi in Resolution 1973, the Security Council sent a clear message to Qaddafi. If Qaddafi did not immediately pull back his forces from the announced massive assault on Benghazi, NATO would initiate a military operation to secure its protection. The rapid advance of the Qaddafi forces to within striking distance of the rebel-held city of one million people had created an urgent need for protection and there was no room for ambiguities as to the legality of protecting Benghazi.³³

On the one hand, the inclusion of 'civilian populated areas . . . , including Benghazi' in paragraph 4 expands the protection mandate from covering solely those who are covered by the term 'civilians' under international humanitarian law. On the other hand, the explicit reference to these areas implies a restrictive interpretation of the mandate. It only licenses protection of these three explicitly mentioned objects. The mandate does not authorize military measures to protect the whole population or the entire geographical territory of Libya.

Moreover, paragraph 4 limits the scope of protection to situations where civilians and civilian populated areas, including Benghazi, are 'under threat of attack'. The expression shows that the mandate not only includes actual attacks, it also covers situations when civilians or populated territories are exposed to a threat of attack. A similar description of the term 'threat' was made by the International Court of Justice in the *Nuclear Weapons* Advisory Opinion where the Court said that a 'threat'

Additional to the Geneva Conventions of 12 August 1949 and Relating to the Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 UNTS 609, art 13(3).

³¹ JM Lehmann, 'All Necessary Means to Protect Civilians: What the Intervention in Libya Says About the Relationship Between the *Jus in Bello* and the *Jus ad Bellum*' (2012) 17 *JC&SL* 117–46, 124.

³² UNSC 6498th meeting, 17 March 2011, UN Doc S/PV6498. The importance of statements by representatives made at the time of the adoption of the UNSC resolution in its interpretation was noted by the International Court of Justice in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of July 22, 2010, para 94.

³³ BBC, 'Libya: Gaddafi Forces "Bomb Rebel-Held Benghazi"' (17 March 2011).

under Article 2(4) of the UN Charter is a 'declared readiness of a State to use force'.³⁴ A 'threat' involves a communicated hostile determination or intention. This communication may be expressed or implied. The existence of a threat must be determined on the basis of whether there are reasonable grounds for such a perception.

The significance of the condition of an 'attack' is that the mandate only permits NATO to conduct military operations to prevent or halt attacks, or threats of attacks, posed by either party to the Libyan conflict. There is no definition of the word 'attack' in Resolution 1973, nor in the UN Charter. But international humanitarian law establishes that civilians 'shall not be the object of attack'.³⁵ 'Attack' is defined in Additional Protocol I to the Geneva Conventions as 'acts of violence against the adversary, whether in offence or in defence'.³⁶ This has been taken to mean 'combat action'³⁷ or 'the use of armed forces'.³⁸ Similarly, 'attack' under paragraph 4 of Resolution 1973 should be taken to mean the use of military force against 'civilians and civilian populated areas'.

At the time NATO and its allies initiated airborne attacks on pro-Qaddafi forces in the city of Misrata, the city had already been under attack by government tanks and artillery for several days.³⁹ This was also the case when NATO began its airstrikes of Qaddafi's troops within Ajdabiua, where government soldiers, tanks and warplanes had been bombarding the town.⁴⁰ When carrying out military airborne action to protect these cities as well as other populated areas from ongoing attacks by government forces, NATO and its allies acted within the mandate in paragraph 4.

When it comes to Benghazi, Qaddafi had not initiated attacks on the city. But although Libya's Foreign Minister, Khalid Kaim, had announced that the government was ready for a ceasefire with the rebels, Qaddafi's forces continued to advance swiftly toward Benghazi. In his speech on a radio show in Tripoli on 17 March, Qaddafi announced his readiness to ruthlessly assault the city of Benghazi the very same night, 'It's over. The issue has been decided', he said, offering amnesty to those who laid down their arms.⁴¹ The actual movement of troops in combination with the announcement of a forthcoming assault the same night constituted a clear communication of a hostile intention. Thus, when the US, France and Britain on 19 March launched airstrikes and Tomahawk cruise missiles directed at the government forces, Libyan army tanks and vehicles outside of Benghazi, these military actions were carried out within paragraph 4 of Resolution 1973.

³⁴ *Nuclear Weapons*, Advisory Opinion of 8 July 1996 para 47. See also N Stürchler, *The Threat of Force in International Law* (CUP 2007) 273.

