
Did the coalition exceed the mandate?

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<td>GA</td>
<td>UN General Assembly</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>VCLT</td>
<td>Vienna Convention on the Law of Treaties</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>UNOMUR</td>
<td>United Nations Observer Mission Uganda-Rwanda</td>
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<td>ICISS</td>
<td>International Commission on Intervention and State Sovereignty</td>
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<td>Responsibility to Protect</td>
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<td>NIAC</td>
<td>Non-International Armed Conflict</td>
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<td>IAC</td>
<td>International Armed Conflict</td>
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<td>GC IV</td>
<td>Fourth Geneva Convention relative to the Protection of Civilian Persons in time of war</td>
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<td>ICRC</td>
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1 Introduction

On March 17th 2011 the United Nations Security Council (UNSC) adopted Resolution 1973 under Chapter VII of the UN Charter, and thereby authorized the use of force in Libya to protect civilians. The adoption came after the Qadhafi-regime had violently responded to what initially were peaceful protests by the Libyan people that began February 15th 2011. The situation quickly escalated into a full-scale armed conflict between the opposition, which armed itself and fought for the removal of the Qadhafi-regime. The ruling authorities used overwhelming force against civilians and the armed opposition alike.1

The resolution was drafted by France and the United Kingdom. It was forwarded jointly with Lebanon and the United States of America. It received 10 votes in favor while five states abstained. The abstaining States included two of the Council’s permanent members, China and Russia together with Germany, Brazil and India. It authorized the use of ‘all necessary measures’ to protect civilians and civilian populated areas, while excluding a foreign occupation force of any form.2 Soon after the resolution was adopted, disagreement emerged on the scope and limits of the mandate. Areal attacks on Libya started March 19th 2011, and already the same day, concerns were raised about military overreach. China expressed regret at the American and European assault on Libya, and Russia condemned the attack.3 From March 24th the operation was led by the North Atlantic Treaty Organization (NATO). According to the UN Human Rights Council Report of Inquiry on Libya, NATO aircrafts carried out 17,939 armed sorties.4 According to NATO, the operation, known as Operation Unified Protector (OUP) had three distinct components: The coalition states were to enforce an arms embargo to prevent transfer of arms, related materials and mercenaries to Libya. They were to impose the no-fly zone to prevent aircrafts from bombing civilian targets. They were to conduct air and naval strikes against military forces involved in attacks or threatening to attack Libyan civilians and civilian populated areas.5 The African Union had rejected military intervention in Libya6 and stressed that only dialogue and consultation could bring solutions in Libya.7 8 On April 26th 2011, the Russian Prime Minister stated that NATO had

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1 Walling (2013) p. 213.
4 UN Doc. A/HCR/19/68 para. 84
5 NATO (2015)
6 NEWS 24 (2011)
8 Ulfstein ; Christiansen (2013) p 161.
exceeded the mandate escalating its action from protection of civilians to killing Qadhafi and enforcing regime change.\textsuperscript{9}

The outcome of the military intervention by NATO was, as Russia predicted, the death of Muammar Qadhafi\textsuperscript{10} and consequently a regime change.

The UNSC has authorized the use of force under Chapter VII based on humanitarian causes in the past. Significant for the adoption is resolution 688 on Northern Iraq in 1991. The consequences of Saddam Hussein repression of Iraqi-Kurds was characterized as a ‘threat to international peace and security’.\textsuperscript{11} The resolution is relevant as it was the first time the UNSC classified a situation internally within a country as a ‘threat to international peace and security’. Consequently, this resolution paved the way for subsequent resolutions under Chapter VII of the Charter in many armed conflicts during the 1990s. For example, in Somalia, Bosnia and Rwanda. Common for these resolutions were the authorization of humanitarian intervention in situations of mass killings.

Based on the mass atrocities that happened in various armed conflicts during the 1990s, and the international society’s late and insufficient response to these, an idea and a notion of States responsibility to protect their population against these crimes turned into the ‘Responsibility to Protect’ (R2P). When the deliberations on whether to intervene in Libya began, it had been five years since the UNSC had formally affirmed the existence of this principle in resolution 1674.\textsuperscript{12} Moreover, it was more than a decade since the last intervention based on humanitarian reasons.\textsuperscript{13}

The situation in Libya is special in two regards:

This was the first time the UNSC adopted a resolution within weeks of an outbreak of violence and on the basis of \textit{apprehended} rather than actual mass atrocities.\textsuperscript{14} At the time of the adoption of the resolution, there was no ongoing civil war. Rather, one could say that Libya might be headed towards that direction, but the fact of the matter was that the

\textsuperscript{9} Reuters (2011)
\textsuperscript{10} NATO (2015)
\textsuperscript{11} UN Doc. S/RES/688 preamble para. 3.
\textsuperscript{12} Walling (2013) p. 213
\textsuperscript{13} Walling (2013) p. 213.
\textsuperscript{14} Walling (2013) p. 214.
government allegedly breached a range of international human rights\textsuperscript{15} which later led to an armed conflict.\textsuperscript{16}

It was the first time the UNSC was expected to take action after the term ‘aggression’ was defined by the International Criminal Court (ICC) in Kampala in 2010. In short, the definition implies that States can use force to protect themselves against acts of aggression from another State on either territory. A State, however, can not act militarily on behalf of, or in another State without a preceding Security Council resolution to do so.\textsuperscript{17} The big question was if the council was going to act?

Resolution 1973 contains three principal objectives for the use of force; an arms embargo, a no-fly zone and to protect civilians. This thesis focuses only on the last objective to explore what really was the mandate, how it was interpreted by the coalition states and subsequently if the use of force represents an exceeding use of force by coalition states within the legal framework of international law or international humanitarian law.

\textsuperscript{15} UN Doc. A/HRC/19/68 para. 132.
\textsuperscript{16} UN Doc. A/HRC/19/68 . para. 80.
\textsuperscript{17} ICC Article 8 \textit{bis} (2).
1.1 The objective of the study

The objective of this thesis is to explore the legal scope of the UNSC Resolution 1973. Numerous questions arise linked to the UNSC mandate for the use of force in Libya in 2011. Was the mandate lawful under international law? How far did the mandate of the UN SC extend? What was the precise meaning of protection of civilians in operational paragraph 4? And finally, did the military operation to enforce Resolution 1973 remain within the confines of the mandate? Of particular interest is whether the mandate implicitly or explicitly permitted an interpretation to pursue the regime change, or whether the mandate proscribed regime change. The question posed in this thesis is; did the coalition states, when implementing the mandate exceeded the limits set forth in international law or international humanitarian law? Albeit the two branches of law converge, they are applied from different angles and at different points in time. To answer the question, both branches of law will be assessed concerning the interpretation by the coalition forces and the subsequent implementation of the mandate.

1.2 Sources of international Law

International law and international humanitarian law are both branches of public international law. International law can be described as the legal responsibilities of states in their conduct with each other, and their treatment of individuals within state boundaries. The latter is known as international human rights law. International humanitarian law (IHL) is known as the law of armed conflict. It is a set of rules which seek to limit the effects of armed conflict, and to protect people who are not or no longer participating in hostilities. The distinction between the two is important as they govern different points in time in armed conflicts. IHL is applied during an armed conflict. International law governs whether a State may actually resort to use force against another State and the rules are set forth in the Charter of the United Nations.

Relevant sources relied on are the UN Charter (Charter), resolutions given by the UN both in the General Assembly (GA) and the UNSC. The Statute of the International Court of Justice (ICJ Statutes), international customary law and legal teachings is applied to lay out the scope of the mandate given in Resolution 1973.

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18 UN (2015)
The sources of international law are largely made on a decentralized basis by the actions of the 193 States which make up the international community.\(^{19}\) To establish exactly what international law is can be difficult, as there is no world government or law-making organ to create international law the way domestic legislatures make laws for one country.

The Statute of the ICJ identifies five legislative sources in its Article 38 (1).

(a) Treaties and conventions between States
(b) International Customary Law derived from state practice
(c) General principles of law recognized by States
(d) Judicial decisions and legal teachings.

Treaties and conventions are written international agreements applied between States or between States and International Organizations. The Vienna Convention on the Law of Treaties (VCLT) governs the rules of interpretation in Article 31 and 32 and provides for the definition of the sources in Article 2 (a).

Customary international law is not a written source. Two elements must be present to recognize a rule as customary. There must be a widespread and consistent State practice of the rule as evidence of a general practice accepted as law. This practice must be obligated throughout the whole legal system of States.\(^{20}\) The element of \textit{opinion juris} is also required, consequently the state practice must be carried out \textit{as of right}.

General principles of law recognized by States are principles, which in one form or another are recognized in a wide range of national legal systems.

Judicial decisions can provide as a guide to determine the content of international law or principles. The teachings of highly qualified publicists may also provide guidance to the content of international law. It is not distinguished between decisions of international or national courts. The former may generally be considered the more authoritative evidence of international law, but decisions of a State’s courts are a part of the practice of that State and consequently contribute directly to the formation of international law.\(^{21}\)

International law is a dynamic instrument and must be recognized as such by also including the importance of the UN and the acts of its organs.

\(^{19}\) Greenwood (2008).
The UN GA possesses no legislative power for the international community, nor are its resolutions legally binding. Still, many of its resolutions have an important effect on the law- or treaty-making process. Some resolutions by the GA are part of the treaty-making process. When a text negotiated in the framework of the UN and recommended to the Member States by the assembly, it is attached to the treaty text, itself; it creates a legal obligation for the ratifying States to act in compliance with it.  

For the development of customary international law, the positions that States take in the UN is part of their practice and can consequently prove to have effect on the development, as long as it is not contradicted by what States actually do elsewhere.

1.3 Interpretation of International Law

The UN Charter governs the permission to resort to use of force in international relations, the rules of *jus ad bellum*. Resolution 1973 was given under Chapter VII and thus the Charter is a substantial source of international law important for this thesis.

Treaties of international humanitarian law will be interpreted as these govern the rules of *jus in bello*, and regulate the rules that apply between the parties in situations of armed conflict. These treaties will be interpreted in occurrence with the provisions of interpretation in the Vienna Convention on the Law of Treaties (VCLT) Article 31 and 32.

The interpretation of resolutions will follow the applicable rules set forth by the International Court of Justice (ICJ) in its Kosovo Declaration of Independence. To assess whether or not the States participating in the operation in Libya complied with the scope of the mandate, who acted and how, will be interpreted as an indication of how they interpreted the mandate.

Decisions taken by the SC under Chapter VII of the Charter are legally binding on all States. Under Article 103 in the Charter, the obligations of States under the Charter shall prevail over obligations under any other international agreement. Does this create a hierarchy that regulates the applicable relevance or weight of the sources?

