

Security Council, the use of force and regime change: Libya and Cote d'Ivoire

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1 Statement of the issues

Between February and March 2011, the United Nations Security Council adopted a series of resolutions with potentially far reaching implications for international law relating to the use of force. The Council adopted Resolution 1970 (2011) and 1973 (2011), with respect to the situation in Libya on 26 February and 17 March respectively, and Resolution 1975 (2011) with respect to the situation in Cote d'Ivoire on 30 March. The operations in Libya to implement Resolution 1973 were led by the North Atlantic Treaty Organisation (NATO) while the operations in Cote d'Ivoire to implement Resolution 1975 were led by UN Operations in Cote d'Ivoire (UNOCI) assisted by French forces.¹

Due to political dynamics on the Security Council, Council resort to the use of force is notoriously rare.² This is not to say that the Council has never authorised force prior to 2011. Prior to the Libya and Cote d'Ivoire resolutions, the Security Council authorised force in several cases. The Council, for example, famously authorised the use of force against Iraq in 1990 after Iraq invaded Kuwait.³ Prior to the resolution on Iraq the Council authorised the use

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¹See, eg, Schmitt 'Daunting task for NATO in Libya as strikes intensify' available at <http://www.nytimes.com/2011/05/25/world/africa/25nato.html?pagewanted=all> (accessed 8 January 2013); Chivers 'NATO says it is stepping attacks on Libya targets' available at <http://www.nytimes.com/2011/04/27/world/middleeast/27strategy.html> (accessed 8 August 2013); Birnbaum 'France sent arms to Libyan rebels' available at http://www.washingtonpost.com/world/france-sent-arms-to-Libyan-rebels/2011/06/29/AGcBxkqH_story.html (accessed 8 August 2013).

²See, eg, Weiss, Forsythe, Coate and Pease *The United Nations and changing world politics* (2010) at 24; Malone 'Security Council' in Weiss and Daws (eds) *The Oxford handbook on the United Nations* (2007) at 117.

³UN Security Council Resolution 678(1990)

of force against the Democratic People's Republic of Korea in response to the latter's invasion of the Republic of Korea, while subsequent to the Iraq resolution, the Security Council authorised the use of force in Somalia.⁴ Additionally, there has been a case of use of force authorised by the Council *ex post facto* in the case of Kosovo,⁵ as well as the controversial case of the US invasion of Iraq which the US (and the UK) argued had been authorised by the Council while for most, the invasion was unauthorised.⁶

Thus, while the Security Council has been reluctant to authorise the use of force, it has done so in the past. However, the authorisation of the use of force in Libya and Cote d'Ivoire created a buzz and talk about a new era in Security Council practice. With the operations having been completed and the dust settled, the purpose of this paper is to assess what, if anything, was new about these resolutions. If, as is shown above, the use of force authorisation is not unprecedented in Security Council practice the novelty of the Libya and Cote d'Ivoire resolutions cannot lie in the mere authorisation of the use of force. The relative speed with which the resolutions were adopted, while relevant from the perspective of political theory, can also not be sufficient to explain the international law significance of the Libya/Cote d'Ivoire resolutions.

Could it be that all the cacophony of views, positive and negative, and excitement about Security Council action in Libya and Cote d'Ivoire were, from an international law perspective at least, much ado about nothing? The conclusion reached in this paper is that authorisation of the use of force in Libya and Cote d'Ivoire pursuant to Security Council authorisation could, in fact, have far reaching implications for the normative development of international law, particularly in so far as it relates to the ever-growing powers of the Council.⁷ It is argued that the essential element that makes the resolutions under consideration significantly different from previous Security Council resolutions authorising the use of force is the legitimacy of regime change implied by the respective resolutions.

I begin in the next section by describing the background under which the resolutions were adopted. This background includes a discussion of the powers of the Security Council to authorise the use of force as well as the international

⁴See UN Security Council Resolution 84(1950) for authorisation of force against North Korea and UN Security Council Resolution 794(1992) for authorisation of the use of force in Somalia.

⁵UN Security Council Resolution 1244(1999)

⁶Roberts 'Law and the use of force after Iraq' (2003) 45 *Survival* at 31; Wheatley 'The Security Council, democratic legitimacy and regime change in Iraq' (2006) 17 *European Journal of International Law* at 531.

⁷For a contrary view see Chesterman 'Leading from behind: The responsibility to protect, the Obama doctrine, and humanitarian intervention' (2011) 25 *Ethics And International Affairs* at 279. At several places in his contribution, Chesterman states that the authorisation in Libya is not, from a legal stand point, 'groundbreaking'.

law climate under which the resolutions were adopted. I then, in Section 3, give an outline and analysis of the relevant provisions of the resolutions under which the operations in Libya and Cote d'Ivoire were carried out. In Section 4 I consider the implications of the resolutions in the light of their implementation. Some concluding observations are offered in Section 5.

2 Background

2.1 *The Powers of the Security Council to authorise the use of force*

The Security Council power to authorise the use of force for the purposes of maintaining or restoring international peace and security is beyond question.⁸ In order to exercise its powers, the Council has been granted a wide margin to determine the existence of a threat to the peace, breach of the peace or act of aggression.⁹ Once the Council has made a determination that there exists a threat to international peace and security, the Council may decide what measures to use, including the use of force, in order to restore peace and security.¹⁰

The discretion of the Security Council, with respect to the determination of both the existence of a threat to international peace and security and the measures necessary to restore or maintain peace, is extremely broad.¹¹ Nonetheless, there is a significant body of literature supporting the notion that, as a matter of law, there are limits to the powers of the Council.¹² It is unnecessary to describe the limits on the power of the Council, other than to say it is generally accepted that the Council's discretion is subject to the provisions of the Charter, in particular the purposes and principles of the UN, and *ius cogens*.¹³ For the purposes of this article it is necessary only to consider whether there are any parameters circumscribing the exercise of power once a legitimate decision that there exists a threat to international peace and that force is necessary to restore or maintain peace and security has been made by the Council.

⁸Article 24 of the UN Charter

⁹Article 39 of the UN Charter. On precisely what the terms mean and how the Council has used them see Frowein 'Chapter VII action with respect to threats to the peace, breaches of the peace, and acts of aggression: Article 39' in Simma *The Charter Of The United Nations: A commentary* (1994).

¹⁰See arts 40, 41 and 42.

¹¹See generally De Wet *The chapter VII powers of the United Nations Security Council* (2004). See also Orakhelashvili *Legal aspects of global and regional international security – the institutional background* (2000) at 20 (on file with author).

¹²De Wet n 11 above. I have, in an earlier publication conceded that while as a matter of law there are certain limitations to the power of the Council, as a matter of political reality, the powers of the Council may be limitless. See Tladi 'Reflections on the Rule of Law in international law: The Security Council, international law and the limits of power' (2006) 31 *SAYIL* 231 at 233. See also Tladi and Taylor 'On the Al Qaida/Taliban sanctions regime: Due process and sunsets' (2011) 10 *Chinese Jnl Of Int'l Law* at 771.

¹³De Wet n 11 above at 178.