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art 51(2) and Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Victims of Non-International Armed Conflicts (Protocol II), art 13(2).

³⁶ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art 49(1).

³⁷ ICRC Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) <<http://www.icrc.org/ihl.nsf/COM/470-750062?OpenDocument>>.

³⁸ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) 66.

³⁹ BBC News, 'Libya Revolt: Qaddafi Targets Ajdabiya and Misrata' (16 March 2011).

⁴⁰ BBC News *ibid*. ⁴¹ New York Times (n 18).

B. The Stalemate between the Combating Forces

During the initial months of the conflict, the government forces altered their tactics, making use of armed 4×4 vehicles like those used by the rebels, as well as placing heavy armoury within civilian populations, making it harder for NATO to identify and strike at the targets. By mid-April 2011 the siege of the city Misrata had lasted for 6 weeks, with Qaddafi's forces bombarding the city with rockets and artillery. Several claimed that the battle in Libya had reached military stalemate and that NATO operations had limited effect on the bloodshed.⁴² France and Britain appealed for more intensified NATO bombing to halt Qaddafi from bombarding civilians. NATO, on the other hand, said it was 'conducting its military operations in Libya with vigour within the current mandate. The pace of the operations is determined by the need to protect the population'.⁴³ Vice Admiral Rinaldo Veri, Commander of Maritime Forces for Operation Unified Protector, opined that he did not think there was a stalemate in the conflict. He said that NATO and its allies 'are going slowly but steady . . . We are still moving forward'.⁴⁴

On 11 April 2011 a delegation led by South African President Jacob Zuma emerged as a peace broker in Libya, suggesting an immediate ceasefire and dialogue aimed at reconciling the two parties of the conflict.⁴⁵ Although the delegation managed to persuade Qaddafi to agree to a mediation plan, Mustafa Abdul Jalil, the Transitional National Council's chairman, rejected the peace initiative because it did not require Qaddafi to immediately relinquish power while both sides negotiated.⁴⁶ The rebels further rejected the peace initiative as it did not require Qaddafi to withdraw his forces and it required a cessation of NATO air strikes.⁴⁷ In addition, Anders Fogh Rasmussen, the NATO Secretary General, considered that it was 'too early' for a ceasefire because for a ceasefire to be credible 'an effective monitoring mechanism' needed to be established.⁴⁸

On 14 and 15 April 2011, NATO held an informal meeting in Berlin of NATO foreign ministers and non-NATO members participating in the Libyan conflict to discuss the alliance's military involvement in the country.⁴⁹ The US and other NATO allies rejected the French and British calls for them to contribute more to the air campaign to help break the ongoing military stalemate.

On 14 April 2011 US President Barack Obama, French President Nicolas Sarkozy and British Prime Minister David Cameron published a joint article in several newspapers. The three state leaders pledged that NATO would protect civilians and stated that 'so long as Qaddafi is in power, NATO must maintain its operations so that civilians remain protected and the pressure on the regime builds'. They acknowledged that 'our duty and our mandate under U.N. Security Council Resolution 1973 are to protect civilians and we are doing that. It is not to remove Qaddafi by force'. Nevertheless, they claimed that 'it is impossible to imagine a future for Libya with

⁴² Reuters, 'NATO May Need Escalation to Break Libya Stalemate' (18 April 2011).

⁴³ Reuters, 'France Says NATO Must Do More in Libya' (12 April 2011).

⁴⁴ NATO, press briefing on Libya (3 May 2011).

⁴⁵ CNN, 'Can African Union Broker a Libya Peace Plan?' 11 April 2011.

⁴⁶ CNN *ibid.* The Guardian, 'Libyan Revolutionary Council Rejects African Union's Peace Initiative' (11 April 2011).

⁴⁷ The Guardian *ibid.*

⁴⁸ *ibid.*

⁴⁹ Time, 'Behind a United Front, NATO Meeting Deepens Cracks in the Alliance' (16 April 2011).

Qaddafi in power' and that a genuine transition from dictatorship to an inclusive constitutional process could only really begin when Qaddafi had resigned.⁵⁰ The ambiguity of this article is striking. On the one hand, it is argued that the mandate does not include the removal of Qaddafi; on the other, it is stated that NATO will maintain its operations and increase the pressure on the regime as long as Qaddafi is in power.