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25 UN Charter Article 25 : ‘The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.’
Cassese argues that there is no such hierarchy of sources or rules, at least not between the two primary law-crating processes, treaty and customary law. The reason for this is that States did not intend to place limitations on their sovereign powers that they had not expressly or implicitly accepted. However, there is a class of general rules made by custom that enjoy a special legal force: they are peremptory and may not be derogated from by treaty, namely *jus cogens*. This set of rules has a rank and status superior to those of all the other rules of the international community.\(^{26}\) In the VCLT Article 53 this view is also expressed. Any source in this thesis that is established as a *jus cogens* will be interpreted in line with this definition.

1.4 Scope and Limitations

The scope of this thesis is to discuss the legal content and limitations of Resolution 1973 in relation to both international law and international humanitarian law. The use of force was permitted in three relations: for the protection of civilians, to enforce the no-fly zone and enforcement of the arms embargo.

The focus in this thesis is primarily limited to the first of the three components. When it is relevant to the protection of civilians, the two latter will be discussed.

The scope is limited to an assessment of the actions of the Coalition States, thus actions by ‘rebel-forces’ in Libya will not be appraised unless it is necessary to shed light on the use of force to protect civilians.

1.5 Structure

This thesis is divided in to 3 parts. Chapter 2 provides for a critical look at authorization to use force under Chapter VII of the Charter. The mandate on Libya will be put into a historical context and compared to other resolutions given under the same chapter. General and special criteria relevant for the authorization of use of force will also be assessed in light of the special legal context the mandate on Libya were given. Chapter 3 stipulates a general outline of Resolution 1973, hereunder, its scope and limitations as well as a presentation of the rules of *jus ad bellum* and *jus in bello* which in their turn regulate the applicable international law on the conflict in Libya. Chapter 4 presents an interpretation of the mandate, and subsequently how it was implemented and executed by the States in the Coalition (NATO) and, consequently if these actions were within the jurisdiction provided for in international law.

2 Authorization of use of force under chapter VII

2.1 Introductory remarks on authorization of use of force
If the UNSC determines the existence of any ‘threat to the peace, breach of the peace or act of aggression’ it is allowed under Chapter VII to decide what measures shall be taken to maintain or restore international peace and security pursuant to Article 39. The UNSC may decide to employ peaceful enforcement methods provided in Article 41, or authorize use of force if the requirements in Article 42 are fulfilled.

The Non-Intervention principle is one of the fundamental duties of States communicated through the Charter. It is part of customary international law27 and jus cogens. Though the principle is not explicitly written in the text of the Charter, it can implicitly be drawn from the wording in the Charter’s article 2 (1) and 2 (7). Sub-paragraph 1 address the principle of sovereign equality of all its member states. Sub-paragraph 7 states that the UN in principle is prohibited from intervening in matters essentially within the domestic jurisdiction for its member states. Additionally, Non-Intervention is considered part of customary and general international law and thereby also codified and embodied in the text of the Charter.28

The International Court of Justice (hereinafter the ICJ or the Court) stated in its judgment on Nicaragua vs. The United States (hereinafter Nicaragua) that the principle ‘involves the right of every sovereign State to conduct its affairs without outside interference’.29 The Court also elaborates on the content of the principle of Non-Intervention by stating that ‘the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other states.’30 In the judgment a prohibited intervention is described as an intervention that seeks to change political, social or cultural systems or a States foreign policy, and thereby undermining the sovereign States inherent right to freely choose its political governance.31

28 Nicaragua v. United States (1984) para. 73
The principle of Non-Intervention must be seen in conjunction with the prohibition of use of force which is recorded in Article 2 (4). The purpose of the sub-paragraph is that States shall enjoy exemption from interference by other States either by ‘threat’ or ‘use of force’, firstly against the ‘territorial integrity’ of any state, and secondly against the ‘political independence’ of any state. Further in 2 (7) the prohibition of intervening in matters that are of a domestic character points in the direction that as a principle, every State shall enjoy freedom in choosing their political system as well as how they govern their internal affairs.

The UNSC most eminent task is stipulated in the Charter, Article 24 (1). The paragraph places the ‘primary responsibility’ for the ‘maintenance of international peace and security’ on the Security Council to ensure ‘prompt and effective action’ by the UN.

It is further set forth in Article 24 (2) that in discharging the duties to maintain international peace and security the UNSC shall ‘act in accordance with the Purposes and Principles of the United Nations.’ The specific powers the Security Council has to ensure and maintain international peace and security are ‘laid down in chapters VI, VII, VIII and XII.’

The word ‘domestic’ in Article 2 (7) makes a clear delineation between protection of domestic jurisdiction and the authority for the UNSC to act under Chapter VII. It is a twofold effect of this delineation. Firstly, whether a matter is ‘essentially within domestic jurisdiction’ is only relevant up to the point where the UNSC ‘determine’ that the matter or the consequences of it constitutes a ‘threat to the peace’ under Article 39. Secondly, even if a matter is essentially within a States domestic sphere of jurisdiction, the Council is not barred from making its ‘threat to peace’ determination based on that matter or its consequences.

2.2 What is a Chapter VII mandate?
The UN is both a peacekeeping and political body. In essence a Chapter VII mandate is an exception from Article 2 (4). Pursuant to this provision the legal basis for prohibition of use of force between States is enshrined in the Charter. The principle is one of the most important

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building blocks of international relations as well as functioning as a tool to ‘save succeeding
generations from the scourge of war … which has brought untold sorrow to mankind’.35

Chapter VII allows for action to be taken with respects to threats to peace, breaches of the
peace and acts of aggression. The UNSC holds the authority to authorize action, but States
can exercise their right of self-defense pursuant to Article 51 without the authorization of the
UNSC.

The extensive powers of the Council in pursuance of the maintenance of peace and security
are laid down in this Chapter. The system of the chapter is quite simple. According to this
system, the Council shall first ‘determine’ the existence of any threat or breach of the peace or
act of aggression (Article 39). If this is the case, the Council may either make
recommendations (Article 39), take provisional measures (Article 40), or decide on
enforcement measures ‘not involving the use of armed force’ in accordance with Article 41 in
order to relieve the situation. And, if the Council considers these non-belligerent measures to
be ‘inadequate’, it may authorize measures involving the use of force pursuant to Article 42 to
put an end to a threat or breach of the peace or an act of aggression.36

The notion of «force» is disputed in judicial theory. Questions have been raised whether
economic and political force, physical force and indirect force among others also are within
the scope of the term. In more recent times, newer concerns with regard to cyberspace warfare
and non-kinetic warfare have entered the realm of methods of conducting war. This kind of
warfare raises important interpretation issues. Might certain types of cyber-attacks constitute a
prohibited use of force? It is in this regard a question of whether the existing legal framework
impose significant constraints on hostile cyber-activities, hereunder what international legal
authority states have to respond, including with military force, to cyber-attacks or threats by
states or non-state actors. The second issue is if in terms of Article 51 of the Charter, a cyber-
attack allows for a right to use military force in response. This question raises the additional
issue of what methods of remedy are available to states that suffer cyber-attacks or threats of
them.37

35 UN Charter preamble sub-para. 2.
36 Schweigman (2001) p. 34.
37 Waxman (2011)
According to the prevailing view, the notion of «force» pursuant to article 2 (4) in the Charter, is limited to armed force.\textsuperscript{38} Further, the text of provision 4 only address ‘international relations’ thus threat or use of force internally within one state is not covered in this article of the Charter.

\textbf{2.3 General Criteria for a Chapter VII mandate}

The relevant condition the UNSC outlined to act upon the situation in Libya was that the state of affairs constituted a ‘threat to international peace and security’.\textsuperscript{39}

Article 39 opens Chapter VII of the Charter and set forth the prerequisites for application of the Chapter. Pursuant to Article 39 it is for the UNSC to ‘determine’ the existence of any of the situations mentioned in chapter 2.2. Subsequently they either make recommendations to continue to operate under Chapter VI and not use the «exceptional powers» provided for under Chapter VII, or the SC decides to use the powers granted to it in accordance with Articles 41 and 42 to maintain or restore international peace and security.

The preceding 1970 Resolution of 26th of February 2011 had a specific reference to Article 41 when deciding to take measures not involving the use of armed force.\textsuperscript{40}

From the wording in Article 42 it is clear that measures provided for in Article 41 \textit{should} be exhausted before the UNSC can consider if the measures provided for in Article 41 ‘would be inadequate or have proved to be inadequate’ in accordance with Article 42. In relation to the situation in Libya this system was followed. The UNSC deplored the ‘failure of the Libyan authorities to comply with Resolution 1970’ in the preamble of Resolution 1973. They determined that the situation in Libya ‘continued to constitute a threat to international peace and security’, though this was not mentioned in 1970. No specific reference to Article 42 is expressed.

\textsuperscript{39} UN Doc. S/RES/1973 preamble para. 21.
\textsuperscript{40} UN doc. S/RES/1970 preamble para. 16.
2.4 Previously given Chapter VII mandates to use force

Numerous mandates have been given under Chapter VII of the Charter. Common for all of them is that a situation has been considered by the UNSC as a threat to, or breach of international peace and security. Many of these resolutions concerned the situation within a state, but were still considered as a threat to ‘international’ peace and security because of a deteriorating humanitarian situation.

The situation in Iraq was special because it was the first time a refugee situation in a region was characterized as a threat to international peace and security.\(^{41}\) The resolution condemned the repression\(^{42}\) of the Kurdish population in Iraq and demanded that Iraq, as a contribution to removing the threat of international peace and security, ended the repression and respected the human and political rights of all Iraqi citizens.\(^{43}\) A no-fly zone was established and enforced by France, the UK and the US despite it was not explicitly mentioned in the resolution. The enforcement of the no-fly zones were announced as offering humanitarian protection for the Iraqi-Kurds in the north and the Iraqi Shia-population in the south.\(^{44}\) The controversy around the legality of the implementation of the no-fly zones will not be treated here, but the subject is discussed by Gray in *International Law and the Use of Force*.\(^{45}\) The conflicts in Somalia, Bosnia, Rwanda, Liberia, the DRC, Sierra Leone, Timor-Leste and Kosovo all drew attention to the extreme levels of suffering for civilians in the midst of situations of armed conflict where the protagonists were demonstrating less and less respect of norms in International Humanitarian Law (IHL). Military intervention based on humanitarian reasons is a highly contested use of military force.\(^{46}\) The tensions have their origin in the relationship between human rights norms and sovereignty norms. In other words, it is about the fine line of dynamics between international law and international humanitarian law.

In order to shed light on the conflicting relationship between the two branches of law, Chapter VII mandates regarding Somalia, Bosnia Herzegovina and Rwanda adopted in the 1990s are examined.