The first point to make is that any Security Council decision to use force must be for the maintenance or restoration of international peace and security and must be consistent with the purposes and principles of the Charter. The authority to use of force cannot be for another purpose, for example, a political or economic purpose. Second, from the text of article 42, non-military measures must be inadequate for restoration or maintenance peace before the use of force is authorised.¹⁴

The question of who implements a decision of the Council for the use of force has been the subject of some discussion by a number of academics.¹⁵ In article 43 of the Charter, Member States of the UN commit to contributing armed forces at the call of the Security Council in order to implement any article 42 measures decided upon by the Council. The commitment to provide armed forces, however, is subject to the conclusion of special agreements.¹⁶ To date Member States have not made available armed forces to the United Nations to implement article 42 decisions.¹⁷ Instead, to date the Council has relied on states, individually or collectively, to implement article 42 decisions – so-called coalitions of the willing and able. For example, with respect to the authorisation of the use of force against North Korea, the UN authorised the ‘unified command’ made up several states including the United States, the United Kingdom and France to use force against North Korea.¹⁸

The reliance on these coalitions of the willing and able to use force at the behest of the Security Council is not unforeseen by the Charter. Article 48 of the Charter provides that any action necessary to implement decisions of the Council ‘shall be taken by all Members of the Council *or some of them, as the Security Council may determine*’.¹⁹ However, as is clear from this provision, there is still a requirement for the Council to ‘determine’. Questions about the legitimacy of the use of force by states authorised by the Council, but not operating under the command and control of the Council, have thus been asked. Frowein, for example, adopts the view that military enforcement action under chapter VII of the Charter ‘is action *by* and under the control of the’

¹⁴See also Frowein n 9 above at 631.

¹⁵De Wet n 11 above at 257; Orakhelashvili n 11 above at 39; White and Ülgen ‘The Security Council and the demilitarised option: Constitutionality and function’(1997) 44 *Netherlands International Law Review* 378, 381. Blokker ‘Is the authorization authorized? Powers and practice of the UN Security Council to authorize the use of force by “coalitions of the able and willing”’ (2000) 11 *European Journal of International Law* 541.

¹⁶Article 42(1) of the Charter.

¹⁷Orakhelashvili n 11 above at 39.

¹⁸UN Security Council Resolution 84(1950) par 5. For the use of force authorised against Iraq during the Kuwait invasion as well as the use of force authorised in Somalia, it was principally the US the led operations. The retroactive authorisation in Kosovo authorised NATO to use force.

¹⁹Article 48(1) of the Charter.

Council – thus military action undertaken by actors other than the Council does not amount to action under article VII.²⁰ Orakhelashvili notes that in practice such forces of the willing and able are controlled by the Permanent Members of the Council.²¹ He further opines that the Security Council, when authorising member states to use of force under article 42, should ensure ‘full compliance with the purposes and principles of the United Nations Charter’.²² Moreover, he observes that any action to give effect to an article 42 decision of the Charter should be ‘exercised under [the Security Council’s] overall authority and control’ otherwise it would be ‘*ultra vires*’.²³

The reason for the necessity of Security Council overall control over operations undertaken under article 42 is clear. When the Council acts under article 42 it does so on behalf of the community of states and the military operations undertaken pursuant to Council decision amount to a collective use of force.²⁴ A complete delegation of the powers of the use of force conferred by the Charter would cease to be truly collective.²⁵ There is some convergence of views, however, that the prohibition of complete delegation cannot prevent the Council from authorising a state or a group of states from implementing its decision to use force. The balance is aptly described by de Wet:

the authorization of one single state by the Security Council to use force can reflect the collective will of the Security Council only if and to the extent that the Security Council as a collective entity retains overall control of the military operation. Anything less would allow the Security Council to absolve itself from its collective responsibility and in effect would allow member states to decide individually how and when to use force ... This would also open the door to abuse by states who claim to be acting on behalf of the United Nations whilst (exclusively) pursuing their own national interests.²⁶

²⁰Frowein n 9 above at 574 (emphasis added). He notes, for example, that military action against Iraq for the invasion of Kuwait did not amount to action under chapter VII because ‘it was unilateral action undertaken by a group of states with the specific authorisation of the SC’.

²¹Orakhelashvili n 11 above at 41.

²²*Ibid.*

²³*Ibid.*

²⁴White and Ülger (above) n 15 at 385 and 386.

²⁵De Wet n 11 above at 266. See however, Blokker n 15 above at 551 who suggests that from ‘a strictly legal point of view, the Council is under no obligation to control the operations by ‘coalitions of the able and willing’ more fully, in view of the large amount of discretion it has under the Charter’. However, he suggests that a more purposive interpretation, which he favours, leads to a different conclusion.

²⁶De Wet n 11 above at 266. On the last mentioned point, concerning potential for abuse, see also Weston ‘Security Council Resolution 678 and Persian Gulf decision making: Precarious legitimacy’ (1991) 85 *American Journal of International Law* 516 at 517 who expresses criticism at the Security Council authorisation of the use of force during the Gulf War because, he argues, ‘[I]t eschewed direct UN responsibility and accountability for the military force that was ultimately deployed, favouring instead, a delegated, essentially unilateralist determination and orchestration of world policy, coordinated and almost exclusively controlled by the United

The critical question thus becomes what is the permissible level of delegation and how much control must the Council retain – the constitutionality requirement. For Blokker, the main question is whether the Council delegated *responsibility*.²⁷ Where the Council gave the implementing state or states ‘more or less a *carte blanche*’ or a ‘wide margin of discretion’, in the analysis of Blokker, such an authorisation would amount to delegation of responsibility and would therefore go beyond permissible delegation.²⁸ He suggests, on the basis of Security Council practice, three tests for necessary Security Council control.²⁹ First, the mandate authorising states to implement decisions to use force should not be overly broad. An authorisation to use force with the objective only to restore international peace and security would not be sufficiently narrow. Secondly, the mandate should be limited in time. Thirdly, there should be an obligation on the authorised states to report to the Security Council comprehensively on the implementation of the mandate. These indicators, as I read them, are not meant to be cumulative but rather are factors to be considered together when assessing whether the delegation in question is valid.

De wet advances similar requirements for determining whether the Council has sufficient command and control to meet the Charter requirements. First, she suggests that the authorisation to use force has to be explicit.³⁰ This can be done by simply using the language of article 42, ie, ‘use all necessary means’. The second requirement she proposes is that the Council should ‘specify clearly the extent, nature and objective of the military action’.³¹ Otherwise, she observes, states will have an opportunity to use force for ‘potentially limitless objectives’.³² In this respect, she suggests that ‘broad or vague language’ should be interpreted restrictively.³³ Finally, she argues, there should be an obligation on the authorised states to report regularly.³⁴

De Wet also considers that authorisation should be deemed to have expired where the operation in question no longer enjoys the overall support of the Council as a collective entity.³⁵ Taking into account the veto, she suggests that

States’.

²⁷Blokker n 15 above at 553. See also discussion at 555-560 where Blokker analyses the views of member states and concludes UN member states have also taken a dim of view of *carte blanche* authorisations.

²⁸*Id* at 554.

²⁹*Id* at 561 *et seq*. See also Blokker and Muller ‘NATO as the UN Security Council’s instrument: Question marks from the perspective of international law?’ (1996) 9 *Leiden Journal of International Law* 417 at 418.

³⁰De Wet n 11 above at 268.

³¹*Id* at 269

³²*Ibid*.

³³*Ibid*.

³⁴*Id* at 270.

³⁵De Wet n 11 above at 270.

this would be the case, in the first instance, where more than half of the permanent members no longer support military action, even if a resolution ending the operation would be impossible due to the possibility of a veto.³⁶ The second situation identified by de Wet in which military action would be deemed to no longer enjoy the support of the Council and therefore no longer authorised under article 42 is where the action is supported by less than half of the Council members, ie, where the continued military action is only supported by seven or less members of the Council. It is not clear why the majority required to keep operation authorised is not the same majority required to authorise Security Council action under article 42 in the first place, ie, nine. Nonetheless, that inquiry, while an interesting food for thought, falls beyond the scope of this article. What is important to note, however, is the general theme of the necessity of Security Council ‘ownership’ over any operation to implement Council resolution authorising the use of force.

