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THE SECURITY COUNCIL AND THE LEGAL LIMITS OF HUMANITARIAN
MILITARY INTERVENTION

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ABSTRACT

It now appears settled that the international community may in appropriate situations and through the UN Security Council intervene militarily in sovereign States for humanitarian purposes. What do not appear settled though, are the exact circumstances when such humanitarian use of force may be justified; how such authority may be used; and whether there are any legal impediments the use of the power. Many in fact believe that any authorisation of the use force for humanitarian purposes by the UN Security Council in reference to Chapter VII of the UN Charter would be unassailable in all circumstances or situations. They assume the Security Council to be above legal limitations on matters of use of force, even for humanitarian purposes.

This article challenges this supposition. It contends that the authority of the Security Council in relation to humanitarian military intervention under the UN Charter the Responsibility to Protect is not limited but circumscribed, not only by the UN Charter, but also by the purposes and principles of the UN and rules of International Humanitarian Law. These limitations, the article contends, far from being under-cut or undermined, have been re-enforced by the doctrine of Responsibility to Protect. The article shows that irrespective of its inclinations to the contrary, the Security Council may not legally authorise humanitarian interventions in contravention of the requisites for the use of force in international law. Using the Council's intervention in Libya and non-intervention in Syria as case studies, the article underlines the legal limits of humanitarian military intervention and the dangers of an unbridled use by the Security Council of military force in the name of humanitarianism.

Keywords: Security Council, humanitarian intervention, Libya, Syria

Introduction

Humanitarian military intervention is 'the use of foreign military force in the territory of a state without its consent with the goal of protecting innocent victims of large-scale atrocities'.¹ It now seems settled that the international community, through the United

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¹R Thakur, 'Humanitarian Intervention', in TG Weiss and S Daws (eds) *The Oxford Handbook on the United Nations* (Oxford University Press, 2007) 387. See also M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd edn (New York: Basic Books, 2000) 107; J Welsh (ed) *Humanitarian Intervention and International Relations* (Oxford: Oxford University Press, 2006) 3.

Nations, especially the Security Council,² may legally undertake such interventions, and that this would justify a departure from the fundamental international law principles of state sovereignty and non-intervention.³ It also seems settled that unilateral interventions by individual states or coalition of states outside the auspices of the UN are unlawful even if dressed in the garb of humanitarianism.⁴ Examples of this are the NATO intervention in Kosovo in 1999, the USA's 2003 intervention in Iraq, and the current interventions without Security Council authorization of certain countries in the Syrian civil war. What is less settled, however, is the precise sources from which the Council's authority derives since there is no express mention of humanitarian intervention in the UN Charter. It also appears unclear whether the power of the Security Council to authorise humanitarian military interventions is without limit, and whether there are circumstances in which such interventions could be unlawful in International Law.

In addition, the doctrine of Responsibility to Protect (R2P) empowers the international community acting through the UN, especially the Security Council, to undertake military intervention to protect the people of a sovereign state where their government commits grievous violations of their human rights or is unable or unwilling to stop such violations. Since interventions under R2P may be without the consent of the government of the state

² See JN Maogoto, 'Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept', in T Jakobsen, *et al* (eds) *Re-envisioning Sovereignty: The End of Westphalia?* (Ashgate Publishing, 2008) 220; R Thakur (n 1) at 390.

³ See F Teson, 'The Liberal Case for Humanitarian Intervention', in JL Holzgrefe and RO Keohane, *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* (Cambridge University Press, 2003) 93 – 129 at 93. See also H Grotius, *De Jure Belli ac Pacis*, (1st edn J Barbeyrac trans) bk. 1, ch. IV, sec. XV (1738) 121.

⁴ GA Res. 54/172 (1999); Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, 2000) 166-167. See also B Simma, 'NATO, the UN, and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1; A Cassese, 'Ex Iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Counter-measure in the World Community', (1999) 10 *European Journal of International Law*, 23-30; M Byers and S Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law', in JL Holzgrefe and RO Keohane (n 3) 177–203, at 178; O Corten, 'Human Rights and Collective Security: Is there an Emerging Right to Humanitarian Intervention?' In P Aston and E MacDonald (eds) *Human Rights, Intervention, and the Use of Force* (Oxford University Press, 2008) 87; C Gray, *International Law and the Use of Force*, 3rd edn (Oxford University Press, 2008) 33 – 51.

concerned, and since its purpose would be the protection of civilians from gross violations of their human rights, it also falls under the umbrella of the use of military force for humanitarian purposes. Again, it appears uncertain what the exact parameters of R2P interventions are. Could the Security Council use R2P as a basis for military intervention in sovereign states as and whenever it pleases, or are there legal limits to its powers in this regard?

This paper examines these important issues and considers whether the Council's military intervention in Libya – in conception and execution – was lawful in international law. It also considers whether the Council could have legally intervened in the on-going crisis in Syria under the principles of humanitarian intervention or R2P as many have called upon it to do. Notwithstanding that the Libyan intervention ended more than six years ago, it remains very much topical because Libya and its people are still suffering from its aftermath, while its effects still reverberate in the Middle East, Africa, Europe, and around the world. Besides, the relevant parties appear not have learnt the lessons of that intervention as demonstrated by the events currently unfolding in the Syrian civil that has created arguably the biggest humanitarian crisis of the twenty-first Century.

The Security Council and Military Intervention for Humanitarian Purposes

Although there have been many humanitarian assistance missions by the UN Security Council (UNSC),⁵ the use of military force in humanitarian intervention has been relatively few. In 1991, the Council authorised the use of force in Northern Iraq for the protection of the

⁵ Examples include Bosnia-Herzegovina (S/Res/770 (1992) and Rwanda (S/Res/929 (1992) in 1992. Mention may also be made of the unexecuted Security Council authorization of humanitarian military intervention in Zaire (DR Congo) in 1996 for the provision of humanitarian relief and assistance (S/Res. 1080 (1996). These are not the subject of this article.

Kurds.⁶ In 1992, it authorised military intervention in Somalia to alleviate the serious humanitarian crises in the country as a result to civil war.⁷ Following post-consultation violence that claimed the lives of many civilians in East Timor, the Council in 1999, authorised intervention in the country to maintain international peace and security and enable humanitarian assistance.⁸ The 1990 military intervention in Liberia to end the protracted civil war and the suffering of civilians is arguably an example of humanitarian military intervention. Although undertaken by ECOWAS,⁹ it had the subsequent approval of the Security Council¹⁰ and, although it was essentially for the purpose of ending a civil war and keeping the peace, the protection of civilians dying and suffering in the conflict was an important consideration in the undertaking.¹¹

In 2004, the Security Council authorised the United Nations Operation in Cote d'Ivoire (UNOCI) to supervise the implementation of a cease-fire agreement between warring factions in that country.¹² Eventually, the Council modified the mandate of UNOCI and extended it to include the protection of civilians caught in post-election violence and support of the new government.¹³ However, since the Security Council undertook the UNOCI operation with the consent of the government of Cote d'Ivoire and the rebel forces, it is more a peacekeeping operation than an example of humanitarian military intervention.

⁶ S/Res. 688 (1991).

⁷ S/Res/794 (1992).

⁸ S/Res. 1264 (1999).

⁹ The Revised Treaty of the Economic Community of West African States was signed in Abuja, Nigeria on 24 July 1993. In order to stop the fighting in Liberia and maintain peace, ECOWAS deployed the Economic community of West African States Monitoring Group (ECOMOG) to the country.

¹⁰ By virtue of S/Res. 788 (1992). The resolution cited the maintenance of international peace and security and the need for humanitarian assistance as some of the rationale for the Council's endorsement of the mission.

¹¹ Ibid.

¹² S/Res/1528 (2004).

¹³ S/Res/2226 (2015).

The 2011 intervention in Libya was the most far-reaching example of humanitarian military intervention by the Security Council, and the first time R2P was cited as reason for military intervention in a sovereign country. In its resolution, the Security Council noted the failed responsibility of the Libyan government to protect its people, and the need and determination of the international community to do so. Accordingly, it authorised states, acting either alone or through regional organizations or arrangements, ‘to take all necessary measures to protect civilians under threat of attack in the country, including Benghazi’.¹⁴ The resolution was in response to allegations of killings and mistreatment of civilians in parts of Libya by the country’s government following anti-government protests. In a resolution¹⁵ that preceded Resolution 1973, the Security Council, while expressing concerns about the violence in the country and the use of force against civilians, had deplored ‘the gross and systematic violation of human rights, including the repression of peaceful demonstrators and the deaths of civilians.’ USA, France, UK, and NATO and some of their allies were to use these resolutions as basis for extensive military activities in the country that culminated in the killing of the Libyan leader and the end of his regime.

In contrast to Libya, the Security Council was not able to intervene in Syria despite the abject humanitarian situation in the country and some stringent calls for it to do so. Whether the Libyan intervention was lawful in international law, and whether the Security Council ought to have intervened in the Syrian situation will be discussed subsequently. First, it would be useful to consider the authority of the Security Council to undertake or authorise humanitarian military interventions.

¹⁴ S/Res/1973 (2011) passed on 17 March 2011, preamble and para 4. The resolution was passed by ten votes to nil, with five abstentions (Russia, China, Brazil, Germany and India).

¹⁵ S/Res/1970/2011 of 26 February 2011.

The power of the Security Council to authorise military intervention for humanitarian purposes is traceable to Articles 11, 24, 39 and 42 of the UN Charter and the later doctrine of Responsibility to Protect (R2P). Article 11 (2) and (3) stipulates that the Council may take action on the recommendation of the General Assembly on any matter concerning cooperation in any question of, or any situation relating to, the maintenance of international peace and security. Actions the Council could take pursuant to this mandate might include the use of military force for humanitarian purposes where the need to arise. By virtue of article 24(1), UN member states, in the interest of speed and effectiveness, vest in the Security Council the primary responsibility for the maintenance of international peace and security and accept that when acting in this capacity the Council would be their delegate. Although article 39 empowers the Council to make recommendations or take actions in order to maintain international peace and security, it does not specify the types of situations that might engage its enforcement action, as long as they constitute a threat to or breach of international peace and security, or amount to aggression. This means that any type of situation negatively affecting or likely to affect international peace and security would come within its purview. Besides, as observed by the ICJ, ‘under international law, an Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.’¹⁶ Under article 42, the actions the Council could take to maintain international peace and security may be military if peaceful and non-military options fail or are unlikely to resolve the situation.

In addition to the above, R2P enables the international community to intervene, if necessary militarily, to protect people from the oppressive acts of their own national governments or authorities. Under the doctrine, authorities of respective states bear the primary responsibility

¹⁶ *Reparation for Injuries, Advisory Opinion*, ICJ Reports (1949) 174. It is for this reason that the UN and the Security Council are able to execute peacekeeping operations even though the Charter contains no express provisions for them. See *Certain Expenses of the United Nations, Advisory Opinion*, ICJ Reports 1962, 151.

for protecting their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁷ However, should a state fail, or refuse to do so; or is itself the perpetrator of the afore-mentioned crimes, the international community, through the UN, may adopt appropriate diplomatic, humanitarian, and peaceful means under chapters VI and VIII of the Charter to protect its people. Should such peaceful means prove incapable of dealing with the situation, the UN may employ forceful measures, including military force.¹⁸ Since the powers of chapters VI and VII of the Charter reside with the Security Council, it could in appropriate cases use military force under R2P.

Limitations on the Security Council's Authority

It might seem at first glance that military intervention by the Security Council in the putative exercise of its powers under the Charter would be free from challenge. This is because of the apparently extensive reach of Chapter VII; the fact that like other organs of the UN, the Council reserves the power to interpret its Charter mandate; and the fact that the International Court of Justice (ICJ) does not possess express powers of judicial review over it. Nevertheless, limitations on the Council's powers are expressed or inherent in the Charter, the purposes and principles of the UN, and the rules of international humanitarian law.

Substantive Provisions of the UN Charter

The powers of the Security Council to authorise the use of military force derives, as earlier noted, directly or indirectly from the UN Charter, and is as such circumscribed by it.¹⁹ Although by article 24(1), UN member states confer on the Council power to act on their behalf, that power relates only to the maintenance or restoration of international peace and security where there are breaches or threats to these. It does not extend to other matters for

¹⁷ World Summit Outcome Document (2005) para. 138.

¹⁸ Ibid, para. 139.

¹⁹ See A Hehir, *Humanitarian Intervention: an Introduction*, 2nd edn (Palgrave Macmillan, 2013) 153-154.

which the Charter has conferred responsibility on other UN organs. As Judge Fitzmaurice observed in the *Legal Consequences Case*,²⁰ decisions taken by the Council under article 24 are not necessarily binding simply by virtue of that provision. To be binding the decision must be consistent with the charter:

Even when acting under Chapter VII, of the Charter itself, the Security Council has no power to abrogate or alter territorial rights, whether of sovereignty or administration. Even a wartime occupation of a country or territory cannot operate to do that. It must await the peace settlement. This is a principle of international law that is as well established as any can be, -- and the Security Council is as much subject to it [...] as any of its individual member States are [...] It was to keep the peace not to change the world order, that the Security Council was set up.²¹

Article 39 also predicates the authority of the Council on breach of or threat to international peace and security. Under the article, the Council 'shall determine the existence of any threat to the peace, breach of the peace, or act of aggression', before making recommendations on which measures would be necessary under articles 41 and 42 to maintain or restore international peace and security. This provision aligns with article 1(1) of the Charter which states that the first purpose of the United Nations is, 'to maintain international peace and security, and *to that end*: to take *effective* collective measures *for the prevention and removal of threats to the peace*, and for the suppression of acts of aggression or other breaches of the peace'.²² These provisions indicate that the Security Council may only undertake or authorise military intervention, even for humanitarian purposes, if the situation involves aggression or amounts to a breach of, or threat to, international peace and security; and its objective is the restoration and maintenance of such peace and security.

