



**THE APPLICABILITY OF THE DOCTRINE OF RESPONSIBILITY TO PROTECT
AND THE LEGALITY OF NATO INTERVENTION IN LIBYA**

BY

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ABSTRACT

The international community gathered in 2005 and adopted the doctrine of ‘responsibility to protect’ in paragraphs 138 and 139 of the World Summit Outcome Document.¹ A few years after this Resolution, the UN Security Council with the support of the international community, applied the concept of responsibility to protect in the 2011 Libyan intervention. The Resolution 1973 was adopted as a result of Gaddafi’s manifest intention to exterminate the Libyan population. The Resolution authorised the member nations and regional organizations to use all measures necessary to protect all civilians in Libya.² Thereafter, the coalition of states went to Libya, under the pretext of responsibility to protect and protection of civilians, and as a result the Libyan leader was killed. The killing of Gaddafi generated wide controversy as a result of the manner in which the intervening forces implemented Resolution 1973. It is against this background that this research work investigates the applicability of responsibility to protect and the legality of the NATO intervention in Libya. In so doing, the research study examines the historical development and content of responsibility to protect, which was introduced in 2001 and adopted by the world leaders in 2005. The study aims to investigate whether or not the intervention in Libya was in line with responsibility to protect, and, in so doing, the study analyses Resolution 1973 to ascertain whether or not the interveners went beyond their mandate. The responsibility to protect is central to the discussion of the research work because Resolution 1973 in its preamble reminded the Libyan government of their responsibility to protect civilian population.

¹ General Assembly Resolution 60/1 also known as World Summit Outcome Document, available at <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf> Accessed on 28-05-2015

² Security Council Resolution 1973 available at https://www.nato.int/nato_static/assets/pdf/2011_03/20110927_110311-UNSCR-1973.pdf. Accessed on 26/06/2015

DECLARATION

I, **Odoemena Emmanuel Chukwuagozie** declare that this dissertation is original, it has been presented to any other University or Institution. Where other people's work have used, references and acknowledgements were provided. Hence, I declare that this research work is originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in international law

Signed.....

Date.....

Supervisor: **Professor Dire Tladi**

Signed.....

Date.....

DEDICATION

I dedicate this dissertation to the blessed memory of my late father, Nze John Odoemena, who died during the course of this programme, and also to all who lost their lives in the NATO military intervention in Libya.



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TABLE OF ABBREVIATIONS

AU	African Union
HLPR	High Level Panel Report
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
NATO	North Atlantic Treaty Organization
OIC	Organization of Islamic Conference
UN	United Nations
WSOD	World Summit Outcome Document

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CHAPTER ONE

INTRODUCTION

1 BACKGROUND OF THE STUDY

The revolt against the Gaddafi's regime started in early 2011, which was closely followed by revolutions in Tunisia and Egypt.³ While in these countries, the autocrats in charge reacted with some measure of restraint, Gaddafi reacted more radically by declaring war on the Libyan uprising.⁴ Thereafter, Gaddafi declared war on the protesters and, soon after, the number of demonstrators killed rose from hundreds to thousands. As the strength of Gaddafi's forces increased in the territory, the opponents weakened to a level that it became clear that the city of Benghazi would fall.⁵ The Libyan authority reacted with a violent crackdown and the crises quickly developed into a mass revolt because thousands were losing their lives daily.⁶ It was at that point that Gaddafi threatened the estranged population (protesters) with extinction.⁷ Gaddafi told his supporters to attack the opposition in its dens and called the demonstrators 'rats and cockroaches' that did not deserve to live.⁸

Subsequent to his comments above, the international community became deeply concerned, and the possibility of massacre and atrocity in Libya at the hands of the government forces was evident.⁹ The UN Security Council met to consider the crisis and the prevailing situation in Libya on the 26th February 2011, and the outcome of the meeting was the adoption of Resolution 1970 (2011). The Resolution expressed serious concerns about the Libyan crises. It also welcomed the condemnation by the various regional organisations. It condemned the killing of civilians and reiterated the Libyan government of its responsibility to protect its population from the heinous crimes.¹⁰ The UN Resolution 1970 demanded that the violence should be immediately put to an end and urged the Libyan government to act with the utmost

³ Spencer Zifcak: "The Responsibility to Protect after Libya and Syria" (2012) 13 *Melbourne Journal of International Law* at 2.

⁴ Spencer Zifcak n 3 above at 2

⁵ Charles Sampford and Ramesh Thakur: *Responsibility to Protect and Sovereignty. Law, Ethics and Governance Series* at 13

⁶ Geir Ulfstein and Hege Fosund Christiansen: "The Legality of NATO Bombing in Libya" (2013) 62 *International and Comparative Law Quarterly* at 160.

⁷ Spencer Zifcak n 3 above page 2

⁸ Ved P. Nanda: "From Paralysis in Rwanda to Bold Move in Libya: Emergence of the Responsibility to Protect, Norm under International Law-Is the International Community Ready for it?" (2011) 34:1, *Houston Journal of International Law* at 39.

⁹ Spencer Zifcak n 3 above at 2.

¹⁰ Charles Sampford and Ramesh Thakur n 5 above at 13

restraint and respect for human rights.¹¹ Despite the non-enforceable measures in Resolution 1970, Gaddafi continued to unleash terror on the Libyan population, and, as a result, the Security Council started considering adopting forcible measures to protect the Libyan people.

2 ADOPTION OF RESOLUTION 1973

In response to General Gaddafi's threat to take action against civilians, the Security Council adopted Resolution 1973,¹² which instructed the member nations with the support of regional organizations to apply 'all necessary measures' to protect civilians under threat.¹³ NATO airstrikes, led by France, Britain and the United States commenced hours after the resolution had been passed.¹⁴ Resolution 1973 in Libya, therefore, signifies the first directive by the Security Council for military intervention based on the responsibility to protect.¹⁵ While the adoption of Resolution 1973 was a surprise as most legal actors had expected Russia and China to veto any proposal for military intervention, from a legal perspective it is unremarkable.¹⁶

Shortly, after the resolution had been adopted, political and international scholars reacted differently. While some supported the resolution, others criticised it as an illegal intrusion in the domestic affair of a sovereign nation,¹⁷ which does not require UN Security Council's response.¹⁸ Some assert that the intervention was hijacked by regime change agenda. Others have argued that the intervention in Libya presented substantial threats for the future of responsibility to protect.¹⁹ Modeme argues that the violent suppression of demonstrators, protesters, insurgency or armed rebellion is an internal affair that has little international significance and, therefore, does not fall within the competence of Security Council and does

¹¹ Security Council Resolution 1970 available at www.icc-cpi-int/nr/rdonlyres/o/1970 ENG. Accessed on 02/04/2015.

¹² Chelsea O'Donnell: "The Development of the Responsibility to Protect: An Examination of the Debate Over the Legality of Humanitarian Intervention" (2014) 24:557 *Duke Journal of Comparative and International Law* at 566

¹³ Security Council Resolution 1973 n 2 above

¹⁴ Chelsea O'Donnell n 12 above page 566.

¹⁵ Geir Ulfstein and Hege Fosund Christiansen n 6 above at 161.

¹⁶ Andrew Garwood-Gowers: "The Responsibility to Protect and the Arab Spring: Libya as the Exception, Syria as the Norm?" (2013) 36(2) *University of South Wales Law Journal* at 603.

¹⁷ Mehrdad Payendeh: "The United Nations, Military Intervention, and Regime Change in Libya" (2012) 52:355, *Virginia Journal of International Law* at 380.

¹⁸ Lawrence Modeme: "The Libya Humanitarian Intervention. Is it lawful in international law?" (2012) at 7 available

at; www.academic.edu/576116/the_libya_humanitarian_intervention_is_it_lawful_in_international_law.

Accessed on 27/04/2015. Page 7

¹⁹ Spencer Zifcak n 3 above at 9.

not warrant international military intervention.²⁰ The UN Security Council has a wide range of discretion to determine whether an internal situation is a threat to international peace and security.²¹ The systematic abuse of human rights can no longer be regarded as a purely internal matter and the notion of sovereignty contained in Article 2 (1) of the UN Charter would not impose a limitation on the Security Council's action in the international legal order.²²

The Organization of Islamic Conference (OIC) has largely supported the adoption of Resolution 1973.²³ The Ministerial Executive of the OIC released a communique which welcomed the Security Council Resolution 1973.²⁴ The Arab League reiterated their support for the 1973 resolution and the no-fly zone in Libya.²⁵ In addition, the three AU non-permanent members of the Security Council, Gabon, Nigeria, and South Africa, voted in favour of the no-fly zone. Justifying Nigeria's endorsement of the Resolution 1973, the country's permanent representatives to the UN, Ogwu, said that the magnitude of the humanitarian disaster in Libya compelled Nigeria to take such a stance.²⁶ From the South African perspective, the Deputy Minister for International Cooperation, Ebrahim Ebrahim, argued that South Africa not only campaigned for the suspension of Libya from the Human Rights Council in Geneva when the conflict broke out, but also that President Zuma had informed Gaddafi that South Africa abhorred his government's violation of human rights, and he referred to South Africa active role in the adoption of the UN Security Council Resolution 1973.²⁷ The President of Rwanda, expressing his support towards resolution 1973, stated that:

If foreigners had not intervened in Libya, the bombardment of the country's towns and cities by Gaddafi's government would have continued. Benghazi most likely would have borne the brunt of a furious administration, and hundreds of thousands of lives could well have been lost. No country knows better than my own the cost of the international

²⁰ Lawrence Modeme n 18 above at 7

²¹ Dire Tladi: "Security Council, the use of force and regime change: Libya and Cote V' Ivoire" (2012) 37 *South African Yearbook of International Law* at 8-10.

²² Erika De Wet: *Chapter VII Powers of the Security Council* (2003), Hart Publishers North America, at 194.

²³ Mehrdad Payendeh n 17 above at

²⁴ Press Release of Organization of Islamic Conference Final Communique Issued by the emergency open ended Ministerial Meeting of the OIC Executive Committee on the Alarming Development in Libya Arab Jamarihya (March, 9 2011) available at <http://www.oic-oci.org/topic-details.asp-id=5057>. Mehrdad Payendeh n 17 above page 380.

²⁵ Martin Chulov: "Arab League to reiterate backing for the Libya no-fly zone, Guardian" (March 22, 2011). Available at <http://www.tinyurl.com/4dxglac>. Accessed on 30/03/2015.

