THE 2011 INVASION IN LIBYA – LEGALITY AND REALITY

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Introduction

The 2011 invasion of Libya by NATO has been marked by many as a successful example of liberal-minded foreign intervention.[1] As recently after the invasion as October 2011, the intervention and bombardment in Libya was celebrated by some commentators as a 'model intervention.'[2] Although celebrated by some, it has been criticised by others as being in contravention of international legal norms surrounding the use of force, and as exacerbating Libya's internal security and gross human rights violations. This essay surveys the intervention's purported legality under international law, before reviewing the troubling human impact of the intervention and ongoing problems remaining in Libya today as a result.

Early 2011 saw the brutal repression of anti-government protests in Libya. The harshly repressive response by the Gaddafi regime saw violence escalate to include the firing on unarmed protestors and the killing of civilians. In response, the United Nations Security Council adopted Resolution 1970, freezing assets of Libyans abroad, and referring crimes of the Gaddafi government to the International Criminal Court. As rebel groups claimed representation by the Libyan Transitional Council, violence further increased and a humanitarian crisis was at hand. Noting these developments, the Security Council passed Resolution 1973, which subsequently became the foundation

[1] Ivo H. Daalder and James G. Stavridis "NATO's Victory in Libya: The Right Way to Run an Intervention" (2012) 91(2) Foreign Affairs 2; David Clark "Libyan intervention was a success, despite the aftermath's atrocities" *The Guardian* [online ed, United Kingdom, 28 October 2011].

[2] Daalder and Stavridis, above n 1, at 2.

for the aerial bombardment and military invasion of Libya by an alliance of the US, NATO, and European allies.

The prohibition on the use of force, one of the strongest in international law, forms a *jus cogens* norm of international law – a peremptory norm from which no derogation is permitted. However, two exceptions to the prohibition exist under the United Nations Charter ("the Charter") – self-defence and actions authorised by the Security Council. In this article, the question of the legality of the use of force against Libya in 2011 will be examined under the relevant mandated powers of the Security Council, the legality of Resolution 1973, and the actual actions of the intervening parties. Finally, the actions will be examined in light of the doctrine of humanitarian intervention and 'Responsibility to Protect' as possible legal authorities.

II. The UN Charter and the Security Council

Article 2(4) of the UN Charter prohibits the use of force against the territorial integrity or political independence of any State.[3] The strength of the norm also extends to customary international law. As the International Court of Justice (ICJ) noted in *Armed Activities,* the customary prohibition on the use of force in international law continues to exist alongside the Charter prohibition.[4] Within this prohibition, 'force' includes armed force, used directly or indirectly (such as support for rebels), and violence that falls outside the technical requirements for a state of war. [5] As such, the air strikes initiated by the intervening parties, the use of attack helicopters, and arming of rebel militias inside Libyan territory in 2011 clearly constitute a 'use of force', and thus are prima facie illegal, unless justifiable under a relevant exception to the prohibition.

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[3] Charter of the United Nations, art 2(4).

[4] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA) (Merits)* [1986] ICJ Reports 14 at [176].

[5] James Crawford *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Great Britain, 2012) at 747; Malcolm Shaw *International Law* (6th ed, Cambridge University Press, New York, 2008) at 1123.

Exceptions to the prohibition on the use of force exist within powers of the Security Council, found in the United Nations Charter. [6] This body, bearing primary responsibility for the maintenance of international peace and security, holds a monopoly over the authorisation of the use of force pursuant to Chapter VII of the Charter. [7] Yet in *Tadic,* it was confirmed that the Council itself is bound by law as 'neither the text nor the spirit of the Charter conceives the Security Council as *legibus solutus*',[8] implying that the Council remains bound by the Charter. In this light, only Security Council resolutions *intra vires* the Charter are binding on member states under article 25, which specifies the binding nature of 'decisions of the Security Council in accordance with the present Charter'.[9] Therefore, if the use of force in 2011 was mandated under a valid Security Council resolution, then the 2011 intervention stands as prima facie legal.