Although there are no specific definitions in the Charter or by the UN of the terms 'aggression' 'breach of' or 'threat to' international peace and security, the meaning of the

²⁰ The Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971, ICJ Report 16.

²¹ Ibid, at 294.

²² Emphasis added.

phrases is not nebulous. Such situations as the unlawful use or threat of force by a state against another, acts of international terrorism, and the threat to use weapons of mass destruction, would clearly threaten international peace and security.²³ A situation that would provoke extra-territorial religious conflict or movement of displaced persons and refugees would also threaten international peace and security.²⁴ The Security Council has however, declared as threats to international peace and security, situations of non-international armed conflicts,²⁵ gross governmental abuse of human rights, breaches of principles of international humanitarian law,²⁶ and unlawful overthrow of elected governments.²⁷ The Council has resolved that:

The deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security.²⁸

It has also resolved that acts of international terrorism, and failure to deal with terrorists, constitute threats to international peace and security.²⁹

Although it seems wide, the discretion of the Council to make the determination as to what constitutes breach of or threat to international peace and security appears conditional rather than absolute. It seems that the Council may only legally make the article 39 determination in

²³ Examples include the invasion of Kuwait by Iraq (S/Res/678 (1990)); the threat posed by the Islamic State, al Nusra Front (now Jabhat Fateh al-Sham) and other terrorist organisations (S/Res/2249 (2015)); and the proliferation of weapons of mass destruction, especially to non-state actors (S/Res/1540 (2004), S/Res/2325 (2016)). The Security Council has not invoked aggression as a reason for humanitarian military intervention; as such, its consideration is not necessary here.

²⁴ Such as the situation in Somalia in 1992 that warranted S/Res/794 (1992) and the situation in Liberia in 1990 S/Res. 788 (1992).

²⁵ As in Congo (S/Res/161 (1961)); former Yugoslavia (S/Res/713 (1991), S/Res/ 724 (1991)); Somalia (S/Res/733 (1992)); Liberia (S/Res/788 (1992)); Angola (S/Res/864 (1993)); Rwanda (S/Res/929 (1994)); Albania (S/Res/1101 (1997)), to name a few.

²⁶ This happened for example, with respect to the situations in Iraq (S/Res/288 (1991)); Somalia (S/Res/794 (1992)); Rwanda (S/Res/929 (1994)); and Zaire (S/Res/1078 (1996)).

²⁷ This happened in relation to the situations in Haiti S/Res/841 (1993), S/Res/ 917 (1994), and S/Res/940 (1994); and Sierra Leone (S/Res/1132 (1997), S/Res/1270 (1999), S/Res/1289 (2000) and S/Res/1306 (2000).

²⁸ S/Res/1296 (2000) of 19 April 2000, para. 5.

²⁹ S/Res/1371 (2001), S/Res/1377 (2001). In S/Res/731 (1991) and S/Res/748 (1992), the Council declared Libya's failure to hand over to the UK for trial, those suspected of bringing down a Pan American civilian airliner over Lockerbie, a threat to international peace and security.

the context of the primary purposes and principles of the United Nations, which are the prevention of wars, the suppression of aggression and unlawful use of force, the peaceful resolution of disputes, and the fostering of friendly relations among States. Accordingly, it may also make the declaration in human rights and humanitarian situations involving threats to or breach of international peace and security.³⁰ It could not have been the intention of the drafters of the Charter that the determination of what constitutes breach of, or threat to, international peace and security could be construed out of context. A breach of or threat to international peace and security should objectively involve situations likely to interfere with the peaceful co-existence, relationship or interaction of States, or which would otherwise jeopardise the international order. It is for this reason that the actions the Council could recommend under article 39 are those necessary ‘to maintain or restore international peace and security’. Although the Council has the prerogative to recommend necessary actions, it is inherent in the provision that any action recommended must be reasonably capable of restoring and maintaining international peace and security. It cannot reasonably be suggested that the Council could lawfully recommend actions which would be certain or likely to exacerbate global or regional discord and insecurity.³¹

Moreover, as observed by Jochen Abr. Frowein and Nico Krisch, although the concept of threat to the peace has evolved and now reflects the increased importance of individuals in international law, this does not justify the conclusion that any severe violation of human rights could trigger action under chapter VII.³² ‘The SC’, they state, ‘enjoys its far-reaching powers only for matters of peace and security; it is not set up to enforce all overarching

³⁰ UN Charter 1945, article 1, 2(4), Chapter VI.

³¹ See S Chesterman, *et al*, *Law and Practice of the United Nations: Documents and Commentary*, 2nd edn (e-book) (Oxford University Press, 2016) 128.

³² J Abr. Frowein and N Krisch, ‘Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression’, in B Simma, *et al* (eds) *The Charter of the United Nations: A Commentary*, 2nd edn, Vol. 1, (Oxford University Press, 2002) 725.

values of the international community.’³³ Any exercise by the Council of more powers than envisaged by Chapter VII does not necessarily nullify or change the law, just like states’ breach of article 2(4) of the Charter does not ‘destroy the normative status of the provision’³⁴ prohibiting unauthorised use of force.

Further, article 2(4) requires all member states of the UN to refrain ‘from the threat or use of force *against the territorial integrity or political independence of any State* or in any other manner inconsistent with the purposes of the UN.’³⁵ The UN Security Council, unless action is warranted under Chapter VII (for the maintenance of international peace and security), would be forbidden by article 2(4) from staging a military intervention. Any intervention outside that context would not only be an infringement of the territorial integrity and political independence of the state concerned, but also inconsistent with the purposes of the UN. Although the Article 2(4) prohibition on the unlawful use of force refers to ‘states’, the prohibition impliedly extends to the Security Council since it exercises the collective power of states and is required to operate within the parameters of the Charter and the purposes of the UN. Since humanitarian intervention is not an exception to the prohibition on the use of force, the only exceptions being self-defence and collective action under Chapter VII, any use of force by the Council under that chapter necessarily has to be in conformity with the requirements of that chapter.

Article 2(7) forbids states from intervening in matters that are ‘essentially within the domestic jurisdiction of any state.’ Again, although this provision relates specifically to the

³³ Ibid.

³⁴ C Gray, ‘The Charter Limitations on the Use of Force: Theory and Practice’, in V Lowe, *et al* (eds) *The United Nations Security Council and the War: the Evolution of Thought and Practice Since 1945* (Oxford University Press, 2008) 87; ICJ Reports (1986) Case Concerning Military and Paramilitary Activities in and against Nicaragua 14 at para. 235.

³⁵ Emphasis added.

actions of states, it aligns with the overarching objective of the Charter to outlaw the use of force except in self-defence and in respect of actions lawful under chapter VII. Thus, humanitarian military intervention in the absence of any breach of international peace and security, or a threat thereof, would also go against the spirit of that provision and could be unlawful. Similarly, military intervention staged ostensibly for humanitarian reasons, but which is actually for military, economic, political, strategic or other parochial or extraneous considerations, would not be consistent with the charter. An apparent humanitarian military intervention should also not be for undermining, in the long term, the territorial sovereignty and political independence of the state concerned; neither should it be a cloak for regime change. As observed by Aidan Hehir, ‘the Council’s powers are exercised in response to breaches of the peace and acts of aggression.’³⁶ Accordingly, ‘the powers of the Council are designed primarily to preserve the peace rather than to enforce the law, although these can coincide.’³⁷

From the foregoing, it follows that humanitarian situations within a state should not engage the responsibility of the Security Council unless they have or are likely to have negative implications in terms of international or regional peace and security.³⁸ Gross and wide scale violations of human rights in the form of genocide, ethnic cleansing, war crime and crimes against humanity by states’ authorities, or the complete break-down of states’ authority and control would be a threat to international peace and security because these situations would

³⁶ A Hehir, *Humanitarian Intervention: an Introduction*, 2nd edn (Palgrave Macmillan, 2013) 153.

³⁷ M Dixon, *Textbook on International Law* (Oxford University Press, 2007) 7; The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (Oxford University Press, 2000) 168.

³⁸ That was apparently the case when in 1991 the Security Council authorized the use of force in Northern Iraq due to trans-national effect of a million Kurds leaving Iraq for neighbouring countries following attacks by the Saddam Hussein government. That was also arguably the case in the 1992 when the Council authorised intervention in Somalia given the total collapse of governance in that country and the effect of the conflict on surrounding States. The intervention in East Timor in 1999 may be cited as another case in point. Government oppression and mass killings coupled with post-referendum killings of approximately 2000 people by pro-government militias created regional security and peace problems.

most likely have deleterious regional or international consequences. As noted by Jochen Abr. Frowein and Nico Krisch:

Although the idea of threat to international peace and security has undergone considerable change, it has not become a limitless concept; rather it may only exist when in a particular situation, a danger of the use of force on a considerable scale arises.³⁹

Such a large-scale use of force would usually have cross-border or regional implications as indicated above. In this context, the Danish Institute of International Affairs (DIIA) has observed that:

It was hardly the intentions of the framers of the Charter that internal conflicts and human rights violations should be regarded as a threat to international peace. There is no evidence that they might have envisaged a competence for the Security Council under Chapter VII to take action to cope with situations of humanitarian emergency within a state resulting from civil war or systematic repression.⁴⁰

Similarly, the Independent International Commission on Kosovo admitted that, ‘at present the Charter does not grant the UN Security Council the power of intervention merely on the ground of abuse of human rights.’⁴¹ These views are consistent with Principle 1 of GA Resolution 2625 (XXV) 1970⁴² – a resolution reflective of Customary International Law – that states should desist from the threat or use of force ‘against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.’ Although the resolution mentions states, it implies that the Security Council should not also act in violation of the Charter or the purposes of the UN. This is because all the organs of the UN, including the council, are required and expected to carry out their functions in accordance with the Charter and the principles and purposes of the

³⁹ J Abr. Frowein and N Krisch (n 32).

⁴⁰ Danish Institute of International Affairs, *Humanitarian Intervention: Legal and Political Aspects* (Copenhagen: Danish Institute of International Affairs, 1999) 62.

⁴¹ See The Independent International Commission on Kosovo (n.4) <<http://www.reliefweb.int/library/documents/thekosovoreport.htm>>.

See also A Roberts and D Zaum, *Selective Security, War and the United Nations since 1945* (London: International Institute for Strategic Studies, 2008) 30.

⁴² A/Res/2625/ (1970), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, of 24 October 1970.

organisation.⁴³ The Council appears cognisant of this as it usually predicates its Chapter VII interventions on the maintenance of international peace and security even if this is not really the case, or refrains from making the determination under article 39 at all.⁴⁴

Article 39 however, indicates that the designation of a situation as involving a breach of or threat to international peace and security might not be enough to confer capacity on the Security Council if that designation is in fact unwarranted. The operative words of the article are that the Security Council '*shall determine the existence of any threat to the peace, breach of the peace, or act of aggression.*' According to the Oxford English Dictionary, 'to determine,' means to, 'ascertain or establish exactly by research or calculation', implying an objective assessment of the factual existence, rather than an arbitrary or whimsical assumption, of a threat or breach. The phrase 'any breach' seems to suggest an actual, rather than an imaginary or non-existent, state of affairs. Thus, although the Council has the power to make a call, the Charter envisages that it should rest it on the existence of situations breaching or threatening to breach international peace and security, or genuinely seeming to do so. To hold that the Council could label any type of situation, irrespective of facts, and no matter how far-fetched, as breaching or threatening international peace and security in order to confer authority on itself, would be to undermine the very foundation of the United Nations and its collective security system. Moreover, the Council is expected to make the article 39 determination judiciously and in good faith, for it is on this understanding that member states of the UN agreed, under article 24, to entrust the primary responsibility for the

⁴³UN Charter 1945, Articles 1, 24(1) and (2).

⁴⁴ The Security Council has for example declared that serious abuses of human rights and breaches of international humanitarian law in Iraq (S/Res/288 (1991), Somalia (Somalia (S/Res/794 (1992), Rwanda (S/Res/929 (1994) and Zaire (Congo) ((S/Res/1078 (1996) amounted to threats to international peace and security. It has also determined that unlawful overthrow of elected governments in Haiti and Sierra Leone (S/Res/841 (1993), S/Res/ 917 (1994), S/Res/940 (1994)); and Sierra Leone (S/Res/1132 (1997), S/Res/1270 (1999), S/Res/1289 (2000), S/Res/1306 (2000)) were threats to international peace and security.

maintenance and restoration of international peace and security to it and co-operate with it in this regard.⁴⁵

Has state practice overridden the provisions and intendment of the UN Charter and conferred on the Security Council an unlimited power in all matters concerning the use of force, whether or not the situations pose any threat to international peace and security? There is little evidence in this regard. Instead, dissatisfaction with the Council's use (or misuse) of Chapter VII powers is rife among states. There is also widespread disaffection about the misuse of the veto by the permanent members to wield undue influence and pursue parochial interests to the detriment of the collective interests of the wider international community.⁴⁶ The largely inconsistent and politically motivated interventions and non-interventions by the Council⁴⁷ has irked many states and undermined the integrity of humanitarian interventions, and the UN itself.⁴⁸ Due to the previously mentioned disaffection with the Council, there have been many attempts to reform it, although these have proved futile,⁴⁹ to the dismay of many states. As Thomas Franck has observed, the actions and proclivities of the Security Council are capable of dismantling the law-based system of the UN and replacing it with 'a model that makes global security wholly dependent on the supreme power and discretion of the United States'.⁵⁰ Hence the warning that the Council is in danger of becoming little more

⁴⁵ UN Charter, articles 1 and 2.