2.2 Climate under which resolutions were adopted: A value-based international law

The Libya and Cote d’Ivoire resolutions were both adopted at a time when international lawyers are understandably concerned with the infusion of values into international law.³⁷ These values, Sands suggests, can be traced back to the Atlantic Charter and include the prohibition on the use of force, inalienable rights of all members of the human community and economic liberalisation.³⁸ They include ideals of human rights, democracy, good governance and the rule of law.³⁹ Jouannette, commenting on the development of this new international law, sees human rights as being ‘clearly emblematic of the new legal humanism’ embodied in the new international law.⁴⁰

This new, value-based international law, stands in opposition to the state centered system of traditional international law based on the preeminence of sovereignty.⁴¹

³⁶*Ibid.* While this is sensible, given the power relations in the Council, and particularly the fact that the P3 have traditionally been the bloc that has sought to rely on art 42, this situation is unlikely to arise.

³⁷Tladi ‘South African lawyers, values and new vision of international law: The road to perdition is paved with the pursuit of laudable goals’ (2008) 33 *SAYIL* at 167.

³⁸Sands *Lawless world: America and the making and breaking of international global rules from Fdr’s Atlantic Charter to George W Bush’s illegal war* (2005) at 8.

³⁹See generally Dugard ‘The future of international law: A human rights perspective – with some comments on the Leiden School of International Law’ (2007) 20 *Leiden Journal of International Law* at 729. See also Wranger ‘The prince and the discourse: Commenting on advising on international law’ in Petman and Klabbers (eds) *Nordic cosmopolitanism: Essays in international law for Martti Koskenniemi* (2003) at 40.

⁴⁰Jouannette ‘Universalism and imperialism: The true-false paradox of international law’ (2007) 18 *European Journal of International Law* 379 at 386.

⁴¹Dugard n 39 above at 731. Jouannette n 40 above at 386. See also Sands who observes that the new rules-based international law born out of the Atlantic Charter was meant to ‘replace the then existing arrangement that allowed a state to do whatever was not expressly prohibited by

However, the traditional state-centered model of international law is still alive and well. As Jouannette describes, what we have currently is a

more multiform and complex law, characterized by greater solidarity, which still flirts with this ideas of sovereignty while at the same seeking to surpass it in favor of a common good [and in which] the goal of international law is no longer merely to respect the freedom of states but also the promotion of this common good.⁴²

Similarly Jones, Pascual and Stedman speak of the emergence of ‘responsible sovereignty’, which recognises the continued significance of sovereignty while expressing the notion that sovereignty carries with it responsibilities.⁴³ The interaction between this new, value-based international law, concerned with the common good, on the one hand, and, on the other hand, the traditional state-centric model of international law concerned with the preservation of sovereignty of states is reflected in, for example, the tension between the Responsibility to Protect principle (or its previous incarnation, humanitarian intervention) and the principle of non-interference in internal affairs.⁴⁴ Whereas, under traditional international law, where sovereignty is a holy cow, a state retained exclusive jurisdiction over persons under its jurisdiction and control, under the new value-laden vision of international law the treatment of persons by a state is no longer the domain of internal affairs. The new international law gives prominence to concepts such as Responsibility to Protect and the Protection of Civilians and allows the limitation of sovereignty to serve these norms.

It is necessary to digress here and say a few words about the Responsibility to Protect and the Protection of Civilians – two concepts at the heart of the Libya and Cote d’Ivoire resolutions. The Responsibility to Protect principle was endorsed by world leaders in 2005.⁴⁵ Intervention by the international community to protect people against atrocities in cases where the state failed to do so (with or without the consent of the state) is the third pillar of the Responsibility to Protect – the first being the responsibility of the state to protect its people against such atrocities and the second being the duty of the international community to assist the state to enable it to meet its responsibility.⁴⁶ This third pillar, which calls for the international community

international law’. Sands ‘Lawless world: The cultures of international law’ (2006) 41 *Texas Journal of International Law* 387 at 390.

⁴²Jouannette n 40 above at 387.

⁴³Jones, Pascual and Stedman *Power and responsibility* (2009) at 9.

⁴⁴See Simma ‘NATO, the UN and the use of force: Legal aspects’ (1999) 10 *European Journal of International Law* 1 at 5.

⁴⁵See par 138 and 139 of the World Summit Outcome Document (2005).

⁴⁶The principles are restated in several reports of the Secretary-General of the United Nations. See, eg, Implementing the responsibility to protect: Report of the Secretary, UN Document A/63/677.

to intervene when the state fails to do so, very much reflects the idea that the international community cannot sit idly by while mass atrocities, such as genocide and crimes against humanity are being perpetrated and in that way embodies the new international law referred to above. The Protection of Civilians is a related but distinct principle. While Responsibility to Protect can apply outside the context of conflict, Protection of Civilians is applicable specifically to conflict situations and, primarily, in the context of peace-keeping.⁴⁷ Both principles, though, are concerned with ensuring the protection of communities from atrocities and place a responsibility on the international community to ensure such protection where the state (or any other party to a conflict) fails to do so. In this respect, they both reflect the new 'legal humanism' that Jouannette was speaking of.⁴⁸ While there has been much excitement about these principle, particularly in academic circles, they have been hotly contested within the United Nations by those who see them as a tool to erode the principle of sovereignty.⁴⁹

In the context of the Security Council and the use of force, the tussle between the new humanism and sovereignty described above, raises the question whether the use of force can be authorised for a purely domestic conflict.⁵⁰ For Dugard, it goes without saying that a 'purely internal situation' involving human rights violation constitutes a threat to international peace and security.⁵¹ Orakhelashvili adopts a more cautious approach.⁵² He states, as a starting point, that the Council authority under chapter VII is not limited to inter-state wars nor is it limited to military conflicts.⁵³ He recognises, however, that the presence of an international dimension 'provides the starting point to clarify the objective criteria for' determining whether there is a threat to international

⁴⁷See Welsh (2011) 'Civilian protection in Libya: Putting coercion and controversy back into RtoP' [year] 25 *Ethics And International Affairs* 255 at 257. See for operational issues relating to protection of civilians, Stian Kjeksrud and Aasland Ravndal 'Emerging Lessons from the United Nations Mission in the Democratic of Congo: Military Contributions to the Protection of Civilians' (2011) 20 *African Security Review* 3.

⁴⁸Note 39 above.

⁴⁹See, eg, the statement by the Ambassador of Egypt, on behalf of the Non-Aligned Movement to the United Nations during the debate on Responsibility to Protect on 23 July 2009 in the General Assembly where he stated that there are still concerns that the principle could be misused to 'legitimize unilateral coercive measures, or intervention in the internal affairs of the state' (on file with author). The Ambassador of Iran, during the same meeting, cautioned that the principle could be 'misused, or indeed abused, to erode the principle of sovereignty of States or intervene in their internal affairs' (on file with author). Interestingly, subsequent to the debate, the General Assembly adopted a resolution which simply took 'note of the report of the Secretary-General' and of the 'productive debate' without endorsing the responsibility to protect as a principle of international law or even recognising its role.

⁵⁰See for discussion Orakhelashvili n 11 above at 25.

⁵¹Dugard 'The influence of the Universal Declaration as law' (2009) 24 *Maryland Journal of International Law* 85 at 88.

⁵²Orakhelashvili n 11 above at 25.

⁵³*Ibid.*

peace and security.⁵⁴ Internal wars and changes of governments, he asserts, are not proper subjects of concern for the Security Council.⁵⁵ However, he accepts that some ‘domestic situations may well have international implications’.⁵⁶ It is these situations that the Council could properly concern itself with. Precisely, when a domestic situation will have international implications is difficult to say but the Council has a wide discretion to make such a determination.