The Council is empowered to authorise the 'use of measures falling short of the use of force' under article 41,[10] or if it considers these inadequate, may authorise 'such measures' (including the use of force) 'as may be necessary to maintain or restore international peace and security' under article 42.[11] However, the legal precursor for these powers is a determination to be made by the Council under article 39 that there exists a threat to the peace, breach of the peace, or act of aggression which enables measures to be taken pursuant to articles 41 and 42.[12] Hence, prior to authorising action, the Council must first find the existence of a threat to or breach of the peace, or an act of aggression.[13]

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[6] Charter of the United Nations, Chapter VII.

[7] Crawford, above n 5, at 758; Charter of the United Nations, art 24(1).

[8] *Prosecutor v Dusko Tadic (Jurisdiction)* ICTY Trial Chamber IT-94-1, 2 October 1995 at [28].

[9] Crawford, above n 5, at 759, Charter of the United Nations, art 25.

[10] Charter of the United Nations, art 41.

[11] Charter of the United Nations, art 42.

[12] Khawar Qureshi "Legal Grounds for Intervention in Libya?" *The Law Society Gazette* (online ed, United Kingdom, 6 May 2011).

[13] Crawford, above n 5, at 759.

A. A Requisite 'Threat to the Peace'?

As 'breach of the peace' and 'act of aggression' under article 39 are not relevant to intra-state situations such as Libya's, this raises the question of whether a relevant 'threat to the peace' existed in March 2011. The wording of article 39 suggests that a 'threat to the peace or breach of the peace' must impact upon 'international peace and security'.[14] However, ICJ in *Tadic* noted that the declaration 'entails a factual and political judgement, not a legal one'.[15] Thus, the wording of this highly discretionary authorisation means that the Council is empowered to make complex factual determinations, which are unlikely to be susceptible to judicial review before the ICJ.[16]

Some commentators argue that internal conflicts and human rights abuses within a state cannot trigger the responsibility of the Security Council, as the Security Council is forbidden by article 2(7) of the Charter from intervening in matters that are 'essentially within the domestic jurisdiction of any state'.[17] The Independent International Commission on Kosovo has stated that 'at present the Charter does not explicitly give the Security Council the power to take measure in cases of violations of human rights'.[18] By this logic, the violent suppression of demonstrations, protests and armed rebellion, such as occurred in Libya, are a domestic matter that have little impact on international peace and security, and do not endanger international peace unless they have a specifically international dimension. In the case of Libya, there was no indication that neighbouring countries were threatened, no indication of international conflict, and a condemnatory statement by the Council could not be agreed to due to

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[14] Qureshi, above n 12.

[15] *Prosecutor v Dusko Tadic (Jurisdiction)* ICTY Appeals Chamber IT-94-1, 10 August 1995 at [24].

[16] Qureshi, above n 12.

[17] Lawrence Emeka Modeme, "The Libya Humanitarian Intervention: Is it Lawful under International Law?" Academia.edu <www.academia.edu> at 6.

[18] At 6.

some Council members insisting that the situation did not threaten international peace and security.[19]

However, severe intra-state violence, alongside human rights violations has been recognised as 'threats to the peace' in the past.[20] For example, the case of Southern Rhodesia was the first time the Council interpreted human rights violations by a state as constituting a threat to international peace and security under article 39.[21] Severe intra-state humanitarian crises in Somalia, Rwanda, and Eastern Zaire have also been held to constitute threats to international peace and security.[22] However, it remains unclear *when* this determination will be made. A patchy and selective record of the Security Council suggests that such decisions have been guided by political considerations and lack principled coherence as 'ad hoc determination dominated by powerful states'. [23]

Therefore, the Libyan insurgency and human rights violations did arguably constitute a 'threat to the peace'. Large-scale loss of life at the hands of pro-Gaddafi forces, rampant civil unrest and enormous refugees' flow exiting Libya point towards such the requisite threshold being reached. The text of Resolution 1973 supports this interpretation, in "*Determining* that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security."[24] Therefore, as the Security Council found a requisite 'threat to the peace' it was thereby permitted to exercise its powers to authorise 'forcible measures' under article 42 in the form of Resolution 1973, the legality of which is examined below.

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[19] At 7.

[20] Crawford, above n 5, at 760.