⁴⁶ For an account of the Council's inconsistencies on the subject in respect of Palestine, East Pakistan, Cambodia, Kosovo, Dafur, Chechnya, Tibet, etc., see A Hehir (n 19) 188-307. See also, Thomas L Friedman, 'How US Won Support to Use Mideast Forces', *New York Times* (2 December 1990); BH Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy' (1991) 85 *AJIL*, 516 at 523-5; D Malone, *Decision Making in the UN Security Council: the Case of Haiti, 1990 – 1997* (Clarendon Press, 1998) 107; S Chesterman, 'Legality Versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law' (September 2002) 33 *Security Dialogue*, No.3, 293-307, at 301 –302.

⁴⁷ For a chronological account of Security Council Interventions, see A Hehir (n 19) 188-307; J Graubert, 'NGOs and the Security Council', in B Cronin and I Hurd (eds), *The UN Security Council and the Politics of International Authority* (Routledge, 2008) 154. See also ICISS Report (2001) < <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, para 6.13.

⁴⁸ A Cassese, *International Law* (Oxford University Press, 2005) 347; A Hehir (n 19), 155-158.

⁴⁹ For a chronological account of these, see J. Von Freiesleben, 'Security Council Reform' in E Perry (ed), *Managing Change at the United Nations* (Centre for UN Reform Education, 2008) 1-20.

⁵⁰ TM Franck, 'What Happens Now? The United Nations after Iraq' (2003) 97 *AJIL*, No. 3, 607-620, at 608.

than a convenient pawn and tool of convenience for the big powers⁵¹ who use it as an engine for laundering and legitimizing their favoured policies.⁵²

The International Commission on Intervention and State Sovereignty (ICISS) has acknowledged widespread concerns among States about the lack of legitimacy, representativeness, credibility and accountability on the part of the Council; and its desire to see a reform sooner rather than later.⁵³ In like manner, the World Summit Outcome has reaffirmed the need for early reform of the Security Council in order for it to be more representative, efficient and transparent, and to more legitimately carry out its primary responsibility of maintaining international peace and security.⁵⁴ However, following many failed attempts at reform,⁵⁵ most states now endure the excesses and failures of the Security Council out of a feeling of helplessness. It is thus clear that there has been no emergence of international custom on any expansion of the authority of the Security Council to use force beyond its Charter prescribed roles.

Has the R2P removed the limitations imposed by the Charter on the Security Council, or brought about a new custom, concerning the use of force? Has it enthroned a custom of disregard by the Council of the doctrines of state sovereignty and non-interference? Although some have proclaimed the R2P a new paradigm in the sphere of humanitarian intervention,⁵⁶

⁵¹ S Chesterman, 'Legality versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law', (September 2002) 33 *Security Dialogue*, No.3, 293-307 at 303.

⁵² See VE Parsi, *The Inevitable Alliance: Europe and the United States Beyond Iraq* (Palgrave Macmillan, 2006); I Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press, 2007). See also J Graubert (n 47) 169.

⁵³ ICISS Report (2001) paras 6.19 – 6.28.

⁵⁴ World Summit Outcome, Final Document, A/Res/60/1 (2005) Articles 152, 153.

⁵⁵ For an account of attempts, so far to reform the Security Council, see J Von Freiesleben (n 49) 1-20.

⁵⁶ S. Adams, 'R2P and the Libyan Mission', *Los Angeles Times* (28 September 2011); Ban Ki Moon, Statement of the Secretary-General on Libya (17 March 2011) <<https://www.un.org/sg/en/content/sg/speeches/2011-03-17/statement-libya>>; R Gerber, 'Beyond Libya: a World Ready to Respond to Mass Violence', *The Stanley Foundation* <<https://www.stanleyfoundation.org/resources.cfm?id=462>>. See also PD Williams, 'The Road to Humanitarian War in Libya' (2011) 3 *Global Responsibility to Protect*, 248-259, at 249. For an analysis of the

it is clear, not only that the doctrine is subject to the UN Charter and not designed to operate outside it, but also that this is the common understanding among states.⁵⁷ The ICISS justified its conclusion that the Security Council is a rightful authority to undertake or authorise humanitarian military intervention based on articles 24, 39 – 42, and 51, and Chapter VIII of the Charter.⁵⁸ Kofi Annan, the UN Secretary General at the time, in his statement on the implementation of R2P, had reiterated that UN members states ‘are prepared to take collective action, in a timely and decisive manner, through the Security Council, *in accordance with the Charter, including Chapter VII [...]*.’⁵⁹ The World Summit Outcome, in which the General Assembly adopted the R2P doctrine, left no room for doubt when it declared that any R2P action should be consistent with the principles and provisions of the Charter (including chapter VII) as well as the principles of International Law.⁶⁰ To this end, it reiterated the purposes and principles of the UN and the mandate of the Security Council to take coercive action only in order to maintain and restore international peace and security; and protect people from such outrages by their government that ‘shock the conscience of mankind’,⁶¹ in accordance with Chapter VII of the Charter.⁶² These outrages – genocide,

normative value of R2P, see A Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

⁵⁷ See C Foty, ‘The Dangers of the Dissemination of Misinformation in Implementing the Responsibility to Protect’ (2015) *Journal of International Humanitarian Legal Studies*, 6, 87 – 117 at 96-101.

⁵⁸ ICISS Report (2001) para. 6.6.

⁵⁹ Emphasis added.

⁶⁰ World Summit Outcome Final Document (2005) (n 54) para. 139.

⁶¹ See LFL Oppenheim, *International Law: a Treatise*, 8th edn (Longmans Green and Co, 1905) 312; LC Green, ‘Enforcement of International Humanitarian Law and Threats to National Sovereignty’ (2003) 8 *Journal of Conflict and Security Law*, 101–131; M Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd edn (Basic Books, 1977) 101, 107; J Slater and T Nardin, ‘Non-intervention and Human Rights’ (1986) 48 *The Journal of Politics*, 86-96 at 92; GH Espiell, ‘Legal Basis of the Right to Humanitarian Assistance’, *International Colloquium on the Right to Humanitarian Assistance* (1995) UNESCO, SHS-95/CONF. 805/4 Paris) 5; J Charvet, ‘The Idea of State Sovereignty and the Right of Humanitarian Intervention’ (1997) 18 *International Political Science Review*, 39 – 48, at 47; JL Holzgrefe, ‘The Humanitarian Intervention Debate,’ in JL Holzgrefe and RO Keohane (n 3) 15 – 52, at 43; J Stromseth, ‘Rethinking Humanitarian Intervention: The Case for Incremental Change,’ in JL Holzgrefe and RO Keohane (eds) (n 3) 232 at 245; O Corten, ‘Human Rights and Collective Security: Is there an emerging Right to Humanitarian Intervention?’ In P Aston and E MacDonald (eds) *Human Rights, Intervention, and the Use of Force* (Oxford University Press, 2008) 87; JN Maogoto, ‘Westphalian Sovereignty in the Shadow of International Justice? A Fresh Coat of Paint for a Tainted Concept,’ in T Jakobsen, C Sampford and R Thakur, *Re-envisioning Sovereignty: The End of Westphalia?* (Ashgate Publishing 2008) 220.

⁶² World Summit Outcome Final Document (2005) (n 54) paras 79 and 139.

ethnic cleansing war crimes and crimes against humanity –⁶³ would be likely to jeopardise regional or global peace and security, would justify a departure from the fundamental international law doctrine of state sovereignty, and would therefore be consistent with the Charter.⁶⁴ The R2P will not apply outside the above parameters unless and until the member states of the UN decide to extend it to other matters⁶⁵ – a determination they are yet to make. Other human rights violations, even if they involve some loss of life, would not have this effect and should not justify R2P intervention.

The power of military intervention for humanitarian purposes under R2P then is subject to the same qualification involved in every use of force by the Security Council, in that there must be a threat to or breach of international peace and security, or an act of aggression. This not however mean that the UN should do nothing in the face of human rights violations not involving threats to or breach of international peace and security, or in respect of situations not involving genocide, ethnic cleansing or crime against humanity. In situations like these, the UN General Assembly (GA) would be the rightful authority to initiate any action. Under article 24 of the Charter, the GA has implied and residual right to authorise intervention

⁶³ World Summit Outcome Document 2005 (n 54) para. 138 - 9; K Annan, A More Secure World: Our shared Responsibility,' Report of the High Level Panel on Threats, Challenges and Change (2004) <http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf>; N Tsagourias, 'Humanitarian Intervention after Kosovo and Legal Discourse: Self-Deception or Self Consciousness?' (2000) 13 *Leiden Journal of International Law*, 11-32, at 21; M Byers and S Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law,' in JL Holzgrefe and RO Keohane (n 3) 177 – 203.

⁶⁴ The UK government affirmed this as part of the conditions for humanitarian intervention in the statement of its position on the legality of humanitarian military intervention in Syria. See A Lang, 'Conditions for using Force in Humanitarian Intervention,' *House of Commons Library* (Standard Note 6716) 29 August 2013 <<http://researchbriefings.files.parliament.uk/documents/SN06716/SN06716.pdf>>.

⁶⁵ Implementing the Responsibility to Protect: the Report of the Secretary General (A/63/677) 12 January 2009, para 10(b); C Foty (n. 57).

where the situation does not concern international peace and security or aggression.⁶⁶ As reiterated by the World Summit Outcome:⁶⁷

Article 24 of the Charter confers on the Security Council “primary”, not total, responsibility for the maintenance of peace and security, and in some cases the perpetration of crimes relating to the responsibility to protect may not be deemed to pose a threat to international peace and security.

The basis on which article 24(1) grants the Security Council primary responsibility in respect of situations requiring the maintenance of international peace and security is the necessity for ‘prompt and effective’ action. Such a need is not likely to arise where the humanitarian situation or human right violation is not grave, and could bear the relative delay involved in General Assembly decisions. It would also ensure that the Security Council does not hastily deploy military force in situations where its use would be unwarranted and counter-productive. In any case, the General Assembly may refer the matter to the Security Council for further action, if it deems fit to do so.⁶⁸ In other situations of human right violations, any humanitarian intervention by the UN should be of a non-military kind, and the UN General Assembly (GA) working in concert with the Human Rights Council (HRC) would be the legitimate authority to initiate it.⁶⁹

⁶⁶ In situations involving threat to or breach of international peace and security or aggression, the General Assembly under the Uniting for Peace, A/Res/ 377 (V) (1950), may undoubtedly also act if the Security Council fails or is unable to exercise its responsibility.

⁶⁷ World Summit Outcome, Final Document (2005) (n. 54) para. 63.

⁶⁸ Indeed, by virtue of the Uniting for Peace Resolution 1950 (n 66), where the Security is unable to act in situations not impacting on international peace and security or involving act of aggression, the GA reserves the power to act as necessary. Such action could involve humanitarian military intervention. Further, under article 10 of the Charter, the GA has a general residual authority, and may make recommendations, in respect of any matter within the jurisdiction of the UN in respect of which the Security Council was not acting.

⁶⁹ HRC, created following the World Summit Outcome 2005 (A/Res/60/251 (2006)) replaced the Human Rights Commission. It is ‘responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner. In addition it has the responsibility, among other things, to address all situations of human rights violations, promote effective co-ordination and mainstreaming of human rights in the UN system, and respond promptly to human rights emergencies: World Summit Outcome Document (2005) (n 54) paras 157-158; J Abr. Frowein and N Krisch eds) (n 32) 724-725. However, the issue of non-military intervention is beyond the scope of this article.

Inherent Rules on the Use of Force

It is evident therefore that the exercise by the Security Council of its powers for the maintenance of international peace and security, including that of humanitarian military intervention, is not beyond challenge and is subject to certain principles relating to rightful use of force implicit in the Charter. These are that the Security Council may use military force, even for humanitarian military intervention, as a *last resort*; and that such use of force *must be likely to achieve the objective* of protecting civilians and maintaining international peace and security. Under article 40, the Council is required to call on affected member states to comply with specified provisional measures before taking further actions. Such further actions should firstly be non-military in nature (such as economic, political, trading, travel, or diplomatic sanctions).⁷⁰ The Council may only resort to the use of military force if these measures are not, or are unlikely, to succeed in resolving the humanitarian situation.⁷¹

The requirement of last resort is in keeping with the main avowed objective of the UN, which is to save humanity from the scourge of war and resolve disputes by peaceful means.⁷² Accordingly, the Security Council may not legally adopt measures that are likely to escalate a conflict or lead to war without exhausting peaceful means for the resolution of the situation. Although these measures need not all be tried in any given case, they ought to be considered and should only be rejected if they have no reasonable prospect of success. In this context, the Security Council has a duty to investigate any dispute or situation to verify if its continuance is likely to endanger the maintenance of international peace and security.⁷³

⁷⁰ UN Charter 1945, Article 41.

⁷¹ Ibid. Article 42.

⁷² Preamble to the UN Charter (1945).

⁷³ UN Charter 1945, Article 34.

Then, any military intervention on humanitarian grounds must have a reasonable prospect of resolving the situation, while its consequences are not likely to exceed the consequences of inaction.⁷⁴ A humanitarian intervention which is likely to cause as many or more civilian casualties as the situation it seeks to deal with, or which is likely to degenerate into a civil war or societal chaos would not be worthwhile. Similarly, an intervention that would, or be likely to, give rise to a failed state or the creation of a haven for terrorists would be neither reasonable nor legitimate. As the UK Guidelines on Humanitarian Intervention advises, ‘we should be sure that the scale of potential or actual human suffering justifies the dangers of military action. And it must be likely to achieve its objectives’.⁷⁵ It is important to observe that reasonable prospect of success does not refer to the military cost or ease of winning the war or deposing an offending regime. Rather, it refers to the effect of the intervention and its aftermath on the civilian population and neighbouring states. Indeed, under the 1949 Geneva Conventions, any international action to enforce serious violations of their provisions or those of their additional protocols must be in accordance with the UN Charter.⁷⁶

Purposes and Principles of the UN

In addition to the substantive provisions of the Charter, any military intervention, both in conception and execution, by the Security Council on humanitarian grounds must be consistent with the purposes and principles of the United Nations. Article 24(2) makes it clear that, in exercising powers on behalf of the UN member states in relation to the maintenance and restoration of international peace and security, the Security Council ‘shall act in accordance with the Purposes and Principles of the United Nations as laid down in Chapters VI, VII, VIII and XII.’