\(^{41}\) UN Doc. S/RES/688 para. 1.
\(^{42}\) UN Doc. S/RES/688 para 1.
\(^{43}\) UN Doc. S/RES/688 para 2.
\(^{44}\) Global Policy Forum.
Somalia:
The civil war in Somalia in the 1990’s is characterized as one of the biggest humanitarian disasters in history. In November 1991, a civil war began. By 1992, almost 4.5 million people were threatened with starvation, malnutrition and related diseases. Overall an estimated 300,000 people, including many children died. Almost 2 million people were violently displaced from their home areas, fled to neighboring countries or were internally displaced within Somalia. Security Council Resolution 794 was adopted in December 1992. The resolution determined that the magnitude of human tragedy caused by the conflict constituted a threat to international peace and security. This was the first time the Council determined that a situation of humanitarian disaster could constitute a threat to international peace and security. In paragraph 10 the Council confirmed that it acted under Chapter VII and authorized the Secretary General and Member States to use all necessary means to establish a secure environment for ‘humanitarian relief’ operations in Somalia. Subsequently, the Unified Task Force (UNITAF) was charged with carrying out resolution 794. Resolution 837 gave permission for the UNITAF troops to use ‘all necessary measures’ to guarantee the delivery of humanitarian aid in accordance with Chapter VII of the Charter. This was a US-led operation sanctioned by the UN, thus an operation with a preceding mandate contrary to the operation in Iraq. For the first time in history, the UNSC authorized armed intervention for a strictly humanitarian cause. Unlike resolution 688 on Iraq, which authorized UN protection for Iraqi Kurds and Shia-population because of the trans border impact of Iraqis human-rights-violating behavior, Resolution 794 defined the internal humanitarian crisis itself as a threat to international peace and security.

Bosnia Herzegovina:
In 1991 an armed conflict broke out on Balkan, known as the Yugoslav Wars. The conflict lasted for four years and demanded the lives of 300,000 victims. Numerous resolutions were adopted by the UNSC, but they proved to be ineffective due to lack of political will to act and

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47 UN (1997)
49 Walling (2013) p. 71
to use force. Resolution 770 (1992) determined that the situation continued to constitute a threat to international peace and security and acted under Chapter VII of the Charter to call upon States to take ‘all measures necessary’ to facilitate the delivery of ‘humanitarian assistance’ to Sarajevo and wherever needed in other parts of Bosnia and Herzegovina. Resolution 836 (1993) called for the full and immediate implementation of all the preceding resolutions and also opened for the use of force in self-defense, in reply to ‘bombardments against the safe areas by any of the parties’ or ‘to armed incursion into them or in the event of any deliberate obstruction in or around those areas to the freedom of movement of UNPROFOR or of protected humanitarian convoys’. The United Nations Protection Forces (UNPROFOR) main task was to ensure protection for humanitarian relief convoys and thus ensure that humanitarian aid was allowed in the ‘safe-areas’ established by the UN. In addition the UNPROFOR monitored the no-fly zone, banning all military flights in Bosnia and Herzegovina, and the UN ‘safe-areas’ established by the UNSC around five Bosnian towns and the city of Sarajevo. The UNPROFOR was authorized to use force in self-defense in response to attack against these areas. A part of their mandate was also to coordinate with NATO the use of air strikes in support of its activities. The conflict in Bosnia captured the attention of the Security Council and much of the world, at a time when there was little international agreement on how to resolve tensions between sovereignty and territorial integrity. On the one hand the right to self-determination, and sovereignty but also humanitarian intervention to stop dreadful human rights violations, on the other. At the same time, the council had not defined the appropriate purpose of, and agreed criteria for, the use of military force. Pursuant to the situation in Bosnia, the council had already defined the cross-border effects of human rights violations in Iraq in 1991 and the internal humanitarian crisis in Somalia in 1992 as threats to international peace and security. This testifies to increasing legitimacy of human rights norms as changing the legitimate purpose of military force. Humanitarian intervention was an emerging, but highly questioned, practice.

51 Preceding UN resolutions 713 and 757 had already defined the situation as such.
52 UN Doc. S/RES/781
53 UN Doc. S/RES/836 para. 10
54 Walliing (2013) p. 94.
55 Ibid, p. 94.
56 Walling (2013) p. 95.
Rwanda:
In 1994, during a violent civil war a genocide took place in Rwanda. Hundreds of thousands of moderate Hutus and Tutsi were killed over the span of a few months. The UN was already present in the country after a Chapter VI mandate was adopted allowing the United Nations Observer Mission Uganda-Rwanda (UNOMUR) to monitor the border between Uganda and Rwanda to verify that no military assistance reached Rwanda. The UNSC adopted several resolutions about the situation in Rwanda, but none of them gave authorization to allow for use of military forces. In 1994 the Secretary General said that the situation was characterized as genocide. UNSC Resolution 929 was adopted in June 1994. It stated that ‘the magnitude of the humanitarian crisis’ constituted a threat to international peace and security and authorized under Chapter VII the use of all necessary means to achieve humanitarian objectives set out in Resolution 925. By this time, 800 000 people were already killed and consequently action was taken too late. The situation in Rwanda demonstrates that despite the increasing legitimacy for humanitarian intervention, significant barriers to the implementation of human rights norms exist, including the counter pull of established national interests, the absence of political will and the highly manifested norms of state sovereignty, domestic non-intervention and protection of nationals.

I argue that the resolution on Northern-Iraq from 1991 represents a shift and a development of the UNSC’s interpretation of the concept ‘threat to international peace and security’ pursuant to Article 39 of the Charter. Following the adoption of UNSC resolution 688, cases of internal strife could classify as ‘threats to international peace and security’.

Through the 1990’s a development towards general acceptance for military intervention in a State on a humanitarian basis is emerging. The resolutions concerning the situations in Bosnia Herzegovina, Somalia and Rwanda were the first of their kind where the UNSC authorized action under Chapter VII on a humanitarian basis because the situations constituted a threat to international peace and security. In the preamble to Resolution 770 (Bosnia Herzegovina) the

57 S/RES/846 para. 3.
58 S/RES/929 preamble para. 10.
61 See for example UN Doc. S/RES/ 713, S/RES/794, S/RES/841 and S/RES/917

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UNSC emphasized that humanitarian assistance was crucial in the effort to re-establish international peace and security in the region. They did not refer to the humanitarian situation in itself as a concrete threat to international peace and security.

UNSC resolution 794 on Somalia refers explicitly to the humanitarian situation as a threat to international peace and security. The Council also found it necessary to underline the uniqueness of the situation and its complex nature that required for an immediate and exceptional response. This could be to impair the resolutions precedence in relation to military intervention on the basis of humanitarian disasters. The tensions within the UNSC on military intervention for humanitarian reasons were made visible when it comes to the lack of action with regard to the situation in Rwanda. When they finally came through one could argue that it was way overdue.

In my view a development of the criteria for a situation to constitute a threat to ‘international peace and security’ must be said to have evolved. The practice shows that matters, essentially of a domestic character now could be recognized as ‘international’ and be pursued militarily, by an expansive interpretation of UN Charter Article 39, mainly due to the humanitarian situation the State. Common for all situations is that the State(s) were in the midst of armed conflicts or civil wars, or headed towards the end of such. It was also stated by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in Tadic that ‘Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which is classified as a ‘threat to the peace’ and dealt with under Chapter VII. (…) It can thus be said that there is a common understanding, manifested by the ‘subsequent practice’ of the membership of the United Nations at large, that the ‘threat to the peace’ in Article 39 may include, as one of its species, internal armed conflicts.’

It is clear that after 1991 the humanitarian aspect in conflicts was given more attention. The resolutions were given to establish ways of relieving the situations, as in Somalia were the UNITAF was to create a protected environment for conducting humanitarian operations. The mandates were to provide security for food, medical assistance and other humanitarian relief.

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62 UN doc. S/RES/770 preamble para.5.
63 UN Doc. S/RES/794 preamble para. 3.
64 UN Doc. S/RES/794 para 2.
In addition, the mandates allowed for the use of all necessary means in order to achieve the objectives, but not aggressively attack, only in self defense or to guarantee that the objectives were achieved. Legally speaking, the practice opened up for military intervention authorized by the UNSC on a humanitarian basis and thereby slowly blurred the lines of international norms between state sovereignty and human rights.

2.5 The Responsibility to Protect as a special Criteria for a Chapter VII mandate

In 2005, the UN General Assembly (GA) adopted Resolution 60/1 at the World Summit Outcome. Paragraph 138 and 139 enshrined the responsibility to protect civilian populations against genocide, war crimes, ethnic cleansing and crimes against humanity. The background for adopting these paragraphs was the release of the Report of the International Commission on Intervention and State Sovereignty (ICISS). The report was meant as an answer to the question asked in the ‘Millennium Report’ (March 2000) posed by the former Secretary General of the UN, Kofi Annan. In this report he asked the question:

‘If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that offend every precept of our common humanity?66

The question was the backdrop for the ICISS report which was published in December of 2001. The report set forth core principles of the Responsibility to Protect (R2P) which in turn eventually were modified and recorded in the World Summit Document of 2005.

One of the most controversial and charged questions in international relations since the end of the Cold War was that of when; and if ever, it is appropriate for States to take coercive and military action, against another States’ will for the purpose of human protection in that other State.67 In essence the report declared that State Sovereignty no longer exclusively protects States from external interference; Sovereignty must be linked with a responsibility that holds the State accountable for the welfare and protection of its people. If a state fails to do so, it is

upon the international community to protect the population. 
Ultimately it is a question of when the protection of human lives yields the principle of State Sovereignty and thereby justifies a military intervention against the States will.

The mandate of the commission which put together the report was an intention to try to develop a global political consensus towards action with respect to intervention for human protection purposes reconciled with the principle of state sovereignty. 68

The apparent question that ascend is; what legal status does the R2P possess?

First of all, the World Summit Outcome document is silent on the legal status of the principle. It was argued in the ICISS report that the principle, was an emerging guiding principle in customary international law, but that it lacked a sufficiently strong basis to be a new principle within customary international law as of yet. 69 Dr. Juris. Mehrdad Payandeh (hereinafter Payandeh) argues that construing the R2P as an emerging norm in customary international law is problematic, as the responsibility was developed within a complex existing framework and not within a normative vacuum.

Essential components of the responsibility are already found in the UNSC’s power to act under Article 39 and Chapter VII of the Charter in instances of massive human rights violations and this is already well-established in the international legal order. Thus, to deem the R2P an ‘emerging’ legal norm is therefore essentially to indicate that this authority enjoyed by the UNSC is similarly only an emerging norm, and not yet part of international law. 70

The R2P can neither be recognized as a source of binding international law, as non of the documents 71 on the principle conform to those sources of international law identified in the Rome Statute Article 38. 72 A further requirement for something to be considered international  

68 Ibid, para. 1.7.
69 See note 24, Ibid. para. 2.24 and 6.17.
71 See the High Level Panel’s «Report on Threats, Challenges and Change» ; the Secretary General’s Report «In Larger Freedom» ; A/RES/60/1 ; S/RES/1674 ; Secretary General’s Report on «Implementing the Responsibility to Protect».
72 Office of the President of the General Assembly (2009).
custom, in conformity with sub-paragraph 1 (b) of Article 38 is that it must prevail a repeated conduct of states that amounts to state practice and a corresponding belief that this conduct is required by international law. In other words – as evidence of a general practice accepted as law, i.e. an *opinio juris*. Further it requires *actual* practice of states and other international actors with regard to the specific conduct.

