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## EVALUATING THE LEGALITY OF APPLICATION OF RESPONSIBILITY TO PROTECT IN AFRICA: THE LIBYA EXPERIENCE

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### Abstract

*The international community gathered in 2005 and adopted responsibility to protect in paragraph 138 and 139 of the World Summit Outcome Document. Few years after this adoption, the international community through the UN Security Council applied the concept of responsibility to protect in the 2011 Libyan intervention. The Resolution 1973 was adopted as a result of Gaddafi's manifest intention to exterminate the Libyan population. It authorised the member nations and regional organizations to use all necessary measures to protect civilians in Libya. Thereafter, the coalition of states went to Libya under the pretext of responsibility to protect and protection of civilians, and as a result the Libyan leader was killed. The killing of Gaddafi generated wide controversy as a result of the manner in which the intervening forces implemented Resolution 1973. It was against this background that this research work set to evaluate the application of responsibility to protect in Africa using the Libyan intervention as a text case. In so doing, the study examines the historical development and content of responsibility to protect, which was introduced in 2001 as a result of the Security Council's failure to authorize intervention for humanitarian purposes in Rwanda, Bosnia and Kosovo. The study aims to investigate whether or not the intervention in Libya was in line with responsibility to protect, and in so doing, the study analyses Resolution 1973 to ascertain whether or not the interveners went beyond mandate. The responsibility to protect is central to the discussion of this research work because Resolution 1973 in its preamble reminded the Libyan authorities of their responsibility to protect civilian populations. The study in analysing Resolution 1973, argues that it would be impossible to enforce civilian protection with Gaddafi in power, and even if some scholars posited that the interveners went beyond mandate in Resolution 1973, the interveners saved many lives which would have been killed by Gaddafi.*

**Keywords:** Responsibility to protect, legality, application in Africa, the Libya experience

### 1. Introduction

The rebellion against Gaddafi's regime started in early 2011, following closely upon revolutionary challenges that were occurring in Tunisia and Egypt.<sup>1</sup>

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<sup>1</sup> Spencer Zifcak, 'The Responsibility to Protect after Libya and Syria' (2012) 13 *Melbourne Journal of International Law* 2.

However, whereas in those countries the autocrats in charge had reacted with a measure of restraint, Gaddafi declared war on the Libyan uprising<sup>2</sup> and soon after, the number of protesters killed rose from hundreds to more than a thousand. As Gaddafi forces gained strength in the territory, the opposition weakened to the level that it became clear that the city of Benghazi would fall.<sup>3</sup> The protesters were met with violent crackdown by the Libyan authorities and the Libyan situation increasingly developed into a mass revolt because thousands were losing their lives daily.<sup>4</sup> It was at that point that Gaddafi threatened the disaffected population with extinction.<sup>5</sup> Gaddafi told his supporters to attack the oppositions in their dens and called the protesters cockroaches and rats, who did not deserve to live.<sup>6</sup>

Following his words, the international community became deeply alarmed, and the prospect of massacre and atrocity in Libya at the hands of the regime's military forces was clear.<sup>7</sup> The UN Security Council met to consider the crisis and the prevailing situation in Libya on 26 February 2011 and the outcome of the meeting was the adoption of Resolution 1970 (2011). The Resolution expressed grave concern about the conflict in Libya. It also welcomed the condemnation by the various regional organisations. It condemned the killing of civilians and reminded the government of Libya of its responsibility to protect its population from the heinous crimes.<sup>8</sup> The UN Resolution 1970 demanded an immediate end to the violence and urged the Libyan authorities to act with utmost restraint, and respect for human rights.<sup>9</sup> Despite the non-forcible measures in resolution 1970, Gaddafi continued to unleash terror on the Libyan population, and as a result, consideration of adopting forcible measures to protect civilian population by the Security Council started.

## 2. Adoption of Resolution 1973

In response to General Gaddafi's threat to take action against civilians, the Security Council passed Resolution 1973,<sup>10</sup> which authorized the member

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<sup>2</sup> Ibid 2.

<sup>3</sup> Charles Sampford and Ramesh Thakur, *Responsibility to Protect and Sovereignty: Law, Ethics and Governance Series 13*.

<sup>4</sup> Geir Ulfstein and Hege Fosund Christiansen, 'The Legality of NATO Bombing in Libya' (2013) 62 *International and Comparative Law Quarterly* 160.

<sup>5</sup> Spencer Zifcak (n 1) 2.

<sup>6</sup> VP Nanda, 'From Paralysis in Rwanda to Bold Move in Libya: Emergence of the Responsibility to Protect, Norm under International Law – Is the International Community Ready for it?' (2011) 34(1) *Houston Journal of International Law* 39.

<sup>7</sup> Zifcak (n 1) 2.

<sup>8</sup> Sampford and Thakur (n 3) 13.