⁷⁴ ICISS Report (n 53) paras 4.41 – 4.43.

⁷⁵ Although the UK government believes in unilateral humanitarian intervention, it recognises these guiding principles and limitations. See A Lang (n 89); Z Beauchamp, ‘Syria’s Crisis and the Future of R2P, Foreign Policy’, 16 March 2012 <<http://foreignpolicy.com/2012/03/16/syrias-crisis-and-the-future-of-r2p/>>.

⁷⁶ Protocol I of 1977 Additional to the Geneva Conventions 1949, Article 89.

Now, all the powers exercisable by the Security Council under the above chapters are in relation to the maintenance of international peace and security. The contextual limitation of these chapters is consistent with the main purposes and principles of the UN as contained in articles 1 and 2 of the Charter. These are to maintain international peace and security and take effective and collective measures in that regard; develop friendly relations among nations based on equal rights and self-determination; strengthen universal peace; and promote respect for human rights and collective freedoms. As a creation of the UN Charter from which it derives its authority and legitimacy, the Security Council has a duty to operate not only within the parameters of the UN Charter, but also within the principles and purposes of the organization.⁷⁷ In *Prosecutor v Tadic*, the International Criminal Tribunal for Yugoslavia (ICTY) reiterated the obligation of the Security Council to act within the Charter and purposes and principles of the UN when it held in (in relation to article 24(2) that, ‘neither the text nor the spirit of the Charter conceives the Security Council as *legibus solutus* (unbound by law).’⁷⁸ Accordingly, it could only act ‘within the limits of the purposes and principles of the Charter.’⁷⁹

The ICJ has indicated in the *Certain Expenses of the United Nations, Advisory Opinion*,⁸⁰ that any exercise of power by a UN organ (including the Security Council) for the purposes of the organisation, might be *ultra vires* if it was not consistent with the achievement of its aims and purposes. According to the court, ‘when the Organisation takes action which warrants the

⁷⁷ A similar issue was raised in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) I.C.J 191. The applicants argued that the arms embargo imposed on the former Yugoslavia by the Security Council violated its right to self-defence under the Charter as well as the purposes of the UN as articulated in article 24(2) of the Charter. The ICJ did not however rule on the matter on the ground that the issue was not properly before it. It did not hold the issue to be non-justiciable.

⁷⁸ ICTY, IT -94-AR72 (Appeals Chamber Interlocutory Judgment on Jurisdiction, 2 October 1995, para. 28.

⁷⁹ N White, ‘The will and Authority of the Security Council after Iraq’ (2004) 17 *Leiden Journal of International Law*, 645 – 672, at 666.

⁸⁰ ICJ Reports (1962) 151 at 168.

assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation.’ Indeed, in *Kadi v Council and Commission of the European Communities*,⁸¹ the European Court of Justice (ECJ) struck down, as a violation of human rights, EU regulations adopted in the implementation of a targeted sanctions regime passed by the Security Council – a ruling that amounted to an indirect judicial review and apparently caused the Council to amend the sanctions regime. Although under article 1(3) of the UN Charter, promoting and encouraging respect for human rights and fundamental freedoms are among the purposes of the UN, any involvement of the Security in these would have to be in the context of maintaining international peace and security. Furthermore, article 2(3) of the UN Charter stipulates that states have a duty to ‘settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.’ It follows from this that humanitarian intervention by the Security Council should not, and could not legally, be undertaken in circumstances or in a manner that would damage international peace and security.

To hold that the Security Council could use military force against the expressed provisions, principles and purposes of the UN Charter would be to undermine international law and the collective security system. In the *Lockerbie* case,⁸² in which Libya challenged the legality of a resolution of the Security Council condemning its response to the Lockerbie airline bombing incident,⁸³ Judge Christopher Weeramantry (dissenting) observed, without contradiction by any member of the panel, that:

The history of the United Nations thus corroborates the view that a clear limitation on the plenitude of the Security Council’s powers is that those powers must be exercised

⁸¹ Case T-315/01, 21 September 2005.

⁸² ICJ Reports (1992) *Case Concerning Questions of Interpretation and Application of the Montreal Convention arising out of the Aerial incident at Lockerbie (Provisional Measures)* 3.

⁸³ S/Res/731 (1992).

in accordance with the well-established principles of international law. It is true that this limitation must be restrictively interpreted and is confined only to the principles and objects which appear in chapter 1 of the charter ... The restriction nevertheless exists and constitutes an important principle of law in the interpretation of the United Nations Charter.⁸⁴

In that case, although the parties withdrew the suit before the court could determine the substantive issue,⁸⁵ the full consideration of the case by the ICJ would have warranted a determination whether or not the Security Council had acted lawfully under the Charter. This implication was clear in *The Legal Consequences Case* when the ICJ in its advisory opinion held that the resolutions of the General Assembly and Security Council requiring South Africa to leave Namibia were valid. Indeed, Judge Petré observed that it would have been impossible to determine the legal consequences of the continued presence of South Africa in Namibia without first ruling on the legality of the relevant General Assembly and Security Council resolutions.⁸⁶

The need to uphold the purposes and principles of the Charter is also the premise for any exercise of power under R2P.⁸⁷ The 2005 World Summit Outcome re-affirmed the sufficiency of the Charter on matters of international peace and security and the need for the Security Council to act ‘in accordance with the purposes and principles of the Charter’ while exercising its mandate to maintain and restore international peace and security.⁸⁸ According to Kofi Annan:

Actions under paragraphs 138 and 139 of the Summit Outcome are to be undertaken *only in conformity with the provisions, purposes and principles of the Charter of the United Nations*. In that regard, the responsibility to protect does not alter, indeed it

⁸⁴ ICJ Reports (1992) 3 (n 81) at 65.

⁸⁵ This followed the passing by the SC of Res. 48 (1992), which required Libya to hand over two suspects in connection with the Lockerbie bombing to the UK.

⁸⁶ *The Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276 (1970)* ICJ Reports (1971) (Separate Opinion of Judge Petré, at 131).

⁸⁷ The World Summit Outcome, Final Document (n 54) paras 2, 5, 15 and 139.

⁸⁸ *Ibid* (para 79).

reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter.⁸⁹

He also made it clear that the ‘enunciation of the responsibility to protect was not intended to detract in any way from the much broader range of obligations existing under international humanitarian law, international human rights law, refugee law and international criminal law.’⁹⁰ As explained by the ICISS, the primary objective of R2P is not to license or clothe aggression with fine words, or to provide strong states with new rationales for doubtful strategic designs, but to strengthen the international order by providing clear guidelines for concerted action in circumstances where violence in a state becomes a source of menace for all.⁹¹ Paragraph 139 of the World Summit Outcome Document premises military intervention on the fact that it would be the only viable option to alleviate the human suffering in that other available non-military measures are clearly unlikely to succeed. As explained by Kofi Annan while promoting R2P:

The primary focus should be on assisting the cessation of violence through mediation and other tools and the protection of people through such measures as the dispatch of humanitarian, human rights and police missions. Force, if it needs to be used, should be deployed as a last resort.⁹²

Rules of International Humanitarian Law

Finally, where the Security Council rightly engages in military intervention for humanitarian purposes under the Charter or R2P, it would have to comply with the principles of International Humanitarian Law (IHL).⁹³ These principles, which are especially relevant for

⁸⁹ Implementing the responsibility to Protect: the Report of the Secretary General, A/63/677 (12 January 2009) <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/63/677>. Emphasis added.

⁹⁰ Implementing the responsibility to Protect: the Report of the Secretary General (12 January 2009) (n 76).

⁹¹ ICISS Report (n 47) para 4.32.

⁹² K Annan (n 89). The UK Guidelines on Humanitarian Intervention affirms this. See A Lang (n 64).

⁹³ For a discussion of the principle of *jus in bello*, see J Moussa, ‘Can “jus ad bellum” override “jus in bello”? Reaffirming the separation of the two bodies of law’. (2008) 90 *International Review of the Red Cross*, 963 – 990; E Cannizzaro, ‘Contextualizing proportionality: jus ad bellum and jus in bello in the Lebanese war’ (2006) 88 *International Review of the Red Cross*, 779 – 792.

the protection of civilians and civilian objects, are *distinction, proportionality and military necessity*.⁹⁴ Under Article 48 of Protocol I Additional (AP I) to the 1949 Geneva Conventions 1949 (GC), parties to an armed conflict must distinguish between military and civilian populations and objects and should direct their military operations only against the former. In this context, AP I, Article 51(4) bans (indiscriminate) military operations not directed against specific military objectives or targets, or the effects of which cannot be controlled or limited. The AP I also prohibits direct attacks on civilian populations and objects, requires that parties take constant and careful precautions to prevent civilian ‘collateral’ damage; and insists that the use of military force should be proportionate to, and necessary for, the accomplishment of military objectives.⁹⁵

Furthermore, AP I, Article 35 makes it clear that the right of parties to choose the means and methods of warfare are limited in international law. Accordingly, it prohibits parties from deploying weapons, projectiles and materials which may cause superfluous injury or unnecessary suffering; or which may cause widespread, long-term or severe damage to the natural environment. Under of AP I, article 51(5) (b), military attacks that would kill or damage civilians or civilian objects would be excessive unless justified by military necessity.⁹⁶ There must therefore be no military attacks on non-defended towns or cities, or de-militarised zones.⁹⁷ These prohibitions, which apply in both international and non-international armed conflicts, are now peremptory norms of customary international law

⁹⁴ Additional Protocol 1 to the Geneva Conventions 1949, Arts. 48 and 51; Articles 22, 25, 1907 Hague Convention IV Regulations on the Laws and Customs of War on Land (and Additional Protocols I and II of 1977); Hague Convention 1954 (and Additional Protocols 1959 and 1999) protecting cultural properties from military attack; J Pattison (n. 84) 364-391.

⁹⁵ AP I to the Geneva Conventions, Arts. 51 – 58.

⁹⁶ For a comprehensive discussion of the principle of *military necessity*, see N Hayashi, ‘Requirements of Military Necessity in International Humanitarian Law and International Criminal Law’ (2010) 28 *Boston University International Law Journal*, 39-140.

⁹⁷ AP I to the Geneva Conventions, Arts. 59 and 60.

binding on parties to armed conflicts.⁹⁸ In international armed conflicts, it would amount to grave breaches of the GC deliberately to cause great suffering, or serious injury to body or health; or to cause extensive destruction and appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly.⁹⁹

Although rules of IHL specifically apply to states, they also by implication apply to military actions by, or on behalf of the Security Council. This is because, first, any exercise of military power by the Security Council would invariably involve states' armed forces bound by these rules. Second, the Security Council, as already noted, is not above international law.¹⁰⁰ Third, since IHL rules are peremptory norms of *jus cogens*, any provisions in an international treaty (including the UN Charter) that contravenes such norms, whether they were in existence at the time the treaty came into force or subsequent to it, shall be void.¹⁰¹ Fourth, use of military force by the Security Council in contravention of IHL would be inimical to the expressed Charter purpose of promoting human rights.¹⁰²

The World Summit Outcome affirms the above principles in relation to the R2P. Since the only legitimate objective of humanitarian military intervention is the protection of populations from the atrocities being perpetrated against them by their governments, only such force as is necessary to accomplish this objective need be used. Attacks on civilians or the unwarranted destruction of civilian properties or infrastructure by disproportionate or overwhelming use of force would be neither proportionate nor consistent with international

⁹⁸ See The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion (1996) ICJ 226, para. 78; Prosecutor v *Tadic*, ICTY, IT-94-1-A (1999) < <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>>.

⁹⁹ Geneva Convention I, Art. 50; Geneva Convention II, Arts. 51 and 130; Geneva Convention IV, Art. 147; Additional Protocol I, 1977, Art. 85

¹⁰⁰ *Prosecutor v Tadic* (n 98); *N White* (n 78); *Certain Expenses of the United Nations, Advisory Opinion* (n 80); *Kadi v Council and Commission of the European Communities*, Case T-315/01, 21 September 2005.

¹⁰¹ Vienna Convention on the Law of Treaties 1969, Arts. 53 and 64.

¹⁰² UN Charter 1945, Article 1(3).

law. In addition, undue prolongation of any intervention for humanitarian purposes or its extension to unauthorized objectives in the form of the so-called ‘mission creep’ would be disproportionate. Accordingly, in the absence of a UN standing military force and an effective Military Staff Committee as envisaged by articles 43 - 47 of the Charter, the Security Council has a duty to find other ways of superintending and controlling any collective military action it takes or authorises on humanitarian grounds. Security Council resolutions that authorise states individually or collectively to ‘take all measures necessary to restore international peace and security’, without any effective UN mechanism to control the duration and dimensions of such operations tend to create free-for-all military zones that engender crises much more serious than the humanitarian needs that warranted them.¹⁰³ It is now pertinent to consider the legality of the military intervention in Libya in the light of the principles discussed above.

Legality of the Security Council’s Intervention in Libya

The ten States which voted for the Libya intervention agreed that strong action was necessary ‘solely to protect civilians from further harm’ because the Gaddafi regime was about to unleash more violence on the opposition strongholds in the Eastern part of the country, especially Benghazi.¹⁰⁴ Following the passage of Resolution 1973, a coalition of states spearheaded by France, USA, UK, and ultimately NATO, commenced military action on 19 March 2011. For about seven months, these forces unleashed massive aerial and missile bombardments on military, political, and communication infrastructure of Libya and provided

¹⁰³ For example, the Security Council’s Commission of Inquiry on the UNOSOM II mission in Somalia found that, ‘many major operations’ done in the name of the UN in the country were ‘totally outside the command and control of the United Nations’.¹⁰³ The prevailing crises in Somalia and Libya in the aftermath of the Security Council’s military interventions demonstrate the failure of such an approach to restore and maintain international peace and security. See the Report of the Commission of Inquiry Established Pursuant to SC Res. 885 (1993) to Investigate Armed Attacks on UNOSOM II Personnel, which Led to Casualties among them (February 1994, para. 244).