²⁶ "Libya, Nigeria votes in favour of no-fly zone" (March 19, 2011). Available at <http://www.vanguardngr.com/2011/03/Libya-Nigeria-Votes-in-favour-of-no-fly-zone-resolution>. Accessed on 02/04/2015 Mehrdad Payendeh n 17 above page 380.

²⁷ Sandy Africa and Rentia Pretorius: "South Africa, the African Union and Responsibility to Protect, the case of Libya" (2012) 12 *African Human Rights Journal* at 409

community failing to intervene to prevent a state killing its own people. In the course of 100 days in 1994, a million Rwandans were killed by government-backed ‘genocidaires’ and the world did not stop them. So it is encouraging that members of the international community appear to have learnt the lessons of that failure. Through UN Resolution 1973, we are seeking a committed intervention to halt the crisis that was unfolding in Libya. From what the world saw on the side-lines of this conflict, had this action not been taken, the bombardment of that country’s town and cities would have continued, Benghazi most likely would have borne the brunt of a furious administration, and hundreds and thousands of lives could well have been lost. Giving the overriding mandate of operation Odyssey Dawn to protect Libyan civilians from state-sponsored attacks, Rwanda can only stand in support of it. Our responsibility to protect is unquestionable-this is the right thing to do; and this view is backed with the authority of having witnessed and suffered the terrible consequences of international inaction.²⁸

South American States have been strongly divided over Resolution 1973. Many of them, such as Bolivia, Brazil, Venezuela and Cuba, strongly condemned the adoption of Resolution 1973 in Libya.²⁹ The Brazilian statement was that the use of force authorised by Resolution 1973 could change the original intent of said Resolution which may have serious repercussions and it also expressed doubt as to whether the use of force would lead to the actualization of the common goal.³⁰ India on its part rejected the use of force and stated that it was not acceptable.³¹ Country like Columbia voted in favour of the resolution and expressed their support. Statements by Russia and China, the two permanent members of the Security Council who did not vote on Resolution 1973, were critical, while China strongly opposed and condemned the Libya intervention, Russia, on the other hand, harshly criticised it.³² The Indian ambassador to the UN objected to the change of the NATO military stance from a relative objectivity in the protection of civilians to evident partiality.³³ He further asserted that the primary aim of Resolution 1973 was the protection of civilians, and that did not include that NATO could annihilate one side, equip rebels, create civil war, and declare victory.³⁴

Arguments in support of or rejecting the NATO intervention in Libya have questioned the applicability of the concept of responsibility to protect, the moral grounds of the Libyan intervention, its legality and selectivity. For instance, some groups of international scholars

²⁸ Paul Kagame: “Intervening in Libya was the Right thing to do, New African” (May, 2011) available at <https://www.questia.com/magazine/IGI-256805831/kagame-intervening-libya-was-right-thing-do>. Accessed on 24/04/2015

²⁹ “Latin America Condemned US/UN Invasion of Libya. COTO Report” (March 22, 2011). Available at <http://www.tinyurl.com/3s6ecxx>. Accessed on 24/ 04/2015.

³⁰ Mehrdad Payendeh n 17 above at 380

³¹ Dire Tladi n 21 above at 13

³² Mehrdad Payendeh n 17 above at 380

³³ Spencer Zifcak: n 3 above at 12

³⁴ Spencer Zifcak: n 3 above at 12

have debated the legality of intervention in Libya by France, Britain and the United States on the grounds of the responsibility to protect. Some authors have focused on the role of NATO in the Libyan intervention and the consequences of its action on the coalition of states.

A review of the literature shows that the main debate concentrated on the applicability of the doctrine of responsibility to protect in the NATO military operations and the effect the intervention in Libya had on the practice of responsibility to protect. Pattison and Weiss, in support of the action, have stressed that the Libyan intervention signifies the first intervention on humanitarian grounds adopted by the UN Security Council that abide by the principles of responsibility to protect and formally recognizes the existence of the doctrine.³⁵ Patrick agreed with Pattison and Weiss and contends that the intervention in Libya represents an example of the concept of responsibility to protect, and he stated that the NATO intervention in Libya brings to the fore a new perspective on rationale of responsibility to protect.³⁶ Ban KI-Moon, the UN Secretary-General, in support of the application of responsibility to protect in Libya, states that the Security Council Resolution 1973 was strictly enforced.³⁷ He further asserts that the military campaign undertaken by NATO forces was strictly in line with Resolution 1973 and there should be no misunderstanding about that. The Secretary-General further states that the international community had advanced the responsibility to protect in Libya and this was a victory for justice and international law.³⁸ Bellamy, in support of the application of the doctrine in Libya, argued that the NATO intervention in Libya is crucial because military forces acting under the responsibility to protect were, for the first time, deployed without the approval of an operative state.³⁹ Adams, in his argument, states that, despite the division and debate about the meaning and implications of the Libyan

³⁵ James Pattison: “The Ethics of Humanitarian Intervention in Libya” (2011) 25 n 3 *Ethics and International Affairs* at 251-254. Thomas G Weiss: “Responsibility to Protect is well and alive after Libya” (2011) 25 n 3 *Introduction to Ethics and International Affairs* at 287-292.

³⁶ Steward Patrick: “Libya and Future of Humanitarian Intervention, How Gaddafi fall vindicated Obama and Responsibility to Protect” (2011) Published by *Council on Foreign Relations, Foreign Affairs* (2011) available at <https://www.foreignaffairs.com/articles/libya/2011-08-26/libya-and-future-humanitarian-intervention>. Accessed on 18/08/2015

³⁷ Simon Adams: *Libya and the Responsibility to Protect* (2012) Global Centre for the Responsibility to Protect. Occasional Paper Series at 17, available at <http://www.globalr2p.org/media/files/libyaandr2poccasionalpaper-1.pdf>. Accessed on 18/08/2015

³⁸ Simon Adams n 37 above at 17

³⁹ Alex J Bellamy: “Libya and Responsibility to Protect: The exception and norm” (2011) 25 n 3 *Ethics and International Affairs* at 263-269.

intervention, responsibility to protect is still the best instrument we have to bridge the gap between the noble aims of the UN and the imperfect world of global diplomacy.⁴⁰

Many authors have forwarded legal assessments of responsibility to protect in Libya. Schmitt and Domesticci-Met investigated the legality of the NATO intervention. While Schmitt focussed on assessing the legal framework in which the no-fly zone was adopted, Domesticci-Met, on the other hand, enquires into the legal stand in which Security Council passed resolution 1973.⁴¹ Some authors were furious about the justification of states, such as France, United States and Britain, intervention in Libya and posited that this type of intervention proves Obama's lack of a rational foresight regarding responsibility to protect.⁴² Alin and Jones assessed the legal ground on which the United States of America had assumed a leadership role and intervened in Libya based on the Security Council authorisation of responsibility to protect. They are of the view that the situation in Libya was an opportunity to show Obama's ideas on international affairs that 'a war is just if it aims to safeguard the lives of innocent people'.⁴³

On the contrary, and among the criticisms of responsibility to protect, Welsh cautions against the moral downside of the intervention in Libya and the effect that the action in Libya may have on the application of responsibility to protect.⁴⁴ In rejecting the application of the doctrine, Welsh advance some reasons for the abuse of responsibility to protect in the Libyan intervention. The first reasons is that the UN Security Council Resolution 1973 mentions the responsibility of the Libyan authority to safeguard its citizens and not the responsibility of the international community to do so.⁴⁵ The second reason is that the intervention in Libya establishes that the principle of impartiality promoted by responsibility to protect had lost its relevance since the Libyan intervention was an example of a one-sided intervention because the international community supported the rebels.⁴⁶ Pattison queries the scope of the operation, as well as the ethical purpose of the intervention in Libya. He contends that the

⁴⁰ Simon Adams n 37 above page 18.

⁴¹ Michael N. Schmitt: "Wings over Libya the No-Fly Zone in Legal Perspective" (2011) 36 *Yale Journal of International Law* at 45. Marie-Jose Domesticci-Met: "Protecting in Libya on behalf of the International Community" (2011) 3 *Göttingen Journal of International Law* at 899.

⁴² Simon Chesterman: "Leading from Behind: The Responsibility to Protect, the Obama doctrine and Humanitarian Intervention after Libya" (2011) 25 n 3 *Ethics and International Affairs* at 279-285

⁴³ Dana H. Alin and Erik Jones: "As good as it gets? Survival" (2011) 53 n 3 *Global Politics and Strategy* at 205-215.

⁴⁴ Jennifer M. Welsh: "Civilians Protection in Libya: Putting Coercion and Controversy back into responsibility to protect" (2011) 25 n 3 *Ethics and International Affairs* at 1

⁴⁵ Jennifer Welsh n 44 above at 1

⁴⁶ Jennifer Welsh n 44 above at 2

transforming of the objective of the intervention from civilian protection to regime change symbolises a regrettable and a risky precedent in the application of responsibility to protect.⁴⁷ He stressed that the selectivity of the international community's action in Libya weakens the concept of responsibility to protect.⁴⁸

A related criticism of the Libyan intervention is that the limited mandate from Security Council to use coercive measures to protect civilians was stretched, as is evidenced by the calls from France, Britain and the United States of America to remove Gaddafi prior to the intervention which left no doubt about their goal of bringing about a regime change.⁴⁹ The intervention, and especially the perceived military creep and lingering crisis, has added further challenges to the concept of responsibility to protect in the future.⁵⁰ Evans, in his own criticism, states that the development and consolidation of the usage of responsibility to protect to the extent that can be seen in Libya may not in itself end gross violation of human rights.⁵¹

The forgoing debates on the Libya intervention under the pretext of responsibility to protect raise issues of the legality of such intervention. This study, therefore, seeks to analyse the legality or otherwise of the intervention in Libya which was authorized by the Security Council Resolution 1973. In doing so, some crucial issues which are central to this study will be interrogated. Firstly, what is the historical background of the concept of responsibility to protect? Secondly, who actually has the legal mandate to intervene under responsibility to protect? Thirdly, is the Libyan intervention in accordance with the concept of responsibility to protect? Fourthly, did the coalition forces (NATO) exceed the mandate provided in resolution 1973?