Russia had from the beginning of the operation been wary of any signs of mission creep and had called for a political solution. In a news conference in Berlin on 15 April 2011, Russian Foreign Minister Sergei Lavrov said that the operation should 'proceed with a political and diplomatic settlement'. He added that 'The UN has not authorized regime change'.⁵¹ NATO Secretary-General Fogh Rasmussen responded by reiterating that the operation did not exceed the UN mandate⁵² and on 19 April Lieutenant-General Charles Bouchard explained that 'NATO will continue its campaign to degrade the Qaddafi regime forces that are involved in the on-going attacks on civilians'.⁵³

On 19 April 2011 NATO aircraft conducted multiple strikes against command and control facilities of the Qaddafi regime, including communications infrastructure used to coordinate attacks.⁵⁴ On 25 April NATO aircraft destroyed an office building in Qaddafi's Bab al-Azizia complex in Tripoli.⁵⁵ Again on 30 April NATO bombed another building in the complex, killing one of Qaddafi's sons and three grandchildren.⁵⁶ NATO held that the last attack was a precision strike against the Qaddafi regime's military installations, including targeting a known command-and-control building in the Bab al-Azizia complex. NATO held that the strikes were legal as the targets were in command and control of forces attacking civilians.⁵⁷ On 1 May British Prime Minister Cameron argued that the attacks were in line with the UN mandate of Resolution 1973. The command and control centres were part of Qaddafi's war-making machine and by its attacks NATO were preventing loss of civilian life, Cameron said.⁵⁸

The already sceptical states became even less convinced as NATO took a more offensive approach. China and Russia repeatedly disputed the allies' interpretation of the resolution, accusing NATO of overstepping Resolution 1973. At a news conference on 26 April 2011, Russian Prime Minister Vladimir Putin held that NATO had exceeded the mandate, escalating its action from civilian protection to killing Qaddafi and enforcing a regime change. Putin expressed outrage over the destruction of Libya's infrastructure and said that 'in essence one of the warring sides is attacking under the cover of aircraft'.⁵⁹ In a statement on 30 June, the Chinese Foreign Ministry spokesman Hong Lei said that his country 'urges the international community to strictly abide by the spirit of the relevant UN Security Council resolution and not take any actions that exceed the authority granted by that resolution. We have always urged a political

⁵⁰ B Obama, D Cameron and N Sarkozy, 'Libya's Pathway to Peace' *New York Times* (14 April 2011).
⁵¹ *Time* (n 49).

⁵² The Guardian, 'Nato Rejects Russian Claims of Libya Mission Creep' (15 April 2011).

⁵³ Reuters, 'NATO Missiles Strike Tripoli, Sirte: Libyan TV' (19 April 2011).

⁵⁴ NATO, 'NATO Pounds Qadhafi Regime Command and Control Centres' (19 April 2011).

⁵⁵ The Guardian, 'Gaddafi Compound Hit in Nato Attack' (25 April 2011).

⁵⁶ *New York Times*, 'Qaddafi Is Said to Survive NATO Airstrike That Kills Son' (30 April 2011).

⁵⁷ NATO, 'NATO Strikes Command and Control Facility in Tripoli' (1 May 2011).

⁵⁸ The Independent, 'Nato Action "In Line" with Policy, Says Cameron' (1 May 2011).

⁵⁹ Reuters, 'Putin: Libya Coalition Has No Right to Kill Gaddafi' (26 April 2011).

solution to the current crisis in Libya, so that Libya returns to peace and stability as soon as possible'.⁶⁰ The African Union stated that 'a verifiable and internationally-monitored ceasefire is key, both to creating conducive conditions for successful negotiations among the Libyan parties and also to ensuring the protection of the civilian population, which is the very purpose for which resolution 1973 (2011) was adopted by the UN Security Council and which should inform the ongoing military operations in Libya.'⁶¹

At the General Assembly dialogue concerning the responsibility to protect, in July 2011, several countries raised their unease about the military force used by NATO when implementing Resolution 1973. South Africa's UN Ambassador, Baso Sangqu, said he believed that the Security Council resolution that his country supported on Libya authorized only a no-fly zone and did not mean 'regime change or anything else'.⁶² The concerns of perceived overreach of Resolution 1973 echoed the Secretary-General of the Arab League, Amr Moussa, who as early as 23 March 2011 underscored that the Security Council had authorized military measures to protect Libyan civilians, not to enforce regime change.⁶³