¹⁰⁴ S/Res/1973 (2011) passed on 17 March 2011, preamble and para 4.

strategic, military, technical and financial support to rebels seeking to overthrow the government. The intervention culminated in the destruction of the government and military forces of Libya and the killing of its leader, Colonel Muammar Gaddafi.¹⁰⁵

In the periods following the intervention, the leaders of USA, France and the UK celebrated the demise of Gaddafi and the apparent saving of civilian lives in Libya. According to the then British Prime Minister David Cameron, during his post-intervention visit to Libya with French President Nicolas Sarkozy, that was ‘a moment when the Arab spring could become an Arab summer and we see democracy advance in other countries too.’¹⁰⁶ The then US Foreign Secretary, Hillary Clinton, unabashedly declared: ‘We came, we saw, he died’, in reference to the killing of Muammar Gaddafi and the fall of his government.¹⁰⁷ Many international commentators, including lawyers and non-lawyers, have described the intervention in Libya as a successful one and a triumph for R2P, with some suggesting that it should provide a benchmark for future humanitarian interventions.¹⁰⁸ According to Professor Gareth Evans, ‘the Libyan case was, at least at the outset, a textbook case of the RtoP norm working exactly as it was supposed to, with nothing else in issue but stopping continuing and imminent mass atrocity crimes.’¹⁰⁹ On his part, Professor Fosun Turkmen, observed that the intervention ‘can be considered as the most successful attempt of humanitarian intervention so far, fulfilling each of the required criteria.’¹¹⁰ Ban Ki Moon, the UN Secretary at the time

¹⁰⁵ <<http://www.dailymail.co.uk/news/article-2051782/Gaddafi-dead-picture-How-NATO-air-strike-finished-Libyas-dictator.html>>.

¹⁰⁶ <<https://www.theguardian.com/world/2011/sep/15/cameron-sarkozy-libya-leader-tripoli>>.

¹⁰⁷ <<https://www.rt.com/news/363454-timeline-gaddafi-death-anniversary/>>.

¹⁰⁸ RA Pape, ‘When Duty Calls: A Pragmatic Standard of Humanitarian Intervention’, (2012) 37 *International Security*, 41-80, at 41, 44; RW Murray, ‘Conclusion: the Responsibility to Protect after Libya’, in A Hehir and R Murray, *The Responsibility to Protect and the Future of Humanitarian Intervention* (Palgrave Macmillan, 2013) 222-228, at 222; Ban Ki Moon, Statement of the Secretary-General on Libya, 17 March 2011 <<https://www.un.org/sg/en/content/sg/speeches/2011-03-17/statement-libya>>.

¹⁰⁹ G Evans, ‘Interview: RtoP Balance Sheet after Libya’ <<http://www.globalr2p.org/media/files/gareth-interview-the-rtop-balance-sheet-after-libya.pdf>>.

¹¹⁰ F Turkmen, ‘From Libya to Syria: The Rise and Fall of Humanitarian Intervention?’ <<http://acuns.org/wp-content/uploads/2013/01/From-Libya-to-Syria-The-Rise-and-Fall-of-Humanitarian-Intervention.pdf>> 15.

simply declared that, ‘the Responsibility to Protect has arrived’, by virtue of the collective actions in Libya and Cote d’Ivoire, as well as diplomacy.¹¹¹ So, did the military intervention in Libya satisfy the requirements of international law?

The first question to answer is whether the authorisation of intervention by the Security Council satisfied the requirement of *Just cause* or Chapter VII of the Charter. Although Resolutions 1970 and 1973 made allegations of killings of civilians and crimes against humanity, there was little convincing evidence to substantiate the fact or scale of these. Moreover, although one of the major justifications for the decision to impose a no-fly zone over Libya was the allegation that the Libyan government was bombing civilians from the air, there was little evidence to substantiate the allegation. It is clear that the Security Council did not do enough to verify the facts on the ground before it embarked on hostile action against the Libyan administration. Resolution 1970 of 26 February 2011 welcomed the decision of the HRC immediately to send to Libya an international commission of enquiry to, ‘investigate all alleged violations of international human rights law [...], to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible, identify those responsible.’¹¹² However, the Security Council proceeded to on 17 March 2011 to pass another resolution that authorized the use of military force, before it had the opportunity to receive any report from the UN commission of enquiry.¹¹³ Thus, although there were many unverified media reports of killings and sundry violations of human rights,

¹¹¹ See the Secretary-General's remarks at Breakfast Roundtable with Foreign Ministers on ‘The Responsibility to Protect: Responding to Imminent Threats of Mass Atrocities’ <<https://www.un.org/sg/en/content/sg/statement/2011-09-23/secretary-generals-remarks-breakfast-roundtable-foreign-ministers>>.

¹¹² S/Res/1970 (2011) preamble, para 5.

¹¹³ S/Res/1973 (2011). The International Commission of Enquiry on Libya only submitted its final report on 8 March 2012.

<<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.68.pdf>>. Although the report alleges that both the government and rebel forces committed war crimes and crimes against humanity, these facts were not known at the time of the intervention. Moreover, although it indicated that government forces killed a few hundred protesters, it is not clear whether these were armed or unarmed. See pp. 6-10 of the report.

the Council undertook military intervention before its commission had time to visit Libya, establish the facts of any breaches, or identify those responsible.¹¹⁴ This led Manjeev Singh, the Indian representative at the Security Council to lament while abstaining from the vote, that Resolution 1973 was ‘based on very little clear information, including a lack of certainty regarding who was going to enforce the measures.’¹¹⁵ Amnesty International, in fact, observed that many of the claims of civilian deaths and sufferings in Libya were not verifiable and that Western Media reports about them were unreliable:

Much Western media coverage has, from the outset presented, a very one-sided view of the logic of events, portraying the protest movement as entirely peaceful and repeatedly suggesting that the regime’s security forces were unaccountably massacring unarmed demonstrators who presented no security challenge.¹¹⁶

The Foreign Affairs Select Committee of the UK Parliament echoed this view in its report on the intervention. The report observed that although many western policy makers might have believed that Gaddafi was going to massacre civilians in Benghazi, ‘this did not necessarily translate into a threat to everyone in Benghazi.’¹¹⁷ It went further to say that, ‘the scale of the threat to civilians was presented with unjustified certainty’ even though US intelligence officials had described the decision to intervene as being ‘intelligence-light’.¹¹⁸ Based on its investigations, including interviews with the principal actors in the intervention, the committee concluded that:

We have seen no evidence that the UK Government carried out a proper analysis of the nature of the rebellion in Libya. It may be that the UK Government was unable to analyse the nature of the rebellion in Libya due to incomplete intelligence and insufficient institutional insight and that it was caught up in events as they developed.

¹¹⁴ The UN Commission of Enquiry only arrived in Libya on 27/04/11, several weeks after the military intervention had commenced. See <<http://www.bbc.co.uk/news/world-africa-13202981>>.

¹¹⁵ Security Council statement of 17/03/11 accompanying Res. 1973 <<http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution>>.

¹¹⁶ <<http://www.independent.co.uk/news/world/africa/amnesty-questions-claim-that-gaddafi-ordered-rape-as-weapon-of-war-2302037.html>>. Indeed much of the figures on civilian casualties emanating from Libya were the result of deliberate misinformation and fabrication by parties keen to procure foreign intervention, information the eager interveners and the UN did not verify; C Foty (n 57) 103-110.

¹¹⁷ House of Commons Foreign Affairs Select Committee, *Libya: Examination of Intervention and Collapse and UK’s Future Options*, Third Report of Session 2016-17, paras 36 – 37; The Washington Times, Hillary Clinton’s ‘WMD moment: US intelligence saw false narrative in Libya’, 29 January 2015.

¹¹⁸ Ibid.

It could not verify the actual threat to civilians posed by the Gaddafi regime; it selectively took elements of Muammar Gaddafi's rhetoric at face value; and it failed to identify the militant extremist element in the rebellion. UK strategy was founded on erroneous assumptions and incomplete understanding of the evidence.¹¹⁹

The Committee also found that the rhetoric of Gaddafi was mostly hot air un-indicative of the way he would act, or the way he had acted in the recent past when his attacks had mostly targeted armed rebels.¹²⁰ Moreover, before deploying troops to re-take Benghazi, Gaddafi had publicly pleaded with the rebels to give up their arms, promising to desist from attacking if they did so. He had also promised to send development aids to Benghazi if the protests stopped,¹²¹ and had responded initially to the uprising with non-lethal force. All these indicated an unwillingness deliberately to attack civilians. Although civilians had died during the government's efforts to re-take towns and cities from rebel fighters, there appears to be no credible evidence that this was a result of a deliberate policy. The situation in Benghazi in particular and Eastern Libya in general did not therefore appear to meet the threshold for humanitarian military intervention: war crime, genocide, crime against humanity, or threat to international peace and security. Although the Human Rights Watch and the International Commission of Inquiry on Libya (which submitted its final report after the intervention) report that Libyan government forces had killed a few hundred people before the NATO intervention, they did not state how many of these casualties were armed rebels and how many were civilians.¹²² The conclusion of the Commission of Inquiry that the Libyan government committed war crimes and crime against humanity would only be valid if the victims were largely civilians targeted as such. However, the report of the Commission that armed rebels (*thumar*) also committed war crimes in the form of executions, torture and inhumane treatment of numerous government soldiers, prisoners, and

¹¹⁹ House of Commons Foreign Affairs Committee (n 117) para. 38.

¹²⁰ Ibid. Para. 32. This conclusion is supported by reports of Human Rights Watch that estimated the number of civilian casualties in the weeks leading up to the intervention to about 233
<<https://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings>>.

¹²¹ House of Commons Foreign Affairs Committee (n 117) para. 33.

¹²²<<https://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings>>;
<<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.68.pdf>>.

loyalists¹²³ tend to suggest that, at least some of the people killed by government forces were armed fighters.

In fact, the conflict in Libya did not merely involve government forces and predominantly civilians agitating for democracy as commonly suggested by certain politicians and media organizations.¹²⁴ According to the International Committee of the Red Cross (ICRC), in international armed conflicts, ‘all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.’¹²⁵ In armed conflicts of a non-international nature (as in Libya), organised armed groups constitute the armed forces of a non-state party to the conflict and consist of ‘individuals whose continuous function it is to take a direct part in hostilities (‘continuous combat function’).’¹²⁶ Although the conflict in Libya apparently started as a civil unrest against the Libyan government, it had quickly and before the intervention began, degenerated into an armed insurrection aimed at the forcible overthrow of the government, with many of the fighters belonging to terrorist organisations. Indeed, it would seem that from the very beginning many of the alleged civilian protesters had armed themselves with an assortment of weapons. As noted by the United Kingdom Foreign Affairs Committee, it was clear to every knowledgeable observer that, ‘militant Islamist militias played a critical role in the rebellion from February 2011 onwards. They separated themselves from the rebel army, refused to take

¹²³ Report of the International Commission of Inquiry on Libya (8 March 2012) 6 – 13.
<<http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.68.pdf>>

¹²⁴ Ibid.

¹²⁵ ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009) 995 <<http://www.icrc.org/eng/resourcesdocuments/article/review/review-872-p991.htm>>.

¹²⁶ Ibid.

orders from non-Islamist commanders and assassinated the then leader of the rebel army, Abdel Fattah Younes.¹²⁷

That the protests had become an armed insurgency was evident from the fact that government forces had to fight battles to re-take towns and cities from fighters armed with guns, bombs, rocket-propelled grenades, artillery and tanks.¹²⁸ The speed with which the apparent metamorphosis from civil unrest to armed insurgency took place suggests that from the very beginning, significant armed elements rode on the back of civil protests to wage an insurrection against the government.¹²⁹ If the protesters were not civilians, but armed rebels, military intervention to protect and assist them would not satisfy the *just cause* requirement since government attacks on them would not amount to war crimes and would not justify humanitarian military intervention. Accordingly, the military intervention that destroyed the capabilities of the Libyan armed forces and empowered the rebels was tantamount to aiding one side of an internal armed conflict,¹³⁰ and acting as an air force for the rebels.¹³¹ This appears to contravene the provisions of article 2(4) and 2(7) of the UN Charter that respectively forbid unlawful use of force and intervention in the internal affairs of states.

Was the primary motivation of the intervention the need to protect civilians? It was clear from the utterances and actions of the main proponents of Resolutions 1970 and 1973 (France, UK and USA) that a major objective of the intervention was the removal of the Libyan leader. Although the resolutions did not require the deposition of the Libyan regime,

¹²⁷ House of Commons Foreign Affairs Committee (n 117) paras 44, 45.

¹²⁸ The rebels were even alleged to be using land mines <<http://www.bbc.co.uk/news/world-africa-13138102>>.

¹²⁹ A Kuperman, 'NATO's Intervention in Libya: A Humanitarian Success?' In A Hehir and R Murray (n 108) 193-196.

¹³⁰ ICJ Reports (1986) Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v The USA) 14.