3 OVERVIEW OF THE CHAPTERS

In order to analyse the diverse arguments that exist about the applicability of responsibility to protect and the legality or otherwise of military intervention in Libya, and to provide answers to the research questions, this research work will be divided into six chapters. Having

⁴⁷ James Pattison n 35 above at 277

⁴⁸ James Pattison n 35 above at 277

⁴⁹ Ved P Nanda n 8 above at 39

⁵⁰ Ved P. Nanda n 8 above at 39

⁵¹ Gareth Evans Interview: "The responsibility to Protect Balance Sheet after Libya. Available at Alex Stark, e-international relations: (2011) *The Responsibility to Protect, Challenges and Opportunities in Light of the Libyan Intervention*" at 42

introduced the first chapter, the second chapter will examine the legal framework of the use of force in international law using the UN Charter as a legal basis. Chapter three will document the historical development of responsibility to protect and the content/criteria of responsibility to protect. Chapter four will analyse the UN Security Council Resolution 1973 in order to discover whether the interveners went beyond the mandate. Chapter five will investigate the criteria for responsibility to protect in order to ascertain whether or not the Libyan intervention was in line with the concept. The final chapter will conclude that analysis and provide useful recommendations based on the lessons drawn from the Libyan intervention.

CHAPTER TWO

THE LEGAL FRAMEWORK OF THE USE OF FORCE

1 INTRODUCTION

Since the creation of the UN in 1945, the ability of states to resort to armed force without violating what is, perhaps, the most fundamental principle of modern international law has been severely limited.⁵² The starting point for the legal framework of use of force in international law is the prohibition of the use of force in Article 2(4) of the UN Charter.⁵³ Based on the above principle, Gray posited that, regardless of whether the UN Charter is seen as a revolutionary departure from existing customary international law on the use force or not, the Charter provides a new terminology and the basic principles relative to the use of force.⁵⁴

Article 2(4) of the UN Charter renders the use of force unlawful, unless such force can be demonstrated to come within the ambit of the two exceptions to the prohibition contained in the UN Charter, namely the inherent right of the individual and collective self-defence, as provided in Article 51, or force that has been authorised by the UN Security Council under Charter VII of the UN Charter.⁵⁵ Previously, there was a debate as regards the legality of the use of force to protect a human population under the guise of humanitarian intervention or whether humanitarian intervention would be included as an exception to the use of force.⁵⁶ According to Kaczorowska the concept of humanitarian intervention is “coercive interference in the internal affairs of a state, involving the use of armed force with the purpose of addressing massive human rights violations or preventing widespread human suffering.”⁵⁷ Humanitarian intervention which does not adhere to the principle of use of force as enshrined in the UN Charter would be regarded as being illegal.⁵⁸ It was against this background that the concept of responsibility to protect was emerged. The study in this section will examine the legal framework relative to the use of force and its exception in international law.

⁵² Lindsay Moir: *Reappraising the Resort to Use of Force: International Law, Jus ad Bellum and the War on Terror* (2010) Hart Publishers USA at 1

⁵³ Christine Gray: *International Law and the Use of Force* (2008) Oxford University Press Third Edition at 6

⁵⁴ Christine Gray n 53 above at 6

⁵⁵ Lindsay Moir n 52 above at 5

⁵⁶ Chelsea O'Donnell n 12 above at 559-560

⁵⁷ Alina Kaczorowska: *Public International Law* (2010) Fourth Edition Routledge Publishers at 732

⁵⁸ Chi Deqiang: “Humanitarian Intervention: From a Right to Intervene to a Responsibility to Protect” available at <http://www.gdoshisha.files.wordpress.com/.../revisit-on-humanitarian-intervene.at.p3>. Accessed on 24/04/2025.

2 THE PROHIBITION OF THE USE OF FORCE

Article 2(4) of the U.N Charter has rightly described the prohibition of the threat or use of force as the corner-stone of the Charter system.⁵⁹ Notwithstanding its inherent weaknesses, which stem primarily from the malfunctioning of the collective security system in the way originally envisioned by the framers of the U.N Charter, international law has, until now, withstood all attempts by states or scholars to restrict the scope and content of the provision.⁶⁰ Article 2(4) provides that “all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.”⁶¹ In other words, no intervention can be made in a state without the consent of the state in question.⁶²

Clearly this provision is directed at the inter-state use of force, although as it has turned out civil conflicts have been more common in contemporary international law than traditional inter-state conflict.⁶³ The prohibition of the use of force is complemented by the non-intervention principle, which prohibits coercive intervention in the exclusive domestic affairs of a state.⁶⁴ Under Article 2(6) of the UN Charter, there is a duty on the UN to ensure that even States which are not UN members act in accordance with these principles for the maintenance of international peace and security.⁶⁵ The essence of complying with the principle of non-intervention in any domestic jurisdiction is to ensure that the international community does not take laws into its own hands, and that the principles relating to the use of force is to be complied with.

3 EXCEPTIONS TO THE USE OF FORCE

As I posited above, Article 2(4) of the UN Charter prohibits the use of force in international law. The UN Charter permits states to use force in only two circumstances: firstly, under the authority of the Security Council pursuant to its powers under Chapter VII of the Charter;

⁵⁹ Mehrdad Payendeh: “With Great Power Comes Great Responsibility? The Concept of the Responsibility To Protect Within the Process of International Law making” (2010) 35: 469 *The Yale Journal of International Law* at 492

⁶⁰ Mehrdad Payendeh n 59 above at 492

⁶¹ Article 2 (4) of the United Nations Charter available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>. Accessed on 18/ 08/2015

⁶² Dire Tladi: “The Non-consenting Innocent State: The Problem With Bethlehem’s Principle 12” (2013) 107:563 *The American Journal of International Law* at 575

⁶³ Malcolm D. Evans: *International Law (2006) Oxford University Press Second Edition* at 591

⁶⁴ Mehrdad Payendeh n 59 above at 492

⁶⁵ Malcolm D. Evans n 63 above at 591

and, secondly, in the exercise of the right of individual or collective self-defence under Article 51 of the Charter.⁶⁶ In other words, any use of force that does not comply with the above principle in the international legal order would be regarded as being *ultra vires* and illegal.

The use of force to end massive atrocities must be consistent with the applicable rules of international law relative to the use of force.⁶⁷ Since the aim of the researcher is to examine the use of force in the light of the responsibility to protect, the study will not analyse the second exception to the use of force provided by the UN Charter under Article 51. The study will instead investigate the Security Council authorization of the use of force in international law.

The Chapter VII powers of the UN Charter, particularly Article 39, provide that

the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.⁶⁸

The Security Council may decide what measures, other than the use of armed force, which are to be employed to give effect to its resolutions and it may call upon the members of the UN to apply such measures.⁶⁹ Should the Security Council consider that measures provided for in Article 41 would not be adequate, it may take such action by air, land forces and sea, as may be reasonably necessary to foster international peace and security.⁷⁰ The Security Council is central in the authorization of use of force in the international legal order, once it determines that such action is necessary to maintain international peace and security.⁷¹

5 CONCLUSION

This chapter has investigated the use of force in international law and it has concluded that the use of force in international law is legal if it complies with the exceptions to the use of force. It is only when the UN Security Council has authorised action pursuant to Chapter VII of the UN Charter or individual and collective self-defence that the use force would be

⁶⁶ John Duggard: *International Law A South African Perspective (2011) Fourth Edition Juta Co* at 499

⁶⁷ John Duggard n 66 above at 482.

⁶⁸ Article 39 of the United Nations Charter n 61 above

⁶⁹ Article 41 of the United Nations Charter n 61 above

⁷⁰ Article 42 of the United Nations Charter n 61 above

⁷¹ Article 53 of the United Nations Charter n 61 above

regarded *intra vires* and legal in the international principle on the use of force. The study has confirmed that the Security Council powers with respect to the authorization of the use of force are very broad. Having established the legal framework of the use of force in international law, the study in the next chapter will investigate the development and content of responsibility to protect. In doing so, the work will look at the content of responsibility to protect and the Security Council powers to authorize use of force for the protection of a human population, in a situation where the host state has failed in its responsibility to protect its population from massive human rights violation.

CHAPTER THREE

THE HISTORY AND DEVELOPMENT OF RESPONSIBILITY TO PROTECT

1 INTRODUCTION

In chapter two above, the study argues that the use of force in international law would be legal only if it complies with the exceptions to the prohibition of use of force in Article 2(4) of the UN Charter. The exceptions are the Security Council enforcement action under Chapter VII of the UN Charter and self-defense under Article 51 of the said Charter. Any use of force for the protection of the human population in a sovereign territory of a state will be legal so long as it complies with the use of force principle. It was as a result of the above principle that the international community started considering what would make intervention under human rights protection purposes legal, and it determined that the Security Council was the right authority to intervene when necessary. The study in this chapter examines the historical development and content of ‘responsibility to protect’ and the Security Council authorization of the use force in the light of the responsibility to protect.

2 THE HISTORICAL DEVELOPMENT OF RESPONSIBILITY TO PROTECT

The development of the ‘responsibility to protect’ evolved after the harsh consequences that followed the inability of the UN Security Council to assume its primary responsibility of the maintenance of international peace and security, and its failure to respond to the horrendous genocide in Rwanda and mass killings in Bosnia and Kosovo.⁷² While the Rwandan case exposed the tragedy of the inaction of the Security Council to authorize intervention on humanitarian grounds, Bosnia and Kosovo displayed the horror of humanitarian intervention that by-passed the Security Council authorization.⁷³

⁷² Willan W. Burke-White: “The Adoption of the Responsibility to Protect” (2011) *Jared Genser and Irwin Cotlereds Oxford University Press* at 9

⁷³ Sira Mohamed: “Taking Stock of the Responsibility to Protect” (2012) *2 Berkeley Law Scholarship Repository* at 322.

Humanitarian intervention could be regarded as unilateral.⁷⁴ It is unilateral when the intervention is carried out by one or more states acting without Security Council authorization.⁷⁵

The intensity of human rights violations in this era sparked serious debates as regards instances where the UN Security Council failed to intervene about whether a single state or group of states can then assume the responsibility of the Security Council.⁷⁶ The United Kingdom contended that, if action in the Security Council is blocked, humanitarian intervention is permitted under international law to take exceptional measures in order to avert a humanitarian catastrophe.⁷⁷ The exceptional circumstances posited by the United Kingdom that could warrant humanitarian intervention without Security Council authorization are:

if there is convincing evidence generally accepted by the international community as a whole of extreme humanitarian distress on a large scale, requiring immediate and urgent relief; or that the intervention must be objectively clear that there is no practical alternative to the use of force if lives are to be safe; and that the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim.⁷⁸

The international instruments that addressed the issue of non-intervention in the domestic affairs of a state did not distinguish between intervention by a state acting unilaterally on the one hand and intervention by a group of states acting in concert on the other hand.⁷⁹ In this perspective, if the intervention were illegal, it would continue to remain so even if it were carried out by a group of states in extreme circumstances without Security Council authorization.⁸⁰

In response to the call of sovereignty as a responsibility, the then Secretary-General of the UN in his address to the UN General Assembly recalled the failures of the Security Council to act in Kosovo and Rwanda and challenged the member states to find a common ground in

⁷⁴ A.O Enabulele: “Humanitarian Intervention and Territorial Sovereignty: the dilemma of two ways strange bedfellows (2010) 3 *The International Journal of Human Rights* at 411.