Nonetheless, on 14 December 2011 UN Secretary-General Ban Ki-moon opined his belief that 'Security Council resolution 1973... was strictly enforced... within the mandate'. 'This military operation done by NATO forces in Libya was strictly within [resolution] 1973', he said.⁶⁴

Whether Resolution 1973 allowed military activities in pursuance of a regime change has been one of the most controversial issues concerning the Libyan intervention. The legal litmus test is whether the NATO measures were aiming at protection of 'civilians and civilian populated areas... including Benghazi' against 'threat of attack'. The term 'under threat of attack' goes beyond the need for a definite or direct link to an actual attack. A comparison between the text in Resolution 1973 on Libya with Resolution 1975 (2011) on Côte d'Ivoire, where the Security Council also authorized the use of armed force to protect the civilian population, shows that while the text of Resolution 1975 is limited to situations where civilians are 'under imminent threat of physical violence', the text of Resolution 1973 does not require imminence. Yet, some form of adequate connection must be established between a military capability and the risk to civilians. Surely, Qaddafi's command and control centres did not in themselves pose a threat against the civilian population. However, they enhanced Qaddafi's capabilities to attack his own people. Without these centres Qaddafi was no longer able to effectively coordinate his forces. Resolution 1973 did not establish a basis for destroying Qaddafi's military forces. Nevertheless, there may be a fine line between what should be considered a lawful destruction of capability to threaten civilians against attack and general impairment of the regime's army.

This leads to the question of overthrowing the regime. Shortly after Resolution 1973 was adopted, on 24 March 2011, UN Secretary-General Ban Ki-moon stressed that Resolution 1973 was not aiming at a regime change but to protect civilians 'because

⁶⁰ Al Arabiya News, 'China and Russia Redraw International Battles lines on Libya. Analysis by JM Dorsey' (30 June 2011).

⁶¹ African Union, press release 'The AU Intensifies Its Efforts towards a Political Solution in Libya and Stresses the Importance of the Respect of the Letter and Spirit of Resolution 1973 (2011)' 3 May 2011.

⁶² UNGA 12 July 2011, UN Doc. GA/11112.

⁶³ New York Times, 'The Goal in Libya Is Not Regime Change' (30 March 2011).

⁶⁴ UN Secretary-General, Press Conference by Secretary-General Ban Ki-moon at United Nations Headquarters (14 December 2011).

Colonel Qaddafi has been killing his own people'.⁶⁵ It could be argued that removing Qaddafi was necessary to protect Libyan civilians from future attacks. Qaddafi himself had announced his preparedness to continue fighting to retain power in Libya. Clearly a regime change would protect civilians. By enforcing a regime change, NATO would remove the greatest threat on the Libyan civilians, Qaddafi.

Nevertheless, what is decisive for the lawfulness of the military activities is that the mandate strictly limits military activities to those directed to achieve protection of 'civilians and civilian populated areas' under 'threat of attack'. The lawful aim was neither general human rights protection in Libya nor to bring down the Qaddafi regime – or to enforce democracy.

C. NATO Assisting Rebels towards Regime Change

NATO provided for the high-precision strike capabilities that the rebel commanders needed.⁶⁶ The rebels were also rapidly improving their operations, especially in combat coordination, due to covert deployment of foreign military advisors and special agents from both France and Britain who trained the rebels and provided tactical intelligence for the NATO aircraft bombing forces.⁶⁷ Moreover, the rebels received secret airdrops of weapons and ammunition, admitted both by France and Qatar.⁶⁸ The rebels managed to push back the regime forces in the Jebel Nafusa mountains and in Misrata. When becoming aware of the French airdrop of arms to Libyan rebels, Russian Foreign Minister Sergei Lavrov reacted by saying that 'If this is confirmed, it is a very crude violation of UN Security Council resolution 1970 [which imposes an arms embargo on Libya]'.⁶⁹

While the rebels grew stronger, the effectiveness of the Libyan government in maintaining control over its own forces declined due to NATO air strikes wiping out command-and-control centres and infrastructure. The rebels then initiated a more aggressive military approach attacking cities and towns held by Qaddafi's forces. When the rebels advanced to Qaddafi-held territories, including Tripoli, Bani Walid and Sirte, NATO and its allies launched air strikes in the same areas. Media reported that sleeper cells had been set up within Tripoli, armed with weapons smuggled in by the rebels. On 20 August 2011 the sleeper cells were activated and there was a closely coordinated operation between the rebels on the ground and NATO, launching precision strikes in the area.⁷⁰ The same day Tripoli fell to the rebels. On 20 October Qaddafi was killed and on 27 October the Security Council adopted Resolution 2016, terminating the protection of civilians and the no-fly zone of Resolution 1973.⁷¹

By providing close air support for the rebels' advances into cities held by Qaddafi's forces, NATO wiped out Libyan military forces defending those cities. NATO's air

⁶⁵ UN News Centre, 'Speedy, Decisive International Action to Protect Civilians in Libya Is Vital – Ban' (24 March 2011).

