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Article

The United Nations, Military Intervention, and Regime Change in Libya

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The military intervention in Libya on the basis of United Nations Security Council Resolution 1973 raises important questions with regard to the legality and legitimacy of forceful regime change. While the resolution is in accordance with the generally accepted post-Cold War practice of the Security Council, its scope and limits are not entirely clear. As a result, controversial debates about the legality and the legitimacy of the military intervention have begun. A closer examination of Resolution 1973 shows the considerably broad scope of the authorization, which could — with certain restrictions — also be regarded as a legal basis for regime change in Libya. In light of the rather weak legal restraints on the Security Council, Resolution 1973 has to be considered legal and consistent with the Security Council's competences under the Charter of the United Nations. However, the authorization is problematic from a policy perspective and with regard to its legitimacy. Beyond the case of Libya, Resolution 1973 and the surrounding debates therefore raise the general question of the legality, legitimacy, and feasibility of forceful regime change under a mandate of the Security Council and its implications for the international system of collective security.

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INTRODUCTION

“...the United Nations does not wage war.”
-Brahimi Report¹

The concept of regime change has a longstanding but hardly glorious tradition in international politics. Idealistically speaking, the concept encompasses the idea that a government that does not abide by minimum human rights standards and the principle of self-determination forfeits its legitimacy and may be overturned, with the use of force if necessary. Accordingly, Michael Reisman defines regime change as “the forcible replacement by external actors of the elite and/or governance structure of a state so that the successor regime approximates some purported international standard of governance.”² In the history of international relations, regime change has, more often than not, been carried out not for the sake of the people that were suffering under a regime, but in order to advance the strategic, economic, or ideological agenda of some external regime changer. Regime change has usually been initiated and carried out by single states and coalitions of states, outside of the international institutional framework and without authorization by the United Nations Security Council.³ The legality and legitimacy of every regime change have been sources of controversy. The reaction of the international community to past regime changes has depended to a large extent on the political context, on whether the change led to an actual improvement of the people’s situation, and on how the change affected political stability in the region.

The concept of regime change has come under public scrutiny once again with the violent escalation of the conflict in Libya. Unlike the revolutions in Tunisia and Egypt, which were carried out largely without external intervention, the brutal reaction of the Gadhafi regime to the protests that began in January and February 2011 quickly made it clear that the Libyan opposition forces would not be able to achieve political progress or to overthrow their government by themselves. In light of ongoing serious human rights violations, the United Nations Security Council established a no-fly zone over Libya and authorized the member states of the UN to take all necessary measures to protect civilians and

1. U.N. Secretary-General, *Rep. of the Panel on United Nations Peace Operations, transmitted by Letter of Secretary-General*, ¶ 53, U.N. Doc. A/55/305-S/2000/809 (Aug. 21, 2000) (by Lakhdar Brahimi).

2. W. Michael Reisman, *The Manley O. Hudson Lecture: Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT’L L. 516, 516 (2004); see also John Linarelli, *When Does Might Make Right? Using Force for Regime Change*, 40 J. SOC. PHIL. 343 (2009).

3. See, e.g., Reisman, *supra* note 2, at 517.

civilian populated areas under threat of attack.⁴ Two days later, a coalition of states—including the United States, the United Kingdom, and France—began to carry out air strikes against military targets in Libya. By the end of March 2011, NATO had taken over the international military operation in Libya.⁵ With the support of NATO, the insurgents successively took power in Libya, gaining control over the capital, Tripoli, in August and over Sirte, the last city held by the Gadhafi regime, in October 2011. During the fights over Sirte, Gadhafi was killed. With the insurgents taking control over most of the country and being recognized as the legitimate (transitional) government of Libya by much of the international community, a change in the Libyan regime has taken place.