<sup>9</sup> United Nations Security Council Resolution 1970

<sup>10</sup> Chelsea O'Donnell, 'The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention' (2014) 24:557 *Duke Journal of Comparative and International Law* 566

nations acting through regional arrangements to use all necessary measures to protect civilians under threat of attack.<sup>11</sup> NATO airstrikes led by the United States, France, and the United Kingdom, commenced hours after the resolution was passed.<sup>12</sup> Resolution 1973 in Libya therefore represents the first mandate by the Security Council for a military intervention based on the responsibility to protect.<sup>13</sup> The adoption of Resolution 1973 was a surprise as most legal actors had expected Russia and China to veto any proposal for military intervention.<sup>14</sup>

Shortly, after the resolution was adopted, political and international scholars reacted to different actions that led to its adoption. While some have welcomed the resolution and expressed their support, others have criticised it as an illegal interference in civil war,<sup>15</sup> which does not require UN Security Council response.<sup>16</sup> Some assert that the intervention has been hijacked by regime change. Others have argued that the Libyan intervention presented considerable danger for the future of responsibility to protect.<sup>17</sup> Modeme argues that violent suppression of demonstration, protests, armed rebellion or insurgency are domestic matters that have little implication and therefore do not fall within the competence of Security Council and do not warrant international military intervention.<sup>18</sup> The UN Security Council has a wide range of discretion to make a determination whether an internal situation poses threat to international peace and security.<sup>19</sup> The systematic violation of human rights could not be regarded purely as an internal matter anymore and the concept of sovereignty contained in the UN Charter Article 2(1) would not pose a limitation to Security Council action in the international legal order.<sup>20</sup>

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<sup>11</sup> United Nations Security Council Resolution 1973  
<[https://www.nato.int/nato\\_static/assets/pdf\\_2011\\_03/20110927\\_110311-UNSCR-1973.pdf](https://www.nato.int/nato_static/assets/pdf_2011_03/20110927_110311-UNSCR-1973.pdf)> accessed on 2 October 2021.

<sup>12</sup> O'Donnell (n 10) 566.

<sup>13</sup> Ulfstein and Christiansen (n 4) 161.

<sup>14</sup> Andrew Garwood-Gowers, 'The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?' (2013) 36(2) *University of South Wales Law Journal* 603.

<sup>15</sup> Mehrdad Payendeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) 52 *Virginia Journal of International Law* 355, 380.

<sup>16</sup> Lawrence Modeme, 'The Libya Humanitarian Intervention. Is it lawful in International Law?' (2012) 7  
<[www.academic.edu/576116/the\\_libya\\_humanitarian\\_intervention\\_is\\_it\\_lawful\\_in\\_international\\_law](http://www.academic.edu/576116/the_libya_humanitarian_intervention_is_it_lawful_in_international_law)> accessed 2 October 2021.

<sup>17</sup> Zifcak (n 1) 9.

<sup>18</sup> Modeme (n 18) 7.

<sup>19</sup> Dire Tladi, 'Security Council, the Use of Force and Regime Change: Libya and Cote d'Ivoire' (2012) 37 *South African Yearbook of International Law* 8, 10.

<sup>20</sup> Erika De Wet, *Chapter VII Powers of the Security Council* (Hart Publishers North America 2003) 194.

The Organisation of Islamic Cooperation (OIC) has largely supported the adoption of Resolution 1973.<sup>21</sup> The Ministerial Executive of OIC issued a Communiqué in which it welcomed the Security Council Resolution 1973.<sup>22</sup> The Arab League reiterated their support for the 1973 resolution and no-fly zone in Libya.<sup>23</sup> Also, the three AU non-permanent members of the Security Council- Nigeria, Gabon, and South Africa- voted in favour of a no-fly zone. Justifying Nigeria's endorsement of the Resolution 1973, the then country permanent representative to UN, Angela Ogwu, said that the magnitude of humanitarian disaster in Libya compelled Nigeria to take such a stance.<sup>24</sup> On the South African perspective, the Deputy Minister for International Cooperation Ebrahim Ebrahim, argued that South Africa not only campaigned for the suspension of Libya from Human Rights Council in Geneva when the conflict broke out, but that President Zuma had informed Gaddafi that South Africa abhorred his government's violation of human rights and he referred to South Africa's active role in the adoption of the UN Security Council Resolution 1973.<sup>25</sup> The President of Rwanda expressing his support towards resolution 1973 stated that:

...no country knows better than my own country the cost of the international community failing to intervene to prevent a state killing its own people. Through UN Resolution 1973, we are seeking a committed intervention to halt the crisis that was unfolding in Libya. From what the world saw on the sidelines of this conflict, had this action not been taken, the bombardment of that country's town and cities would have continued. Benghazi most likely would have borne the brunt of a furious administration, and hundreds and thousands of lives could well have been lost-our responsibility to protect is unquestionable-this is the right thing to do; and this view is backed with the authority of having witnessed and suffered the terrible consequences of international inaction'.<sup>26</sup>

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<sup>21</sup>Payendeh (n 15).