Security Council Resolution 418 (1977) on South Africa is often used as an illustration of Council action in purely internal matter.⁵⁷ However, Orakhelashvili observes that the Council’s decision was based, in part, on South Africa’s military build-up and its persistent acts of aggression against its neighbours.⁵⁸ Nonetheless, the clear tendency of the Council to act in situations with little, if any, international implications cannot be denied. Arguably this is due to the new vision of international law, whose concern is not only the protection of state sovereignty, but the pursuit of the common good including the protection of human rights.⁵⁹

3 Security Council Resolutions on Libya and Cote D’Ivoire

3.1 Building the case for the use of force in Libya and Cote d’Ivoire

Resolution 1975 authorising the use of force in Cote d’Ivoire takes place within a larger context of instability. The more immediate cause of the conflict leading to the adoption of resolution 1975 was, however, the disputed elections of November 2010. While the Independent Electoral Commission announced that Ouattara had won the elections by a margin of around nine percent, the Constitutional Council decided that the elections had in fact been won by the incumbent, Gbagbo. On the same day that the Constitutional Council made its

⁵⁴*Ibid.*

⁵⁵*Id* at 26. While Orakhelashvili asserts that internal wars are not matters for the Security Council, we have clearly moved to the phase in international relations where internal wars and conflicts are accepted as having an international dimension.

⁵⁶*Ibid.*

⁵⁷Dugard n 51 above at 88.

⁵⁸Orakhelashvili n 11 above at 26. See Tladi ‘Strict positivism, moral arguments, human rights and the Security Council: South Africa and the Myanmar vote’ (2008) 8 *African Human Rights Law Journal* 23 at 30. Dugard’s response that the ‘debates in the Security Council make it clear that Resolution 418 was prompted by internal repression’ (n 44 above at 89) is unconvincing especially since the actual negotiations in the Council take place behind closed doors. Moreover Dugard’s assertion that the references to external factors were ‘mere window dressing’ in fact serves to illustrate the point that the Council requires (or should require) some external connection, even if tangential, to take a decision under chapter VII of the Charter.

⁵⁹Tladi n 37 above at 180 where the author states: ‘It is appropriate to remind readers that when push comes to shove, the Security Council will *always* subjugate human rights issues to its core issues and, not only is it within powers to do so, but its very limited mandate *may* require it to do so’ suggesting that the Council’s ever expanding mandate may not be due to these values but rather to other, more political, considerations.

announcement, the Special Representative of the Secretary-General (SRSG) in Cote d'Ivoire, Choi, certified the results of the Electoral Commission and declared Ouattara the winner.

Legally, the events described above raised a number of questions. The main question revolved around who had the mandate, under the law, to declare the winner of the elections. For some, the answer was simple and lay in Security Council resolution 1765 which authorised the SRSG to 'certify that all stages of the electoral process provide all the necessary guarantees for the holding of open, free and fair transparent elections in accordance with international standards'. It was argued that the mandate to certify the elections under Resolution 1765 suggested that the declaration of the SRSG was final and consequently that Ouattara was the rightful winner of the elections.

On the other hand, others pointed to the constitutional framework in Cote d'Ivoire, which, if followed to the letter, would suggest that the declaration by the Constitutional Council of Gbagbo as the winner was final and binding. The Constitution of Cote d'Ivoire provided that all disputes concerning the elections are decided upon by the Constitutional Council and that the Constitutional Council 'proclaims the definitive results of the presidential elections'.⁶⁰ The objectively correct interpretation of the electoral laws – if there is such a thing – is neither here nor there for the purposes of this paper. The point is that the law governing the elections was complex, involving an interaction between international law in the form of Resolution 1765 and domestic law of Cote d'Ivoire, and open to several interpretations. Nonetheless, on the basis of the certification of the elections by the SRSG, the 'international community', including the Security Council, the Economic Community of West African States and the African Union declared Ouattara the winner of the elections and called for Gbagbo to relinquish power.⁶¹

The political impasse between Gbagbo and Ouattara that followed the disputed election results led to conflict and violence between forces loyal to the leaders resulting in civilian casualties. In response, prior to the adoption of Resolution 1975, the Council adopted two Press Statements.⁶² The Press Statements called upon Gbagbo to 'respect the outcomes of the elections' and to relinquish power

⁶⁰Article 94 of the Constitution of Cote d'Ivoire, available at http://abidjan.usembassy.gov/ivorian_constitution2.html (accessed 5 January 2013). The Electoral Act of 2000 grants the Electoral Commission the mandate to proclaim 'provisional' elections results and to transmit these to the Constitutional Council (which has the mandate to proclaim the final result) and the SRSG.

⁶¹See, eg, Communiqué of the AU Peace and Security Council, PSC/AHG/COMM(CCLIX) of 28 January 2011; ECOWAS Final Communiqué of Heads of States of 7 December 2010.

⁶²Security Council Press Statement on the Situation in Cote d'Ivoire of 10 January 2011; Security Council Press Statement on the Situation in Cote d'Ivoire of 3 March 2011 and Security Council Press Statement on the Situation in Cote d'Ivoire of 11 March.

to Ouattara and expressed concern about attacks on civilians and peacekeepers. Importantly the Press Statement of 3 March urged the UN Peacekeeping Operation in Cote d'Ivoire to use 'all necessary means' to implement its mandate. The adoption of Resolution 1975 was thus the culmination of rhetoric, based on the protection of civilians and the responsibility to protect, that had been building up in the Council.

While there was a chorus of voices calling for tough Security Council action against Gbagbo, a minority, whose voices were drowned out, called for dialogue between Gbagbo and Ouattara and a political process to secure peace.⁶³ The argument pushed by this minority of voices was twofold. First, the outcome of the election was, at best, inconclusive. Second, it was argued that a sustainable peace could only be achieved through dialogue and a political process. Indeed, before the adoption of Resolution 1975, the AU established a High Level Panel for the Resolution of the Crisis in Cote d'Ivoire to formulate a comprehensive solution.⁶⁴ The High Level Panel presented a 'political solution' to the AU, which was endorsed by the AU Peace and Security Council.⁶⁵ The content of the 'political solution' was never made public – although the word was that it involved some sort of power-sharing. In the course of the frantic back and forth of the AU leaders trying to sell the deal to Ouattara and Gbagbo, Resolution 1975, authorising the use of force in Cote d'Ivoire, was adopted.

The Libyan use of force resolution, Resolution 1973, was adopted under different context in that while the situation precipitating Resolution 1973 occurred in the context of the so-called Arab Spring and not as part of a wider conflict that the Council had been previously seized with. The uprising against Gaddafi and the brutal manner in which he attempted to quell the uprising resulted in worldwide condemnation.⁶⁶ The Arab League, on 22 February, decided to suspend Libya from participating in future meetings. On 25 February, NATO met to discuss possible NATO action in Libya. On the same day the EU agreed on a sanctions package for Libya. The Human Rights Council met on 25 February and decided to establish a commission of inquiry into the human rights abuses in Libya.⁶⁷

In the afternoon of 25 February, the US delegation circulated a draft resolution on the situation in Libya. Amazingly the resolution imposing targeted sanctions and referring the situation in Libya to the International Criminal Court for

⁶³On the Security Council these voices included South Africa, India, Brazil, China and Russia.

⁶⁴See, eg, the AU Peace and Security Council Communiqué of 28 January 2011.

⁶⁵See par 7 of the AU Peace and Security Council Communiqué PSC/AHG/COMM(CCLCV) of 10 March 2011.

⁶⁶For a breakdown of developments in the Libya conflict see Security Council Report's updates available at <http://www.securitycouncilreport.org>.