⁷⁵ A. O Enabulele n 74 above at 411.

⁷⁶ Mehrad Payendeh n 59 above at 469-470.

⁷⁷ “Supplementary Written Evidence from RT Hon Robertson MP, Minister of State, Foreign Affairs and Commonwealth Office: Humanitarian Intervention and the Responsibility to Protect” available at <file:///c:/users/Residence/Download/UK%20Position%ON%20R2P%20AND%20HUMANITARIAN%20INTERVENTION.Pdf>. Accessed on 24/ 04/2015

⁷⁸ Supplementary Written Evidence from RT Hon Robertson MP n 77 above

⁷⁹ T Modibo Ocran: “The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping” (2002) 25 *Boston College International and Comparative Law* at 4

⁸⁰ T. Modibo Ocran n 79 above at 4

upholding the principles of the UN Charter and acting in the defence of our common humanity.⁸¹ As a result of this, in his Millennium Report to the General Assembly, the Secretary-General reinstated the problem and repeated the challenge “if humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica-to gross and systematic violations of human rights that offend every precept of our common humanity?”⁸²

As a result of this challenge, the Canadian government responded to the Secretary-General by announcing the introduction of the Report of an International Commission on the Intervention and State Sovereignty (ICISS).⁸³ The Commission was contended that the intervention for human rights purposes should not be based on “the right to intervene” but on “the responsibility to protect”. It states that the responsibility to protect acknowledges that the primary responsibility resides on the host state, and that, when it is unable and unwilling to take action, the responsibility reverts to the international community through the Security Council authorization.⁸⁴

The state whose citizens are affected has the primary responsibility to protect, a residual responsibility also resides with the broader community of states. This substitute responsibility is triggered when a host state is evidently unwilling to discharge its responsibility to protect its population from massive atrocities. The responsibility required in this situation is that the international community will take prompt and decisive action to protect any population that is under serious threat of attack.⁸⁵ The responsibility to prevent, according to the Commission, addresses both the immediate and remote cause of domestic conflict and other man-made crises that put populations at risk.⁸⁶ The responsibility to react according to the Commission must take necessary measures short of military action before resorting to military action and that the military action must be taken with extreme care to avoid causing more harm than

⁸¹ A/54/2000. The Millennium Assembly Report of the United Nations. Report of Secretary-General, paragraph 217, available at www.un.org/en/ga/search/view_doc.asp?symbol=A/54/2000. Accessed on 07/09/2015

⁸² A/54/2000 n 81 above paragraph 217

⁸³ The Report of International Commission on Intervention and State Sovereignty; The Responsibility to Protect (2001), paragraph 1:7, available at <http://www.responsibilitytoprotect.org/iciss%20Report.pdf>. Accessed on 04/04/2015.

⁸⁴ ICISS Report n 83 above at paragraph 1:7

⁸⁵ ICISS Report n 83 above at paragraph 2: 3

⁸⁶ Jeremy Sarkin: “Is Responsibility to Protect an Accepted Norm of International Law in the Post-Libya Era? How it’s Third Pillar Ought to be applied”. (2012) 1 N0 11 *Groningen Journal of International Law* at 27. See also Carnegie Corporation of New York, Preventing Deadly Conflict: Final Report, 1997 Xviii page 39.

good particularly to the civilian population.⁸⁷ The responsibility to rebuild requires that there is adequate aid and assistance with recovery, reconstruction, and transnational justice issues which shall include reconciliation in order to address what happened in such a situation. Responsibility to protect should have roles to play to avoid further crises and set in motion the process to rebuild and prevent violation of human rights.⁸⁸

The Commission further outlines six thresholds for military intervention. These are right authority, just cause, right intention, last resort, proportional means, and reasonable prospect.⁸⁹ It states that the element of ‘right authority’ requires the appropriate body that can authorize military intervention on humanitarian ground. The Commission placed the Security Council as the right authority to take appropriate action and gave the General Assembly the secondary responsibility to authorize action based on the Uniting for Peace Resolution in a situation where the Security Council fails to discharge this responsibility.⁹⁰ The ‘just cause’ criterion according to the Commission is whether the harm or the human rights violations is sufficient to warrant military intervention.⁹¹

The Commission states that the primary aim of the ‘right intention’ must be to prevent, halt and avert human suffering.⁹² The last resort criterion means that diplomatic and non-coercive measures for the prevention of humanitarian crisis have to be exhausted and explored before resorting to military action. In other words, the responsibility to react must be justified when the responsibility to prevent has been fully utilized.⁹³ ‘Proportional means’ emphasizes that the scale and duration of the military action should be the minimum necessary to secure the humanitarian objective. The ‘reasonable prospect’, according to the Commission, highlights that the military action can only be authorized and justified only if it stands as a reasonable chance of success; it also states that military intervention for human protection cannot be justified if the actual purpose for the authorization cannot be achieved⁹⁴ or if the

⁸⁷ ICISS Report n 83 above paragraph 4:5

⁸⁸ Jeremy Sarkin: n 86 above at 30.

⁸⁹ ICISS Report n 83 above at paragraph 4:16

⁹⁰ ICISS Report n 83 above at paragraph 4:17

⁹¹ ICISS Report n 83 above at paragraph 4:17

⁹² ICISS Report n 83 above at paragraph 4:33

⁹³ ICISS Report n 83 above at paragraph 4:37

⁹⁴ ICISS Report n 83 above at paragraph 4:41

consequences of embarking upon the intervention are likely to be worse than if there is no action at all.⁹⁵

The Report further states that there would be an infringement of the international legal order if the Security Council is by-passed and it also stresses/reiterates that there would be massive infringement to that order if human beings are slaughtered while the Security Council does not take decisive action. The Commission warns the Security Council that a single state or regional organization may take military action if the Security Council fails to discharge its primary responsibility.⁹⁶

The concept of responsibility to protect that was developed in the ICISS Report was subsequently considered by the High Level Panel Report on Threats, Challenges and Change (HLPR), chaired by the then Secretary-General in order to look at the available policies in maintaining international peace and security.⁹⁷ The Report, in highlighting the importance of responsibility to protect, states that the appropriate authority to be vested with the enforcement of use of force in the light of responsibility to protect is the UN Security Council.⁹⁸ The Report endorses the principle of the responsibility to protect and states that there is a collective international responsibility which is to be carried out by the Security Council.⁹⁹ The Panel invites the Security Council to use the developed procedures for the authorization of use of force and military action when the need arises.¹⁰⁰ Like the ICISS Report, the HLP Report also identifies a certain threshold for military intervention, such as the seriousness of the threat, proper purpose, last resort, proportional means, and balance of consequences.¹⁰¹

The World Summit Outcome Document (WSOD), thereafter, brought together the heads of state and government who discussed and considered other issues including the responsibility to protect. The core elements of responsibility to protect were contained in paragraphs 138

⁹⁵ Eve Massingham: “Military intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?” (2009) 91 *N0 876 International Review of the Red Cross* at 808.

⁹⁶ Mehrad Payendeh: n 59 above at 474

⁹⁷ Mehrdad Payendeh n 59 above at 474.

⁹⁸ “The Secretary General Report of High-Level Panel on Threats, Challenges and Change” (2004) available at [http:// www.un.org/en/peacebuilding/pdf](http://www.un.org/en/peacebuilding/pdf). Paragraph 207. Accessed on 04/04/2015.

⁹⁹ Eki Yemisi Omoregbe: “The African Union, Responsibility to Protect and Libyan Crisis” (2012) 59 *Netherlands International Law Review* 2 at 147.

¹⁰⁰ Eki Yemisi Omoregbe n 99 above at 147

¹⁰¹ High Level Panel Report n 98 above at paragraph 207

and 139 of the WSOD.¹⁰² The basic ingredients are that the states have the responsibility to protect their populations from genocide, war crimes, ethnic cleansings and crimes against humanity.¹⁰³ While accepting that responsibility, the world leaders affirmed that the international community is committed to assist states so that they can meet these responsibilities.¹⁰⁴ They also agreed that the international community has the responsibility to use diplomatic, humanitarian and other peaceful means in accordance with the UN Charter to help to protect people from these crimes when the host state is unwilling and/or unable to protect its population.¹⁰⁵

It should be noted however, that the UN Security Council made official reference to the doctrine of responsibility to protect in Resolution 1674 on the protection of civilians in armed conflict.¹⁰⁶ The Security Council reaffirms the provisions of paragraphs 138 and 139 of the 2005 WSOD regarding the responsibility to protect populations from war crimes, genocide, ethnic cleansing and crimes against humanity.¹⁰⁷ Also, the Secretary-General's Report Implementing the Responsibility to Protect in 2009 was based on paragraphs 138 and 139 of the WSOD.¹⁰⁸ The Report contributed immensely to turning responsibility to protect into policy implementation.¹⁰⁹ The Report further stated that the operative paragraphs 138 and 139 of the WSOD suggest that responsibility to protect rests on the following three pillars. Pillar one provides the protection responsibilities of the state, pillar two outlines the matter of international assistance and capacity building, and pillar three states the need for timely and decisive response.¹¹⁰ Pillar three is the responsibility of member states to respond collectively in a timely and decisive manner when a state is manifestly failing to provide such protection.¹¹¹ The Report further calls on the General Assembly to consider any policy that will ensure the realization of implementing this concept. The Secretary-General, in his

¹⁰² The General Assembly Resolution 60/1 n 1 above

¹⁰³ The General Assembly Resolution 60/1 n 1 above

¹⁰⁴ The General Assembly Resolution 60/1 n 1 above

¹⁰⁵ Ved P Nanda n 8 above at 26-27.

¹⁰⁶ "United Nations Security Council Resolution 1674" paragraph 4 available at <http://www.un.org/press/en/2006/sc8710.pdf>. Accessed on 05/04.2015.

¹⁰⁷ United Nations Security Council Resolution 1674 n 106 above.

¹⁰⁸ "The 2009 Report of Secretary General on Implementing the Responsibility to Protect" available at <http://www.un.org/en/responsibilitytoprotect.org/implementing%20%20r2p.pdf> Accessed on 05-04-2015.