Being that the concept of R2P encompasses a variety of possible reactions to a deteriorating human rights situation in a specific state, Payandeh argues that it is relatively easy to allege a connection between a reaction of a state or international organization in a specific case and the concept of the R2P.\(^{73}\)

In conclusion to the legal status of the R2P principle, is that it is a *political* commitment towards already existing legal framework. According to Payandeh, it would seem arbitrary and unconvincing to interpret every action that is mentioned within the concept of the R2P as a possible measure and to attribute *opinion juris* to an actor due to the mere mention of the concept.\(^ {74}\) It is difficult to see the Security Councils explicit reference to the R2P in the preamble of Resolution 1973 as anything else than a *consensus* with regard to the concept, and not with regard to the specific consequences that flow from the concept.\(^ {75}\) It is stated in the preamble that the situation in Libya constituted a threat to international peace and security and thereby nonetheless allows the Council to act under Chapter VII of the Charter.\(^ {76}\)

### 2.6 R2P and the definition of ‘aggression’

The political landscape concerning use of force in international relations after 2000 is important for understanding the UNSC and the international community’s succeeding practice. Unauthorized humanitarian intervention falls outside the scope of this thesis, but NATO’s bombing of Kosovo in 1999 and the unauthorized US-led invasion of Iraq in 2003 have shaped the discussion related to humanitarian intervention.

In March 1999 NATO led ‘Operation Allied Force’ and bombed Yugoslavia. The military operation was not authorized by the UNSC. The US claimed that the use of force was

\(^{73}\) Payandeh (2010) p. 484.


\(^{75}\) Payandeh (2010) p. 484.

authorized implicitly through the UNSC’s adoption of resolution 1199 and 1203 in 1998 as the situation was perceived to represent a threat to peace and security in the region.\(^{77}\) The UK justified its engagement in the bombing as legally justifiable, as an ‘exceptional measure on the grounds of overwhelming humanitarian necessity’ and because every mean short of force had been tried to avert the situation.\(^{78}\) In the aftermath of the operation it has been a subject of discussion whether international humanitarian law allows for a military intervention without the preceding authorization of the UNSC. Another criticized military intervention is that in Iraq in 2003. The United States led a coalition of forces when invading Iraq, not specifically authorized by the UN. The US argued that previous Security Council resolutions and Iraq’s failure to comply with these was sufficient authority to use force against Iraq.\(^{79}\) The definitions of the ‘act of aggression’ and ‘crime of aggression’ may be seen as narrowing the possibility to proceed with the earlier practice by the West to militarily intervene especially in the Middle-East.

Do the ICISS report from 2001 and the World Summit Document of 2005 about the R2P change the political landscape of military intervention pursuant to Article 39 of the Charter?

As argued in paragraph 2.5, the adoption of the General Assembly Resolution of the World Summit document can be seen as a political commitment towards an already existing legal framework. One way to look at this commitment is for States to actually honor the responsibility they have agreed to take, by letting the Council determine when such protection is called for. As a consequence, the Charter itself is also honored. The Secretary General, Ban Ki-Moon, quickly framed the Libyan crisis in R2P terms: ‘When a State manifestly fails to protect its population from serious international crimes, the international community has the responsibility to step in and take protective action in a collective, timely and decisive manner.’\(^{80}\)

In 2010, a definition of the term ‘aggression’ was agreed upon in Kampala. This could be seen as a reaction to the Western States extreme will to participate in, or lead military

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\(^{77}\) UN doc. S/PV/3988 p. 4.
\(^{78}\) UN Doc. S/PV/ 3988, p.12
\(^{79}\) Congressional Research Service (2002)
\(^{80}\) UN Doc. S/PV/6490 p. 3.
interventions that might not be authorized by the UNSC. The world society may have had a need to impose a constriction on the practice of intervention based on humanitarian reasons. Similar to the World Summit Document of 2005, it is left mainly upon the UNSC to determine if a threat to international peace and security has occurred and subsequently decide what measures should be taken to maintain or restore international peace and security. Thus, if a State acts militarily solely on its own initiative, on a humanitarian- or other basis without authorization from the UNSC, or if the act is not self-defense in accordance with Article 51 of the Charter, it is for the UNSC to determine whether an act or crime of aggression has happened towards that State, and consequently the intervention should be deemed illegal.

Libya:
Two resolutions under Chapter VII were adopted regarding the situation in Libya in 2011. Resolution 1970 was adopted February 26th and refers explicitly to the Libyan authorities’ responsibility to protect its population in the preamble. In addition, the UNSC considered that ‘the widespread and systematic attacks currently taking place … against the civilian population may amount to crimes against humanity.’ There is no reference to Article 39 in this resolution, but a direct reference to Article 41 in Chapter VII is made. The UNSC demands an immediate end to the violence and calls for steps to fulfil the ‘legitimate demands’ of the population. Further it urges the Libyan authorities to respect human rights and international humanitarian law, and allow immediate access for international human rights monitors. Pursuant to Article 41, the UNSC declared an arms embargo, imposed targeted sanctions on Qadhafi and his family, and referred the situation in Libya to the International Criminal Court. On March 1st 2011, the General Assembly suspended Libya’s membership of the Human Rights Council.

In the preamble the UNSC underlines ‘its strong commitment to the sovereignty, independence, territorial integrity and national unity’ of Libya. This referral can be interpreted as a signal that certain members of the Council still are reluctant to use of force on humanitarian basis and are mindful of the principle of sovereignty. Yet again, tensions are evident between the legitimacy to use force and the inherent right of sovereignty and non-intervention.

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82 UN (2011)
Less than a month after resolution 1970 was adopted, the UNSC adopted resolution 1973. The Council expressed ‘its determination to ensure the protection of civilians and the civilian populated areas and the rapid and unimpeded passage of humanitarian assistance’. The resolution allowed for ‘all necessary measures’ to be taken to protect civilians and civilian populated areas ‘under threat of attack’.

In comparison to the resolutions given on Bosnia, Somalia and Rwanda, Libya represents a new regime. The time aspect is crucial. The previous resolutions were all given when the States were in an actual state of civil war or armed conflict or the deteriorating humanitarian situation was evidentiary. In Libya it is not fully constituted, as the resolution uses the word ‘may’ when describing the attacks that might amount to crimes against humanity.

The protection of civilians in Libya was also implemented different. The former resolutions gave mandate to protect civilians through help of providing for humanitarian assistance by enforcing no-fly zones or providing safe passage for humanitarian aid vehicles. The use of force was limited to self-defense or to ensure the aforementioned components. The mandate to use force in Libya is allowed under ‘threat’ of attack. This allows for a very expansive interpretation of when a ‘threat’ exists. Associate Professor at Albion College, Carrie Booth Walling (hereinafter Walling) has found that it was the first explicit authorization to use military force against a UN member to stop a perpetrator government from committing human rights atrocities. Consequently, the resolution allowed for a direct and aggressive use of force to protect civilians.

Before Libya, there were two things that had affected the Security Councils behavior when it came to authorization of humanitarian intervention:

Primarily, when human rights norms were characterized as complementary to sovereignty norms the council could promote and protect both norms at the same time. Next, when the

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two norms were characterized as in conflict with each other, the human rights norms were yielded to the exceedingly established norm of state sovereignty.  

The resolution on Somalia for example, made humanitarian intervention possible because the country lacked a legitimate government authority. Therefore the potential conflict between protecting human rights norms and protecting sovereignty norms was eliminated. On the other side of the specter, we find Rwanda and Kosovo which both had internationally recognized government authorities as the legitimate sovereign authorities, who at the same time were the perpetrators of the human rights violations. The lack of action testifies that the council would not use military force against a perpetrators when doing so would bring these dual responsibilities into conflict.

3 UNSC Resolution 1973

3.1 Scope and Limitations of the mandate

When resolution 1973 was adopted in March 2011, it facilitated the legal framework for the subsequent NATO led operation in Libya. The authorization to use force, points back to the stated objective, namely to ensure protection of civilians. Every limitation posed in the mandate is also conditioned to the protection of civilians. The aim of the mandate was to protect civilians and civilian populated areas, while the mission was to use all necessary measures to protect the civilian population against threats of attack. It is clear from the language in the resolution that the R2P was endorsed as a principle by the UN. In resolution 1973 the council found it necessary to reiterate the Libyan authorities’ responsibility to protect the civilian population. Secondly, the council expressed ‘its determination to ensure the protection of civilians and civilian populated areas’. Walling argues that by adopting the principle, it is meant to resolve the tension between sovereignty obligations after Article 2 (7) in the Charter and human rights required to be obligated by states. When states are unwilling to do so, the UNSC is to protect basic human rights as part of the responsibility to protect. In

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87 Walling (2013) p. 230
other words, easing the tensions between sovereignty norms and human rights norms is done by re-conceptualizing sovereignty to entail responsibility, in cases of alleged mass atrocities the realization of sovereignty norms essentially means protecting human rights.\textsuperscript{90}

\textbf{Scope.}

The mandate given in resolution 1973 by the Security Council came as a result of the failure of the Libyan authorities to comply with resolution 1970 adopted shortly a month before the adoption of resolution 1973. The council determined that the situation in Libya ‘continues to constitute a threat to international peace and security’ and acted under Chapter VII of the charter. The resolution authorized ‘all necessary measures … to protect civilians and civilian populated areas under threat of attack’ it also established a ‘ban on all flights’ in the Libyan air-space ‘in order to help protect civilians’.\textsuperscript{91}

The objective of the resolution was to protect civilians and civilian populated areas of Libya ‘under threat of attack.’\textsuperscript{92} The scope of the objective is the use of all measures necessary, in other words use whatever force is necessary. In addition to this the resolution demands an immediate cease-fire and an end to all violence against civilians.\textsuperscript{93}

In the preamble’s paragraph 4, the Security Council reiterates ‘the responsibility of the Libyan authorities to protect the Libyan population’. This should be seen as a direct referral to the obligation, as a political consensus, of states toward their population to protect them against mass atrocities.

\textbf{Limitations.}

Whilst the mandate given in paragraph 4 is broad and accented with ambiguity, the use of all necessary measures is limited in scope to ‘protection of civilians and civilian populated areas under threat of attack’. Here a direct link is made to the use of force and when its permitted in accordance with the mandate.

Paragraph 4 further provides another limitation, namely that ‘all necessary measures’

\textsuperscript{90} Walling (2013) p. 231.
\textsuperscript{92} UN Doc. S/RES/1973 Operational para. 4.
\textsuperscript{93} UN Doc. S/RES/1973 para.1
excludes ‘a foreign occupation force of any form on any part of the Libyan territory’. A problematic issue in conjunction with this limitation is how this should be interpreted? Is it permitted to use limited ground troops as long as they are not seen as an occupying and consequently an invading force? An analysis of this question will be provided in section 4.4.2.