<sup>22</sup> Press Release of Organization of Islamic Conference Final Communiqué Issued by the emergency open ended Ministerial Meeting of the OIC Executive Committee on the Alarming Development in Libya Arab Jamarihya (9 March 2011) <<http://www.oic-oci.org/topic-details.asp-id=5057>> accessed 30 November 2021. See also Payendeh (n 15) 380.

<sup>23</sup> Martin Chulov, 'Arab League to Reiterate Backing for the Libya No-fly Zone, Guardian' (22 March 2011). <<http://www.tinyurl.com/4dxglac>> accessed 30 October 2021.

<sup>24</sup> 'Libya, Nigeria votes in Favour of No-fly Zone' (19 March 2011) <<http://www.vanguardngr.com/2011/03/Libya-Nigeria-Votes-in-favour-of-no-fly-zone-resolution>> accessed 2 November 2021. See also Payendeh (n 15) 380.

<sup>25</sup> Sandy Africa and Rentia Pretorius, 'South Africa, the African Union and Responsibility to Protect, the case of Libya' (2012) 12 *African Human Rights Journal* 409.

<sup>26</sup>Paul Kagame, 'Intervention in Libya was the Right Thing to do, New African' (May 2011) <<http://www.connection.ebscohost.com/c/opinions/60584069/kagame-intervening-libya-was-right-thing-do>> accessed 24 October 2021.

South American States were strongly divided on the Resolution 1973. While a lot of them such as Bolivia, Brazil, Venezuela and Cuba strongly condemned the adoption of Resolution 1973 in Libya,<sup>27</sup> the Brazilian statement was that the use of force authorised by the Resolution 1973 could change the narrative and ways that may have serious repercussions and also expressed doubt as to whether the use of force will lead to the actualization of the common goal.<sup>28</sup> India on their own rejected the use of force and stated that it was not acceptable.<sup>29</sup> Other countries such as Mexico and Columbia having voted in favour of the resolution expressed their support. Statements by Russia and China, the two permanent members of the Security Council who abstained in the vote on Resolution 1973 were critical. China strongly opposed and condemned the Libya intervention, Russia harshly criticised it.<sup>30</sup> Indian ambassador to the UN objected to the alteration of NATO military stance from the relative neutrality of civilian protection to evident partiality. He further asserted that the Resolution 1973 was concerned with the protection of civilians, it did not mean that NATO could decimate one side, arm rebels, worsen tribal animosities, declare victory and take the other way.<sup>31</sup>

### 3. Prohibitions to the Use of Force and its Exceptions

The prohibition of the threat or use of force in Article 2(4) of the UN Charter has rightly been described as the corner-stone of the Charter system.<sup>32</sup> Notwithstanding its inherent weaknesses, which stem primarily from the malfunctioning of the collective security system in the way originally envisioned by the framers of the UN Charter, international law has until now withstood all attempts by states or scholars to restrict the scope and content of the provision.<sup>33</sup> Article 2(4) provides that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.<sup>34</sup> In other words, no intervention can be made in a state without the consent of the state in question.<sup>35</sup>

<sup>27</sup> 'Latin America Condemned US/UN Invasion of Libya. COTO Report' (22 March 2011) <<http://www.tinyurl.com/3s6ecxx>> accessed 24 October 2021.

<sup>28</sup> Payendeh (n 15) 380.

<sup>29</sup> Dire Tladi, (n 19) 13.

<sup>30</sup> Payendeh (n 17) 380.

<sup>31</sup> Zifcak, (n 3) 12.

<sup>32</sup> Payendeh, 'With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Law making' (2010) 35 *The Yale Journal of International Law* 469, 492.

<sup>33</sup> Payendeh (n 15) 492.

<sup>34</sup> Article 2 (4) of the United Nations Charter <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>> accessed 18 October 2021.

<sup>35</sup> Dire Tladi, 'The Non-consenting Innocent State: The Problem With Bethlehem's Principle 12' (2013) 107 *The American Journal of International Law* 563, 575.

Clearly, this is directed at inter-state use of force, although as it has turned out, civil conflicts have been more common in the contemporary international law than traditional inter-state conflict.<sup>36</sup> The prohibition of the use of force is complemented by the non-intervention principle, which prohibits coercive intervention into the exclusive domestic affairs of a state.<sup>37</sup> Under the UN Charter Article 2(6), there is a duty on the UN to ensure that even States which are not UN members act in accordance with these principles for the maintenance of international peace and security.<sup>38</sup> The essence of complying with the principle of non-intervention in any domestic jurisdiction is to ensure that the international community do not take laws into their hand, and that the principles relating to use of force is to be complied with.

As we posited above, the UN Charter Article 2(4) prohibits the use of force in international law. The UN Charter permits states to use force in only two circumstances: first, under the authority of the Security Council pursuant to its powers under Chapter VII of the Charter, and secondly, in the exercise of the right of individual or collective self-defence under Article 51 of the Charter.<sup>39</sup> In other words, use of force that does not comply with the above principle in international legal order would be regarded *ultra vires* and illegal.