[21] Rudiger Wolfrum "The UN Experience in Modern Intervention" in Michael Keren and Donald Sylvan (eds) *International Intervention: Sovereignty versus Responsibility* (Frank Cass, London, 2002) 95 at 100.

[22] *The Situation in Somalia* SC Res 733, S/Res/733 (1992); *UN Assistance Mission for Rwanda* SC Res 918, S/Res/918 (1994); *The Great Lakes Region* SC Res 1080, S/Res/1080 (1996).

[23] Wolfrum, above n 21, at 109; Eric Heinze *Waging Humanitarian War* (SUNY Press, New York, 2009) at 64.

[24] *The Situation in Libya* SC Res 1973, S/Res/1973 (2011).

III. The Security Council Resolutions

The use of force by the intervening states must be examined in light of the validity of the empowering Council Resolution, which must itself conform to the Council's powers. Exercising its article 42 powers through Resolution 1973, the Security Council allowed states to take 'all necessary measures' to enforce compliance with a flight-ban, and protect civilians from threat of attack, permitting the possibility of the use of force and authorising attacks on anything that threatened civilians on the ground.[25]

Two legally problematic provisions arise with Resolution 1973. Firstly, the broad and vague language of its second operative clause leaves open the controversial consideration of what political reforms are 'necessary' in Libya.[26] Prima facie, these appear to interfere with Libya's internal affairs in violation of article 2(7) of the Charter, which the Council must respect under article 25. Secondly, Resolution 1973 did not meet the demand of article 42 that a determination be made that 'measures not involving the use of force' have failed.[27] While such determinations would be difficult in countries experiencing civil war, at the time of intervention fact-finding missions of the UN Human Rights Council and Security Council had not yet been to Libya.[28]

Lawrence Modeme argues that the sanctions, arms embargo and asset freezes under the earlier Resolution 1970 were not given adequate time to work before military force was authorised, and little attempt was made to contact the Libyan government.[29] Four representatives on the Council also claimed that not enough attempts had been made to resolve the conflict peacefully.[30] Hence, Resolution 1973 may have breached article 2(7) of the Charter if it authorised 'political reforms'

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[25] Ibid.
[26] Curtis Doebbler "The Use of Force against Libya: Another Illegal Use of Force" *Jurist* [online ed, Pittsburgh, 20 March 2011].
[27] Ibid.
[28] Ibid.
[29] Modeme, above n 17, at 13.
[30] Ibid., at 13.

and authorisation of the use of force may have been made before the non-effectiveness of non-violent measures was ascertained or proved. These factors, individually or cumulatively, may make Resolution 1973 *ultra vires*. Again, however, the highly discretionary and expansive nature of the Council's powers makes this difficult to ascertain.

A. Actions of Intervening States

However, assuming that the Resolution was lawful, the actions of the states themselves may have exceeded the empowering resolution. The mandate of Resolution 1973 confined the use of force to protecting civilians and civilian populated areas under threat of attack and the support of a no-fly zone. However, the outright support of aid to Libyan rebels exceeded this mandate.[31] The states provided aid in the form of air support, military facilities, 'advisers' to Libyan rebels alongside the debilitation Libyan armed forces. This may amount to an illegal intervention in and aiding one side of an internal armed conflict.[32]

In a collective letter written by Barack Obama, David Cameron and Nicolas Sarkozy in April, the leaders of the intervening parties stated it 'is impossible to imagine a future for Libya with Gaddafi in power…Colonel Gaddafi must go for good.'[33] President Obama appeared to confine intervening actions on 18 March 2011, stating 'we are not going to use force to go beyond a well-defined goal, specifically, the protection of civilians in Libya'. Ten days later this had expanded to "pursue the broader goal of a Libya that belongs not to a dictator, but to its people."[34] Khawar Qureshi writes that this discourse of regime change manifested an intention which 'went far beyond

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[31] Crawford, above n 5, at 767.

[32] *Military and Paramilitary Activities In and Against Nicaragua*, above n 2, at [242].

[33] Barack Obama, David Cameron, and Nicolas Sarkozy 'Libya's Pathway to Peace" *New York Times* [online ed, New York, 14 April 2011].

[34] Marianne Mosegaard Madsen and Simone Sophie Wittstrøm Selsbæk "The Responsibility to Protect and the Intervention in Libya" (Global Studies non-Master thesis, Roskilde University, 2012), 44.