There are two limitations regarding the no-fly zone. The first one is found in the very purpose of establishing the ban of flights, namely that it is in order to protect civilians. Then, an exception from this limitation is that it is not intended to apply to flights ‘authorized by paragraphs 4 and 8’ and other flights that are ‘deemed necessary by States acting’ to enforce compliance with the ban on flights. From the wording, the conditions to uphold and enforce the ban on flights have to be for the protection of civilians, and for the benefit of the Libyan people. The thesis will now focus on operational paragraph 4 in the resolution.

3.2 The rules of Jus ad bellum and Jus in bello

Jus ad bellum and Jus in bello are two sets of rules that must be seen independent of each other, but are nonetheless connected in relation to the mandate given in resolution 1973. Jus ad bellum refers to the conditions under which States may resort to the use of armed force or war in general, while Jus in bello regulates the conduct between parties to an armed conflict.

The mandate given in resolution 1973 was to protect civilians. The challenge is that the mandate is an ad bellum mandate (permission to use force under international law), given in suspicion of breaches of in bello (crimes against humanity) regulations, and the content of the ‘protection of civilians’ is enforcement of international humanitarian law in bello (to protect civilians and civilian populated areas). So the question is; is the ‘protection of civilians and civilian populated areas’ an ad bellum or in bello mandate? In other words, which rules apply to the warfare between the belligerents?

Jus ad bellum deals with the legality of use of force by UN Member States or or UN mandated organizations (NATO) of collective security. The jus ad bellum sources that governs the mandate given on Libya are the Charter, customary international law and resolution 1973.
*Jus in bello,* regulates how Non-International- and International armed conflicts, (NIACs and IACs) are fought. *Jus in bello* is synonymous to International Humanitarian Law (IHL). IHL consist of a set of treaty-based and customary rules that govern belligerents’ rights and duties in the conduct of hostilities. These include the legality of methods and means of warfare and the safeguarding of protected persons, notably those *hors de combat,* prisoners of war and civilians not taking direct part in hostilities.94 The IHL rules that govern the rights and duties of the conflict in Libya is the Fourth Geneva Convention relative to the Protection of Civilian Persons in time of war (GC IV) and Additional Protocol I relating to the Protection of Victims of International Armed Conflicts (AP I) and Additional Protocol II relating to the Victims of Non-International Armed conflicts (AP II).

As the rules of *jus ad bellum* and *jus in bello* have developed over time, one can now say that the proportionality for *jus ad bellum* (permission to use force) is regulated by the UN when the Security Council decides to act under Chapter VII, and the proportionality test applied in war and combat, namely *jus in bello* falls primarily under IHL.95 Support for this statement is also found in the Report of the International Commission of Inquiry on Darfur to the Secretary General from 2005 paragraph 166 (viii).

The proportionality for authorizing use of force in Resolution 1973 was the widespread and systematic attacks that possibly amounted to crimes against humanity which in turn was determined to suffice to a ‘threat to international peace and security.’96 Next, use of force was only to be conducted to ‘protect civilians and civilian populated areas’.

The crux of the matter is to lay out the content of the enforcement of ‘protection of civilians’ after the coalition intervened militarily March 19th 2011. The challenge with the rules of proportionality *ad bellum,* is that action containing use of military force always must be seen in conjunction with the potential harm to civilians against the military advantage to be gained. Also, the permission to use force in Libya is bound to protection of civilians and civilian populated areas. The rules *in bello,* pay particular interest as to whether actions are committed in conformity with the rules of proportionality, necessity and distinction. Thus, acts can be

95 Truscott, Mathew (2012) p. 49.
illegal after the rules *ad bellum*, namely if they overstretch the rules and principles found in the charter, or in breach of the language in resolution 1973 or if actions represent a breach to international customary law. On the other hand, they can still be allowed *in bello* as long as the act is in conformity with the aforementioned rules of proportionality, necessity and distinction. This also works vice versa.

### 3.3 Interpretation of Security Council Resolutions

Security Council Resolutions (SCRs) usually consist of a preamble, operative paragraphs and sometimes annexes. In general, the preamble presents the considerations on the basis of which action is taken, an opinion expressed or a directive given. The operative part states the opinion of the UNSC and the action to be taken, the operative part is the agreed upon rights or duties. There is no treaty that deals with the interpretation of SCRs, the rules of interpretation have not been codified. To this end, the applicable rules and tools of interpretation are found in jurisprudence from the International Court of Justice (ICJ).

The most recent ICJ document with regard to applicable rules of interpreting SCRs is the Kosovo Declaration of Independence Advisory Opinion of July 22\(^{nd}\) 2010 (hereinafter the Kosovo Declaration).

First, it was stated in the advisory opinion that the the rules embodied in the Vienna Convention on the Law of Treaties (VCLT) articles 31 and 32 ‘may provide guidance’ for interpretation, but also other factors will be relevant to take into consideration due to the legal status of Security Council resolutions set against adopted treaties.\(^97\)

Next, The Court set forth four factors that an interpreter of Security Council resolutions ‘may’ take into account. The use of the word ‘may’ in this context by the Court illustrates that the following factors are non-exhaustive and shows that other relevant factors also must be taken into account where this is appropriate and called for.

The first factor mentioned in the examples is the requirement to analyze statements by representatives of members of the Security Council ‘made at the time of their adoption.’ An

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analysis of statements is relevant to disentangle the content and thereby the intended right and different understandings of a resolution. This requires an examination of the meetings in the UNSC leading up to the adoption of resolution 1973. Consequently, it will be an indication of how the different States interpreted the mandate.

Secondly an analysis of ‘other resolutions of the Security Council on the same issue’ is considered relevant, as well as ‘the subsequent practice of relevant United Nations organs’ and the subsequent practice of States ‘affected by those given resolutions.’ Thus, an analysis or interpretation of the preceding UNSC resolution 1970 will be provided for where the two resolutions respectively intertwine and affect each other. The subsequent practice of States affected by the resolutions will also be provided for where this is necessary to shed light on how the mandate was interpreted and implemented.

Furthermore, it can be helpful to look to supplementary means of interpretation where resolutions are vague in nature, such as the preparatory works and the negotiating history of the particular resolution. On the one hand this may only give the interpreter a partial picture of the situation that needs assessment, on the other hand it can nonetheless be useful. This notion is similar in nature to what VCLT Article 32 describes as supplementary means of interpretation to determine the content or meaning of general rules of interpretation pursuant to VCLT Article 31.

Finally as it can be implicitly drawn from the Charter itself in its Chapter I and Article 24 (2), a resolution adopted or action performed should be in accordance with the principle and purposes of the UN. In order to give effect to the intentions by the UNSC set forth by the choice of words used by the Council, the aim of interpretation should be to give effect to these in the light of the surrounding circumstances under which the resolution was adopted.

VCLT Article 31 (1) sets forth the general rule of interpretation and takes the position that a treaty [resolution] shall be ‘interpreted in good faith in accordance with the ordinary meaning to be given to the terms’ of the resolution. Further the terms shall be interpreted in good faith.
and in accordance with the resolution ‘in their context and in the light of its object and purpose’.

The ‘terms’ interpreted in this thesis are those in the preamble and operative paragraphs of both resolutions 1970 and 1973 where these intertwine and are of importance to each other. The terms will also be interpreted in accordance with their textual and ordinary meaning and where it is appropriate the lexical or the definition found in a dictionary will be used.

In the following, the interpretation of UN Resolution 1973 will follow these rules of conduct.

4 Interpretation and implementation of the mandate

The mandate given in resolution 1973 was to ensure protection of civilians and civilian populated areas through the use of all necessary measures when they were under threat of attack. Statements made by delegates from the abstaining States during the deliberations prior to the adoption of the resolution, indicate that the exact scope of authorization is not entirely clear. Section 4.1, 4.2 and 4.3 provide for an interpretation of operational paragraph 4 in the resolution in conformity with the international law applicable for interpretation. Section 4.4 seeks to explicate the implementation of use of force to protect civilians in bando and an assessment of the implementation will also be provided for in relation to the rules of jus ad bellum.

4.1 All necessary measures

There is no doubt that the mandate given in paragraph 4 of resolution 1973 is broad. In the past, ‘all necessary measures’ which is similar in significance to ‘all means necessary’, has widely been interpreted to mean use of military force. It is not contested that force can be used in principle, but to what extent. The resolution does not specify the particular objective of the authorization or when this authorization expires.

Paragraph 4 in resolution 1973 authorize ‘all necessary measures’ to be taken to ensure

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protection of civilians and civilian populated areas. The first question that becomes apparent is what the term ‘necessary’ entails in this relation. Is this interpreted to mean ‘essential’ or the ‘only means possible’?

Payandeh recognizes that the term can have different meanings in legal doctrine. The international notion of this test is that a measure may not go beyond what is strictly necessary in order to achieve a certain goal.\footnote{Payandeh (2012) p. 384.} If milder means are available to obtain the objective in the same way, the authority has to resort to the milder mean. If the term ‘necessary’ was approached according to this understanding, the scope of the Security Council resolution would be meticulously restricted. In respect to this, the coalition states would have to show that every action they took was essential to the objective and purpose of the resolution; namely the protection of civilians and civilian populated areas.

On the other hand, in order to obtain the objective of protecting civilians and populated areas, it can be argued that the choice of measures should be proportionate to the objective. In the past, the term ‘all necessary measures’ or ‘means’ have not been interpreted to impose a limitation on the \textit{scope of force}, but rather understood as encryption for the authorization to use force.\footnote{Payandeh (2012) p. 382.} The limitations as to what is ‘necessary’ must be taken as flowing from the objective that the use of force is designed to achieve.\footnote{Dapo, Akande, «What does UN Security Council 1973 permit? » Blog of The European Journal of International Law.} In relation to the situation in Libya, the permission to use force in the mandate given by the UN is to be carried out ‘to protect civilians and civilian populated areas under threat of attack’. Thus, every act of military force which serves to protect civilians or civilian populated areas will be within the given mandate of the resolution.

On the contrary, every use of military force that does not provide protection of the civilians or civilian populated areas could be argued to be unlawful in relation to the mandate and thereby illegal under customary international law. Specifically it would be in breach of the Charter’s Article 2 (4) and thereby amount to an illegal ‘threat or use of force’.\footnote{Dapo, Akande, «What does UN Security Council 1973 permit? » Blog of The European Journal of International Law.}
Resolution 1973 was adopted with 10 votes in favor, 0 against and 5 abstentions. The abstaining member States were permanent members of the Security Council China and Russia as well as Brazil, Germany and India. To further lay out what ‘all necessary measures’ entailed, an analysis of the abstaining States statements is provided.