⁶⁶ A Fogh Rasmussen, 'NATO after Libya, the Atlantic Alliance in Austere Times' (2011), 90 *Foreign Affairs* 2–6.

⁶⁷ *New York Times* 'Surveillance and Coordination with NATO Aided Rebels' (21 August 2011). CBS News 'Tripoli Opened to Rebels by Sleeper Cells, NATO' (22 August 2011).

⁶⁸ BBC News, 'Libya Conflict: France Air-Dropped Arms to Rebels' (29 June 2011).

⁶⁹ BBC News, 'Libya: Russia Decries French Arms Drop to Libya Rebels' (30 June 2011).

⁷⁰ CBSNews (n 67).

⁷¹ UNSC 6640th meeting, 27 October 2011, UN Doc S/PV.6640.

strikes assisted the rebels in conquering new areas and finally in bringing down the Qaddafi regime. This raises the question of whether the coalition lawfully could provide such aerial support for rebel operations on the ground.

Any armed assistance provided for by NATO was limited by the mandate in Resolution 1973. As already stated, the resolution did not cover regime change or general human rights protection in Libya. NATO was solely and exclusively authorized to protect 'civilians and civilian populated areas' under 'threat of attack'. The areas held by Qaddafi were obviously not under threat of attack by him. When the rebels advanced on cities held by Qaddafi's forces it was the rebels themselves who posed a threat of attack on civilians and civilian populated areas.⁷²

Moreover, the coordination between the rebels and NATO while the rebels advanced on Qaddafi-held territories, witnessed NATO taking sides in the conflict. The traditional UN principle of impartiality implies that when the Security Council authorizes the use of force in situations of armed conflict, unless otherwise specified, the intervening states should remain neutral towards the political aims of the parties of the conflict.⁷³ Evidently during the Libyan conflict, NATO and its allies acted solely on the part of the rebels, although the mandate did not take sides in the conflict.

The legal basis for NATO air strikes in this phase was arguably consent by the rebels as the new effective government of Libya, rather than Resolution 1973. But neither the UN mandate nor consent would provide a basis for NATO's use of force to assist the rebels with the offensive. While Resolution 1973 had the defensive purpose of protecting civilians, consent from the rebels would only be relevant once they had secured sufficient control of Libyan territory. Moreover, there is general agreement that the right of 'intervention by invitation' does not apply in cases of civil war.⁷⁴

While it is easy to understand that NATO for military and political reasons wanted to overcome the stalemate between Qaddafi and the rebels, the air support for the Libyan rebels to advance on Qaddafi-held territories went beyond the mandate of Resolution 1973 and thus violated the prohibition against the use of force under the UN Charter article 2(4).

III. CONCLUDING REMARKS

Operation Unified Protector in Libya showed the commitment of the international community to the protection of civilians. The responsibility to protect was operationalized and implemented in practice through Resolution 1970 and 1973. The international community was relieved by the ousting of the brutal Qaddafi regime.

But the claims of military overreach of the UN mandate by the NATO states may represent a threat to the viability of the responsibility to protect. The reluctance of the four BRIC countries was already striking at the adoption of Resolution 1973. And the

⁷² D Akande, 'Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?' (EJILTalk, 31 March 2011) <<http://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels>>.

⁷³ C Pippan, 'The 2011 Libyan Uprising, Foreign Military Intervention and International Law' (2011) *Juridikum: Zeitschrift für Kritik-Recht-Gesellschaft* 2, 159–69.