¹⁰⁹ Mustafa Karakaya: The Role of the United Nations in Respect of the Responsibility to Protect (2013) 111 Human Rights Review at 148

¹¹⁰ The 2009 Secretary-General Report n 108 above at 8 and 9

¹¹¹ The 2009 Secretary-General Report n 108 above at 9

opening statement at the 64th General Assembly in 2010, concluded that the General Assembly has widely agreed and reaffirmed the concept of the responsibility to protect.¹¹²

3 THE CONTENT/CRITERIA FOR RESPONSIBILITY TO PROTECT

During the evolution of the principle of the responsibility to protect, both the ICISS Report and HLP Report developed different kinds of threshold criteria.¹¹³ Although the WSOD did not outline specific criteria for responsibility to protect, it maintained that “each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The international community, through the UN, also has the responsibility of using appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.¹¹⁴

The WSOD identifies the Security Council as the legal authority to intervene when a state fails to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity. From the legal parlance, however, the WSOD maintains the powers of Security Council that flow from Chapter VII of the UN Charter to order enforcement action when there is a threat to international peace and security.¹¹⁵ The Summit further states that use of peaceful means is to be deployed by the UN Security Council before resorting to enforcement through military intervention. In other words, military and coercive action should be utilized as a last resort.¹¹⁶ The report also maintains that the protection of population from war crimes, genocide, ethnic cleansing and crimes against humanity must be the utmost priority of the use of force.¹¹⁷ This study discusses the content of this principle in the next chapter using intervention in Libya as case study.

¹¹² Mehrdad Payendeh n 59 above at 478

¹¹³ Mehrdad Payendeh n 59 above at 497

¹¹⁴ The General Assembly Resolution 60/1 n 1 above at paragraph 139

¹¹⁵ Mehrdad Payendeh n 59 above page 497

¹¹⁶ The General Assembly Resolution 60/1 n 1 at paragraph 139

¹¹⁷ The General Assembly Resolution 60/1 n 1 at paragraph 139

4 THE SECURITY COUNCIL'S AUTHORIZATION OF USE OF FORCE UNDER RESPONSIBILITY TO PROTECT.

Article 39 vested in the Security Council the power to determine a threat to international peace and to make recommendations about it.¹¹⁸ Once the Security Council determines that a threat to international peace exists, it will consider appropriate measures for dealing with such a situation. The Security Council, acting pursuant to Chapter VII, may, by a majority of at least nine votes (so long as none of the permanent members exercises a veto), in the first instance authorize the use of measures falling short of military force under Article 41 of the UN Charter.¹¹⁹ If the Security Council decides that Article 41 measures would not be adequate or that they have shown to be inadequate, it may authorise such forcible measures under Article 42 as may be necessary to maintain or restore international peace and security.¹²⁰

The Sovereignty of state has long been regarded as a crucial structural paradigm of international law.¹²¹ Its recognition, in Article 2(1) of the UN Charter, as a fundamental, though limited, principle of the UN is only one of many pointers that it has not lost its relevance.¹²² In the contemporary international legal order, it is obvious that the treatment of human population within the domestic arena of a state does not belong exclusively to the domain of a state to the exclusion of interference from the outside.¹²³ The concept of responsibility emphasizes the protection of civilian populations from war crimes, ethnic cleansing, genocide and crimes against humanity by the international community through the UN Security Council in a situation where the host state fails to discharge its responsibility to protect its citizens.¹²⁴

Intervention in intrastate human rights violations and humanitarian crises does not fit neatly into the international law governing the use of force,¹²⁵ except where this is done in terms of the exceptions to the use of force posited above, that is pursuant to Security Council powers

¹¹⁸ Article 39 of the United Nations Charter n 61 above

¹¹⁹ Khawar Quareshi: "Legal Grounds for the Intervention in Libya", available at <http://www.lawgazette.co.uk/analysis/legal-grounds-for-intervention-in-libya/60292.fullarticle>. Accessed on 15/06/2015.

¹²⁰ Khawar Quareshi n 119 above

¹²¹ Mehrdad Payنده n 59 above at 470

¹²² Mehrdad Payنده n 59 above at 470

¹²³ Mehrdad Payنده n 59 above at 470

¹²⁴ United Nations General Assembly Resolution 60/1 n 1 above paragraph 138-139

¹²⁵ Andrew Garwood-Gowers n 16 above at 595

under Chapter VII, and Self-defence under Article 51. In other words, intervention under the doctrine of responsibility to protect would be legal only if it complies with the use of force enshrined in the UN Charter. There is a dispute as to whether the Security Council may adopt a resolution, under Article 39, determining that a situation constitutes a threat to the international peace so justifying action under Chapter VII, when it involves a serious violation of human rights within a particular territory.¹²⁶

Some argue that there must be some external element which affects a neighbouring state or has the potential of provoking armed conflict between states; others claim that a serious violation of human rights within the domestic jurisdiction of a state poses a threat to international peace under Article 39.¹²⁷ Based on the above assertion, Tladi contends that the test of whether the Security Council should act is no longer whether there is a threat to peace or a breach of international peace, but rather whether the issue is important internationally and has a high profile.¹²⁸

It should be noted that gross violations of human rights, failing humanitarian situations, and the adverse consequences of internal conflict on a region, such as, possible military engagement in neighbouring states, increasing refugee migration and spill over effects, have become grounds for the Security Council to apply the Charter's peace enforcement mechanisms.¹²⁹ Dugard maintains that a purely internal situation can constitute a threat to international peace under Chapter VII, which could warrant the Security Council to invoke the use of force or measures under Article 41 and 42.¹³⁰ De Wet states that the systematic violation of human rights cannot be regarded as a purely internal matter anymore and that the concept of state sovereignty contained in Article 2(1) of the UN Charter would not pose a limitation to Security Council action under Chapter VII.¹³¹ The argument for the legality or otherwise of the use force in light of responsibility to protect is more likely to be based on the growth of the importance of human rights rather than the restrictions on state sovereignty.¹³² Gray posited that, since human rights protections is no longer a wholly internal matter in a

¹²⁶ John Dugard n 66 above at 483

¹²⁷ John Dugard n 66 above at 483.

¹²⁸ Dire Tladi: "Strict Positivism, Moral Argument, Human Rights and the Security Council; South Africa and the Myanmar Vote" (2008) 8 *African Human Rights Law Journal* at 32

¹²⁹ Mehrdad Peyendeh n 17 above at 366

¹³⁰ John Dugard: "The Influence of the Universal Declaration as Law" (2009) 24 *Maryland Journal of International Law* at 88

¹³¹ Erika De Wet n 22 above at 194.

¹³² Christine Gray: *Use of Force for Humanitarian Purpose; "Research Handbook on International Conflict and Security Law (2013) Edward Elgar Publishers edited by Nigel D White, Christian Henderson"* at 230.

state, the use of force to protect human population overrides the prohibition of the use of force.¹³³ In other words, humanitarian crises in a domestic arena can now be justification for the Security Council authorization of use force for human rights protection in the internal jurisdiction of a state.

It must be pointed out that the UN Security Council has on several occasions in the past authorised the use of force for human rights protection purposes in situations of internal conflict.¹³⁴ Examples of the earlier use of force authorised by the Security Council for human protection include Resolution 794 on Somalia and Resolution 940 on Haiti.¹³⁵ Where a population is suffering serious harm, such as genocide, war crimes, ethnic cleansing and crimes against humanity and the host state is unable or unwilling to protect that population, it is the responsibility of the international community through the Security Council to intervene and provide human protection.¹³⁶ From the analysis above, it is now settled law that the Security Council, acting under Chapter VII, can authorize the use of force under Article 41 and 42 of the Charter to protect a population under the pretext of responsibility to protect that population from human rights violations.

5 CONCLUSION

This study has investigated that responsibility to protect has not added anything new to the general principle of the use of force in international law. It stipulates only that, when a state fails to discharge its responsibility to protect its citizens, the international community through the UN Security Council should authorize enforcement action to protect such a population from massive human rights atrocities. In other words, the concept cannot trigger enforcement action without Security Council authorization, since it has not attained the status of customary international law. It does not add anything new to the principle of the use of force under the UN Charter.

The study further confirmed that the Security Council practice on the authorization of use of force in the international legal order under Article 39 of the Charter has shown that the Council can act in intrastate conflict that involves human rights violations. Article 39, however, did not mention the term ‘human rights violations’, but the broad interpretation and

¹³³ Christine Gray n 132 above at 230

¹³⁴ Andrew Garwood-Gowers n 16 above at 603-604

¹³⁵ Andrew Garwood-Gowers n 16 above at 604

¹³⁶ Mustafa Karakaya n 109 above at 146

discretionary powers exercised by the Security Council have empowered the Council to authorize the use of military force as long as the situation threatens international peace and security. Having established that the Security Council can authorize enforcement action in a domestic territory of a state here, the next chapter investigates the provisions of Resolution 1973 in order to discover whether the coalition of states and interveners in Libya went beyond the mandate. It investigates the Libyan intervention based on the content of responsibility to protect that was developed by the WSOD to discover whether the intervention in Libya was in line with the principle of the responsibility to protect.

CHAPTER FOUR

THE ANALYSIS OF UN SECURITY COUNCIL RESOLUTION 1973

1. INTRODUCTION

Chapter three above determined that the UN Security Council can order non-coercive and coercive measures in an internal situation that is characterised by massive human rights atrocities. It was as a result of this principle that Resolution 1973 was adopted by the Security Council under the guise of responsibility to protect in Libya. Immediately, the resolution was adopted, the interveners carried out the mandate of protection of the civilian population in Libya. But the public debate that erupted about the manner in which the coalition carried out the intervention in Libya generated divergent criticism throughout the world. The study in this chapter has analysed the Security Council Resolution 1973, and has found that the NATO military operations in Libya were within the mandate.