Germany found that it could not support use of force as they saw ‘great risks’. They found that the military option could lead to large-scale loss of life and if the steps taken in the resolution turned out to be ineffective, there was a danger to be drawn in to a ‘protracted military conflict that would affect the wider region’. Also they pointed out that the member States should not enter in to a ‘militarily confrontation on the optimistic assumption that quick results with few casualties’ would be achieved.106

India’s delegation claimed that the Council had adopted ‘a resolution that authorizes far-reaching measures under Chapter VII of the United Nations Charter, with relatively little credible information on the situation on the ground in Libya.’ At this point in the process, the Special Envoy appointed by the Secretary-General had yet to deliver a report on the ground situation in Libya as well as the Secretariats report on his assessments. Another point made by India was that the member States did not have clarity about details of enforcement measures, who would participate with what assets and how those measures would be exactly carried out.107 From the Indian delegations’ expressed opinions, it may seem as the member states blindly entered into military confrontation based on little information and in this respect, little objective information to support the heavy military invention it would turn in to after NATO enforced the mandate.

Brazil’s opinion was that ‘the text of resolution 1973 contemplates measures that go far beyond’ the call of the League of Arab States to deploy strong measures to stop the violence through a no-fly zone. In addition to this the Brazilian delegation was doubtful that the use of force as provided for in paragraph 4 in the resolution would ‘lead to the realization of our common objective - the immediate end to violence and the protection of civilians.’ Another concern was that the use of force adopted through resolution 1973 would cause more harm than good to the same civilians they were determined to protect. They also recognized the

106 UN Doc. S/PV/6496 p. 5.
very nature of the popular movement that was taking place in North Africa and the Middle East, namely that the people’s calls for change were of a ‘spontaneous, homegrown nature’ and feared that military intervention in Libya might change that notion of dynamics and lead to unbeknownst repercussions for the situation in Libya and throughout the region.108

Russia’s delegation strongly opposed the adoption of resolution 1973. Initially, ‘a whole range of questions’ raised by Russia and other members of the Council remained unanswered. These questions touched on how the no-fly zone would be enforced, what the rules of engagement would be and what limits on the use of force there would be. Further, Russia expressed that the draft which was ultimately adopted changed ‘before our very eyes’ and surpassed the initial concept stated by the League of Arab States which was only a call for help to enforce the no-fly zone. Russia also remained skeptical that provisions were added to the text that ‘could potentially open the door to large-scale military intervention.’109

China took the stand that they are ‘always against the use of force in international relations.’ They emphasized that the Security Council ‘should follow the United Nations Charter and the norms governing international law, respect the sovereignty, independence, unity and territorial integrity of Libya and resolve the current crisis in Libya through peaceful means.’110

Common features of statements from the abstaining States were that they all condemned the violence deployed on the Libyan people by its leader. They encouraged political change as well as expressing their wish to see an end to the gross violations of basic human rights for the Libyan people and underscoring that abstention should not be mistaken for commendation of the attacks on the civilian population.111. Another common feature is that the crisis needs to be approached and seek solution through peaceful, diplomatic and political means. Moreover, to this respect by further tightening the economic sanctions and travel-ban sanctions as well as the enforcement of the no-fly zone provided for in resolution 1970.

The main issue for the abstaining states is that the resolution does not offer a definition to

109 UN Doc. S7PV76498 p. 10.
110 UN Doc. S/PV76498 p. 10.
111 UN Doc. S/PV/6498.
where the boundaries of the language go. It does not define what ‘all necessary measures’ entail or which actions are permitted according to the wording and subsequently not permitted.

Based on the aforementioned arguments, ‘necessary’ as used in Resolution 1973 means that the use of force may not be excessive and that it must be conducted in relation to the objectives of the resolution, namely to protect civilians and civilian populated areas under threat of attack. It is therefore not necessary that each single act is strictly necessary to avoid violations of human rights in the sense that no alternative, less intrusive means is available as long as the act serves to achieve the objective of the resolution. The necessity to use force is also limited to what the laws of war certify as legitimate targets, allowing for the destruction and killing of military targets, while attacks on anything else than military objectives will fall outside the scope of use of all necessary measures and thus suffice to a breach of international humanitarian law.

4.2 Civilians and civilian populated areas … Including Benghazi

The next question is who is regarded as ‘civilians’ and thus should be the objects of protection according to the mandate given in Resolution 1973. Again, no definition is provided in the resolution. To establish what the term entails, ordinary means of interpretation must be resorted to.

The ordinary meaning of the term ‘civilian’ is understood as a person who is not a member of the military and not a member of armed forces. According to the Oxford Advanced Learner’s Dictionary a ‘civilian’ is a person ‘not in armed services or the police force.’ Thus the term implies that it is a person on the outside of the armed conflict.

The situation on Libya amounted to an International Armed Conflict from March 19th 2011, when the French Air Force flew into Libyan Air-Space and destroyed its first military target. Part IV in AP I regulating the rules of conduct in IACs, offers the basic rules and fields of application in order to ensure respect for and protection against effects of hostilities.

113 In the Tadic Appeal case from 1995, the ICTY provided for a general definition of when an international armed conflict exists; namely ‘whenever there is a resort to armed force between States’. See para. 70.
Article 48 provides for the basic rule of distinction between civilians and combatants and between military objectives and civilian objects. Accordingly, Parties to the conflict shall direct their operations only against military objectives.

There is no treaty based definition of ‘civilians’ in NIACs. It is though accepted for IACs as well as NIACs that civilian’s are not protected against attacks for ‘such time as they take a direct part in hostilities’.

AP I, Article 50 (1) has a negative definition and states that a civilian is ‘any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be civilian.’

The persons excluded from enjoying protection as civilians are (1) members of armed forces of a Party to the conflict, (2) members of other militias or other volunteer corps including members of organized resistance movements, (3) members of regular armed forces who profess allegiance to another government or authority than the detaining power, and (4) Inhabitants of non-occupied territory, who when approaching the enemy, spontaneously take up arms to resist invading forces, if they carry arms openly and respect the laws and customs of war.

Thus, ‘civilians’ are persons who are not members of armed forces. If there are doubts as to whether a person is a civilian or not, this doubt should benefit that individual and he or she shall be treated and enjoy protection as a civilian accordingly.

If Article 50 (1) shall be interpreted literally, the opposition forces against the Qaddafi regime are to fall outside the category that should enjoy protection as they are combatants in relation to AP I Article 43 and therefore not civilians. There are, however, certain requirements that must be fulfilled to be a ‘combatant’ after Article 43. Sub-paragraph 1 says that the ‘combatant’ must be ‘under a command responsible’ that enforces ‘international law applicable in armed conflict’. Secondly, Article 44 (3) obliges combatants to ‘distinguish

114 GC AP I Article 51 (3) and GC AP II Article 13 (3).
115 Ulfstein ; Christiansen (2013) p. 162-163.
themselves from the civilian population’ while they are engaged in an attack, in addition to this you are viewed as a combatant if you carry ‘arms openly’ during military engagement. The opposition forces are consequently, *not* viewed as combatants unless they comply with the abovementioned requirements and shall then enjoy protection as any ordinary civilian outside these situations.

The second element that shall enjoy protection is ‘civilian populated areas’. This raises the question if the literal interpretation of Article 50 (1) above, is too narrow for Security Council authorizations.

Dr. Juris. Geir Ulfstein (hereinafter Ulfstein) at the Department of Public and International Law at the University of Oslo argues that the mandate of paragraph 4 in Resolution 1973 allows for ‘protection’. Subsequently, this protection is provided regardless of whether attacks are being directed at territories inhabited by civilians or ‘rebels’ or if attacks are directed at military objects recognized as legitimate under IHL as long as the territory as such is inhabited by civilians.116

Thus protection of ‘civilians’ must be seen in conjunction with the phrase ‘civilian populated areas’. Article 50 (3) states that presence within the civilian population of ‘individuals who do not come within the definition of civilians’ does not ‘deprive’ the population of its civilian character. The acts of war were necessarily conducted within civilian territories and consequently anyone who is in a civilian territory shall enjoy protection from attack.

This widely extends the mandate, basically permitting Coalition Forces to also protect cities and towns held by opposition forces as well as protecting opposition forces present in such civilian areas.117

The third protected element in paragraph 4 of the resolution is the city of Benghazi. This specific protection was included in the mandate after Qadhafi warned the citizens of Benghazi that an attack was imminent. «We are coming tonight, » he said, speaking on a call-in radio show, «You will come out from inside. Prepare yourselves tonight. We will find you in your

116 Ulfstein ; Christiansen (2013) p. 162-163
117 Ulfstein, Geir ; Christiansen, Hege Føsund (2013) p. 163.
closets. » He promised amnesty for those «who throw their weapons away» but «no mercy or compassion» for those who fight.\textsuperscript{118}

On the same day that the resolution was adopted, Qadafi held the abovementioned speech and the inclusion of the phrase stress the urgent need to protect the population there. The French delegation’s statement in the meeting where the resolution was adopted\textsuperscript{119} was that the resolution authorizes States ‘to take all measures necessary to protect civilians and territories, including Benghazi, which are under the threat of attack by Colonel Al-Qadhafi forces.’\textsuperscript{120}

All though, the city of Benghazi would enjoy protection under the wording ‘civilian populated areas’ the inclusion of Benghazi is significant because it was the opposition fighters who held the city since the revolution began in February 2011.\textsuperscript{121}

Ulfstein argues that, on the one hand the inclusion of ‘civilian populated areas … Including Benghazi’ expands the scope of protection from those covered by the term ‘civilians’ in accordance with AP I Article 50 (1) to also allow for protection of potential opposition combatants in civilian areas.\textsuperscript{122} On the other hand, the explicit mention of these three elements limits a wider interpretation of the mandate. Thus, it only licenses protection of these three, and not military measures to protect the whole population or the entire geographical territory of Libya\textsuperscript{123} and only if the respected civilians or areas are under ‘threat of attack’.

4.3 Under threat of attack

The resolution does not provide for definition of neither ‘threat’ or ‘attack’. The language shows that the mandate not only includes protection for the civilians or the civilian populated areas when these are under \textit{actual} attacks, but also when they are exposed to ‘threats’ of attack. The ICJ said in their Nuclear Weapons Advisory Opinion from July 8\textsuperscript{th} 1996, that a ‘threat’ under Article 2 (4) of the Charter is a ‘declared readiness of a state to use force’.\textsuperscript{124} A ‘threat’ involves a communicated verbalized hostile intention or determination. This can be

\textsuperscript{118} Kirkpatrick, David D ; Faheem Karim (2011).
\textsuperscript{119} UN Doc. S/PV/6498 p. 3.
\textsuperscript{120} UN Doc. S/PV/6498 p. 3.
\textsuperscript{121} BBC (2011).
\textsuperscript{122} Ulfstein ; Christiansen (2013) p. 163.
\textsuperscript{123} Ulfstein; Christiansen (2013) . p 163.
either expressed or implied. The speech by Qadhafi on March 17th of 2011 suffices to meet this criterion. The language of the resolution allows for action to be taken on a preventive basis. This means that the coalition forces can take action to prevent attacks on towns and cities whether those attacks are directed at civilians or what would ordinarily be a legitimate military target, conditioned to that the objects are in a civilian populated area.