The Chapter VII powers of the UN Charter particularly Article 39 provides that the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.<sup>40</sup> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the UN to apply such measures.<sup>41</sup> Should the Security Council consider that measures provided for in Article 41 would be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.<sup>42</sup> Security Council is central in the authorization of use of force in international legal order, once it determines that such action threatens international peace and security. No enforcement action shall be made either by the regional agencies without Security Council authorization.<sup>43</sup>

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<sup>36</sup> Malcolm D Evans, *International Law* (2<sup>nd</sup> edn, Oxford University Press 2006) 591.

<sup>37</sup> Payendeh (n 15) 492.

<sup>38</sup> Evans (n 63) 591.

<sup>39</sup> John Duggard, *International Law A South African Perspective* (4th edn Juta Co 2011) 499.

<sup>40</sup> Art 39 of the United Nations Charter.

<sup>41</sup> Art 41 of the United Nations Charter.

<sup>42</sup> Art 42 of the United Nations Charter.

<sup>43</sup> Art 53 of the United Nations Charter.

#### **4. The Security Council Authorization of Use of Force under Responsibility to Protect**

The Security Council authorization of the use of force for the purposes of maintaining or restoring international peace and security is beyond question.<sup>44</sup> In order to exercise its powers, the Council has been granted a wide margin to determine the existence of a threat to the peace, breach of the peace or act of aggression.<sup>45</sup> Under the UN Charter Article 24(1), the Security Council has the primary responsibility for the maintenance of international peace and security. The Chapter VII of the UN Charter gives the Security Council wide range of powers for the authorization of use of force.<sup>46</sup>

Article 39 vested on the Security Council the power to determine threat to international peace and make recommendation thereto.<sup>47</sup> Once the Security Council determines that a threat to international peace exists, it will consider appropriate measure for dealing with such situation. The Security Council acting pursuant to Chapter VII will, by majority of at least nine votes (so long as none of the permanent members exercises a veto), will in the first instance authorize the use of measures falling short of military force under Article 41 of the UN Charter.<sup>48</sup> If the Security Council considers that Article 41 measures would be inadequate or have proved to be inadequate, it may authorise such forcible measures under Article 42 as may be necessary to maintain or restore international peace and security.<sup>49</sup>

State sovereignty has long been regarded as the pivotal structural paradigm of international law.<sup>50</sup> Its recognition in Article 2(1) of the UN Charter as a fundamental, albeit qualified, principle of the UN is only one of many indicators that it has not forfeited its significance,<sup>51</sup> although Article 2(7) has put a caveat, that the above principle shall not prejudice the application of enforcement measures under Chapter VII of the UN Charter. At the same time, the rising importance of the protection of human rights raises the question of how to reconcile the inherent tension between these two principles.<sup>52</sup> In the contemporary international legal order, it has become clear that the treatment of human beings within the territorial boundaries of a state does not belong to the

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<sup>44</sup> Tladi (n 19) 24.

<sup>45</sup> Tladi (n 19) 24.

<sup>46</sup> Evans (n 36) 607.

<sup>47</sup> The United Nations Charter, art 39.

<sup>48</sup> Khawar Quareshi, 'Legal Grounds for the Intervention in Libya' <<http://www.lawgazette.co.uk/analysis/legal-grounds-for-intervention-in-libya/60292.fullarticle>> accessed 15 October 2021.

<sup>49</sup> Quareshi (n 48).

<sup>50</sup> Payendeh (n 15) 470.

<sup>51</sup> Ibid 470.

<sup>52</sup> Ibid 470.



domain of a state exclusively to exclude interferences from the outside.<sup>53</sup> Responsibility to protect is a concept which emphasizes the protection of civilian populations from war crimes, ethnic cleansing, genocide and crimes against humanity, by the international community through the UN Security Council in a situation, where the host state failed in its responsibility to protect its citizens.<sup>54</sup>

Intervention in intrastate human rights violations and humanitarian crisis does not fit neatly into the international law governing the use of force,<sup>55</sup> except where it falls within the exceptions to the use of force posited above, that is, pursuant to Security Council powers under Chapter VII, and self-defence under Article 51. In other words, intervention under the doctrine of responsibility to protect would only be legal if it complies with the use of force enshrined in the UN Charter. There is a dispute as to whether the Security Council may adopt a resolution under Article 39, determining that a situation constitutes a threat to the international peace justifying action under Chapter VII, when it involves a serious violation of human rights within a particular territory.<sup>56</sup>

Some argue that there must be some external element, which affects a neighbouring state or has the potential of provoking armed conflict between states; others posited that a serious violation of human rights within the domestic jurisdiction of a state poses a threat to the international peace under Article 39.<sup>57</sup> Based on the above assertion, Tladi contended that the test of whether the Security Council should act is no longer whether there is a threat to peace or breach of international peace, rather whether the issue is important internationally and has a high profile.<sup>58</sup> It should be noted that massive human rights violations, a deteriorating humanitarian situation, and the negative effects of internal conflict on a region, for example, increasing refugee migration, possible military engagement in neighbouring states, and spill over effects, have become grounds for the Security Council to activate the Charter's peace enforcement mechanisms.<sup>59</sup> Dugard maintains that a purely internal situation can constitute a threat to international peace under Chapter VII, which could warrant Security Council to invoke use of force or measures under Article 41 and 42.<sup>60</sup> De Wet states that systematic violations of human rights cannot be regarded as

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<sup>53</sup>Ibid 470.