UNSCR 1973'.[35] The statements of the leaders of intervening states show that a major objective of the intervention was the removal of Libyan leader Gaddafi, stating that the military intervention would not cease until Gaddafi left office. Alongside the aid given to Libyan rebels, this may exceed the empowering Resolution 1973, which neither mandated nor required the deposition of the Libyan regime.[36]

The question of proportionality also forms a fundamental component of the law on the use of force.[37] The resort to force under collective actions authorised under Chapter VII is governed by the customary law requirement that it be proportionate to the aggression that gave rise to the right of force.[38] In the given situation, having destroyed government fighter jets, anti-aircraft guns, airports, airstrips, and launching pads, the intervening powers also targeted telecommunication installations, government troops, Gaddafi's compound and his home town of Sitre, though no fighting was occurring there.[39] The repeated bombings of pro-Gaddafi cities and the resulting civilian deaths suggest this requirement was not met.[40] Further, commentators indicate NATO strikes against Gaddafi's troops increasingly enabled rebel advancement rather than served civilian protection as mandated by UNSC Resolution 1973.[41]

Leaving aside the problematic nature of the empowering Security Council resolution itself, the actions of the intervening states arguably exceeded their mandate through undertaking 'regime change' and exceeding proportionality requirements governing the use of force.

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35 Qureshi, above n 12.

36 Modeme, above n 17, at 16.

37 Judith Gardam "Proportionality and Force in International Law" (1993) 87 AJIL 391 at 391.

38 UN Department Of Public Information, Report Of The Secretary-General On The Work Of The Organization, DPI/I 168-40923 (1991).

39 Modeme, above n 17, at 20.

40 Madsen and Selsbæk, above n 34, at 44.

41 Harry van der Linden "Barack Obama as Just War Theorist: The Libyan Intervention" (2012) Butler University Digital Commons <http://digitalcommons.butler.edu> at 5.

IV. Humanitarian Intervention?

Actions of the intervening powers may be examined through the emerging doctrine of humanitarian intervention, existing either within the Charter or customary international law. Proponents of such a doctrine argue that intervention may be legal to protect the lives of people from humanitarian disasters. However, whether such a doctrine exists and to what extent are matters of uncertainty. Such intervention remains controversial as it easily lends itself to widespread abuse. As few states have the military capacity to intervene, intervention can become the prerogative of powerful states and a tool of domination.[42] The ICJ recognised this in the *Corfu Channels* case, where it declared that such intervention could not find place in international law–as 'intervention would be reserved for the most powerful states and might easily lead to perverting the administration of international justice itself.'[43] It is here that that the celebratory remarks of some commentators that the Libyan intervention was truly an 'international' one (despite being undertaken by NATO and America) seems only to reinforce the validity of the ICJ's heedings. The ICJ further expressed sentiment contradicting the nature of humanitarian intervention in *Armed Activities*, in stating that 'the use of force could not be the appropriate method to monitor or ensure respect' for human rights.[44] This suggests a position inconsistent with a customary right of humanitarian intervention.[45]

A. Under the UN Charter

The Charter contains no explicit provisions for such intervention and lacks principled criteria for determining conditions under which 'humanitarian' intervention is permissible. Thus, intervention is

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[42] Jan Klabbers *International Law* (Cambridge University Press, New York, 2013) at 197.

[43] *Corfu Channels (United Kingdom v Albania) (Merits)* [1949] ICJ Rep 244 at 35.

[44] Aidan Hehir *Humanitarian Intervention* (New York, Palgrave Macmillan, 2010) at 89.

[45] Simon Chesterman *Just War or Just Peace: Humanitarian Intervention and International Law* (New York, Oxford University Press, 2001) at 62.

characterised by ad hoc determinations of the Security Council which lack principled coherence and remain dominated by veto powers.[46] Malcolm Shaw writes that humanitarian intervention is 'difficult to reconcile' with article 2(4) of the Charter, unless 'one adopts a rather artificial definition of the 'territorial integrity' criterion in order to permit temporary violation or posit the establishment of the right in customary law.'[47]

The ICJ's finding in *Corfu Channels* rejects this narrow interpretation of article 2(4),[48] which was included in the Charter to give more specific guarantees to small states, rather than to have a restrictive effect.[49] Hence, the actions of intervening parties were not legal 'humanitarian intervention' via the UN Charter, which grants sole prerogative on the use of force to the Security Council (with the exception of self-defence).