The main elements of the Resolution 1973 are in operative paragraphs 4 and 8.¹³⁷ The paragraph 4 of the resolution

authorizes the member states that have notified the UN Secretary-General, acting nationally or through regional organization, to take all necessary measures, notwithstanding paragraph 9 of the Resolution 1970 (2011), to protect civilians and the civilian populated areas under threat of attack in Libya, including Benghazi, while excluding a foreign occupation force on any part of Libyan territory.¹³⁸

The operative paragraph 8

authorizes member states that have notified the UN Secretary-General and the Secretary-General of the League of Arab States, acting nationally or through regional organizations or arrangements, to take all necessary measures to enforce compliance with the ban on flights imposed by paragraph 6, as necessary, and request states concerned in cooperation with the Arab League to coordinate closely with the Secretary-General on measures they are taking to implement this ban.¹³⁹

The primary objective of Resolution 1973 was civilian protection, and there were “five major ways that the resolution authorized this protection such as a mandate to use all necessary measures, the protection of civilian populated areas including Benghazi, the protection of

¹³⁷ Dire Tladi n 21 above at 36

¹³⁸ Security Council Resolution 1973 n 2 above at paragraph 4

¹³⁹ Security Council Resolution 1973 n 2 above at paragraph 8

areas under threat of attack, an exception to the arms embargo notwithstanding paragraph 9 of Resolution 1970, and the exclusion of ground forces and a no fly zone.”¹⁴⁰

2. ALL NECESSARY MEASURES

The Security Council immediately reacted to the Libyan crises by passing Resolution 1973 that authorized all necessary measures to stop attacks on civilians.¹⁴¹ The phrase “all necessary measures” used in the operative paragraphs is a well-accepted practice of the Security Council for permission to use force to achieve a specific purpose.¹⁴² This is the language utilized by the Security Council to authorize the use of force under Chapter VII, particularly under Article 42 of the UN Charter.¹⁴³ Given the prevailing situation in Libya, Henderson contended that the wording was used to create some form of intentional obscurity thereby allowing all States to win the debates over its permitted limits.¹⁴⁴ Inasmuch as the UN Security Council Resolution 1973 does not provide the time limits and modalities to be taken, the interveners would have to show that every action taken was necessary with regard to the goal they pursued, namely the protection of civilians and civilian populated areas, including Benghazi, and to enforce compliance with the no fly zone.¹⁴⁵

Some legal commentators have argued that the manner in which the coalition of states carried out the all necessary measures in Resolution 1973 assisted the opposition forces in winning the war, thereby ousting Gaddafi from power.¹⁴⁶ In rejecting this view, Akande posited that the use of all necessary measures employed by the UN Security Council was the only way of stopping Gaddafi’s forces from winning the war and could not be interpreted as assisting the opposition forces.¹⁴⁷ The reason for this is that the risk to civilians that justified the military intervention originated from the Gaddafi regime, and any military action against the source of the human rights violations encompasses the measures necessary for the civilian

¹⁴⁰ Paul R. Williams & Colleen (Betsy) Popken: “Security Council Resolution 1973 on Libya: A Moment of Legal & Moral Clarity” (2011) 44:225. *Case Western Reserve Journal of International Law* at 233.

¹⁴¹ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 233

¹⁴² Christian Henderson: “International Measures for the Protection of Civilians in Libya and Cote d’Ivoire” (2011) 60, *International and Comparative Law Quarterly* at 770

¹⁴³ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 234

¹⁴⁴ Christian Henderson n 142 above at 771

¹⁴⁵ Mehrdad Payendeh n 17 above at 385

¹⁴⁶ Simon Adams n 37 above at 15

¹⁴⁷ Dapo Akande: “What does the United Nations Security Council Resolution 1973 permit?” (2012), “available at <http://www.ejiktalk.org/what-does-un-security-council-resolution-1973-permit>.” Accessed on 04/05/2015.

protection.¹⁴⁸ The interveners could have hardly protected civilians in Benghazi and other places in Libya against the Libyan forces without, simultaneously strengthening the opposition. Even if the coalition forces sought to protect civilians and not opposition, such an approach would have been unfeasible in practice.¹⁴⁹ In other words, all necessary measures encompasses those measures the intervening states employed for civilian protection including training and assisting the rebels.

3. CIVILIAN POPULATED AREAS IN LIBYA INCLUDING BENGHAZI

The operative paragraph 4 of Resolution 1973 also incorporated the protection of civilians in Libyan territory and, in addition, made special reference to include those living in Benghazi.¹⁵⁰ Article 51 of the Protocol Additional to the Geneva Convention provides “that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.”¹⁵¹ Article 52 of the Protocol provides “that civilian population shall not be the object of attack and threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”¹⁵² Although military personnel are present in an area, their presence does not divest such an area of its civilian features.¹⁵³

The express inclusion of Benghazi in Resolution 1973 as a protected area was significant because it had been the command and control centre for the Libyan opposition since the inception of the uprising.¹⁵⁴ Apart from the fact that the Libyan uprising started in Benghazi, Gaddafi’s threat to civilians living in Benghazi ‘that he would not have pity on them’ also triggered the Security Council to make specific reference to the protection of civilians living in Benghazi in Resolution 1973.¹⁵⁵ By including Benghazi as a civilian populated area, the Security Council acknowledged that those in need of protection may also be engaged in self-defence, and it also assisted them in doing so.¹⁵⁶ In addition, the advancement of the regime forces to the rebel held city of one million people had created an urgent need for the

¹⁴⁸ Mehrdad Payendeh n 17 above at 387

¹⁴⁹ Mehrdad Payendeh n 17 above at 387.

¹⁵⁰ Security Council Resolution 1973 n 2 above at paragraph 4

¹⁵¹ “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts” (Protocol 1) 8, June 1977 available at: <http://cpwg.net/wp-content/uploads/sites/2/2013/08/AP-1-and-11-to-the-Geneva-Conventions.pdf>. Accessed on 07/07/2015.

¹⁵² Article 51(2) of the Additional Protocol to the Geneva Convention n 152 above

¹⁵³ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 237-238.

¹⁵⁴ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 238

¹⁵⁵ Geir Ulfstein and Hege Fosund Christiansen n 6 above at 160-161

¹⁵⁶ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 238

protection of civilians in Benghazi. There was no room for uncertainties as to the legality of protecting the entire population living in Benghazi including the opposition forces.¹⁵⁷ This was an explicit acknowledgement by the Security Council that Gaddafi's forces and the opposition in Libya were not entitled to similar protection.¹⁵⁸

The operative paragraph 4 of Resolution 1973 also widened protection to civilians and civilian populated areas under threat of attack and, thereby, provided the interveners with the flexibility to fulfil their objective of protection of civilian successfully.¹⁵⁹ Authorising the civilian protection under imminent attack may seem like common sense for a resolution with the objective of civilian protection in order to ensure that the intervening forces were able to end the attacks on civilians before they occurred.¹⁶⁰ While Welsh posited that NATO construed this approach to permit it to overstep its mandate in Resolution 1973,¹⁶¹ Williams and Popkin, on the other hand, contended that this clause provided NATO with the opportunity to adapt the campaign to changing the circumstances on the ground and to strike at all targets that posed a risk and threat to the civilian population.¹⁶² In addition, the interveners did not pull back in eliminating imminent threats of attack to civilians, because destroying targets that posed an imminent threat to civilians was a key objective in the early campaign when the regime forces were staging offensives against the opposition in Benghazi¹⁶³

4 EXCLUDING FOREIGN OCCUPATIONAL FORCES

The Security Council Resolution 1973 in its operative paragraph 4 also authorized the use of force but expressly excluded a foreign occupational force of any kind on any part of Libya.¹⁶⁴ As a result of the above proposition, it has been argued that Resolution 1973 categorically excluded the deployment of foreign forces, because of the fact that the operative paragraph 4 did not mention the word ground forces but resorted to the term 'occupation force'.¹⁶⁵ Payendeh defines the concept of occupation 'as the exercise of effective control over the

¹⁵⁷ Geir Ulfstein and Hege Fosund Christiansen n 6 above at 163

¹⁵⁸ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 338

¹⁵⁹ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 338

¹⁶⁰ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 338

¹⁶¹ Jennifer Welsh: Civilian Protection in Libya n 44 above at 1

¹⁶² Paul R. Williams & Colleen (Betsy) Popken n 140 above at 240

¹⁶³ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 240

¹⁶⁴ Mehrdad Payendeh n 17 above at 385

¹⁶⁵ Mehrdad Payendeh n 17 above at 385

territory of one state by another state.’¹⁶⁶ According to Article 42 of the Hague Convention IV, ‘a territory is considered occupied when it is actually placed under the authority of the hostile army.’¹⁶⁷ Williams and Popkin posited that ‘any foreign intelligence or military presence on the ground in Libya falling short of this, did not constitute the foreign occupation of territory.’¹⁶⁸

In addition, a very broad interpretation of the operative paragraph 4 of Resolution 1973 clearly gives the interveners the opportunity of putting limited foreign military intelligence and personnel on the Libyan territory, inasmuch as they did not constitute a foreign occupation of any form in Libya.¹⁶⁹ In other words, foreign intelligence and military personnel can be used as long as they do not wield effective control in Libya.¹⁷⁰ On the basis of this formulation, ‘military operation’ can include ground forces without the occupation of the territory. Accordingly, the deployment of ground troops in order to gather information or mark possible targets for air strikes is encompassed by the Security Council authorization in as much as it aims at civilian protection.¹⁷¹ Many scholars assert that coalition forces on ground abused this provision because of the fact that they provided the rebel forces with arms, ammunitions and military training, which contradicted the wording of operative paragraph 4.¹⁷² Akande posited that any measure that was adopted by the coalition for the protection of civilian population in Libya would be accepted provided it was for the purposes of civilian protection.¹⁷³ In addition, ground troops were deployed to ensure civilian protection, though they were prohibited from besieging Libyan territory, and this suggests that the Security Council wanted to rule out the possibility that a military intervention would result in the occupation of Libya.¹⁷⁴ With regards to the admissible measures, occupation forces only are explicitly excluded, which means that the deployment of ground troops was

¹⁶⁶ Mehrdad Payehdeh n 17 above at 385

¹⁶⁷ “Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. The Hague” 18 October 1907 available at www.opbw.org/int_inst/sec_docs/1907HC-TEXT.pdf. Accessed on 07/07/2015

¹⁶⁸ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 247

¹⁶⁹ Paul R. Williams & Colleen (Betsy) Popken n 140 above at 247

¹⁷⁰ Ben Smith and Arabella Thorp: “Interpretation of Security Council Resolution 1973 on Libya, April 6 2011, House of Commons Library” at 5 available at [http://www.icil.cam.ac.uk/sites/default/files/icil/documents/arabspring/libya_38_House_of_Commons Interpretation_SCResolution_1973.pdf](http://www.icil.cam.ac.uk/sites/default/files/icil/documents/arabspring/libya_38_House_of_Commons_Interpretation_SCResolution_1973.pdf). Accessed on 04/06/2015

¹⁷¹ Mehrdad Payehdeh n 17 above at 385-386

¹⁷² Christian Henderson n 142 above at 771

¹⁷³ Dapo Akande: “Does Security Council Resolution 1973 Permit Coalition Military Support for the Libyan Rebels?” (2012) available at www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/. Accessed on 08/07/2015

¹⁷⁴ Mehrdad Payehdeh n 17 above at 386

generally allowed so long as they did not seize effective control over parts of Libyan territory.¹⁷⁵

5 CONCLUSION

The chapter confirmed that NATO's intervention in Libya was strictly within the mandate enunciated in Security Council Resolution 1973. The reason being that the said Resolution was passed for the sole aim of civilian protection, and measures that would enhance this purpose would be in consonance with the spirit and letters of Resolution 1973. Although, there are measures employed by the interveners which seemed to contradict the mandate of the Resolution 1973, such as the jungle justice they displayed in ousting the Libyan authorities and assisting the rebels. The broad interpretation of the mandate has shown that protection of civilian population was the exclusive aim of Resolution 1973, and anything that would obstruct the realization of this objective would not be tolerated by the interveners. Having determined in this chapter that NATO's intervention in Libya was within the mandate, the next chapter will examine the content and criteria of responsibility to protect that was enunciated by the world leaders in 2005 in order to ascertain whether the intervention in Libya was in line with the concept of responsibility to protect.