While a change in a state's regime has often been the consequence of military intervention, the intervention in Libya is the first case of a Security Council-mandated operation conducted with the more or less openly admitted goal of overthrowing the government and changing the regime. The events in Libya raise serious questions about the legality, legitimacy, and feasibility of "pro-democratic" military interventions and about the role of intervening states and the United Nations (particularly the Security Council) in regime change. This Article approaches those questions by analyzing the intervention in Libya in three steps. Part I explains the legal framework for military and, in particular, pro-democratic military regime change, focusing on the UN Charter and its development through the practice of UN organs and states. Part II analyzes the legality of the military intervention in Libya. This Part focuses on interpreting the scope of the Security Council's authorization and addressing the question of whether the resolution provided a legal basis for military regime change. Part III will put the situation in Libya in a broader perspective, identifying what implications the Security Council's engagement in Libya has for the international system of collective security and for the role of the United Nations and the Security Council within the international legal order. This Part will go beyond legal analysis and will assess the international community's engagement in Libya from a policy perspective, with specific regard to the legitimacy of the operation and of forceful regime change under a Security Council mandate.

I. THE UN CHARTER FRAMEWORK FOR MILITARY INTERVENTION AND REGIME CHANGE

An assessment of the military intervention in Libya first requires an analysis of the international legal framework for military action as provided

4. S.C. Res. 1973, ¶¶ 4, 6, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

5. Press Release, NATO Secretary General's Statement on No-Fly Zone Over Libya, NATO Press Release (Mar. 23, 2011).

by the UN Charter. Under the UN system of collective security, unilateral military action has been severely restricted. However, the scope of collective military action under the auspices of the Security Council has been continually extended.

A. Unilateral Military Action under the UN Charter

Pro-democratic military interventions with the aim of changing a regime collide with the prohibition of the threat or use of force under Article 2(4) of the UN Charter.⁶ Under the UN Charter, there are only two exceptions to this prohibition: self-defense under Article 51 of the Charter⁷ and enforcement measures taken by the Security Council under Chapter VII of the Charter.⁸ Thus, unilateral military intervention without a Security Council mandate is *prima facie* illegal, unless the targeted state has committed an armed attack that would justify the intervention under Article 51.

Nevertheless, representatives of states as well as international lawyers have tried repeatedly to justify interventions beyond the scope of the UN Charter's enumerated exceptions. They have argued in favor of a restrictive reading of Article 2(4) of the Charter, according to which interventions for benevolent, humanitarian reasons are construed as falling outside the scope of Article 2(4) because they are not directed against the territorial integrity or political independence of a state.⁹ State representatives and international lawyers have cited morality¹⁰ and conflicting goals and obligations in making this argument,¹¹ or they have argued that unwritten, customary exceptions to the prohibition of the use of force exist when humanitarian interventions are at issue.¹² However,

6. U.N. Charter art. 2, para. 4 ("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 other manner inconsistent with the Purposes of the United Nations.").

7. U.N. Charter art. 51.

8. See U.N. Charter ch. VII. A possible third exception, the so-called "Enemy States Clause" of Article 107 of the UN Charter, is obsolete today. See U.N. Charter art. 107; see also Albrecht Randelzhofer, *Article 2(4)*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 112, 125 (Bruno Simma ed., 2d ed. 2002).

9. See, e.g., ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 216–24 (2005); W. Michael Reisman & Myres S. McDougal, *Appendix A: Humanitarian Intervention to Protect the Ibos*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 167, 177 (Richard B. Lillich ed., 1973); see also W. Michael Reisman, *Commentary, Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984). But see Oscar Schachter, *Commentary, The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984).

10. FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY (3d ed. 2005).

11. See, e.g., Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the UN Charter*, 4 CAL. W. INT'L L. J. 203, 255 (1974).

12. See, e.g., Christopher Greenwood, *Commentary, International Law and the NATO Intervention in Kosovo*, 49 INT'L & COMP. L.Q. 926, 929–31 (2000).

international courts and the majority of international lawyers have until now been unwilling to restrict the scope of Article 2(4) of the Charter or enlarge the possible grounds for justification of the use of force.¹³ While there might be a growing tendency among international lawyers to accept unilateral humanitarian intervention,¹⁴ most states still explicitly refuse to accept the legality of such interventions in the absence of a Security Council mandate.¹⁵ Even the growing recognition of the concept of a “responsibility to protect” — which holds that sovereignty carries with it a responsibility of the state to protect its citizens from atrocious crimes and that the international community has a responsibility to prevent and to react to massive human rights violations¹⁶ — does not support the view that unilateral humanitarian intervention is legal.¹⁷