B. Under customary international law

For such doctrine to exist as a rule of customary international law there must be sufficient acts of state practice and opinio juris. However, much existing state practice– such as interventions in Yugoslavia, Somalia, Rwanda, Haiti, and East Timor– may not be considered part of the doctrine as they were authorised by the Security Council at the time and hence already legal under Charter law.[50]

The NATO intervention in Kosovo, taken outside Security Council endorsement, is widely seen as an example of this emerging norm. However, the intervening agents in this case did not demonstrate a requisite sense of opinio juris. Statements by US Secretary of State Madeline Albright demonstrated a desire to avoid setting legal precedent.[51] NATO states did not argue that their intervention was

[46] Heinze, above n 23, at 64.
[47] Shaw, above n 3, at 1155.
[48] Chesterman, above n 45, at 50.
[49] Ibid.
[50] Heinze, above n 23, at 75.
[51] At 77.

legal on a basis of law outside the UN Charter. Only in subsequent proceedings against intervening states did the responding states begin to provide legal justifications of humanitarian intervention, with only Belgium using the doctrine as a possible legal defence.[52] Shaw indicates that the doctrine, though invoked and not condemned, received meagre support.[53]

Academic analyses of state practice and *opinion juris* regarding humanitarian intervention from 1960-1990 indicates that no such right of 'humanitarian intervention' exists.[54] Only three examples of 'humanitarian' intervention before 1990 exist – those in East Pakistan, Uganda and Cambodia. However, the justification for these is typically linked to Council Resolutions.[55] Later cases of 'humanitarian intervention' in the 1990s that typically occurred with Security Council endorsement under Chapter VII, such as in Kuwait, have been described as haphazard, leading to 'ambiguous resolutions and conflicting interpretations' and dependence more on a coincidence of national interest.[56] Statements by the G-77 explicitly rejected the right of humanitarian intervention, stating that it had 'no legal basis in the United Nations Charter or in the general principles of international law.'[57]

Most commentators agree that humanitarian intervention remains unclear and unsettled at best, or illegal at worst. Furthermore, it remains uncertain whether it is a right that states possess, one that belongs to oppressed populations, or an obligation that states have.[58] Its amorphous nature and ambiguity, along with lack of the required *opinio juris* needed for a norm of customary international law, suggests that it does not form a valid legal exception to the prohibition on the use of force. Therefore, the actions of the intervening powers in Libya

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[52] At 77.
[53] Shaw, above n 3, at 1157.
[54] Hehir, *Humanitarian Intervention*, above n 44, at 92.
[55] Heinze, above n 23, at 76.
[56] Hehir, *Humanitarian Intervention,* above n 44, at 90
[57] At 94
[58] Klabbers, above n 42, at 197.

cannot be justified solely on the grounds of a customary norm of international law permitting humanitarian intervention.

C. Responsibility to Protect (R2P)

Since 2001, there has been the rise of discourse that places state sovereignty as conditional on the protection of a state's own population.[59] This considers sovereignty as responsibility – state authorities as responsible for protecting the safety and lives of citizens, and national political authorities as responsible to the citizens internally and to the international community through the UN.[60] A significant normative development in international law, the R2P doctrine puts states under international supervision and thereby qualifies the nature of traditional, Westphalian sovereignty, making it conditional to approval by the international community.[61] James Crawford describes it as 'less a doctrine of its own than a refocusing of humanitarian intervention', though it has been adopted in several UN documents, including the GA's 2005 World Summit Outcome.[62] Nonetheless, a lack of clarity remains around its key aspects including the threshold criteria for intervention.[63]

In the case of Libya, there are no indications that the Security Council made a conscious decision to apply the R2P doctrine regarding the crimes made by the Libyan regime in 2011. While the earlier Resolution 1970 mentioned the Libyan regime's 'responsibility to protect its population' in relation to the Libyan authorities, the legal basis for action is cited as Chapter VII of the Charter, rather than any

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[59] Ibid.