⁷⁴ O Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart Publishing 2010), 290, 294 and 309; T Christakis and K Bannelier, 'Volenti non fit Injuria? Les Effets du Consentement à l'Intervention Militaire' (2004) 50 *AFDI* 127 and 135; and C Gray, *International Law and the Use of Force* (3rd edn, OUP 2008) 81.

long-term consequences of the Libyan intervention are far from settled. Politically, the authorization to use armed force in Libya and the following military expansion of the mandate by NATO have created a suspicion towards western humanitarian intervention which might be a barrier to implementation of the responsibility to protect elsewhere. For instance, the Deputy Minister of the South African Department of International Relations and Cooperation, Ebrahim Ebrahim, has held that the manner in which NATO 'misinterpreted and misused' Resolution 1973 left South Africa with a sense of betrayal towards the UK, US and France.⁷⁵ South Africa and Russia⁷⁶ are among the countries that have demanded a thorough investigation into the legality of the NATO operation in Libya.

The lack of a consistent, united and efficient international response to the current conflict in Syria may be contrasted with the international reaction to the Libyan crisis, and further conclusions drawn. In the Syrian context, as early as 15 March 2011 the first peaceful demonstrations against the Syrian regime of Bashar al-Assad started. The regime quickly responded with forcible measures to crush the unrest.⁷⁷ At the end of April 2011 the revolt in Syria already displayed similar features to the Libyan uprising at the time the Security Council decided to intervene militarily to protect the civilian population there. By September 2012 the Commission of Inquiry on Syria presented its latest report on the situation in Syria to the Human Rights Council. The Commission held that the intensity of the conflict had reached the legal threshold for a non-international armed conflict. It found reasonable grounds to believe that Government forces and militias had committed crimes against humanity, war crimes and gross violations of international humanitarian law and human rights law and that anti-Government armed groups had committed war crimes.⁷⁸

Russia, China as well as Brazil, India and South Africa have been opposed or reluctant to adopt strong Security Council resolutions against Syria. Speaking in a council meeting on Syria on 4 October 2011, the representative of Russia stated that the Syrian situation cannot be considered separately from the Libyan experience, worrying that the NATO interpretation of the Security Council Resolutions on Libya is a model for future actions of NATO in implementing the responsibility to protect and that NATO 'may begin to apply this "exemplary model" in Syria'.⁷⁹ The representative of South-Africa has also highlighted that Security Council resolutions recently have 'been abused' and that 'their implementations have gone far beyond the mandate of what was intended'. South Africa was concerned that the draft resolution on Syria was 'aimed at once again instituting regime change', with a clear reference to Libya.⁸⁰ The three vetoes by Russia and China on the situation in Syria, first on 4 October 2011,⁸¹ then on

⁷⁵ E Ebrahim, 'Lecture by Deputy Minister of International Relations and Cooperation... on the occasion of the Speakers Meeting at the South African Institute of International Affairs' (International relations & cooperation 22 July 2011) <<http://www.dfa.gov.za/docs/speeches/2011/ebra0722.html>>.

⁷⁶ The Voice of Russia, 'Russia Demands Thorough Investigation into NATO Libya Operation' (17 January 2012).

⁷⁷ Haaretz, 'U.S. Urges Syria to Respect Civil Rights, after Security Forces Open Fire on Protesters' (28 March 2011).

⁷⁸ Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, 16 August 2012 (A/HRC/21/50).

⁷⁹ UNSC 6627th meeting, 4 October 2011, UN Doc S/PV.6627.

⁸⁰ *ibid.*

⁸¹ *ibid.*

4 February 2012⁸² and again on 19 July 2012⁸³ witness that the consensus present in the Council when adopting Resolution 1973 is no longer present. Due to fear by some countries of military intervention, the Council has not even able to adopt non-military sanctions, such as an arms embargo or reference to the International Criminal Court.

In conclusion, we are not advocating that use of military force authorized by the Security Council is the best way to resolve humanitarian crises. On the contrary, the use of force should be the absolutely last resort. But when the UN has authorized such use, it is essential that the mandate is scrupulously respected.⁸⁴ The responsibility to protect is a fragile creation. The overstepping of the UN mandate in Libya may have the unfortunate effect, as the current Syrian conflict appears to underscore, that the first use of this principle may also be the last.

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⁸² UNSC 6711th meeting, 4 February 2012, UN Doc S/PV.6711.

⁸³ UNSC 6810th meeting, 19 July 2012, UN Doc S/PV.6810.

⁸⁴ The Brazilian proposal about 'Responsibility while Protecting' (RwP) focuses on monitoring and assessment of the use of force authorized by the Security Council (Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General (11 November 2011 A/66/551-S/2011/701)).

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