States have also tried to defend interventions by arguing that an intervention would advance democracy or the right of the oppressed people to self-determination in a given situation. This argument was especially prevalent in the context of decolonization during the Cold War. After the Second World War, the success of some national liberation movements in forcefully expelling colonial rulers was directly connected to the help of third-party states, which claimed to have the right to support these independent movements with force.¹⁸ However, state practice in the context of decolonization does not support a general right to pro-democratic military intervention on the part of third-party states. First, while modern regime change is concerned with the intervention of one state in another state in support of the opposition forces, the decolonization cases usually involved a tripartite relationship involving the colonial state, the liberation movement struggling for independence, and a third state intervening on behalf of the liberation movement. This tripartite relationship raised a question not as pertinent to the interventions of today — that is, whether the colonial power itself violated the prohibition of the use of force and whether the third state exercised self-defense on behalf of the independence movement.

Second, while the legitimacy of the colonized people’s effort to achieve independence was hardly disputed, no consensus was reached on whether

13. See Randelzhofer, *supra* note 8, at 117–24.

14. Such a growing consensus is observed, for example, in MATTHIAS HERDEGEN, *VÖLKERRECHT* 274 (9th ed. 2010).

15. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 744 (7th ed. 2008).

16. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001); 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1, at 138–39 (Oct. 24, 2005).

17. Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect Within the Process of International Lawmaking*, 35 *YALE J. INT’L L.* 469, 506–08 (2010).

18. See, e.g., CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 59–64 (3d ed. 2008); Michael Bothe, *Friedenssicherung und Kriegsrecht*, in *VÖLKERRECHT* 639, 659–60 (Wolfgang Graf Vitzthum ed., 5th ed. 2010).

the right to self-determination encompassed the right to use force against the colonial power or whether third-party states had the right to support the colonized people with the use of force.¹⁹ This lack of a consensus is best exhibited in the numerous resolutions of the General Assembly dealing with decolonization. In the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, the General Assembly emphasized the right to self-determination and called for the independence of the colonized people, but it did not state its position on the use of force.²⁰ Subsequent resolutions also recognized the legitimacy of the struggles experienced by people striving to break free of colonial rule but did not address the issue of whether this struggle could involve the use of force or forceful support by third-party states.²¹ The Friendly Relations Declaration of 1970 also emphasizes the right to self-determination, but it is silent on the right to use force in order to realize self-determination,²² as is the 1974 Definition of Aggression.²³ When the General Assembly eventually started to highlight that the liberation of a colonized people could include armed struggle, it did not qualify this armed struggle as legal but as legitimate,²⁴ and it met the resolute opposition of the colonial powers and other Western states.²⁵ In conclusion, the decolonization cases do not provide a convincing argument in favor of a general right to military intervention in order to advance the democratic rights of a people.

Beyond the context of decolonization, states have tried to justify military interventions on grounds of democracy and self-determination.²⁶ At this point, an essential distinction between two kinds of pro-democratic intervention has to be made. First, there have been interventions in order to restore the legitimate — or at least the *de jure* recognized —

19. The principle of self-determination is incorporated in Article 1(2) and Article 55 of the UN Charter. *See* U.N. Charter art. 1, para. 2, and art. 55. It has been recognized as a fundamental human right in the identical Article 1(3) of the International Covenant on Civil and Political Rights and of the International Covenant on Economic, Social and Cultural Rights. *See* U.N. General Assembly, International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; U.N. General Assembly, International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3. While its status as a binding rule under international law is beyond question, its exact scope and content are subject to fierce debate. For an overview see, for example, Daniel Thürer & Thomas Burri, *Self-Determination*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2008).

20. G.A. Res. 1514, U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960).

21. *See, e.g.*, G.A. Res. 2105, U.N. Doc. A/RES/2105(XX) (Dec. 20, 1965).