<sup>54</sup>United Nations General Assembly Resolution 60/1 n 109 para 138-139.

<sup>55</sup>Garwood-Gowers (n 14) 595.

<sup>56</sup>Dugard (n 39) 483.

<sup>57</sup>Ibid 483.

<sup>58</sup>Dire Tladi, 'Strict Positivism, Moral Argument, Human Rights and the Security Council: South Africa and the Myanmar Vote' (2008) 8 *African Human Rights Law Journal* 32.

<sup>59</sup>Peyendeh (n 15) 366.

<sup>60</sup>John Dugard, 'The Influence of the Universal Declaration as Law' (2009) 24 *Maryland Journal of International Law* 88.

purely internal matters anymore and that the concept of state sovereignty contained in Article 2(1) of the UN Charter, would not pose a limitation to Security Council action under Chapter VII.<sup>61</sup> The argument for the legality or otherwise of use of force in the light of responsibility to protect is more likely to be based in the growth on importance of human rights and the restrictions on state sovereignty.<sup>62</sup> Gray posited that since the protection of human rights is no longer a purely domestic matter, a use of force for human protection purposes overrides the prohibition of the use of force.<sup>63</sup> In other words, humanitarian crises in a domestic arena can now be a justification for Security Council authorization of use force for human rights protection in an internal jurisdiction of a state.

It should be noted that the UN Security Council had on several occasions in the past authorised use of force for human rights protection purposes in a situation of internal conflict.<sup>64</sup> Examples of earlier use of force authorised by the Security Council for human protection include Resolution 794 on Somalia and Resolution 940 on Haiti.<sup>65</sup>

### **5. Analysis of UN Security Council Resolution 1973 and Criteria for Responsibility to Protect**

The main elements of the Resolution 1973 are the operative paragraphs 4 and 8.<sup>66</sup> The paragraph 4 of the resolution authorizes the member states that have notified the UN Secretary-General, acting nationally or through regional organization, to take all necessary measures, notwithstanding paragraph 9 of the Resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in Libya, including Benghazi, while excluding a foreign occupation force on any part of Libyan territory.<sup>67</sup> The operative paragraph 8 authorizes member states that have notified the UN Secretary-General and the Secretary-General of the League of Arab States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6, as necessary, and request states concerned in cooperation with the Arab League to coordinate closely with the Secretary-General on measures they are taking to implement this ban.<sup>68</sup> The overarching purpose of Resolution 1973 was the protection of civilians, and there were five major ways that the resolution

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<sup>61</sup> Erika De Wet (n 20) 194.

<sup>62</sup> Christine Gray, *Use of Force for Humanitarian Purpose; Research Handbook on International Conflict and Security Law*, Nigel D White (ed) (Edward Elgar Publishers 2013) 230.

<sup>63</sup> Ibid 230.

<sup>64</sup> Garwood-Gowers (n 14) 603-604.

<sup>65</sup> Ibid 604.

<sup>66</sup> Tladi (n 19) 36.

<sup>67</sup> Security Council Resolution 1973 paragraph 4

<sup>68</sup> Security Council Resolution 1973 paragraph 8.

authorized this protection like mandate to use all necessary measures, protection of civilian populated areas including Benghazi, Protection of areas under threat of attack, an exception to the arms embargo notwithstanding paragraph 9 of Resolution 1970, exclusion of a ground forces and no fly zone.<sup>69</sup>

### 5.1 All Necessary Measures

The Security Council immediately responded to the violence in Libya with a comprehensive resolution that authorized all necessary measures to stop attacks on civilians.<sup>70</sup> All necessary measures used in the operative paragraphs are a well-accepted practice of the Security Council for the permission to use force to achieve a specific purpose.<sup>71</sup> This is the language employed by the Security Council to authorize the use of force under Chapter VII, particularly under Article 42 of the UN Charter.<sup>72</sup> Given the prevailing situation in Libya, Henderson contended that the wording was adopted to create some form of intentional ambiguity thereby allowing all States to win the arguments over its permissible limits.<sup>73</sup> In as much as the UN Security Council Resolution 1973 does not provide the time limits and modalities to be taken, the intervening states would have to show that every action they took was essential with regard to the objective they pursued, namely the protection of civilians and civilian populated areas including Benghazi, and to enforce compliance with the no-fly zone.<sup>74</sup>

Some legal commentators have argued that the manner, in which the coalition of states carried out the ‘all necessary measures’ in Resolution 1973, assisted the opposition forces in winning the war, thereby ousting Gaddafi from power.<sup>75</sup> In rejecting this view, Akande posited that the use of all necessary measures employed by the UN Security Council was the only way of stopping Gaddafi forces from winning the war and could not be interpreted as assisting the opposition forces.<sup>76</sup>

The reason being that the threat to civilians that justifies the military intervention emanated from the Gaddafi regime, and military action against the origin of the human rights violations encompasses the measures necessary for

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<sup>69</sup> PR Williams and Colleen (Betsy) Popken, ‘Security Council Resolution 1973 on Libya: A Moment of Legal and Moral Clarity’ (2011) 44 *Case Western Reserve Journal of International Law* 225, 233.