⁶⁷Human Rights Council Resolution S-15/1 of 25 February 2011.

investigation was adopted on in the early evening 26 February – amazing because of the swiftness of the action. International condemnation of the Gaddafi regime continued with the adoption by the General Assembly of a resolution suspending Libya from the Human Rights Council.⁶⁸ On 12 March, the Arab League called on the Security Council to impose a no fly zone over Libya to prevent Gaddafi from using aircrafts to target civilians. The UN Security Council resolution authorising the use of force against Gaddafi, in order to protect to civilians, was adopted on 17 March 2011. In a period of just over a month, the Council had moved with astonishing speed to respond to the atrocities committed by Gaddafi by authorising the use of force to protect civilians.

While public opinion against Gaddafi's attacks on his own population was unanimous, not everyone supported the use of force as the solution to the Libya problem. Brazil, Russia, China, India and Germany all abstained from the vote on Resolution 1973. The German Permanent Representative, explaining his country's decision to abstain from the vote said the aim of Council action should be 'political transformation of Libya' which required stopping the violence and starting 'a true political process.'⁶⁹ In explaining India's vote, The Deputy Permanent Representative stated that India 'deplore(d) the use of force' which, he said, was 'unacceptable' while also stressing the importance of political efforts to address the situation.⁷⁰ Important, and directly linked to the question of the Council's command and control of authorisation, the Indian Ambassador added the following:

We also do not have clarity about details of the enforcement measures, including who will participate and with what assets, how these measures will exactly be carried. It is of course important that there be full respect for the sovereignty, unity and territorial integrity of Libya.

The Brazilian statement expressed fear that the use of force authorised by the Resolution could 'change the narrative in ways that may have serious repercussions' and also expressed doubt as to whether the use of force will lead to the 'realization of our common objective'.⁷¹ Russia also asked questions about would be the 'rules of engagement' and 'what limits on the use of force would there be'.⁷² The Russian Permanent Representative expressed the view that the text of Resolution 1973 could 'open the door to large-scale military

⁶⁸GA/65/265 of 1 March 2011.

⁶⁹Statement by the Permanent Representative of Germany, Peter Wittig, before the Security Council after the adoption of Resolution 1973, 17 March 2011.

⁷⁰Statement by the Deputy Permanent Representative of India, Manjeev Puri, before the Security Council after the adoption of Resolution 1973, 17 March 2011

⁷¹Statement by the Permanent Representative of Brazil, Mari Luisa Viotti, before the Security Council after the adoption of Resolution 1973, 17 March 2011.

⁷²Statement by the Permanent Representative of Russia, Vitaly Churkin, before the Security Council after the adoption of Resolution 1973, 17 March 2011.

intervention'. The statement of South Africa, which did vote in favour of the resolution, was of particular interest. The South African Permanent Representative explained that South Africa supported the resolution with necessary caveats, rejects 'any foreign occupation or unilateral intervention under the pretext of protecting civilians' and expressed the hope that the resolution would be 'implemented in full respect for both its letter and spirit'.

As with the situation in Cote d'Ivoire (and perhaps more so), the African Union sought to find a political solution to the situation in Libya and, for this purpose, established an Ad Hoc High Level Committee on Libya.⁷³ The Committee's efforts sought, *inter alia*, a process that included Gaddafi's 'commitment to an inclusive dialogue process with the participation of the Transitional National Council' as well as 'his acceptance of not being part of the negotiation process'.⁷⁴

3.2 *The main elements of the Resolutions*

Resolution 1970 does not authorise the use of force and its main elements were the referral of the situation in Libya to the ICC, an arms embargo, a travel ban and an assets freeze on certain individuals and entities in Libya. However, the general tenets of the argument for the use of force were already apparent in the negotiations leading up to the adoption of the Resolution 1970.

The final preambular paragraph of Resolution 1970 specifies that the resolution imposes article 41 measures, ie, non use of force measures. Furthermore, operative paragraph 26 of the resolution, on humanitarian assistance, is very specific about the kinds of humanitarian and related measures intended. In particular, it only calls upon states 'to facilitate and support the return' of such assistance. In the original text, however, the final preambular paragraph did not specify that the measures being taken were taken under article 41, thus leaving open the possibility of interpreting the resolution as authorising military operations. Moreover, operative paragraph 25 of the original text (the predecessor to operative paragraph 26), authorised member states to

Adopt all necessary measures to enable the return to Libya of humanitarian agencies and to secure the prompt and safe delivery of humanitarian assistance to those in need (emphasis added).

As previously drafted, and without the express reference to article 41, operative paragraph 25 (the predecessor to operative paragraph 26) implies the authorisation of the use of force to enable the return of humanitarian assistance.

⁷³See, eg, par 3 of AU/Dec 385(XVII) in which the AU reiterates that 'only a political solution will make it possible to fulfill the legitimate aspirations of the Libyan people'.

⁷⁴See AU Proposal to the Libyan Parties for a Framework Agreement on a Political Solution to the Crisis in Libya (on file with author).

It was at the insistence of a few delegations, with fierce resistance from the sponsors of the resolution, that the caveat in the preamble expressing that the resolution only authorised article 41 measures was inserted and that operative paragraph 26 was redrafted to exclude the ‘all necessary measures’ language. This may suggest that the intention to use force was present even before Resolution 1973 was negotiated.

The main elements of Resolution 1973 are in operative paragraphs 4 and 8. Operative paragraph 4 provides that the Council authorises

member states that have notified the Secretary-General acting nationally or through regional organizations or arrangements, acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970, to protect civilians and civilian populated areas under threat of attack in [Libya] ... while excluding a foreign occupation force of any form on any part of Libyan territory ..

Paragraph 4 also requests states taking such measures to report on the measures they have adopted. In operative paragraph 6, the Council bans all flights over Libyan airspace in order to protect civilians. Operative paragraph 8 then authorises states, also with the requirement to make notifications, to ‘take all necessary measures measure’ to enforce the no-fly zone instituted in operative paragraph 6.

A few points can be made about the use of force in resolution 1973. First, consistent with previous use of force provisions, the use of force is not to be exercised by the Council or under the Council’s operational control but rather, the resolution authorises a ‘coalition of the willing and able’ to use military action in Libya. The second point to make is that the objective of the use of force, both in operative paragraph 4 and operative paragraph 8 is spelt out as being for the protection of civilians. That the purpose of the resolution is the protection of civilians is clear from the preambular paragraphs in which the need to protect civilians and the responsibility to protect Libyans are omnipresent.⁷⁵ Indeed the theme of Responsibility to Protect and Protection of Civilians is equally reflected in Resolution 1970.⁷⁶ Moreover, the explanation of votes of delegations supporting the resolution all raise the Responsibility to Protect and the Protection of Civilians as the basis for their support of the resolution.⁷⁷

⁷⁵See, eg, the 3rd preambular paragraph which expresses grave concern at the ‘heavy civilian casualties’; the fourth preambular paragraph reiterates the responsibility of the Libyan government to protect its citizens and that the responsibility of parties to a conflict to protect its civilians; and in preambular paragraph the Council expresses determination to ‘ensure the protection of civilians’.

⁷⁶See, eg, preambular par 9 of UN Security Council Resolution 1970.

⁷⁷See statements of France, Lebanon, the United Kingdom, Bosnia and Herzegovina, Colombia, Portugal, Nigeria, South Africa and the United States on the adoption of Resolution 1973.