¹³¹ S Milne, 'If there were global justice, Nato would be in the dock over Libya', The Guardian (15 May 2012) <<https://www.theguardian.com/commentisfree/2012/may/15/global-justice-nato-libya>>.

the leaders of the above countries signed a joint commitment to depose Colonel Gaddafi in the course of the operation,¹³² and made it clear they were not going to stop the military campaign unless he left office.¹³³ Pursuant to this objective, the intervening forces bombarded the offices and residences of Colonel Gaddafi on numerous occasions and led other offensives to kill him.¹³⁴ Not only did these attacks kill civilians, the coalition quickly left Libya after the death of Gaddafi and abandoned the country's civilians to chaos and the mercy of murderous militias, a state of affairs over which President Obama would later express regret.¹³⁵

That regime change and other considerations unconnected with the protection of civilians were the primary motivations for the intervention was evident from emails exchanged between Foreign Secretary Hillary Clinton and Sydney Blumenthal, her security adviser and analyst. In the leaked email. Mr. Blumenthal disclosed that he gathered from conversations with French intelligence operatives the reasons for Sarkozy's intervention in Libya. These were a desire to obtain a greater share in the Libyan oil market; increase French influence in North Africa; improve his own political fortunes at home; and re-assert the power of French military in the world and French dominance in Africa.¹³⁶ The French authorities have not denied or controverted these allegations. In addition, NATO, Qatar and the United Arab

¹³² <<http://www.bbc.co.uk/news/world-africa-13090646>>.

¹³³ <<http://www.guardian.co.uk/world/2011/apr/15/obama-sarkozy-america-libya>>.

¹³⁴ The Telegraph (1 May 2011)

<<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8486741/Libya-Nato-raid-was-Gaddafi-assassination-attempt.html>>; The Independent (30 April 2011)

<<http://www.independent.co.uk/news/world/africa/nato-air-strike-kills-gaddafis-son-2277464.html>>.

¹³⁵ <<https://www.theguardian.com/us-news/2016/apr/12/barack-obama-says-libya-was-worst-mistake-of-his-presidency>>.

¹³⁶ See US Department of State, H: France's client and Q's gold. Sid, 2 April 2011, C05779612. See also B Hoff, Hillary Emails Reveal True Motive for Libya Intervention, *Foreign Policy Journal* (6 January 2016) <<http://www.foreignpolicyjournal.com/2016/01/06/new-hillary-emails-reveal-true-motive-for-libya-intervention/>>. M Forter, *Slouching towards Sirte: NATO's War on Libya and Africa* (Baraka Books, 2012).

Emirates provided the rebels with military, intelligence, and strategic assistance,¹³⁷ with the UK government ‘embedding’ its Special Forces personnel with them. This assistance buoyed the rebels making them able, along with the coalition, to reject ceasefire and peace initiatives by the Libyan government, Turkey, Venezuela, and the African Union.¹³⁸ These go to show that the dominant motive of the intervention appeared to be regime change and not the protection of civilians.¹³⁹

Indicative of the fact that the rebels were more concerned with regime change than the alleviation of civilian suffering was their behaviour after government forces were dislodged from Benghazi and other eastern cities and areas they had earlier captured. The retreat of the government forces from these areas meant that one of the main objectives of Security Council Res. 1973, which was ‘to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi,’¹⁴⁰ had been accomplished. Instead of focusing on enhancing the protection of civilians in the regained areas, the rebels, backed by NATO air support, proceeded on a military offensive aimed at capturing new areas, including Gaddafi’s hometown of Sirte and the Capital city of Tripoli, and toppling the government. As the United Kingdom Foreign Affairs Committee found, ‘if the primary object of the coalition intervention was the urgent need to protect civilians in Benghazi, then this objective was

¹³⁷ On 19 April 2011, for example, the UK government announced that it would be sending senior military ‘advisers’ to assist the rebel fighters. This is an addition to Secret Service personnel already in the country. The following day, France and Italy also announced that they would be sending military advisers to the rebels <<http://www.bbc.co.uk/news/world-africa-13143988>>. Meanwhile, on 20 April 2011, the USA announced that it would be giving \$24 million worth of ‘non-lethal’ military equipment to the rebels <<http://www.guardian.co.uk/world/2011/apr/20/libya-rebels-us-military-equipment-non-lethal?INTCMP=SRCH>>.

¹³⁸ Mustafa Abdel Jalil of the rebels’ Transitional National Council (TNC) insisted that ‘The African Union initiative does not include the departure of Gaddafi and his sons from the Libyan political scene; therefore it is outdated’. <<http://www.bbc.co.uk/news/world-africa-13035501>>. See also <<http://www.bbc.co.uk/news/world-africa-13249923>>. For details of the AU proposal, see, A de Waal, ‘My Fears, Alas, Were Not Unfounded: Africa’s Response to the Libya Conflict’, in A Hehir and R Murray (n 108) 58-82, at 65-72.

¹³⁹ For a further discussion of this point, A Kuperman, ‘NATO’s Intervention in Libya: A Humanitarian Success?’ (n 129) 196-198.

¹⁴⁰ See S/Res/1973 (2011) para. 4.

achieved in less than 24 hours'.¹⁴¹ If however, the primary objective of the rebels was to oust the Libyan government by force, then the Libyan government was entitled to resist them with force.¹⁴²

Although the interveners had insisted that the provision of military assistance to the rebels was consistent with the Security Council Res. 1973, it is difficult to see how the encouragement and assistance of a fighting force and the elongation of a civil war could protect civilians and end their suffering. Diplomatic and political solutions were more likely to achieve that objective. By ruling out any discussion with the Libyan regime; by referring the regime to the prosecutor of the International Criminal Court for possible prosecution; by insisting that the Libyan regime quit as a pre-condition for discussion; and by re-enforcing the rebel fighters; the interveners made resolution of the conflict and the protection of civilians practically impossible.¹⁴³ Moreover, the failure to plan for a post-conflict Libya and the manner in which the intervening countries left the Libyan people to the fate once they had eliminated Gaddafi and his government, cast doubt on the claim that the intervention was to protect civilians. Although a responsibility to re-build included in the ICISS report¹⁴⁴ was not included in the eventual R2P doctrine, a commitment to post-intervention rebuilding would provide reasonable evidence that the intervention was truly humanitarian.

¹⁴¹ House of Commons Foreign Affairs Committee (n 113) para 44, 45.

¹⁴² For suggestions that the regime change was implicit in Security Council Res. 1973, see M Payandeh, 'The UN, Military Intervention, and Regime Change in Libya', (2012) 52 *Va. J. Int'l L* 355, 355 – 403; E Voeten, 'How Libya Did and Did Not Affect the Security Council Vote on Syria', *Washington Monthly* (2012) <<http://washingtonmonthly.com/2012/02/07/how-libya-did-and-did-not-affect-the-security-council-vote-on-syria/>>.

¹⁴³ Reports indicate that the fighting in Libya, especially in the city of Misrata, became more intense following the intervention leading to escalation in the number of casualties
<<http://www.guardian.co.uk/world/2011/apr/21/libyan-rebels-heavy-price-misrata?intcmp=239>>.

¹⁴⁴ ICISS Report (2001) para. 5.1.

Was the military intervention the last resort in the circumstances? The answer would appear to be a clear 'No' although Res. 1973 appeared to claim otherwise. The reality was that the Security Council did not take reasonable steps to resolve the situation by non-violent means before it authorized the use of force. Although Security Council Res. 1970 imposed sanctions, including arms embargo, assets freeze and travel ban on officials of the Libyan government,¹⁴⁵ these measures were not given any time to work before military force was authorised and commenced. The Council also made little attempt to contact the Libyan government with a view to ending the conflict peacefully. The president of the Security Council at the time and the Chinese representative, Li Baodong, had insisted that his country could not support the resolution because the Council did not respect the provisions of the UN Charter on the peaceful resolution of conflicts. China, he said, would not support 'the use of force when those means were not exhausted.'¹⁴⁶ Representatives of Brazil, Russia and Germany, who all abstained from the vote, also insisted that the Council did not make enough attempts to resolve the conflict peacefully.¹⁴⁷

In addition, the coalition made no reasonable attempt to resolve the situation peacefully or through negotiations and even blocked peace proposals made by the African Union.¹⁴⁸ While UK claimed to have had a plan to 'pause' the use of force and seek negotiated solution after securing Benghazi, it made little effort to encourage any negotiation in lieu of military force. This was in spite of the fact that former Prime Minister Tony Blair was in communication with Libyan authorities, and there were indications that Muammar Gaddafi might be willing

¹⁴⁵ S/Res/1970 (2011) paras. 9 – 21.

¹⁴⁶ See Security Council statement of 17/03/11 accompanying Res. 1973<

<http://www.un.org/News/Press/docs/2011/sc10200.doc.htm#Resolution>>.

¹⁴⁷ Ibid.

¹⁴⁸ For an account of this, see A de Waal, 'My Fears, Alas, Were Not Unfounded: Africa's Response to the Libya Conflict', in A Hehir and R Murray (n 108) 58-82, at 79.

to co-operate in bringing about a ceasefire. The United Kingdom Commons Foreign Affairs Committee confirmed these observations and added that the UK approach undermined the protection of civilians.¹⁴⁹ Clearly, the approach adopted by the Council and the intervening coalition seems to contravene a key principle of humanitarian intervention, which is that the use of military force should be a last resort.

Was the military intervention in Libya likely to achieve the objectives of protecting civilians without creating more and worse problems? Was it likely to promote international peace and security? As preparations for the intervention were being made, many including Gaddafi, had warned of the grave probability that it could seriously jeopardise the unity of the country, divide it along ethnic and sectional lines, foster a civil war, and create a haven for terrorists who would probably come from Iraq and Afghanistan. Given that Gaddafi had ruled Libya with a strong hand for 42 years and the relative weakness of the civil society and institutions in the country, it was easy to envision that a destabilization of the government and societal order could create a power vacuum that could precipitate more conflicts. Moreover, the ongoing experience of the failures of the states of Iraq and Afghanistan due to military interventions by the USA and its allies and the consequent explosion of terrorist groups and activities in those countries should have provided adequate warning that a similar fate could befall Libya; and so it did.

The NATO bombs and support for the rebel fighters led directly to the unnecessary death of many civilians and the destruction of much of Libyan public infrastructure,¹⁵⁰ and in the aftermath of the intervention, thousands of civilians have lost their lives in the ensuing tribal,

¹⁴⁹ See House of Commons Foreign Affairs Committee (n 117) (para 57).

¹⁵⁰ Human Rights Watch, *Unacknowledged Civilian Deaths: Civilian Casualties in NATO's Air Campaign in Libya* <<https://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya>>.

ethnic, religious and terrorist violence.¹⁵¹ In Tawergha, anti-Gaddafi rebels either killed or expelled an estimated 40,000 inhabitants and razed many of their homes in ethnically motivated and revenge violence.¹⁵² In fact, the country has descended into almost complete anarchy with no effective central government. Different militias control different parts of the country. The efforts of the UN to broker a settlement has proved futile. The country's economy is on its knees, with the production of oil – the country's main export and source of income – at a very low level. In the meantime, thousands of refugees have fled the country with a huge number drowning in the Mediterranean Sea in a desperate attempt to reach Europe. In a few weeks, the 'humanitarian' military intervention in Libya had turned a relatively stable and prosperous state into a theatre of civil war, terrorist militias and religious fanaticism.¹⁵³ As Seumas Milne has observed, 'If the purpose of western intervention in Libya's civil war was to "protect civilians" and save lives, it has been a catastrophic failure'.¹⁵⁴ Any threats posed to civilians by the Gaddafi regime seems relatively minor when juxtaposed with the threats, harm and danger they have faced following the intervention.¹⁵⁵ In effect, military intervention in Libya has created the real humanitarian emergency.¹⁵⁶

Most significantly, from an international law standpoint, the Libyan intervention has directly led to the deterioration of peace and security in the regions around the country, especially in

¹⁵¹ Amnesty International's report on Libya, 2012-2017 <<https://www.amnesty.org/en/>>. Human Rights Watch report on Libya <<https://www.hrw.org/middle-east/n-africa/libya>>.

¹⁵²<<https://humanrightsinvestigations.org/2013/03/20/human-rights-watch-report-tawergha/>>; <<http://www.bbc.co.uk/news/magazine-16051349>>.

¹⁵³ Before the intervention, Libya ranked first in Africa and among the top 52 countries in the world in GDP and Human Development indices. House of Commons Foreign Affairs Select Committee (n 117). See also G Chengu, Libya: From Africa's Richest State under Gaddafi, to Failed State after NATO Intervention', *Global Research* (14 September 2016); M Chussodovsky, 'Destroying a Country's Standard of Living: What Libya had Achieved, what has been Destroyed', *Global Research* (12 March 2013). Although the political protests and unrest that precipitated the intervention had arguably affected the stability of the country, it seems clear that government was on course to bring the situation under control before the intervention started.

¹⁵⁴ S Milne, If the Libyan war was about saving lives, it was a catastrophic failure', *The Guardian* (26 October 2011) <<https://www.theguardian.com/commentisfree/2011/oct/26/libya-war-saving-lives-catastrophic-failure>>.

¹⁵⁵ Ibid.

¹⁵⁶See Amnesty International's Report on Libya, 2016/16 <<https://www.amnesty.org/en/countries/middle-east-and-north-africa/libya/report-libya/>>.

relation to the growth of terror networks and incidence of terrorist attacks. As noted by the United Kingdom House of Commons Foreign Affairs Committee, the fall of Gaddafi has led to the proliferation of small arms and heavy artillery in North and West Africa from which terrorist groups, including Boko Haram in Nigeria, have profited.¹⁵⁷ The UN Panel of Experts on the impact of Res. 1973 echoes this finding. According to the panel, ‘arms originating from Libya have significantly reinforced the military capacity of terrorist groups operating in Algeria, Egypt, Mali and Tunisia’.¹⁵⁸ In addition, terrorist groups, especially the so-called Islamic State (ISIL), have exploited the power vacuum in Libya to establish footholds in the country where they now train suicide bombers and jihadists.¹⁵⁹ Since these grim outcomes, which led the then president of the USA to describe the situation in Libya as a ‘shit show’,¹⁶⁰ were predictable before the intervention,¹⁶¹ it was irresponsible to embark on it without proper assessment or any plan on how to deal with the aftermath.