<sup>70</sup> Ibid.

<sup>71</sup> C Henderson, ‘International Measures for the Protection of Civilians in Libya and Cote d’Ivoire’ (2011) 60 *International and Comparative Law Quarterly* 770.

<sup>72</sup> Williams and Popken (n 69) 234.

<sup>73</sup> Henderson (n 70) 771.

<sup>74</sup> Payendeh (n 15) 385.

<sup>75</sup> Simon Adams 15.

<sup>76</sup> Dapo Akande, ‘What does the United Nations Security Council Resolution 1973 permit?’ (2012) <<http://www.ejktalk.org/what-does-un-security-council-resolution-1973-permit>> accessed 4 May 2021.

the civilian protection.<sup>77</sup> The intervening states could hardly have protected civilians in Benghazi and other places in Libya against the Libyan forces without at the same time strengthening the opposition. If coalition forces had wanted to protect only civilians and not insurgents, such approach would have been impossible to implement in practice.<sup>78</sup> In other words, ‘all necessary measures’ encompasses those measures the intervening states employed for civilian protection which includes training and assisting the rebels.

### **5.2 Civilian Populated Areas in Libya including Benghazi**

The operative paragraph 4 of Resolution 1973 also incorporated protection of civilians in Libyan territory and also made special reference to include those living in Benghazi.<sup>79</sup> Article 51 of the Protocol Additional to the Geneva Convention provides that the civilian population shall enjoy general protection against dangers arising from military operation.<sup>80</sup> The civilian population as such shall not be the object of attack or threats of violence the primary purpose of which is to spread terror among the civilian population.<sup>81</sup> Even if military personnel are present in an area, their presence does not deprive the area of its civilian nature.<sup>82</sup> Thus, going by the Geneva Convention ‘civilian populated areas used in Resolution 1973’ authorized the intervening states to use force to protect entire towns and villages in Libya, even if legitimate military targets existed within them, so long as civilians were present.<sup>83</sup>

The express inclusion of Benghazi in Resolution 1973 as a protected area was significant because it was the command and control centre for the Libyan opposition since the inception of the uprising.<sup>84</sup> Apart from the fact that the Libyan uprising started in Benghazi, Gaddafi’s threat to civilians living in Benghazi that he would not have pity on them also triggered the Security Council to make specific reference to the protection of civilians living in Benghazi in Resolution 1973.<sup>85</sup> In extending protection to civilian populated areas including Benghazi, the Security Council recognized that those needing protection may also be engaged in self-defence, but also assisted them in doing so.<sup>86</sup> Also, the rapid advance of the regime forces to within striking distance of

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<sup>77</sup>Payendeh (n 15) 387.

<sup>78</sup>Ibid.

<sup>79</sup> Security Council Resolution 1973 para 4.

<sup>80</sup> ‘Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts’ (Protocol 1) (8 June 1977) <<http://cpwg.net/wp-content/uploads/sites/2/2013/08/AP-1-and-11-to-the-Geneva-Conventions.pdf>> accessed 7 October 2021.

<sup>81</sup> Art 51(2) of the Additional Protocol to the Geneva Convention.

<sup>82</sup> Williams and Popken (n 69) 237-238.

<sup>83</sup> Ibid 238.

<sup>84</sup> Ibid 238.

<sup>85</sup> Ulfstein and Christiansen (n 4) 160-161.

<sup>86</sup> Williams and Popken (n 69) 238.

the rebel held city of one million people had created an urgent need for the protection of civilians in Benghazi, and there was no room for ambiguities as to the legality of protecting the entire population living in Benghazi including the opposition forces.<sup>87</sup> This was a clear acknowledgement by the Security Council that Gaddafi forces and the Libyan opposition were not entitled to the same protection.<sup>88</sup>

The operative paragraph 4 of Resolution 1973 also extended protection to civilians and civilian-populated areas under threat of attack and in doing so, provided the interveners with the flexibility to successfully fulfil its mandate of civilian protection.<sup>89</sup> Authorising the protection of civilians under threat of attack may seem like common sense for a resolution with the goal of protecting civilians, to ensure that the intervening forces were able to stop attacks on civilians before they occurred.<sup>90</sup> While Welsh posited that NATO construed this approach to overstep their mandate in Resolution 1973,<sup>91</sup> Williams and Popkin on the other hand contended that this clause provided NATO with the flexibility to adapt the campaign to changing circumstances on the ground and to strike all targets that posed a risk and threat to civilian population.<sup>92</sup> Also, the interveners did not shy away from eliminating threats of attack to civilians, because destroying targets that posed an imminent threat to civilians was a key objective in the early campaign when the regime forces were staging an offensive against the opposition in Benghazi.<sup>93</sup>

### ***5.3 Notwithstanding Paragraph 9 of Resolution 1973 and Excluding Foreign Occupation***

The broad interpretation of ‘notwithstanding paragraph 9 of the Resolution 1973’ in operative paragraph 4 of Resolution 1973 authorises states to arm and train the opposition as long as it was necessary for civilian protection.<sup>94</sup> The paragraph 9 of Resolution 1973 provides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel

<sup>87</sup> Ulfstein and Christiansen (n 4) 163.