The consequence of the condition of an ‘attack’ is that the mandate only allows the coalition forces to conduct military operations to prevent or halt attacks, or threats of attacks made by either party to the conflict. There is no definition of ‘attack’ in the Charter or in the resolution. IHL, hereunder AP I Article 49 (1) defines attack as ‘acts of violence against the adversary, whether in offence or defense.’ In the ICRC commentary to AP I ‘attack’ is understood as ‘combat action’. Similarly, the use of the word ‘attack’ under paragraph 4 in resolution 1973, should be taken to mean the use of force against civilians and civilian populated areas.

4.4 Implementation of the mandate

When implementing the mandate, the coalition forces can only have one objective in mind, namely protection of civilians and areas where these reside. Acts that do not serve to protect civilians that are under threat of attack will consequently fall outside the scope of the mandate, and be an overstretch by the coalition forces that could be deemed as an illegal use of force and thus suffice to a breach of jus ad bellum rules in international law. Execution of the mandate goes on in bello, which means that actions taken must be evaluated against international humanitarian law. In this section the focus is on those violations which are closest to the limits of legality in view of what the mandate authorized. The public debate over Resolution 1973 has focused on a specific set of limitations to the authorization. These include the exclusion of foreign occupation forces of any form on the territory, and whether the regime change was legitimate or not. These following questions are discussed: How did the States comply with the mandate? Is there something in the mandate that explicitly or implicitly allows or prohibits the regime change?

125 Ulfstein ; Christiansen (2013) p. 164.
126 Ulfstein ; Christiansen (2013) p. 164.
4.4.1 Excluding a foreign occupation force

Operational paragraph 4 in resolution 1973 authorizes the use of all necessary measures to protect civilians and civilian populated areas ‘while excluding a foreign occupation force of any form’ on Libyan territory. This is the only explicit limitation in relation to the forcible measures allowed. What does this entail?

There has been debate whether the phrase allows for the coalition states to deploy boots on the ground, or whether, it explicitly rules this out. The ordinary reading of the phrase is that it excludes forces that can amount to ‘occupational’ forces. No definition of occupational forces is provided in the resolution. Therefore the rules set forth by the ICTY in the Kosovo Advisory Opinion will be resorted to.

VCLT Article 31 provides for the general rules of interpretation, and these can also provide guidance when interpreting Security Council resolutions. According to Article 31 (3) (c) any relevant rules of international law applicable between the parties shall be taken into account. The legal conditions for the commencement of occupation are determined by the Hague Convention IV Article 42.

The condition for a territory to be occupied is that it is ‘actually placed under the authority of the hostile army’. Under international law this is understood as exercise of effective control over the territory of a state by another state. This means that the ousted government is incapable of exercising authority in that area. The second condition is that ‘authority has been established and can be exercised’ by the occupational power. An ordinary textual understanding of this indicates actual establishment of authority. In international law, the determination of whether the conditions for occupation have been met, must be based on a case-by-case factual analysis. In ICRC’s commentary to the fourth Geneva Convention from 1958, it is stated that the question of ‘control’ bids up at least two different interpretations.

128 Kosovo Declaration of independence, para. 94.
129 Convention Respecting the Laws and Customs of War on Land (Hague Convention IV) Article 42.
130 Article 42 (1).
On the one hand, it could be taken to mean that a situation of occupation exists whenever a party to a conflict exercises some level of control or authority within the territory of the other state. (my emphasis).

On the other hand, a more restrictive approach to the question would be to say that a situation of occupation exists only once a party to a conflict is in a position to exercise sufficient authority over the other state’s territory as to enable the occupational power to discharge all of the duties imposed by the law of occupation.133

To elucidate what the intention of the UNSC was with the language ‘excluding a foreign occupation force’, statements from representatives when the resolution was adopted must be considered.134

The delegation of Lebanon emphasized that the mandate given to protect civilians would not ‘result in the occupation of any part of Libyan territory.’135 Nigeria maintained that a foreign occupation is ‘not an option to secure peace in Libya.’ Further, they acknowledged that the language in resolution 1973 ‘specifically carves out that possibility, constraining the actions of states seeking to play a role in the quest for peace’. They further said they were ‘… guided by an overriding determination to respect the unity and territorial integrity of Libya’. 136 Both the delegations’ touches upon the the term without providing any further direction as to what the exact content of a ‘foreign occupation force’ is. What is common for their opinion is the articulated determination to respect the sovereignty, unity and territorial integrity of Libya. 137

Russia’s delegation voiced that ‘provisions were introduced into the text that could potentially open the door to large-scale military intervention.’138 South-Africa saw the resolution as containing the ‘necessary caveats to preserve the sovereignty and territorial integrity of Libya and reject any foreign occupation or unilateral military intervention under the pretext of

135 UN Doc. S/PV/6498 p. 3.
137 UN Doc. S/PV/6498 p. 3 and 8.
138 UN Doc. S/PV/6498. 8.
protecting civilians.’ The South-African delegation appear to juxtapose the term ‘military intervention’ with the term ‘foreign occupation force’ as both being out of the question according to the mandate given. Russia on the other hand, sees the potential of the language as a door-opener to a large scale military-intervention and thus set the threshold for what an ‘occupation’ can entail closer to Article 42 of The Hague Convention. None of the delegates further elucidate what they lay in this language.

Without any other evidentiary clues, it is not unreasonable to interpret this to that the UNSC meant an occupation as is defined in The Hague Conventions Article 42. The term the UNSC drafted and applied was ‘foreign occupation force’. To see how the exception was implemented, the last interpretation mean provided by the Kosovo Declaration is the examination of subsequent practice of states affected by the resolution.

On April 19th 2011, the former UK Foreign Secretary William Hague said to BBC that the UK ‘National Security Council has decided that we will now move quickly to expand the team already in Benghazi to include an additional military liaison advisory team.’ Their job would in particular be to ‘advise the NTC on how to improve their military organizational structures, communications and logistics, including how best to distribute humanitarian aid and deliver medical assistance.’ He also said that the move was within the resolution on Libya. UK’s Prime Minister, David Cameron insisted that the UK’s decision to send military advisers to Libya did not exceed the limits set by resolution 1973. He stated ‘What we’ve said is there is no question of an invasion or an occupation, this is not about Britain putting boots in the ground, this is not what we are about here,’ On why international forces in Libya would not exceed the mandate, he said ‘It is because we have said we are not going to invade, we are not going to occupy (that) this is more difficult in many ways because we can’t fully determine the outcome with what we have available. … But we are very clear that we must stick to the terms of the UN Security Council Resolution, we must keep the support of the Arab world.’ It can seem from these statements that Cameron delineates the term of occupation closely, but apart from military invasion.

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139 UN Doc. S/PV/6498 p. 10.
140 BBC (2011)
141 The Telegraph (2011)
President Obama had insisted that no American military ground troop would participate in the Libya campaign. Still, a small group of Central Intelligence Agency (CIA) operatives had been working ‘in Libya for several weeks as part of a shadow force of Westerners that the Obama administration hopes can help bleed Colonel Qaddafi’s military’ an American official said.  

Mr. Obama was recently asked in an interview with Fox News what his biggest mistake as the President of the US was, and he replied: ‘Probably failing to plan for the day after, what I think was the right thing to do, in intervening in Libya.’ In another interview with The Atlantic he also blamed internal Libyan dynamics saying that: “The degree of tribal division in Libya was greater than our analysts had expected. And our ability to have any kind of structure there that we could interact with and start training and start providing resources broke down very quickly.”

In conclusion, it can be argued as Payandeh does, that a state does not gain effective control over the territory of another state simply by deploying ground forces. Basically, this means that a military operation can include ground forces without amounting to an occupation of the territory. Thus, it can be asserted that the coalition States accepts the more restricted interpretation to when an occupation is actually in place; namely when they are in a position to exercise sufficient authority over the territory as to enable all of the duties imposed by the law of occupation.

The character of the operations for the ground troops that were deployed, were essentially to gather intelligence about the whereabouts of Libyan government tank columns, artillery pieces and missile installations. It can be asserted that this is to gather accurate information so as to enable them to carry out more precise airstrikes, and thus limit the loss of civilian’s lives while executing the mandate. It is difficult to see how this enables the coalition States to gain effective control over the territory of Libya. The States that contributed with ground forces also saw this as being encompassed by the resolution.

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142 The New York Times (2011)
143 BBC (2016)
144 The Atlantic (2016)
146 Payandeh (2012) p. 385
147 Payandeh (2012) p. 383
The resolution is also carefully drafted. If the UNSC wanted to specifically rule out any engagement on the ground by coalition forces, they could have simply excluded this in the paragraph in stead of an ‘occupation force’. The language suggests that the UNSC did not want to exclude the deployment of ground forces in general.\textsuperscript{148} Statements made by Nigeria and Lebanon hints to that the occupation of Iraq and Afghanistan years prior, might have influenced the language of the resolution.\textsuperscript{149} They clearly delineate the use of all necessary measures to protect civilians as a pretext for a foreign occupation as an option to ensure peace.\textsuperscript{150}

Accordingly, the deployment of advisers from the coalition States does not exceed the limits of the mandate, as the language specifically does not rule this mean out.

\textbf{4.4.2 \quad Regime Change}

The mandate given in resolution 1973 is to use all necessary measures to protect civilians and civilian populated areas under threat of attack. In this part, an examination of the language in the resolution and the subsequent implementation is discussed. However, actions taken that are clearly within the mandate by the coalition forces are not discussed. Thus, the bombing of Qadhafi-forces attacking the rebels in the cities of Misrata and Ajdabiya\textsuperscript{151} are considered to be within the mandate to protect civilians and civilian populated areas.\textsuperscript{152} All though Qadhafi had not yet initiated attacks on the city of Benghazi, the language of the resolution allows for use of force to prevent or halt attacks made by either party to the conflict.\textsuperscript{153} When the US, France and Britain on March 19\textsuperscript{th} launched airstrikes and cruise missiles directed at government forces, these military actions are considered to be within paragraph 4 of the resolution.\textsuperscript{154}

\textsuperscript{148} Payandeh (2012) p. 386.
\textsuperscript{149} Payandeh (2012) p. 386.
\textsuperscript{150} UN Doc. SC/10200
\textsuperscript{151} BBC (2011)
\textsuperscript{152} Ulfstein ; Christiansen (2013) p.164.
\textsuperscript{153} See section 4.3. above
\textsuperscript{154} Ulfstein ; Christiansen (2013) P. 164.
The resolution adopted was mainly drafted and later submitted by the UK, France, US and Lebanon.\textsuperscript{155} As the UK, US and France are permanent members of the UNSC one could ask the question; would they submit and adopt a resolution only to later exceed this mandate? As noted in section 1.3. above, in order to see how the coalition States complied with the mandate, statements by the coalition States are taken as an indication on how the State interpreted the language of the mandate.