The responsibility to protect and the protection of civilian themes are continued in Resolution 1975 pertaining to Cote d'Ivoire. In operative paragraph 6 of Resolution 1975 the Council reiterates the mandate given to UNOCI 'to use all necessary means ... to protect civilians under imminent threat of physical violence ... including to prevent the use of heavy weapons against the civilian population'. Again, that the authorisation to 'use all necessary means' is for the protection of civilians is confirmed in operative paragraph one as well as several preambular paragraphs.⁷⁸

Resolution 1975, however, is different from resolution 1973 in several significant ways. First, resolution 1975 authorises UNOCI, a UN mission, and not 'member states' to use force. Second, even before Resolution 1975, UNOCI had been authorised to use all 'necessary means'. Operative paragraph 16 of resolution 1933 (2010), for example, already provides UNOCI with the mandate to protect civilians while operative paragraph 17 authorises UNOCI 'to use all necessary means to carry out its mandate'. The only significant addition in Resolution 1975 is the secondary purpose 'including to prevent the use of heavy weapons against civilian populations'. Resolution 1975, in addition to the protection of civilians theme, also contains elements recognising Ouattara as the winner of the November elections.⁷⁹ Finally, the ambiguous, but ever present role of French forces in UNOCI mandate, though not referred to in Resolution 1975, cannot be ignored. Paragraph 3 of Resolution 1964 requested French forces to assist UNOCI in the execution of its mandate.⁸⁰

4 Implementation of the Resolutions and regime change

The first question that arises with respect to Resolution 1973 is whether the resolution builds in sufficient control to meet the constitutionality requirement identified above, ie, whether the delegation to the coalition of the willing and able is permissible delegation. The second and third of Blokker's test are easiest to dispense with. With respect to the duty to report as an element of Council control, the resolution creates a duty to report to the Security Council through the Secretary-General. With respect to Blokker's second indicator, ie, time limit on the authorisation, the resolution does not provide for a time limit. However, as can be concluded from de Wet's analysis, there is close link between the objective of the military operation and the time limit.⁸¹ De Wet argues that a time limit can be deduced from the purpose of the authorising resolution – this she refers to as 'functional limit'.⁸² In other words, as I

⁷⁸Paragraph 1 expresses concern at recent escalation of violence and demands an end to the violence against civilians. See also preambular par 9.

⁷⁹See par 1 of Resolution 1975; see also the 5th preambular paragraph.

⁸⁰See also par 10 of Resolution 1967 (2010) and par 9 of Resolution of 1967 (2011).

⁸¹De Wet n 11 above at 270.

⁸²*Ibid.*

understand the argument, where the purpose has been achieved, the authorisation should cease to exist. Whether the Council exercises sufficient control or command of the operations authorised in Security Council Resolution 1973 is thus largely dependent on the objective. Thus, applying Blokke's factors, if the authorisation is overly broad then the authorisation is *ultra vires*.⁸³ Applying the same logic, de Wet suggests that the resolution should 'specify clearly the extent, nature and objective of the military action'.⁸⁴

The purpose of the use of force in Resolution 1973 is quite clearly stated as the 'protection of civilians'. Thus the purpose is neither overly broad nor is it unclear. While the objective in Resolution 1973 is expressed with sufficient clarity in the text, questions have been asked about whether implementers have stuck to the originally 'intended mandate'. Already, at the adoption of the resolution a number of the abstaining delegations raised questions about the actual purpose.⁸⁵ Subsequent to the adoption, a number of actors, including, South Africa, which had voted in favor of the resolution, questioned whether the military operation was being conducted consistently with the 'letter and spirit' of resolution 1973.⁸⁶

Those that questioned the implementation of the resolution argued that NATO operations in Libya went beyond the protection of civilians and, in fact, were designed to oust Gaddafi.⁸⁷ The concerns about the implementation of the resolution were not completely unfounded. There were sufficient reports in the news media to at least suggest a *prima facie* case that the sole purpose of the NATO operation was not the protection of civilians but that the ousting of Gaddafi was, at the very least, a secondary objective.⁸⁸ Information gleaned

⁸³Blokke n 15 above at 561.

⁸⁴De Wet n 11 above at 269.

⁸⁵See, eg, the explanations of vote from Brazil, Russia, India and China.

⁸⁶See, eg, par 11 of the Decision of the African Union Peace and Security Council, PSC/MIN/COMM.2 (CCLXXV) of 26 April which, *inter alia*, 'stresses the need for all countries and organizations involved in the implementation of Security Council Resolution 1973 (2011) to act in a manner fully consistent with international legality and the resolution's provision, whose objective is solely to ensure the protection of the civilian population'. The Foreign Minister of Russia, Sergei Lavrov, is also quoted as saying 'The Security Council has never a put a change of regime in Libya or any other country as its goal' and those 'who use the Security Council resolution to change regimes are violating the mandate of the United Nations'. See Filipovic 'UN Security Council not pushing regime change, Lavrov Says', available at <http://www.bloomberg.com/news/print/2011-04-19/un-security-council-not-pushing-libya-regime-change-lavrov-says.html> (accessed 3 January 2013). See also the Statement of the South African Government on Developments in Libya of 2 May 2011 which 'reiterates that Resolution 1973 must be implemented in letter and spirit, without giving and (*sic*) that there are other motives at play, including regime change'.

⁸⁷*Ibid.*

⁸⁸See Rayner 'Libya: Secret plot played by Britain creating path to the fall of Tripoli' available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/87176758/Libya-secret-role-played-by-Briatin-crating-path-the-fall-of-Tripoli.html> (accessed 5 January 2013)

from reports suggested that NATO airstrikes were not solely for the purpose of protecting civilians but rather were meant to weaken Gaddafi to enable a smoother path for the rebels.⁸⁹

In what seems a near admission of an objective of regime change, a New York Times article reported that NATO was planning increased attacks on resources that Gaddafi 'uses to maintain his grip on power'.⁹⁰ In that same report a 'US official' is quoted as saying that the NATO operations were intended to ensure that Gaddafi 'knows that there is war going on'.⁹¹ The heads of state and government of France, the United States and the United Kingdom, the primary sponsors of Resolution 1973, certainly seemed to suggest that a necessary step in the protection of the Libyan people was the ousting of Gaddafi.⁹² Indeed, Merdad Payandeh suggests that while regime change may have not been a legitimate goal of the resolution, it may have been 'a legitimate consequence' of protecting civilians.⁹³

Events surrounding the circumstances of Gaddafi's death also seem to point to this conclusion. First, from all accounts Gaddafi was captured by the rebel fighters after his fleeing convoy was attacked by US drones and NATO bombs, ie, he was not attacking civilians and therefore attacks leading to his death could not, strictly speaking, be said to be carried out 'for the protection of civilians'.⁹⁴ Secondly, the fact that the declaration of the end of the operation and its description as successful came after the capture and killing of Gaddafi also suggests that his ouster was the objective of the operations. What cannot be denied is that NATO was actively assisting the rebel movement whose sole purpose was to remove Gaddafi from power.

The French decision to arm the rebels intent on ousting Gaddafi similarly suggests a regime change motive.⁹⁵ Similarly, the United Kingdom had stated that it would be supplying the rebels with military equipment such as body

⁸⁹See Burns 'With help from NATO, Libyan rebels gain ground' available at <http://www.nytimes.com/2011/05/10/world/africa/10Libya.html?pagewanted=all> (accessed 7 January 2012), which amongst many others stated that the NATO airstrikes were 'weakening [Gaddafi] to the point that a ground attack was possible'.

⁹⁰Chivers 'NATO says it is stepping attacks on Libya targets' available at <http://www.nytimes.com/2011/04/27/world/middleeast/27strategy.html> (accessed 7 January 2013)

⁹¹*Ibid.*

⁹²See Obama, Cameron and Sarkozy 'Libya's pathway to peace' available at <http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html> (accessed 8 January 2013).

⁹³Payandeh 'The United Nations, Military intervention, and regime change in Libya' available at (2011) 52 *Virginia Journal International Law* 355 at 386.

⁹⁴Harding 'Col Gaddafi killed: Convoy bombed by drone flown by pilot in Las Vegas' <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8839964/Col-Gaddafi-killed-convoy-bombed-by-drone-flown-by-pilot-in-Las-Vegas.html> (accessed 8 January 2013).