<sup>88</sup> Williams and Popken (n 69) 338.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Jennifer Welsh, ‘Civilian Protection in Libya’ 1.

<sup>92</sup> Williams and Popken (n 69) 240.

<sup>93</sup> Ibid 240.

<sup>94</sup> Ibid 243.

whether or not originating in their territories.<sup>95</sup> In common language, when the word ‘notwithstanding’ is used as a preposition, as it is in operative paragraph 4 of Resolution 1973, it means despite, and states could use all necessary measures to protect civilians despite paragraph 9 of the Resolution 1970.<sup>96</sup> Although, the meaning of this phrase has been debated, the logical interpretation is that this phrase created an exception to the paragraph 9 arms embargo for measures that were necessary to protect civilians, and includes measures that may include arming and training civilians so that they may protect themselves.<sup>97</sup>

It should be noted that the UN Security Council Resolution 1973 only authorises protection of civilians in Libya.<sup>98</sup> The inclusion of notwithstanding paragraph 9 in Resolution 1973 shows that drafters of the resolution purposely and thoughtfully created exceptions to the arms embargo.<sup>99</sup> The addition of this phrase reflects an understanding by the Security Council that those who need protection may also be engaged in self-defence.<sup>100</sup> In rejecting this above proposition, Milanovic argues that distribution of arms to the rebels was absolutely prohibited by the operative paragraph 4 of resolution 1973.<sup>101</sup> Akande contended that those States using force in and against Libyan forces must be entitled to transfer their own arms, for their own use to the territory of Libya. If this were not so, the authorization to use force would be meaningless.<sup>102</sup> Furthermore, the reference to acting nationally or through regional arrangements is not intended to limit the authorization but rather to make clear that force can be used in different ways.<sup>103</sup> More importantly, the authorization is to use all necessary means to achieve a goal and there is no reason why this must be done directly and not indirectly. The authorization is effectively an authorization to use force.<sup>104</sup> Under international law, states may use force either directly, through their own armed forces or indirectly by providing support to non-State groups.<sup>105</sup> If a State is authorised to use force it may choose to do so directly or

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<sup>95</sup>Security Council Resolution 1970 (2011).

<sup>96</sup> Williams and Popken (n 69) 244.

<sup>97</sup> Ibid 244.

<sup>98</sup> Security Council Resolution 1973.

<sup>99</sup>Williams and Popken (n 69) 244.

<sup>100</sup>Ibid.

<sup>101</sup> Marko Milanovic, ‘Can the Allies Lawfully Arm the Libyan Rebels?’ (2011) <[www.ejiltalk.org/can-the-allies-lawfully-arm-the-libyan-rebels/](http://www.ejiltalk.org/can-the-allies-lawfully-arm-the-libyan-rebels/)>. accessed 8 October 2021.

<sup>102</sup>Dapo Akande, ‘Does Security Council Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?’ (2011) <[www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/](http://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/)>. accessed on 8 October 2021.

<sup>103</sup>Ibid.

<sup>104</sup>Ibid.

<sup>105</sup>Ibid.

indirectly and this may include providing support or arms or other assistance to non-State groups in order to fulfil the mandate.<sup>106</sup>

#### **5.4 Excluding Foreign Occupational Forces**

The Security Council Resolution 1973 in its operative paragraph 4, also authorized the use of force but explicitly excluded a foreign occupation force of any kind on any part of Libyan territory.<sup>107</sup> On the basis of this formulation, it has been argued that Resolution 1973 categorically excluded the deployment of foreign forces, because of the fact that the operative paragraph 4 did not stipulate the term ground forces, but instead resorted to the technical phrase occupation force.<sup>108</sup> Under international law, the concept of occupation can be defined as the exercise of effective control over the territory of a state by another state.<sup>109</sup> Also, according to Article 42 of the Hague Convention IV, a territory is considered occupied when it is actually placed under the authority of the hostile army.<sup>110</sup> Williams and Popkin posited that any foreign intelligence or military presence on the ground in Libya falling short of this threshold definition did not constitute foreign occupation of territory.<sup>111</sup> It should be noted that this phrase certainly set the tone that there would not be heavily-armed peacekeeping forces in Libya, but it allowed some military presence on the ground.<sup>112</sup>

Also, a very broad interpretation of the operative paragraph 4 of Resolution 1973 clearly gives the interveners the flexibility of putting limited foreign intelligence and personnel on the ground of Libya, so long as they did not constitute a foreign occupation of any form.<sup>113</sup> In other words, foreign intelligence and military personnel could be used as long as they do not exercise effective control over the Libyan territory.<sup>114</sup> On the basis of this formulation, military operation could include ground forces without occupation of the territory. Accordingly, the deployment of ground troops in order to gather information or mark possible targets for air strikes is encompassed by the

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<sup>106</sup>Ibid.