The question is whether the language in the mandate to protect civilians implicitly or explicitly permits an interpretation to pursue the regime change, which ultimately was the outcome, or if there is something in the mandate that prohibits this interpretation. Are there indications that the mandate does not categorically rule out the possibility of regime change in Libya on the basis of resolution 1973?\textsuperscript{156} As important as the language of the mandate, is the subsequent practice of member States executing the mandate, consequently, this will also be addressed.

According to VCLT 31 (1) the general rule of interpretation is to interpret in good faith and in accordance with the ‘ordinary meaning’ to be given to the terms in their context and in the light of its object and purpose. In light of the context in which the mandate is given, there are several ways to interpret the use of all necessary measures to protect civilians and civilian populated areas. The first issue that needs to be addressed is the focus in the resolution on the democratic element of the conflict.\textsuperscript{157}

In both resolution 1970 and 1973, the UNSC refers to the ‘legitimate demands’ of the Libyan people in relation on how to respond to the violence imposed by the regime.\textsuperscript{158} The question will remain unanswered as to whether the legitimate demands of the Libyan people could have been fulfilled with Qadhafi still in power. But what is certain, is that a sheer reference to the demands of the people is insufficient as a legal basis to conclude that resolution 1973 was a legal entitlement for forceful regime change.\textsuperscript{159} On the other hand, the authorization to use force can be regarded within the overall context of the conflict, which was not only about

\begin{footnotesize}
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\item[155] UN Doc. S/PV/6498 p. 2.
\item[159] Payandeh (2012) p. 388.
\end{enumerate}
\end{footnotesize}
human rights violations, but also about the realization of the political rights of the Libyan people as mentioned in both resolutions.\textsuperscript{160} Still, one would then lose sight of what the uttered goal with the resolution was, namely to protect civilians from attack or threat of attack.

It is not disputed that Qadhafi and his regime is what poses the threat to the Libyan people.\textsuperscript{161} The natural understanding of this is that it is Qadhafi and his regime that must be removed in order to protect civilians from attacks or threats of attack. The UNSC does not explicitly authorize force in order to overthrow the regime, but they impose further sanctions against it. The objective of these sanctions were to end attack on civilians, and at the same time it cannot be denied that they also supported the struggle of the Libyan opposition against the regime and as a mere consequence to this it wakened the government forces.\textsuperscript{162}

Another strong argument against the assumption that resolution 1973 categorically excludes a regime change through intervening states is based on the distinction between \textit{means} and \textit{objectives} in a UNSC resolution.\textsuperscript{163} The objective of the resolution is the protection of civilians and civilian populated areas. It does not specify on the admissible means that may be employed in order to implement and achieve this goal other than the use of ‘all necessary measures’. Thus the argument can be made that while regime change may not have been a legitimate goal to be pursued on the legal basis of the resolution, it might have been a legitimate \textit{mean} to pursue the objective of the mandate, namely to protect civilians.\textsuperscript{164}

If you look at the subsequent practice of the coalition states, some support for this argument is found in the open letter that the Presidents of France, the UK and US posted in several new papers on April 15\textsuperscript{th} 2011. They stated:

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\textsuperscript{160} Payandeh (2012) p. 388.
\textsuperscript{161} UN Doc. S/PV/6498 see the French, Lebaneese, UK, Germany and Colombia delegates who all explicitly refers to Colonel Al-Qadhafi.
\textsuperscript{162} Payandeh (2012) p. 388.
\textsuperscript{163} Payandeh (2012) p. 388.
\textsuperscript{164} Payandeh (2012) p. 388.
\end{flushleft}
‘Our duty and our mandate under UN Security Council Resolution 1973 is to protect civilians, and we are doing that. It is not to remove Gaddafi by force. But it is impossible to imagine a future for Libya with Gaddafi in power.’

These arguments contradict each other. It also alters the objective of the coalition states by seeing Qadhai personally as the threat to the civilians and civilian populated areas. It is no longer at this point necessarily only about a regime change, but the removal of a State leader. As stated by the Presidents of three of the five countries that are permanent members of the UN Security Council: [Only] ‘then a genuine transition from dictatorship to an inclusive constitutional process can really begin, led by a new generation of leaders. For that transition to succeed, Colonel Gadaffi must go, and go for good.’ If they were to view Qadhafi as a ‘threat’ it must be assessed within the rules of IHL. As the military leader of Libya, there is no doubt that he is a legitimate military target in accordance with the rules in section 4.2. On the other hand, at the time of the eventual use of force by the coalition states, one would have to evaluate the level of threat he poses to civilians and civilian populated areas at this time.

Still, the question of legality must concern the mandate, and thus what is authorized in the material part of this mandate.

The delegations from the last two permanent members of the UNSC; Russia and China apprehended the situation differently. Russia remained convinced throughout the conflict that the right solution would be a political one. At the time of the adoption they were convinced that the ‘quickest way to ensure robust security for the civilian population and the long-term stabilization of the situation in Libya is an immediate ceasefire.’ China emphasized that the UNSC should ‘follow the United Nations Charter and the norms governing international law, respect sovereignty, independence, unity and territorial integrity of Libya and resolve the current crisis in Libya through peaceful means.’ The departed Secretary General of the Arab League said March 23rd 2011 that the goal was to protect civilian lives and that the mission had the task of protecting the civilian population in Libya against attack threats and threats.

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165 The Telegraph (2011)
166 Ibid note 150.
against use of weapons. On April 26th 2011, Russian Prime Minister said that NATO had exceeded the mandate, escalating its action from protection of civilians to killing Qadhafi and enforcing a regime change. The statement came after the coalition attacked a building in Qadhafi’s compound earlier that week, but Qadhafi was not present.

NATO through the coalition states, provided for the high-precision strike capabilities that the opposition commanders needed to ultimately achieve regime change. Moreover, the opposition forces received secret airdrops of weapons and ammunition, admitted by both France and Qatar. The Russian Foreign Minister called this a ‘very crude violation of UN Security Council Resolution 1970’ which imposed an arms embargo on Libya. As the summer progressed, the opposition forces advanced to Qadhafi-held territories. These included Tripoli, Bani Walid and Sirte. Coalition forces launched airstrikes in the same areas. It was reported through media that sleeping cells had been set up in Tripoli, armed with weapons smuggled in by the rebels. On August 20th 2011, these cells were activated and there was a closely coordinated operation between opposition forces on the ground and NATO launching precision strikes in the area. This day Tripoli fell to the opposition forces. Qadhafi was killed on October 20th 2011 and the UNSC terminated its operation in Libya on October 27th through resolution 2016.

On one hand, the language in resolution 1973 does not categorically exclude the regime change and ultimately the killing of Qadhafi. If one would only examine the language the natural interpretation would be to remove the obvious threat which is Qadhafi, being that he is the leader of the military and subsequently a lawful target under IHL. This interpretation would not stand in conflict with how the mandate was implemented either, and it could be seen as a ‘natural’ consequence of the mandate to use force to provide protection for civilians.

170 Reuters (2011)
171 Ibid note 155.
172 NATO (2011)
173 BBC (2011)
174 BBC (2011)
175 Ulfstein; Christiansen (2013) p. 168.
177 Ulfstein; Christiansen (2013) p. 168.
On the other hand, we have a mandate that specifically only allows for use of force to protect civilians and civilian populated areas *only* when these are under threat of attack, that means a ‘declared readiness to use force’.\(^{178}\) Also in the mandate, the UNSC has found it necessary to underscore its ‘strong commitment to the sovereignty, independence, territorial integrity and national unity’ of Libya. What is decisive for the lawfulness of use of force is that the mandate strictly limits military activities to those directed to achieve protection of civilians and civilian populated areas under threat of attack.\(^{179}\) The lawful objective was neither general human right protection in Libya, nor to bring down the Qadhafi regime- or to enforce western democracy.\(^{180}\) The coalitions use of force to enforce the regime change is thus outside the scope of the mandate. The UN as an organization is based on respect for each States sovereignty, which is also stipulated in Article 2 (1) of the Charter. Albeit the use of force is authorized under Chapter VII of the Charter, it does not remove the fact that the UNSC in discharging their duties ‘shall act in accordance with the Purposes and Principles of the United Nations’ pursuant to Article 24 (2). In Article 2 (4) member States are prohibited in their international relations to use force against another States political independence. By aiding to remove Qadhafi, this represents a breach of that principle by the coalition states.

### 4.5 Final conclusions

Five years after the intervention in Libya, we see that the political magnitudes of the violation of resolution 1973 are massive. In 2014 Russia and China both vetoed a resolution in the UNSC to refer the situation in Syria to the ICC.\(^{181}\) Since the outbreak of the civil war in Syria in 2011 an estimated 9 million people have fled from their homes.\(^{182}\) While Operation Unified Protector showed the commitment of the international community to protection of civilians, the military overreach has had unintended political consequences. The UNSC’s practice over the last decades showed that human rights have yielded sovereign rights in cases of extreme abuse, and this also explains the rise of the R2P norm over the last years.\(^{183}\) As I Concluded in section 4.4.1. the actions of the coalition states did not amount to an occupation in the sense of Article 42 of The Hague Convention. Notwithstanding if the criteria were formally...

\(^{178}\) See section 4.3.
\(^{179}\) Ulfstein ; Christiansen (2013) p. 168
\(^{180}\) Ulfstein ; Christiansen (2013) p. 168
\(^{181}\) The Guardian (2014)
\(^{182}\) Syrian Refugees (2014)
\(^{183}\) Falk, Richard (2012)
fulfilled, the practice earned to strengthen the suspicion to Western states and their purposes for military intervening and interfering in other States affairs.

The removal of Qadhafi personally could be seen as a mere consequence of removing a ‘threat’ to the civilian population and thereby be within the mandate of resolution 1973 under IHL. On the other hand, the assistance from Western states to the opposition forces’ pursuit of Qadhafi’s death, is contrary to the general conception of justice. It is also difficult to conform targeting a State leader personally with the purposes and principles of the Charter and especially the principle of State sovereignty in Article 2 (1) in the Charter. Finally, the death of Qadhafi lead to a regime change. As argued in section 4.4.2 the lawful objective of the mandate was to protect civilians. When the operation turned in to protection of general human rights, overthrowing the regime and enforcing western democracy through military action, it was illegal under international law. The Charter is the constitutional framework that is to guide the behavior of the UN. Ultimately, when the UNSC did not interfere in NATOs execution of the mandate, this lead to a breach of one of the building blocks in the Charter, Article 2 (4), which prohibits states to threat or use force against the territorial integrity or political independence of any state. In Article 2 (1) the inherent right of a States’ sovereignty is stipulated. Despite these developments the Charter still provides the operative guidelines for use of force.\textsuperscript{184} The R2P is not a norm recognized as legally binding and could not trump the rules set forth in the Charter itself; the aiding to enforce regime change is consequently in breach of Article 2 (4) and of Article 24 (2).

\textsuperscript{184} Falk, Richard (2012)
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