[60] International Commission on Intervention and State Sovereignty "Responsibility to Protect : The Report of the International Commission on Intervention and State Sovereignty" (2001) at 2.15.

[61] Klabbers, above n 42, at 198.

[62] Crawford, above n 5, at 755.

[63] Aidan Hehir "The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect" (2013) 38 International Security 137 at 151.

'responsibility to protect' on behalf of the international community.[64] Resolution 1973 refers only to one element of the R2P doctrine, being the responsibility of the state to protect its own population.[65] As commentators note, this is a perfunctory statement only, since this responsibility is already part of the state obligations under the Charter and under international law.[66] Meanwhile, the resolution made no mention of the international community's 'responsibility to protect' or the action being a function of this responsibility,[67] indicating that this was not considered as the consensual normative basis of the intervention.[68]

Thus, while Resolution 1973 'cohered with the spirit of R2P', it was part of a trend of Security Council responses to intra-state crises that has combined inertia, periods of resolve and the 'rare confluence of interests and humanitarian need'.[69] Further, neither Barack Obama's speech justifying intervention, nor the joint article supporting intervention written by the leaders of the intervening powers (Barack Obama, David Cameron, and Nicolas Sarkozy) make any mention of the R2P doctrine.[70] Therefore, R2P could not be a justifying norm of international law for the actions of the intervening parties.

D. A 'Success' Nonetheless?

Leaving aside a strict legalistic examination of the intervention's legality, many commentators celebrate the intervention as a successful

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[64] At 147.

[65] The *Situation in Libya* SC Res 1973, S/Res/1973 (2011).

[66] Francesco Francioni and Christine Bakker "Responsibility to Protect, Humanitarian intervention and Human rights: Lessons from Libya to Mali" (April 2013) Transworld Working Paper 15, Transworld < http://www.transworld-fp7.eu> at 8.

[67] Aidan Hehir *The Responsibility to Protect: Rhetoric, Reality and the Future of Humanitarian Intervention* (Palgrave Macmillan, New York, 2012) at 13.

[68] Francioni and Bakker, above n 66, at 8.

[69] Hehir "The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect", above n 63, at 137.

[70] Hehir, *The Responsibility to Protect,* above n 67, at 15.

example of an international, well-intentioned and effective intervention. For example, it is alleged that crimes committed in Sirte are far smaller in scale that what could be expected had Gaddafi been allowed to overrun Benghazi in March 2011.[71] This opinion remains justified for one commentator on the problematic assumption that 'Arab dictators who have suppressed uprisings tended not to show a great deal of mercy after the fact.'[72] Others remarked early on that the intervention was truly 'international in nature', yet it is difficult to accept an alliance of NATO, the US and Europe (all being no strangers to foreign intervention) as 'diverse' enough to warrant a triumphant use of the term.[73] Other factors such as an absence of NATO casualties, and the prediction that the 'shockwaves' of overthrowing the Gaddafi regime would largely 'dissipate at the border' (later turning out to be untrue) also helped construct Libya as a successful intervention.[74]

Other evaluations, particularly those focussed on the Libyan population, paint a less celebratory picture. The collapse of the Libyan state saw a security vacuum filled by militias, wholesale looting of Gaddafi's massive arsenals and such weapons finding their way to the Syrian conflict[75] and local militias.[76] On the ground investigations in early 2014 show that Libyan security is now entrusted to heavily armed, largely unregulated militias.[77] Compounded with accusations of large scale torture, arbitrary detention and other human rights abuses, is the rampant impunity and lack of accountability for grave human

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[71] David Clark "Libyan intervention was a success, despite the aftermath's atrocities" *The Guardian* (online ed, United Kingdom, 28 October 2011).

[72] Ibid.

[73] Paul Oliver "6 Reasons Why the Libya Intervention was a Success" (8 September 2011) PolicyMic <www.policymic.com>.

[74] Ibid.

[75] Jim Lobe "Libya Intervention More Questionable in Rear View Mirror" (6 April 2013) AntiWar.com <http://original.antiwar.com>

[76] "Libya: State of Insecurity" (19 February 2014) *Al Jazeera 'Fault Lines'* (online ed, Qatar).