¹⁷⁵ Mehrdad Payنده n 17 above at 391

CHAPTER FIVE

THE CRITERIA FOR RESPONSIBILITY TO PROTECT IN THE INTERVENTION IN LIBYA

1 INTRODUCTION

Chapter three above, in which the history and development of responsibility to protect was discussed, set out the tone for a consideration of the content and criteria for responsibility to protect as enumerated by the WSOD. While the ICISS Reports and HLP Report specifically itemized the criteria for responsibility to protect, the WSOD did not outline specific criteria for responsibility to protect,¹⁷⁶ but maintains, in paragraph 139, “that the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”¹⁷⁷

Since the ICISS and HLP Reports are not official documents to be relied upon,¹⁷⁸ the study discusses the criteria and content of responsibility to protect it identified based on the WSOD. Importantly, the fact is appreciated that, in international legal order, the Security Council’s authorization of military action is not dependent on the WSOD. The Security Council is empowered to carry out its enforcement action pursuant to its Chapter VII powers once it determines a threat to international peace and security.¹⁷⁹ The UN Security Council can authorize military action under article 42 if the non-coercive measures under article 41 are inadequate to halt the prevailing situation. The case of Libya is an example of responsibility to protect, where the government not only fails to live up to its responsibility to safeguard the rights of its citizens, but the government itself is the author of the mass atrocities. The study in this section investigates the content of ‘responsibility to protect’ and it confirms that the Libyan intervention was in conformity with the concept of responsibility to protect.

¹⁷⁶ Bruno Pommier: “The Use of Force to Protect Civilians and humanitarian: The case of Libya and Beyond” (2011) 93 *International Review of the Red Cross* at 1066

¹⁷⁷ General Assembly Resolution 60/1 n 1 above paragraph 139

¹⁷⁸ Bruno Pommier n 176 above at 1066

¹⁷⁹ Erika De Wet n 22 above at 134

2 THE UN SECURITY COUNCIL AS THE RIGHT AUTHORITY

The WSOD maintains that the International Community is prepared to take action through the UN Security Council in accordance with its powers under Chapter VII of the Charter. In the Libyan case, there was no divergent view about the Security Council's authorization of military action. Since one of the purposes of this work is to examine Resolution 1973, it stands to reason that the UN Security Council was the key player in the authorization and the deployment of armed forces for the protection of Libyan population.¹⁸⁰ In other words, the legal authority for the military operations in Libya was contained in the UN Security Council Resolution 1973.¹⁸¹ As I indicated above, the Security Council authorization of military enforcement action is not dependent on the WSOD, but, rather, the WSOD incorporated what had existed since 1945. The Security Council also has a wide range of discretion when authorizing military enforcement action.¹⁸² From the analysis above, military intervention in Libya was in line with the legal powers conferred on the UN Security Council under the Charter. Given the scope of resolution 1973, therefore, and placing it within the wider concept of responsibility to protect, it is clear that the right authority criterion prior to the intervention was fulfilled. In other words, the military intervention in Libya does correspond with the above threshold requirement.

3 INTERVENTION WHERE THE HOST STATE IS UNWILLING TO PROTECT ITS POPULATION

Firstly, with regard to this threshold, the WSOD maintains that it is only when it is obvious that the host state is incapable of stopping the atrocities that the international community can intervene to help to protect the human population.¹⁸³ The question now is whether the Libyan authority was manifestly unwilling and incapable of halting the human rights violations. Some scholars have argued that the prevailing situation in Libya did not pass this threshold and so warrant military intervention.¹⁸⁴ Walzer, in support of the above proposition, contended that military intervention in Libya was authorized when it was still uncertain that

¹⁸⁰ Erfau Norooz: "Libya, Resolution 1973 and the Responsibility to Protect" (2015) 1 *Central European Journal of International Law* at 78

¹⁸¹ Ethan Chorin: "NATO's Libya Intervention and the Continued Case for a Responsibility to Rebuild" (2013) 31:365 *Boston University International Law Journal* at 371.

¹⁸² Erika De Wet: "Regional Organizations and Arrangements and Their Relationship with the United Nations; the Case of African Union" (2013) at 4. *Max Weller Oxford Handbook on the Use of Force*, "available at <http://ssrn.com/abstract=2279555>." Accessed on 10/10/2013

¹⁸³ General Assembly Resolution 60/1 n 1 above paragraph 139

¹⁸⁴ James Pattison n 35 above at 271

the host state had failed to protect its population.¹⁸⁵ He concludes by saying that military intervention is permissible only in response to acts that shock the moral conscience of mankind and that the case of Libya did not pass this litmus test.¹⁸⁶ Similarly, Modeme argues that this threshold requirement was not properly fulfilled before the military intervention.¹⁸⁷ He goes further to say that the allegation of the killing of civilians and crimes against humanity were made in both the Security Council Resolutions 1970 and 1973; little compelling evidence was produced to substantiate the facts.¹⁸⁸ He concludes that the UN Commission of Enquiry that was constituted to look into the situation of Libya was unable to file a report verifying that international crimes were being perpetrated by the regime forces.¹⁸⁹

In order to assess the intervention in Libya under this threshold clearly, it is imperative to look at the situation of Libya prior to the military intervention briefly to ascertain whether or not this threshold criterion was met. The Libyan people took to the streets of Benghazi and other cities located in the East of the country in 2011.¹⁹⁰ As the protest progressed, the Libyan leader declared that he would not step down and ordered his supporters to cleanse the Libyan population house by house and room by room.¹⁹¹ The situation deteriorated rapidly and the widespread use of violence by the Libyan government against civilians became widely recognized as amounting to crimes against humanity, one the four crimes the eradication of which was the reason for the introduction of the responsibility to protect.¹⁹² Despite the series of calls from the international community to stop the mass atrocities, Gaddafi threatened civilians living in areas that refused to comply with his rule, and declared that he would not have pity or mercy on them.¹⁹³ Gaddafi, speaking in Tripoli, called upon the loyalists to get out of their houses and attack all opponents of the regime. Invoking language that was reminiscent of the 1994 genocide in Rwanda, he described the protesters as drug-crazed rats,

¹⁸⁵ Michael Walzer: “The Case against Our Attack on Libya” available at <http://www.newrepublic.com/article/world/85509/the-case-against-our-attack-libya>. Accessed on 11/06/2015.

¹⁸⁶ Micheal Walzer n 185 above. See James Pattison n 35 above page 271-272

¹⁸⁷ Lawrence Modeme n 18 above at 13-14

¹⁸⁸ Lawrence Modeme n 18 above at 14

¹⁸⁹ Lawrence Modeme n 18 above at 14

¹⁹⁰ Leonie Maes: “Towards an Effective United Nations-African Union Partnership for Peace. A Critical Outlook based on the Implementation of Responsibility to Protect in Libya” (2012) 1 *Journal of African Union Studies* at 64

¹⁹¹ Leonie Maes n 190 above at 64

¹⁹² Leonie Maes n 190 above at 64

¹⁹³ Geir Ulfstein and Hege Fosund Christiansen n 6 above at 160-161

cockroaches and cowards.¹⁹⁴ It was against this background that the UN Security Council adopted Resolution 1973, authorizing member nations and regional organizations to intervene in Libya in order to stop the serious threat the Libyan regime posed to the civilian population. In other words, Gaddafi's demonstrable intention to unleash terror on the civilian population posed a serious threat to them that triggered the adoption of Resolution 1973.

4 MILITARY INTERVENTION AS A LAST RESORT

The WSOD stipulates that military intervention should be authorized when diplomatic and other peaceful means have been explored.¹⁹⁵ Were diplomatic and non-coercive measures explored in Libya before resorting to military action? The UN Security Council met to consider the situation in Libya. The outcome of the meeting was the adoption of Security Council Resolution 1970. The Resolution 'expressed grave concern about the conflict in Libya and also condemned the killings of civilians and reminded the Libyan government of its responsibility to protect its population' from human rights violations.¹⁹⁶ The said Resolution 'demanded an immediate end to the violence and urged the Libyan authorities to act with the utmost restraint and respect for human rights'.¹⁹⁷ The Resolution also referred the situation in Libya to the Prosecutor of the ICC for investigation, and imposed an arms embargo and a travel ban on key Libyan officials, as well as freezing all Libyan assets.¹⁹⁸

Regardless of the implementation of those measures pursuant to resolution 1970 and international condemnation, the Gaddafi government continued its brutalities against the Libyan population.¹⁹⁹ The situation was later aggravated as Gaddafi's troops came dangerously close to conquering the last remaining city of Benghazi, and, backed by the Arab League and the Support of African Union, the Security Council adopted Resolution 1973, authorising member states and regional organization to use all necessary measures to protect the civilian population in Libya Arab Jamahiriya.²⁰⁰ The UN Security Council adopted resolution 1970 in order to ensure that the Libyan situation was given a peaceful and diplomatic settlement. Unfortunately, Gaddafi's intention to eliminate the Libyan population and his unwillingness to adhere to Resolution 1970, led to the adoption of Resolution 1973.