⁹⁵Birnbaum 'France sent arms to Libyan rebels' available at <http://www.washingtonpost.com/world/france-sent-arms-to-Libyan-rebels/2011/06/29/AG> (accessed 5 January 2013).

armor, uniforms and communications equipments.⁹⁶ The consistency of the supply of weapons to the rebel movement with the arms embargo instituted by Security Council resolution 1970 was questioned in Security Council meetings by, *inter alia*, some Council members.⁹⁷ The French argued that the supply of arms to the rebels was permissible under paragraph 4 Resolution 1973 which provides that ‘all necessary measures’ were authorised ‘notwithstanding paragraph 19 of resolution 1970’, ie, that the supply of weapons was permissible if it was intended to aid in the protection of civilians. Whatever the proper legal interpretation of paragraph 4 of Resolution 1970, the supply of arms to the rebels certainly implies that NATO forces had taken sides in the Libyan conflict. The accusation that through NATO action, the UN had taken sides, was made very strongly by the South African President, Jacob Zuma, during the general debate of the 66th session of the General Assembly:

We should defend the independence and impartiality of the UN [...] The UN should never take sides in any conflict but should always maintain its impartiality.⁹⁸

With South Africa joining the abstaining states (Russia, China, Brazil, India and Germany) and expressing disapproval at the operation, the support for the resolution stood at only nine – the bare minimum for the adoption of a chapter VII resolution.⁹⁹ In any event, by De Wet’s proposed standard requiring only a simple majority of the full Council for the continued validity of the authorisation, ie, eight members, the NATO operation would certainly continue to have the support of Council as an entity. This being the case, then regime change agenda of NATO would have, at the very least, the blessings of the Council if not its endorsement.¹⁰⁰ The operations of NATO in Libya can be said to have been acknowledged and accepted by the Council within the meaning of article 9 of the Draft Articles on the Responsibility of International Organisation – the attribution of conduct here is irrespective of the wrongfulness or not of the operation.¹⁰¹ The NATO operations were discussed

⁹⁶*Ibid.*

⁹⁷Paragraph 9 of UN Security Council Resolution 1970 provides as follows: ‘Decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya’. For a discussion, see Henderson ‘International measures for the protection of civilians in Libya and Cote d’Ivoire’ (2011) 60 *International and Comparative Law Quarterly* at 767.

⁹⁸Statement by President Jacob Zuma to the General Debate of the 66th Session of the United Nations General Assembly on 21 September 2011 (on file with author).

⁹⁹See South African statement cited n 83 above.

¹⁰⁰It has to be recalled, in this regard, the practice of organs and states implementing or affected by Security Council are important in determining the meaning of the relevant resolution. See, eg, par 94 of *The Advisory Opinion on the Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo* 2011 ICJ.

¹⁰¹See art 9 of the Draft Articles on the Responsibility of International Organisations, with commentaries (2011).

frequently in the Council and at no point did the Council as an entity express concern with the operation. Moreover, on the successful unseating of Gaddafi, the Council adopted resolutions which, *inter alia*, eased the arms embargo and assets freeze established by Resolution 1970 and terminated the use of force provisions in Resolution 1973.¹⁰²

The authorisation of military force in Cote d'Ivoire, leading to the ouster of Gbagbo does not raise question about the command and control in the same way as the operation in Libya because in Cote d'Ivoire it was UNOCI, a UN operation that was authorised to use force, although French forces already possessed the mandate to provide assistance to UNOCI.¹⁰³ As the forces authorised to use force were under UN control, the constitutional question of whether the mandate amount to permissible delegation does not arise.

Even without the 'command and control' issue, the Cote d'Ivoire operation leading to the fall of Laurent Gbagbo was not without controversy. Early on the morning of 11 April 2011, after the capture of Gbagbo, two main narratives were advanced to explain the role of French and UN forces in Gbagbo's capture. In the one narrative Gbagbo had been captured by French Special Forces and handed over to forces loyal to Ouattara.¹⁰⁴ This narrative had special resonance as it came both from Gbagbo and Ouattara sources.¹⁰⁵ In another, slightly more ambiguous report, it is stated that Gbagbo 'had been arrested by Ouattara's forces *backed by the United Nations and the French Military*'¹⁰⁶ (emphasis added). The French and the UN sought to present a different narrative. In this narrative, the capture of Gbagbo was effected by Ouattara's forces and not the French or UNOCI forces.¹⁰⁷ This narrative sought to capture the role of UNOCI and French forces within the strictures of Resolution 1975, ie, strictly for the protection of civilians and prevention of the use of heavy weapons. The day after the arrest of Gbagbo, the French Foreign

¹⁰²See UN Security Council Resolution 2009 (2011) and UN Security Council Resolution 2016 (2011).

¹⁰³See par 3 of UN Security Council Resolution 1964 (2010).

¹⁰⁴See, eg, Hoft 'French Forces capture Gbagbo – hand him over to rebels in Ivory Coast' available at <http://www.thegatewaypundit.com/2011/04/french-forces-capture-gbagbo-hand-him-to-the-rebels-in-ivory-coast/> (accessed 8 January 2013).

¹⁰⁵See also Allen 'Ivory Coast: Laurent Gbagbo captured by French Special Forces, rivals claims' available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/cotedivoire/8443240/Ivory-Coast-Laurent-Gbagbo-captured-by-French-special-forces-rival-claims.html> (accessed 8 January 2013) wherein it is reported that the information that Gbagbo was captured by French forces was provided by a 'spokeswoman for presidential rival Alassane Ouattara'.

¹⁰⁶See Ange Aboa and Loucoumane Coulibaly 'Ivory Coast's Gbagbo held after French Troops move in' available at <http://af.reuters.com/article/top/Newa/idAFJOE73A01F20110411> (accessed 7 January 2013).

¹⁰⁷See statement of Choi Young-Jin, appearing before the Special Security after the capture of Gbagbo in which he asserts that the 'Ivorian crisis was dealt with largely by Ivorians'.

Minister stated that the ‘UN and France wanted the Security Council resolutions implemented: nothing more, nothing less’.¹⁰⁸ He went on to state that it ‘was President Ouattara’s army, the Republican Forces of Cote d’Ivoire, that subsequently intervened, entered the bunker and seized Mr Gbagbo’.¹⁰⁹

What is clear, even under the second UN/French narrative, is that French and UN bombardment of Gbagbo weakened him significantly, enabling Ouattara’s forces to move in.¹¹⁰ Alain le Roy, the head of UN peacekeeping operations is reported as saying that the UN/French strikes on Gbagbo may have ‘helped clear the way for his rivals to storm the residence’.¹¹¹ The statement of the US President, Barack Obama, to the 66th session of the General Assembly, extolling the growth in maturity of the UN, suggests that Gbagbo’s refusal to cede power was motivating factor in the call to action:

One year ago, the people of Cote d’Ivoire approached a landmark election. And when the incumbent lost, and refused to respect the result, the world refused to look the other way.¹¹²

As with the Libyan operation, the attacks on Gbagbo’s compound leading to his arrest, suggests either an effort to oust him, or at the very least, offering assistance to those determine to oust him. What should be pointed out is that resolution 1975, by including the calls and demands for Gbagbo to relinquish power would, at least comparatively, make the intention to remove Gbagbo more consistent with the text of resolution. Nonetheless, whatever one accepts the results of the November elections to be, the constant calls by the UN Security Council on Gbagbo to cede power, suggests that he still held power in Ivory Coast and that the operations by the French and UNOCI forces contributed to his ouster.