<sup>107</sup>Payendeh (n 15) 385.

<sup>108</sup>Ibid. 385.

<sup>109</sup>Ibid.

<sup>110</sup>'Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague' (18 October 1907) <[www.opbw.org/int\\_inst/sec\\_docs/1907HC-TEXT.pdf](http://www.opbw.org/int_inst/sec_docs/1907HC-TEXT.pdf)> accessed 7 October 2021.

<sup>111</sup>Williams and Popken (n 69) 247.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ben Smith and Arabella Thorp, 'Interpretation of Security Council Resolution 1973 on Libya (6 April 2011) House of Commons Library' 5 <[http://www.icil.cam.ac.uk/sites/default/files/icil/documents/arabspring/libya\\_38\\_House\\_of\\_Commons\\_Interpretation\\_SCRResolution\\_1973.pdf](http://www.icil.cam.ac.uk/sites/default/files/icil/documents/arabspring/libya_38_House_of_Commons_Interpretation_SCRResolution_1973.pdf)> accessed 4 November 2021.

Security Council authorization in as much it aims at civilian protection.<sup>115</sup> Many scholars assert that coalition forces on ground abused this provision because of the fact that they provided the rebel forces with arms, ammunitions and military training, which contradicted the wordings of operative paragraph 4.<sup>116</sup> Akande posited that any measure that was adopted by the coalition for the protection of civilian population in Libya would be accepted provided it was for the purposes of civilian protection.<sup>117</sup> Furthermore, ground troops were allowed to be deployed to ensure civilian protection, but they were prohibited to besiege Libyan territory, and this suggests that the Security Council wanted to rule out the possibility that a military intervention would result in the occupation of Libya.<sup>118</sup> With regards to the admissible measures, only occupation forces are explicitly excluded, which means that deployment of ground troops was generally allowed so long as they did not seize effective control over parts of Libyan territory.<sup>119</sup>

## **6. Conclusion**

There are legal merits in the application of responsibility to protect in Libya. The mandate no doubt was for the protection of civilians, and the interveners worked tremendously in ensuring that the Libyan protection was given adequate protection. The intervention in Libya actualized the mandate in both Resolutions 1970 and 1973 by meeting the legitimate demands of the Libyan population, including ousting Gaddafi's regime which posed serious threat to the peace and security in Libya. The intervention in Libya also advanced the concept of responsibility to protect populations from massive human rights atrocities, which was adopted by the world leaders in 2005 in order to ensure that the international community through the UN Security Council aided in preventing mass atrocities anywhere they are likely to occur in the world. That is to say, leaders of individual states cannot rely on inviolability of sovereignty as an alibi to unleash atrocities on their civilian population, while the international community stands by. Contemporary international law has adopted the principle of responsibility to protect to lift the veil of sovereignty.

In conformity with the above reasoning, the UN Security Council swiftly adopted Resolution 1973 which authorized military force in Libya, and this seemed to point to a new era of international cooperation and prompt response on civilian protection. As expected, the supporters of responsibility to protect were quick to hail Resolution 1973 as a triumph for a new concept.<sup>120</sup> Conversely, the opponents of military intervention in Libya such as China,

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<sup>115</sup>Payendeh (n 15) 385-386.

<sup>116</sup>Henderson (n 70) 771.

<sup>117</sup>Akande (n 76) 179.

<sup>118</sup>Payendeh (n 15) 386.

<sup>119</sup>Payendeh (n 17) 391.

<sup>120</sup>Garwood-Gowers (n 16) 616.



Russia, India, Brazil and South Africa (though South Africa voted in favour of Resolution 1973) put up a fierce opposition to the manner in which the interveners carried out the military operations in Libya, arguing that Resolution 1973 that was adopted under the pretext of responsibility to protect was employed to advance regime change in Libya.

The study wonders at what security implications the international community would have grappled with, in the event that Resolution 1973 was not adopted, as it later became evident that despite the criticisms the intervention in Libya prevented massive atrocities. The work contended that military intervention in Libya will no doubt serve as a precedent to would-be perpetrators of human rights violations and opponents of the responsibility to protect who will ultimately come to terms with this emerging concept that requires international cooperation for perfection.

The study found that the responsibility to protect has not attained the status of customary international law and could not be binding on States to implement the concept when the need arises. The implementation of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity by the international community would only be legal if, the use of force to protect human population is authorized by the UN Security Council. This study found that the interveners in Libya averted mass atrocities, humanitarian crises and other grave forms of human rights violations.