¹⁹⁴ Simon Adam n 37 above at 5

¹⁹⁵ General Assembly Resolution 60/1 n 1 above paragraph 139

¹⁹⁶ Security Council Resolution 1970 n 11 above

¹⁹⁷ Security Council Resolution 1970 n 11 above

¹⁹⁸ Security Council Resolution 1970 n 11 above

¹⁹⁹ Geir Ulfstein and Hege Fosund Christiansen n 6 above at 160

²⁰⁰ Security Council Resolution 1973 n 2 above

In other words, the failure of diplomatic measures that were carried out to prevent the human rights violations led to the adoption of coercive and military measures to ensure that civilians were protected from mass atrocities.

5 THE PURPOSE MUST BE TO AVERT MASSIVE ATROCITIES

According to the WSOD, the purpose of which the intervention is to take place must be to stop human rights atrocities where the host state has failed to avert them.²⁰¹ The purpose of the use of force in Resolution 1973 is quite clearly stated as the protection of civilians.²⁰² As indicated in the above chapter, the proper aim of Resolution 1973 was the protection of civilians, and there were five major ways that the resolution authorized this protection, such as a mandate to use all necessary measures, the protection of civilian populated areas including Benghazi, the protection of areas under threat of attack, an exception to the arms embargo notwithstanding paragraph 9 of Resolution 1970, the exclusion of ground forces and a no fly zone.²⁰³ In other words, the civilian protection was the primary objective of the use of force in Libya. At the adoption of the resolution, a number of the abstaining states raised questions about the proper purpose of Resolution 1973.²⁰⁴

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.²⁰⁵ Norooz argued that, if civilian protection had been the real aim, NATO forces would have backed a cease fire and negotiated a peaceful settlement rather than siding with the rebels.²⁰⁶ Weiss posits that the proper purpose was about controlling Libya's oil despite all high-blown rhetoric surrounding the action.²⁰⁷

In rejecting this view, Pattison contended that the predominant intention was for civilian protection.²⁰⁸ He posits that the military targets selected for bombing were largely those that posed a serious threat to the civilian population.²⁰⁹ He further asserts that if regime change

²⁰¹ General Assembly Resolution 60/1 n 1 above paragraph 139

²⁰² Dire Tladi n 21 above at 38.

²⁰³ Security Council Resolution 1973 n 2 above

²⁰⁴ Dire Tladi n 21 above at 38

²⁰⁵ Dire Tladi n 21 above at 88

²⁰⁶ Efraun Norooz n 180 above at 97

²⁰⁷ Thomas G. Weiss and Marry Ellen O'Connell: "The Responsibility to Protect: Challenges & Opportunities in the Libyan Intervention" (2011) at 16 available at <http://www.e-ir.info/info/wp-content/uploads/R2P.pdf>. Accessed on 06/05/2015

²⁰⁸ James Pattison n 35 above at 273

²⁰⁹ James Pattison n 35 above at 273

had initially been the primary aim of NATO, the coalition would have bombed Gaddafi's troops wherever they were likely to be found, with fewer civilian casualties.²¹⁰ From the letters and text of Resolution 1973, the proper purpose of intervention in Libya was civilian protection. Despite the above argument, the initial aim of the interveners was for the protection of civilians. The intervention in Libya, for all intents and purposes, fulfilled its objective of protecting civilians, as a result of the fact that it prevented numerous attacks that were directed against the civilian population by the Gaddafi forces.

It should be noted that the intervention to avert human suffering and prevent massive atrocities according to the WSOD must be to save life. To assess this requirement, Norooz asks whether those at risk would be better or worse overall as a result of the intervention.²¹¹ There were divergent views on this issue, while some argued that those who died in Libya during the intervention were many, others posited that the intervention saved many lives.²¹² Human Rights Watch reported that the NATO air strike killed many civilians.²¹³ Similarly, Amnesty International posited that the Libyan civilians who died as a result of the NATO air strike were enormous, including those who were not directly participating in hostilities.²¹⁴

In rejecting the above arguments, Norooz posited that NATO's leadership and its operations in Libya protected many tens of thousands of lives.²¹⁵ He asserts that Gaddafi's intention to wipe out the Libyan population in Benghazi, which NATO prevented, could have been synonymous with the Rwandan genocide which left more than 800,000 civilians dead in under a month.²¹⁶ Chorin argued that the above requirement was met with flying colours, because the number of those who died before the intervention was greater than the number who died during the intervention in Libya.²¹⁷ Given the scope of resolution 1973, therefore, and placing it in the wider concept of responsibility to protect, it is clear that many of the vital ingredients needed for a military operation prior to the intervention were fulfilled. There may, however, be some criticism that holds NATO to account, but the intervention in Libya does correspond with the general requirements and principles of responsibility to protect

²¹⁰ James Pattison n 35 above at 274

²¹¹ Erfraun Norooz n 180 above at 99

²¹² Erfraun Norooz n 180 above at 99

²¹³ "Human Rights Watch (2012), NATO Investigate Civilians Death in Libya" available at <http://www.hrw.org/news/2012/05/14/nato-investigate-civilian-death-libya>. Accessed on 30/04/2015.

²¹⁴ "Amnesty International Report: Libya the Forgotten Victims of NATO Strike; Amnesty International Publications" (2012) at 5-7 available at www.amnesty.org.pdf. Accessed on 30/04/2015

²¹⁵ Erfraun Norooz n 180 above at 99

²¹⁶ Erfraun Norooz n 180 above at 99

²¹⁷ Ethan Chorin n 181 above at 373

enshrined in the Secretary-General's Report and Outcomes Document. Based on the above proposition, the research concludes that the intervention in Libya was in line with responsibility to protect.

6 CONCLUSION

The study concludes that the intervention in Libya was the first time the intervention under the pretext of responsibility to protect was carried out in a domestic arena of a sovereign state. It confirms that the response of the international community to humanitarian crises has improved considerably from what the world experienced in the 90s. Looking at the Libyan intervention, *vis-a-vis* the Syrian crisis, questions the claims that the Security Council's authorization of military action to protect the civilian population from massive human rights abuse is not consistent.

The study argues that the intervention in Libya for the reason of civilian protection was orchestrated by the super powers and should not be seen as an example for future intervention. The work also maintains that the mandate of Resolution 1973 that resulted in regime change was construed broadly by the interveners, and this will hinder the opportunity of making responsibility to protect a customary international law. It is the opinion of the researcher that the intervention in Libya does correspond with responsibility to protect but that the concept cannot legalize the intervention without the Security Council Resolution 1973. The study will, in the final chapter, conclude the research by examining the lessons drawn from the intervention in Libya under the concept of responsibility to protect and will provide vital recommendations for future intervention.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATION

1 CONCLUSION

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

In conformity with the above reasoning, the UN Security Council swiftly adopted Resolution 1973 which authorized military force in Libya and this seemed to point to a new era of international cooperation and prompt response to matters of civilian protection. As expected, the supporters of responsibility to protect were quick to hail Resolution 1973 as a triumph for a new concept.²¹⁸ Conversely, the opponents of military intervention in Libya, such as China, Russia, India, Brazil and South Africa (although South Africa voted in favour of Resolution 1973) put up a fierce opposition to the manner in which the interveners carried out their military operations in Libya, arguing that Resolution 1973 that was adopted under the pretext of responsibility to protect was employed to advance regime change in Libya.

The study wonders about what security implications the international community would have grappled with had Resolution 1973 not been adopted, as it later became evident that, despite the criticisms of the intervention in Libya, it prevented massive atrocities. This work considers that military intervention in Libya will no doubt serve as a precedent to would-be

²¹⁸ Andrew Garwood-Gowers n 16 above at 616

perpetrators of human rights violations and opponents of the responsibility to protect who will ultimately come to terms with this emerging concept which requires international cooperation for perfection.

The study has found that the responsibility to protect has not attained the status of customary international law and cannot be binding on states to implement the concept when the need arises. The implementation of the responsibility to protect a population from genocide, war crimes, ethnic cleansing and crime against humanity by the international community would be legal only once the use of force to protect a human population is authorized by the UN Security Council. This study has found or is cognizant of the fact that the interveners in Libya averted mass atrocities, humanitarian crises and other grave forms of human rights violations. It is also the study's view that the interveners failed to operate within their mandate. That is to say, NATO and its allies went outside the scope of Resolution 1973 which did not contemplate any form of regime change. This study considers NATO's conduct as having been contrary to the purposes of the UN in the authorisation of the use of military force for civilian protection, because jungle justice was employed to oust the Gaddafi regime from office.

2 RECOMMENDATION

The research recommends that the international community, through the UN Security Council, endeavours to fashion the best approach to advancing the concept of responsibility to protect. This is because the UN appears to have failed to intervene in similar flash points such Syria and Yemen, creating the impression that there was selectivity and handpicking in the determination of the Security Council to intervene in Libya, or that the lives of some people are more important than others. For this reason the Council has been criticised. These criticisms may be eliminated if the UN Security Council employs appropriate measures through some UN specialized agencies that will ensure the adequate implementation of measures short of military force before resorting to military intervention. In the event to authorize military enforcement action or intervention in domestic jurisdiction of a state for human rights protection, the permanent members should cautiously exercise the veto at their disposal so as not to plunge the Council into deadlock.

Where the UN Security Council is in deadlock with regard to authorizing military intervention to protect civilian population, the UN General Assembly is to be expected to

order measures that will enable the international community to intervene in such instances. The regional agencies and organizations, in carrying out the maintenance of peace and security in their various regions, are to be assured that they do not stand by and watch civilians been slaughtered. In the event where there are massive atrocities and the UN Security Council is in deadlock, the regional organizations and agencies are to carry out the enforcement action so long as it is aimed at civilian protection.

It is further recommended that the Security Council should ensure that the appropriate committees are constituted in case of future intervention for the purpose of monitoring the interveners so as to keep them within the limits or scope of the mandate. The various agencies and arrangements that carry out the Security Council mandate should be required to employ precautionary measures and generally comply with the customary law principles of proportionality and necessity, so that the cause of action will not be greater than inaction.

Since the crimes and massive atrocities which responsibility to protect (such genocide, war crimes, ethnic cleansing and crimes against humanity) intends to prevent are embedded in the customary international law, the international community is enjoined to work out adequate modalities to ensure that responsibility to protect crystallizes to customary international law. In order to ensure that responsibility to protect is applied without divergent views, the UN Security Council should devise suitable criteria for the concept which would ensure that every principle in authorizing the use of force is strictly adhered to. The responsibility to protect a population from human rights violations includes the responsibility to rebuild. It means that, after the enforcement of military intervention, the Security Council is to ensure that the victims and those who were displaced as a result of the intervention are reintegrated into the society.

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