The operation in Libya by NATO and the attacks on Gbagbo’s compound by French and UNOCI troops are both cases in which UN Security Council action led to regime change. While the Council has previously authorised the use of force to reinstall a democratically elected government removed from power by force,¹¹³ Security Council decision to institute, explicitly or implicitly, the

¹⁰⁸Interview given by Alain Juppe, French Minister of Foreign and European Affairs, to ‘France Info’. Available at <http://www.ambafrance-uk.org/Alain-Juppe-interviewed-France,18868> (accessed 7 January 2013)

¹⁰⁹*Ibid.*

¹¹⁰See, eg, Adam Nossiter, Scott Sayare and Dan Bilefsky ‘Leader’s arrest in Ivory Coast ends standoff’ available at <http://nytimes.com/2011/04/12world/africa/12ivory.html?pagewanted=all> (accessed 7 January 2013).

¹¹¹*Ibid.* The same article notes that a French Commander conceded that the strikes had ‘broken Gbagbo’s defenses leaving him open to capture’.

¹¹²Remarks by President Obama to the General Debate of the 66th Session of the United Nations General Assembly on 21 September 2011 (on file with author).

¹¹³See par 4 of UN Security Council Resolution 940 (1994).

removal of governments from power is novel. The reluctance of the implementing powers, NATO, UNOCI and French forces, to accept credit for the victories of the 'rebel forces' in Libya and Cote d'Ivoire may also indicate the uncertainty, on the part of both the Council and the powers implementing these resolution, as to the legality of such regime change as a motive for Council actions, even where the governments deposed have committed the kinds of atrocities against their people as those committed by the Gaddafi and Gbagbo regimes.

In analysis of the actions implementing Resolutions 1973 and 1975, Henderson considers these questions and makes a number of comments.¹¹⁴ First, he seems to be of the view, as am I, that the implementers of the resolutions deemed regime change to be part of the operation.¹¹⁵ For example, analysing the provision of arms and other assistance to the rebels in Libya, he states that it is difficult to see how assisting the rebels 'does anything other than assisting them in winning the civil war and changing the political leadership of the country'.¹¹⁶ Further, after a lengthy analysis, he states that the message that the implementers of resolution 1973 'appear to be conveying is that regime change is the only method of achieving the goal of compliance' with the resolution, although it is not the goal itself – an invocation of what Payandeh refers to as the 'legitimate consequence of measures' for the protection of civilians.¹¹⁷ More definitively, he asserts, 'it became clear over time that regime change in both [Libya and Cote d'Ivoire] was the ultimate goal'.¹¹⁸ Henderson's analysis, of course, is concerned with interpretative questions, and he seems to conclude that it is possible to interpret the text as permitting regime change. Similarly, Payandeh, concludes that while text of resolution 1973 does not explicitly mandate regime it was not specifically excluded.¹¹⁹ In particular, he argues that measures envisaged in the resolution included any measures that were necessary even if they promoted regime change.¹²⁰ My conclusion is based, not on the texts, but rather on the fact that throughout, the operation had the support of the Security Council as an entity – in a sense that through acquiescence, the Council acquired ownership of the operation. As such, the operation is attributable to the Council and the interpretation accorded to the resolutions by the implementers, *became* the interpretation of the Council and could legitimately be read into the resolution.

¹¹⁴See Henderson n 97 above at 769. Henderson's analysis is concerned more with interpretative questions, rather than the implications of a particular interpretation.

¹¹⁵*Ibid.*

¹¹⁶*Id* at 771.

¹¹⁷*Id* at 777. Payandeh n 93 above at 389.

¹¹⁸*Id* at 773

¹¹⁹Payandeh n 93 above at 387.

¹²⁰*Id* at 389.

The notion that Security Council resolutions, through their implementation, implied a regime change raises some questions about the future development of international law. First, can it be expected that the Security Council would adopt more resolutions authorising force for the protection of civilians in cases of internal conflict? Second, can the protection of civilians or responsibility to protect be read to imply the removal of a government or leader not complying with these principles? In other words, is it plausible to argue that the removal of Gaddafi and Gbagbo were necessary for the protection of civilians – the conflation of responsibility to protect/protection of civilians with regime change described above?¹²¹ Third, it raises the question whether, in a future resolution, the Security Council could expressly provide for regime change. Finally, all these questions should lead the international lawyers to ponder whether, beyond the theoretical ‘principles and purposes’ and amorphous *ius cogens*, there are, or can ever be, any (real) limits to the power of the Security Council.¹²² Can, for example, the Council legitimately determine that the maintenance of international peace and security requires the removal of one government and the installation of another? If so, what is to stop the Council from determining that the maintenance of international peace and security requires the adoption of particular economic policies (a far less invasive measure than regime change and yet intuitively more problematic)? The question is particularly significant taking into account the not-so-gradual erosion of the international/domestic divide alluded to above.

To be true, the link between regime change and the responsibility to protect/protection of civilians principle also raises political questions. It raises the question whether those who oppose the development of these principles would seize upon a purported over exuberance in the implementation of the resolutions to retard the further development and acceptance of the principles into mainstream international law. We have already witnessed a reluctance on the part of some Council members to adopt a 1970-type resolution for fear that it would lead to a 1973-type scenario – once bitten twice shy.¹²³ South Africa, for example, specifically referred to the fact that recent ‘Security Council resolutions have been abused and their implementation far beyond the mandate’ and expressed fear that the draft resolution on Syria was ‘a prelude

¹²¹See Welsh n 47 above at 269. See also Obama, Cameron and Sarkozy n 92 above and Henderson n 97 above at 117.

¹²²See, eg, Nicholias Tsagourias ‘Security Council Legislation, Article 2(7) of the UN Charter, and the Principle of Subsidiarity’ 24 (2011) *Leiden Journal of International Law* 539 at 545 who correctly observes that ‘legal criteria [as to the jurisdictional limits of the Council], if they exist, are not at all clear whereas the availability of judicial processes to resolve disputes or the legally binding effect of their decisions is haphazard’ and thus any attempt to analyse Council powers in terms of jurisdictional limits is unhelpful.

¹²³Russia and China vetoed a draft resolution, S/2011/612, threatening sanctions if the Syrian Government did not comply with demands. India, Brazil, South Africa and Lebanon all abstained from the vote.

to further action’ – what is pejoratively termed the Libya hangover.¹²⁴ The Russian statement was more forthright:

The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya on the NATO interpretation is a model for future actions of NATO in implementing the responsibility to protect.¹²⁵

5 Conclusion

The present article, without seeking to pass judgment on the lawfulness of Security Council resolutions in question or their implementation, argued that the resolutions adopted in March 2011 pertaining to Libya and Cote d’Ivoire were legally significant. The legal significance of resolutions 1973 and 1975 lay not in that they authorised force or even that force was authorised in what were wholly internal conflicts – although undoubtedly with international implications. Rather, it was argued in this article that the resolutions were legally significant in that they appeared, through the use of force and for the purposes of protecting civilians, to authorise regime change in Libya and Cote d’Ivoire.

That the authorisation to forcibly remove a government was given under the cover of the protection of civilians and responsibility to protect serves further to raise the question whether regime change, a hitherto frowned upon concept,¹²⁶ can be a means to giving effect to the legitimate principles of responsibility to protect and protection of civilians. Whether the resolutions adopted by the Security Council and their implementation by NATO and UNOCI and French forces will establish a blueprint for future Security Council action remains to be seen. What is clear, though, is that through these resolutions, the already abundant arsenal of the Council has been extended to include regime change.

¹²⁴Statement by the Permanent Representative of South Africa, Baso Sangqu, on the explanation of vote on the situation in Syria, 4 October 2011.

¹²⁵Statement by the Permanent Representative of Russia, Vitaly Churkin, on the explanation of vote on the situation in Syria, 4 October 2011.

¹²⁶Payandeh n 93 above at 357.