Was the intervention consistent with the purposes and principles of the UN Charter concerning the pacific resolution of disputes and the avoidance of actions that would endanger international peace and security? It is clear that the eager resort to military force instead of seeking to resolve the conflict peacefully seriously exacerbated and prolonged it. Before the military intervention began, the forces of the Libyan government had taken control of most of the rebel held areas and were closing in on the last rebel stronghold of Benghazi.

¹⁵⁷ House of Commons Foreign Affairs (n 117) (para 85).

¹⁵⁸ United Nations, Final Report of the Panel of Experts Established Pursuant to Resolution 1973 (2011) (paras 200–201)

¹⁵⁹ <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_128.pdf>. In the case of Egypt, an anti-aircraft gun from Libya has been used to shoot down an Egyptian army helicopter in January 2014: ‘Isis in Libya: How Muammar Gaddafi’s Anti-aircraft Missiles are Falling into the Jihadists’ Hands’, *The Independent* (11 March 2016); A Kuperman, ‘NATO’s Intervention in Libya: A Humanitarian Success?’ In A Hehir and R Murray (n 108) 210-213.

¹⁵⁹ The Foreign Affairs Select Committee Report 2016 (n 117) (paras 112 – 117).

¹⁶⁰ <<http://www.independent.co.uk/news/uk/politics/barack-obama-says-david-cameron-allowed-libya-to-become-a-s-show-a6923976.html>>.

¹⁶¹ For an account of warnings about the probable negative regional and international consequences of the intervention, see, A de Waal, ‘My Fears, Alas, Were Not Unfounded: Africa’s Response to the Libya Conflict’, in A Hehir and R Murray (n 108) 58-82, at 58, 59.

Benghazi would have fallen relatively easily but for the intervention. In fact, the imminent fall of Benghazi to government forces was one of the main factors that hastened the adoption of the Security Council Res. 1973. The capture of Benghazi by the government forces would have meant that efforts of the international community would have been concentrated on the humanitarian needs of the civilians caught up in the fighting. Instead, the intervention, coupled with the provision of air cover and military assistance to the rebel fighters, enabled the conflict to continue and escalate¹⁶² with the consequent and substantial additional losses of life and the creation of the ‘shit show’ that is today’s Libya. Thus, rather than enabling a peaceful settlement of the dispute and promoting international peace and security, the intervention predictably achieved the opposite.

Did the military action in Libya satisfy the requirement of proportionality? Pursuant to the apparent objective of the intervention – the creation of a no-fly zone – NATO destroyed the Libyan government’s fighter jets, anti-aircraft guns, airports and airstrips, and launching pads, in the ostensible enforcement of the No Fly Zone. However, having crippled Libyan air capabilities and defences, NATO proceeded to target telecommunication installations, command and control facilities, government troops, and Gaddafi’s compound and his home town of Sirte even though no fighting was going on in those places.¹⁶³ Bombardment of non-military facilities, which are not necessary to achieve the aims of humanitarian intervention, cannot be a proportionate use of force. It contravenes the International Humanitarian Law principle of distinction and may amount to a war crime. As the United Kingdom Commons Foreign Affairs Committee observed, the bombing campaign in Libya imposed a ‘no-drive zone’ rather than the no-fly zone envisaged by Security Council Res. 1973 and enabled the coalition to assume the ‘authority to attack the entire Libyan Government command and communications

¹⁶² See A Kuperman, ‘NATO’s Intervention in Libya: A Humanitarian Success?’ (n 108) 198-207.

¹⁶³ Gaddafi’s youngest son and three of his grandsons were reported on 30/04/11 to have been killed in one such attack on Gaddafi’s compound. Gaddafi was reportedly in the building when the bombing took place.

network'.¹⁶⁴ The deployment by the USA of unmanned predator drones already implicated in large-scale killing of civilians in Pakistan and Afghanistan re-enforces the point that the use of force in the intervention was not proportionate.¹⁶⁵

The consequences of the absence of UN control and supervision of the Libya mission was obvious immediately the intervention began. Whereas Resolution 1973 aimed to protect civilians through the imposition of a no-fly zone and other 'necessary measures', the interveners quickly re-defined the mission to include regime change and the provision of air-support, military facilities and 'advisers' to rebels fighting against the government. Effectively, the UN unwittingly took part in a civil war on the side of the rebels. Although the intervention apparently went beyond the mandate of Resolution 1973, the UN and the Security Council appeared unable to do anything about it. Indeed, the 2011 Libya intervention is a study as to when and how not to undertake humanitarian military intervention. Instead of protecting civilians, the intervention multiplied the threat and danger they faced, as many have lost their lives, been expelled from their homes, or become refugees in other countries. Instead of restoring and maintaining international peace and security, it seriously breached it; and instead of promoting friendly relations among nations, it damaged it and fractured further the already fractious relationship between the permanent members of the Security Council.¹⁶⁶ The intervention also undermined the confidence of some other members of the council and many in the world community in the ability of the Council to use

¹⁶⁴ See House of Commons Foreign Affairs Committee (n 117) (para 24).

¹⁶⁵ For a report of USA drone strikes in Afghanistan, Pakistan, Somalia and Yemen, see <<https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data>>.

¹⁶⁶ Russia and China believe the USA, France and Britain procured the Libya intervention using the false pretense of humanitarianism when their motive was regime change, and that they exceeded the mandate contained in Res. 1973, see e.g., C Stea, 'World War and the Russia-China Veto: Towards a Break Point at the UN Security Council?' <<https://www.globalresearch.ca/world-war-and-the-russia-china-veto-towards-a-break-point-at-the-un-security-council/29141>>.

<<https://www.globalresearch.ca/world-war-and-the-russia-china-veto-towards-a-break-point-at-the-un-security-council/29141>>

force fairly and justly for humanitarian purposes.¹⁶⁷ In sum, and as observed by Alan Kuperman, ‘NATO’s intervention in Libya has been a disaster. If it is a “model intervention”, as US officials claim, it is a model of failure’.¹⁶⁸ This notwithstanding, many had called on the Security Council to undertake the Libya-style intervention in Syria as the conflict in that country and the accompanying humanitarian crisis unfolded, a call that appears to have been negatively affected by the intervention and events in Libya.¹⁶⁹

The Situation in Syria

The Syrian conflict began in March 2011 when mass demonstrations started in apparent response to the government’s alleged high-handed reaction against 15 teenagers who painted anti-government and revolutionary graffiti on a school wall. This was in the wake of the so-called Arab Spring in some neighbouring countries.¹⁷⁰ However, it soon became obvious that other forces were at play as the demonstrations, even if not originally violent, quickly morphed into armed opposition against the government.¹⁷¹ In fact, according to a USA Defence Intelligence Agency (DIA) report of August 2012, ‘the Salafist, the Muslim Brotherhood and AQI [Al Qaeda in Iraq, later ISIS] are the major forces driving the

¹⁶⁷ KR Nossal, ‘The Use – and Misuse – of R2P: The Case of Canada’, in A Hehir and R Murray (eds) (n 108) 110 – 129, at 125.

¹⁶⁸ A Kuperman, ‘NATO’s Intervention in Libya: A Humanitarian Success?’ (n 108) 213.

¹⁶⁹ S Horton, ‘Up in smoke: did the Idea of a Legal War Die along with Muammar al-Qaddafi?’ *Foreign Policy* (2011) <<http://foreignpolicy.com/2011/10/25/up-in-smoke/>>.

¹⁷⁰ ‘Arab Spring’ was the term given by the western media to the anti-government uprisings that swept through Tunisia, Egypt, Bahrain and Libya between late 2010 and early 2011 <<https://www.thoughtco.com/definition-of-the-arab-spring-2353029>>.

¹⁷¹ There are significant doubts that the demonstrations had begun peacefully and that government forces had shot and killed civilians. There is evidence that armed Islamic insurgents instigated or initiated the killings by shooting and killing civilians and State security operatives. See <<http://www.globalresearch.ca/daraa-2011-syrias-islamist-insurrection-in-disguise/5460547>>. There was also evidence of organised efforts to misinform the world about the nature of the protest and paint the government as the aggressor even though, at least some of, the protesters appeared armed from the beginning, and many of the victims were insurgents, as well as soldiers and civilians loyal to the Syrian government. For an account of these, see C Foty (n 57) at 111-116.

insurgency in Syria ... AQI supported the Syrian Opposition from the beginning, both ideologically and through the media.¹⁷²

Within months, the conflict had become a full-fledged civil war between the country's armed forces and armed rebels spearheaded by the Free Syrian Army (FSA) and armed Islamist groups with the help of some foreign powers, most notably, the USA.¹⁷³ Soon different regional and foreign powers openly joined the fray so that Syria became a battleground for different trans-national, geo-political, economic and sectarian interests with the common goal of toppling the Syrian regime. While different sects of Islam vie for supremacy and control of the country, terrorist organizations like Al Qaeda, Al Nusra Front¹⁷⁴ and the Islamic State¹⁷⁵ seek to impose their fundamentalist ideology on the country and establish a religious hegemony in the region.¹⁷⁶ Meanwhile, the Kurdish Popular Protection Units (YPG) sees in the conflict an opportunity to fight for political autonomy or independence for the Kurdish people of Syria – a situation with ramifications in Iraq and Turkey who also have significant Kurdish populations agitating for an independent Kurdish homeland.¹⁷⁷

The coalition of USA, Saudi Arabia, Turkey and Qatar, intervened in the conflict in support of different armed groups fighting against the government. The USA alleges that the Syrian president is killing his own people, and therefore needs to step aside in order for the people to be safe. It also rationalized its military involvement in the country on the imperative to fight terrorist groups, especially the ISIS. It insists that president's Bashar Al Assad's vacation of

¹⁷²<<https://levantreport.com/2015/05/19/2012-defense-intelligence-agency-document-west-will-facilitate-rise-of-islamic-state-in-order-to-isolate-the-syrian-regime/>>.

¹⁷³<<https://levantreport.com/2015/05/19/2012-defense-intelligence-agency-document-west-will-facilitate-rise-of-islamic-state-in-order-to-isolate-the-syrian-regime/>>.

¹⁷⁴ Later renamed Jabhat Fateh al-Sham.

¹⁷⁵ Also referred to as ISIS, ISIL or Da'esh.

¹⁷⁶ (26 June 2017) < <http://www.bbc.co.uk/news/world-middle-east-39528673>>.

¹⁷⁷ <http://www.ecfr.eu/article/commentary_syria_the_view_from_iraq136>.

his office must precede any negotiated settlement of the crisis and would not co-operate with the Syrian regime in its own fight against the militant and terrorist groups fighting against it. The USA bombed Syrian government forces¹⁷⁸ and shot down its military planes and drones in purported self-defence for entering the vicinity of its self-declared ‘de-confliction’ zone.¹⁷⁹ In addition, it launched a cruise missile attack on a Syrian military base following allegations of the use of chemical weapons by the Syrian government.¹⁸⁰

Apart from the USA, Israel has also launched missile strikes on Syria in an attempt to get at its long-standing military adversary, Hezbollah.¹⁸¹ The United Kingdom, France, Qatar and Jordan, who joined the USA-led coalition, have provided varying degrees of support for the so-called ‘moderate’ rebels and militants.¹⁸² Given the absence of any UN authorization for external military intervention and the different and often parochial and self-serving motivations of the interveners, it seems clear that these unilateral interventions and the provision of military support to the rebel fighters cannot be justified as lawful humanitarian interventions in international law.¹⁸³

Russia formally joined the Syrian conflict in September 2015 at the invitation of the Syrian government. Although its declared objective was helping the Syrian government to defeat the

¹⁷⁸ Foreign Policy (18 May 2017) <<http://foreignpolicy.com/2017/05/18/u-s-bombs-syrian-regime-forces-for-first-time/>>.

¹⁷⁹ The New York Times of 18 June 2017 <<https://www.nytimes.com/2017/06/18/world/middleeast/iran-syria-missile-launch-islamic-state.html>, accessed on 22 June 2017>.

¹⁸⁰ <<https://www.theguardian.com/world/2017/apr/06/trump-syria-missiles-assad-chemical-weapons>>

¹⁸¹ <<http://www.bbc.co.uk/news/world-middle-east-39728682>>;

<<https://www.theguardian.com/world/2017/sep/07/israel-airstrike-syria-chemical-weapons-facility>>.

¹⁸² <<https://www.theguardian.com/world/ng-interactive/2015/oct/09/who-backs-whom-in-the-syrian-conflict>>.

¹⁸³ UN Charter 1945, Articles 2(1) and 2(4); A/Res/ (2625) (XXV) (1970) Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations. Arguably, the foreign-backed war against the Syrian government entitles Syria to invoke its right of self-defence in customary international law and under the UN Charter, Article 51. The USA, France and UK also invoke the right to defend themselves against ISIS and other terrorist groups who organize or inspire terror attacks in their countries, even though they refuse to co-operate with the Syrian government and its allies who are fighting the same terrorists. However, whether or not the right of self-defence avails them in the present circumstances is beyond the scope of this article.

terrorists, rebels and foreign armed forces warring against it, Russia also appears interested in preventing the fall of the government of Syria – a regional ally. Hezbollah, the Lebanese militant organization and an ally of President Assad, as well as Iran, also support the forces of the Syrian government. Irrespective of one's views about the Syrian government, the involvement of these parties would seem legal under article 51 of the UN Charter's and under customary international law as self-defence. However, their involvement is not under the rubric of humanitarian intervention, and begs the question whether the conduct of the Syrian government created a humanitarian situation that would warrant intervention on humanitarian grounds.