[77] Ibid.

rights violations.[78] The prevalence of assassinations, bombings and kidnappings is also documented.[79]

Others state that the intervention dramatically increased both the duration of Libya's civil war and its death toll by at least seven times, while also exacerbating human rights abuses, humanitarian suffering and radicalism.[80] Evidence by Amnesty International also shows evidence of mass abduction and detention, beatings, torture, killings and atrocities by US, UK and French backed rebel militias.[81] Further, African migrants and black Libyans have been subject to a relentless racist campaign of mass detention, lynching and atrocities on the usually unfounded basis that they have been pro-Gaddafi mercenaries.[82]

Throughout the conflict, NATO leaders vetoed ceasefires and negotiations, while not facing a single casualty, and now find themselves with significant commercial advantage in an extremely oil-rich state. [83] As Tarak Barkawi argues, aerial campaigns such as NATO's in Libya create an illusion that a 'clean war' can be fought, where only 'bad guys' are hit by precision guided munitions, and the 'complexities and moral ambiguities of intervention on the ground are seemingly avoided'.[84]

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[78] Ibid.

[79] Ibid.

[80] Alan Kuperman "Lessons from Libya: How Not to Intervene" (September 2013) Policy Brief, Belfer Center for Science and International Affairs, Harvard Kennedy School <http://belfercenter.ksg.harvard.edu>.

[81] Amnesty International *Detention Abuses Staining the New Libya,* October 2011, <http://www.amnesty.org/sites/impact.amnesty.org/files/PUBLIC/mde190362011en.pdf≥

[82] Seumas Milne "If the Libyan war was about saving lives, it was a catastrophic failure" *The Guardian* [online ed, United Kingdom, 26 October 2011].

[83] Ibid.

[84] Tarak Barkawi "Intervention without Responsibility" *Al Jazeera* [online ed, Qatar, 23 November 2011].

V. Concluding Remarks

For international lawyers, the legal justification of the 2011 intervention in Libya must be examined in light of the powers of the Security Council under which it was mandated. It is arguable that Resolution 1973 exceeded the mandate of the Security Council, hence making it invalid under Charter law. Yet, the Council does employ highly discretionary powers which may make this difficult, if not impossible, to judicially review. It is also arguable that actions of the intervening parties exceeded their Security Council mandate in explicitly seeking regime change and political reform in Libya, and perhaps by exceeding proportionality requirements in the use of force. The actions of these powers cannot be legally justified unilaterally under either the doctrine of humanitarian intervention or the Responsibility to Protect. Notwithstanding doubtful legality, intervention may be tacitly accepted by the international community where deemed necessary by other considerations of morality and justification. Like Kosovo, intervention in Libya may be seen by many as 'illegal but legitimate'.[85] However, critiques remain of such intervention as a continuation of imperialist discourse whereby Western states act as 'agents of liberation' in corrupt Third World countries[86] and as materialisation of the belief that democracy can be 'exported by military means'.[87]

The intervention and its almost immediate hailing as a 'success' indicates the continuation of the 'liberator' mindset underpinning Western-led intervention, and the highly contradictory criteria by which success in Libya has been measured. Both these remain based on the problematic belief that 'military power can be used surgically to deal with problems that are ultimately political, social and economic in nature.'[88] Issues of whether the decisions of the Security Council fell

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[85] Hehir, *Humanitarian Intervention*, above n 38, at 19.

[86] Anne Orford *Reading Humanitarian Intervention*, *Human Rights and the Use of Force in International Law*, (Cambridge, Cambridge University Press, 2003) at 40.

[87] Barkawi, above n 84.

[88] Ibid.

within their mandate or if ultra-vires Resolutions can ultimately be held invalid will remain complex legal issues. Yet decisions to intervene are undeniably highly interpretive, selective and require a conflation of ideological, military and political convenience, particularly at the hands of the Security Council's permanent veto-wielding members. As Barkawi notes, the NATO intervention in Libya adds to a growing narrative in which it is becoming 'increasingly legitimate to use military power in the global South without taking responsibility for the political and human aftermath.'[89]

[89] Ibid.