Many have called for such an intervention and the provision of financial and military support for the 'moderate' rebels fighting the government. Some of the most notable advocates are the former British Prime Minister Tony Blair, and US senator John McCain, two of the chief protagonists of the disastrous military intervention in Iraq in 2003,¹⁸⁴ and Nicolas Sarkozy, the former French president and chief architect of the ill-fated Libya intervention of 2011.¹⁸⁵ Earlier, when President Sarkozy visited Tripoli following the killing of Muammar Gaddafi, he had expressed the desire that a Libya-style intervention would happen in Syria.¹⁸⁶

Other advocates of humanitarian military intervention in Syria include Anders Rasmussen, the Secretary-General of NATO;¹⁸⁷ Ahmet Davutoglu, the Turkish Foreign Minister;¹⁸⁸ US senator Lindsey Graham;¹⁸⁹ the Washington Post;¹⁹⁰ many officials of the US State

¹⁸⁴<<http://www.telegraph.co.uk/news/worldnews/middleeast/syria/10165984/Tony-Blair-calls-for-intervention-in-Syria.html>>;<http://www.bbc.co.uk/news/av/uk-19908995/john-mccain-calls-for-greater-intervention>>.

¹⁸⁵<<https://www.csmonitor.com/World/Europe/2012/0809/Sarkozy-ignites-furor-with-push-for-foreign-intervention-in-Syria>>.

¹⁸⁶ <<https://www.theguardian.com/world/2011/sep/15/cameron-sarkozy-libya-leader-tripoli>>.

¹⁸⁷ <<http://www.dw.com/en/nato-chief-calls-for-intervention-in-syria/a-17061245>>.

¹⁸⁸ <<https://www.theguardian.com/world/2012/oct/19/turkey-britain-us-intervene-syria2017>>.

¹⁸⁹ <<http://foreignpolicy.com/2013/03/19/graham-calls-for-american-boots-on-the-ground-in-syria/>>.

department,¹⁹¹ former UK Prime Minister, David Cameron¹⁹² and many members of the UK Parliament.¹⁹³ Also advocating military intervention on humanitarian grounds is the government of Qatar, as well as the Gulf Co-operation Council¹⁹⁴ and some international lawyers.¹⁹⁵ Although there have been many unanimous UNSC resolutions on Syria, eight resolutions critical of the Syrian government and which call for the end of the fighting or the imposition of sanctions on the government or its officials failed to be passed. The resolutions failed because of the refusal of Russia and/or China to support them.¹⁹⁶ They accuse the sponsors of the resolutions of insincerity and bias in that they only targeted and condemned the actions of the Syrian government while ignoring the wrongdoings of the rebel and opposition forces. They also accuse the sponsors of ignoring their suggestions and using the resolutions as a cloak or stratagem to engineer regime change in Syria.¹⁹⁷

It is evident that the Syrian war has given rise to a terrible humanitarian crisis. According to Filippo Grandi, the UNHCR High Commissioner, ‘Syria is the biggest humanitarian and refugee crisis of our time, a continuing cause of suffering for millions which should be garnering a groundswell of support around the world.’¹⁹⁸ As at June 2017, about 500, 000 civilians have

¹⁹⁰ <https://www.washingtonpost.com/opinions/the-bloody-second-anniversary-of-syrias-civil-war/2013/03/14/e5c96dc4-8bf9-11e2-b63f-f53fb9f2fcb4_story.html?utm_term=.e55d84854ee9>.

¹⁹¹ <<http://www.pbs.org/newshour/bb/state-department-officials-push-for-military-intervention-in-syria/>>.

¹⁹² <<https://www.theguardian.com/politics/2015/nov/26/david-cameron-publishes-case-for-syria-airstrikes>>.

¹⁹³ <<https://www.spectator.co.uk/2016/10/syria-and-the-cruel-farce-of-humanitarian-intervention/#>>.

¹⁹⁴ <<http://ny.mission.qa/en/news/detail/2016/11/16/qatar-calls-on-security-council-to-immediately-intervene-to-protect-civilians-in-aleppo>>; <<http://www.dw.com/en/gulf-cooperation-council-calls-on-un-to-intervene-in-syria/a-35941314>>.

¹⁹⁵ See e.g., PR Williams, JT Ulbrick and J Worboys, ‘Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis’ (2012) 45 *Case W. Res. J. Int’l Law* 473; AN Guoira, ‘Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration’ (2011) 44 *Case W. Res. J. Int’l L*, 251; E Hannon and H Russel, ‘From Peaceful Demonstrations to Armed Conflict: Considering Humanitarian Intervention in the Case of Syria’ (Al-Marsad 2013)

< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2212711>; E Engle, ‘Humanitarian Intervention and Syria: Russia, the United States, and International Law’, (2012) 18 *Barry Law Review* 1; S Adams, ‘Failure to Protect: Syria and the UN Security Council’, *Global Centre for the Responsibility to Protect Occasional Paper Series*, No. 5 (March 2015).

¹⁹⁶ UNSC Draft Res. S/2011/612; S/2012/77; S/2012/538; S/2014/348; S/2016/846; S/2016/1026; S/2017/172; SC/12791/12 April 2017.

¹⁹⁷ <<https://www.ft.com/content/2f488b00-ef71-11e0-941e-00144feab49a?mhq5j=e1>>.

¹⁹⁸ <<http://www.unhcr.org/uk/syria-emergency.html>, accessed 21 June 2017>.

been killed. More than 5 million have fled the country as refugees. While most of the refugees have gone into neighbouring countries, especially Turkey, Iran, Lebanon, Jordan, Iraq and Egypt, many have travelled to Europe.¹⁹⁹ The exodus of refugees from Syria has led to serious political and social tensions in the host countries, not least in Europe where it has become the subject of much political debate and acrimony. It has also led to the growth and exportation of terror around the world by lieutenants and sympathizers of different terrorist groups, especially the so-called 'Islamic State'. In addition to the refugee crisis, the Syrian conflict has internally displaced over 6 million people, while much of the country's infrastructure now lay in ruins.²⁰⁰ In 2016, the UN estimated that it would require about \$3.2 billion to provide humanitarian assistance and relief to about more than 13 million people affected by the conflict.²⁰¹ With weapons and money flowing to the warring factions from foreign supporters and the proceeds of illicit oil sales, and with foreign powers effectively fighting proxy wars in the country, the Syrian conflict in all its complexities continues despite efforts by some parties, including the UN, to negotiate an end to it.

The Syrian situation provides another clear and strong evidence against unrestrained military intervention on humanitarian grounds. From the very beginning, the states championing intervention had demonstrably parochial agenda but sought the legitimizing imprimatur of the Security Council to accomplish them. The actions of the US-led coalition in support of rebel fighters and wittingly and unwittingly, Al Nusra Front, ISIS and other terrorist militias;²⁰² the

¹⁹⁹ Ibid.

²⁰⁰ <<http://www.unhcr.org/uk/syria-emergency.html><http://www.bbc.co.uk/news/world-middle-east-26116868>>;
<<http://www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>;
<http://www.unhcr.org/uk/syria-emergency.html>>.

²⁰¹ Ibid.

²⁰² It is on record that many of the weapons including guns, tanks and armoured vehicles emanated from the USA or its allies and somehow ended in the hands of the terrorists. See
<<http://edition.cnn.com/2015/12/08/politics/amnesty-international-isis-weapons-u-s-/index.htm>>l;
<<http://uk.businessinsider.com/the-us-lost-track-1-billion-arms-iraq-they-could-end-up-isis-hands-2017-5?r=US&IR=T>>.

determined support by Russia, Iran and Hezbollah of the Syrian regime; the flip-flop of the Turkish government; and the inclinations of the Kurdish forces bring into sharp focus the agenda and motivations of the actors. The intervention and involvement of these powers in Syria mean that the conflict has lasted much longer than it would have otherwise, and caused much more loss of lives and destruction.

Moreover, it is clear that the Syrian rebellion, even if it had begun as a pro-democracy demonstration, quickly became a civil war spearheaded by heavily armed factions that are intent on forcibly bringing down the government. Although the Syrian government and its supporters have apparently used excessive force or committed international crimes in dealing with the armed rebellion,²⁰³ it would be more appropriate to assess and deal with this from the standpoint of international criminal law rather than military intervention. Humanitarian military intervention or R2P is not an excuse for engagement in a civil war on the side of any of the warring parties, even if it warrants humanitarian assistance. As Simon Jenkins has aptly observed:

All nations and peoples have a humanitarian obligation to aid those afflicted by war. That obligation is to relieve suffering, not add to it. It is to aid those trying to comfort war's victims and offer sanctuary to its refugees. It is not to take sides, guns blazing, in other people's civil wars.²⁰⁴

Military intervention in Syria as many had called for would also likely have failed the last resort test. At the start of conflict, the Syrian government had demonstrated a willingness to

It is also evident that there is no clear distinction between many of the 'moderate' rebels and confirmed terrorists. <<http://www.globalresearch.ca/disturbing-reality-in-syria-moderate-and-not-moderate-terrorists-whats-the-difference/5529241>>; <<https://www.activistpost.com/2016/05/whats-the-big-difference-between-natos-moderates-and-extremists-in-syria.html>>.

²⁰³ See the report of the Independent International Commission of Inquiry on the Syrian Arab Republic (13 March 2017)

< <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/IndependentInternationalCommission.aspx>>

²⁰⁴ S Jenkins, 'Syria and the Cruel Farce of "Humanitarian Intervention"' (The Spectator 2016)

<<https://www.spectator.co.uk/2016/10/syria-and-the-cruel-farce-of-humanitarian-intervention/#>>.

end the conflict. It had quickly removed the governor of Daraa Province and ordered the release of the arrested teenagers. It had also initiated political reforms, including the registration of political parties and an end to emergency rule that had been on for 48 years. In addition, the regime agreed to have the country's weapons of mass destruction decommissioned and removed by the UN and seemed willing to participate in peace initiatives brokered respectively by the UN, Russia, Iran and Turkey. However, the rebels and the foreign powers not only refused to acknowledge these moves, but refused to negotiate with the government and insisted on the departure of the Syria President as a pre-condition for any peace talk or settlement.²⁰⁵ This attitude would be inimical to lawful humanitarian military intervention since reasonable attempts at peaceful resolution must precede the use of military force.

Furthermore, since the UN does not have its own standing army, it would invariably have relied on capable and willing states, which would almost certainly rely on aerial and missile bombardments that would likely occasion heavy civilian deaths, great destruction, and suffering as evident from the ongoing fighting. This would mean that the intervention could not meet the proportionality requirement. The current state of Syria after years of bombardment and the recent experience of wars in Afghanistan, Iraq, and Libya amply bear out this conclusion.

Finally, it is unlikely that military intervention in Syria by the Security Council would have had a reasonable prospect of success in terms of stopping the killings and alleviating the suffering of civilians. The intervening States, even under the aegis of the Security Council would have pursued their own agenda in Syria. The on-going unilateral interventions in the

²⁰⁵<<http://www.dailymail.co.uk/wires/afp/article-3354786/Syria-opposition-groups-say-ready-talks-Assad.html>>;

<<http://www.the-daily-record.com/news/20171127/latest-renewed-syrian-opposition-insists-assad-must-go>>.

country prove the point: while States intent on regime change would not stop fighting until they accomplish their objectives, those intent on preserving the government and territorial integrity of Syria would continue to resist them. In the midst of this type of power play, it is reasonable to surmise that ending the conflict and protecting civilians would not be the immediate concern of many of the intervening powers. In fact, the rebellion and civil war in Syria would probably have ended long ago were it not for the military, financial and logistic assistance provided to the rebels by foreign powers. In addition, and just as in Libya, the presence and involvement of terrorist militias in the war have resulted in greater harm to civilians and a breach of international peace and security.²⁰⁶ The terrible civil war in Syria, with the attendant humanitarian crisis, calls for concerted and genuine international efforts for peace. It does not call for further military intervention.

Conclusion

The international community rightly agrees on the need for military intervention to save people suffering serious violations in the hands of their own governments and in the authority of the Security Council, in appropriate circumstances, to undertake such interventions. There is however, no such unity of understanding or purpose when it comes to the precise parameters or limits of the Council's power or the kind of situation that should engage it. This paper has attempted to articulate the sources and extent of the powers of military intervention for humanitarian purposes as they apply to the Security Council; and using the intervention in Libya and the mire in Syria as case studies, has highlighted the dangers of straying beyond them.

²⁰⁶ See generally, C Carpenter, 'Don't Call this a Humanitarian Intervention', *Foreign Policy* (30 August 2013) <<http://foreignpolicy.com/2013/08/30/dont-call-this-a-humanitarian-intervention/>>.

Although the Security Council has authority to undertake humanitarian military intervention by virtue of certain provisions of the UN Charter and the doctrine of R2P, these also provide guidelines on the limits of this authority. Not only does the Council not have the power to contravene these provisions and principles, any contravention would render its intervention *ultra vires*. Accordingly, military intervention by the Security Council on humanitarian grounds can only lawfully arise in situations involving war crime, crimes against humanity or aggression, or otherwise negatively affecting or threatening international peace and security.

In addition, the authority of the Security Council to undertake military intervention on humanitarian grounds is necessarily subject to the principles and purposes of the UN Charter, which include the elimination of the scourge of war, the promotion of friendly and peaceful relations and cooperation among nations, the peaceful resolution of conflicts, and the protection of the rights of people. The Security Council is not entitled to embark on military interventions that would contravene these principles and purposes, even under the cloak of humanitarianism. Accordingly, any humanitarian intervention must not only be legally and factually justified, it must be a last resort in circumstances where it is likely to achieve the intended humanitarian goals.

The Council is also not entitled to ride roughshod on the overarching principles of international humanitarian law, notably distinction, proportionality and military necessity. To hold otherwise would be to betray the UN Charter and the people of the world who put their hope in the UN system. It would empower the putative custodians of international law as its abusers, and overturn the foundations of international law and the international legal order. The heavy loss of life and chaos in Libya in the course and wake of the NATO-led intervention and the ongoing destruction of Syria in unbridled civil and proxy war, provide

poignant reminders of the need to keep the use of military force for humanitarian purposes within tight limits and control as envisaged by the UN Charter.