22. Friendly Relations Declaration, G.A. Res. 2625, U.N. Doc. A/RES/2625(XXV) (Oct. 24, 1970).

23. Definition of Aggression, G.A. Res. 3314, U.N. Doc. A/RES/3314(XXIX) (Dec. 14, 1974).

24. *See, e.g.*, G.A. Res. 34/44, U.N. Doc. A/RES/34/44 (Nov. 23, 1979).

25. GRAY, *supra* note 18, at 62.

26. For an overview, see *id.* at 55–59; NILS PETERSEN, DEMOKRATIE ALS TELEOLOGISCHES PRINZIP 127–31 (2009); Jeremy I. Levitt, *Pro-Democratic Intervention in Africa*, 24 WIS. INT'L. L. REV. 785 (2006).

government of a state after a coup d'état. In 1997, for example, Nigeria intervened militarily in Sierra Leone after President Ahmad Tejan Kabbah was overthrown by a coalition of the Rebel Unity Front and parts of the Sierra Leone army.²⁷ Due to the explicit invitation to intervene by the legitimate government of Sierra Leone, a compelling case can be made for the international legality of the intervention.²⁸ However, interventions aimed at restoring the legitimate government upon invitation have to be distinguished from interventions whose aim is regime change — that is, overthrowing the government in place. Into this category falls, for example, the 1989 intervention of the United States in Panama in order to overthrow the regime of Manuel Noriega. To justify this intervention, President George H.W. Bush referred to the defense of democracy in Panama.²⁹ Similarly, President George W. Bush relied on the goal of liberating the Iraqi people in order to justify the 2003 intervention in Iraq.³⁰ Both interventions have been criticized as illegal by the international community. The intervention in Panama has been “strongly deplored” by the UN General Assembly as a “flagrant violation of international law,”³¹ and the consideration that a democratizing regime change in Iraq could have justified the military intervention has been emphatically rejected by the international community and many international lawyers.³² The international community’s reaction is in line with the holding of the International Court of Justice (ICJ) in the *Nicaragua* case, that under customary international law there is no general right of states to intervene in support of an internal opposition in another state,

27. For background, see Matthias Goldmann, *Sierra Leone: African Solutions to African Problems?*, 9 MAX PLANCK Y.B. U.N. L. 457, 460–65 (2005); Karsten Nowrot & Emily W. Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT’L L. REV. 321, 325–32 (1998).

28. See PETERSEN, *supra* note 26, at 166; Goldmann, *supra* note 27, at 471–72; Nowrot & Schabacker, *supra* note 27, at 388–402. On the concept of intervention by invitation in general, see Georg Nolte, *Intervention by Invitation*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2010). For a more critical view of the intervention, see Michael Byers & Simon Chesterman, “You, the People”: *Pro-democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 259, 289–90 (Gregory H. Fox & Brad R. Roth eds., 2000).

29. See George H.W. Bush, Address to the Nation Announcing United States Military Action in Panama (Dec. 20, 1989), available at <http://tinyurl.com/6ycfzdu>.

30. See George W. Bush, State of the Union Address (Jan. 28, 2003), available at <http://tinyurl.com/6e63nud>.

31. G.A. Res. 44/240, ¶ 1, U.N. Doc. A/RES/44/240 (Dec. 29, 1989); see also David Wippman, *Pro-Democratic Intervention in Africa*, 96 PROCS. ANN. MEETING AM. SOC’Y INT’L L. 143 (2002).

32. See, e.g., GRAY, *supra* note 18, at 231–34; Michael Bothe, *Der Irak-Krieg und das völkerrechtliche Gewaltverbot*, 41 ARCHIV DES VÖLKERRECHTS 255, 258 (Thomas Bruha et al. eds., 2003); Philip Kunig, *Das Völkerrecht als Recht der Weltbevölkerung*, 41 ARCHIV DES VÖLKERRECHTS 327, 330 (2003); Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT’L L. 691, 709–11 (2004); Steven Wheatley, *The Security Council, Democratic Legitimacy and Regime Change in Iraq*, 17 EUR. J. INT’L L. 531, 533 (2006).

even if this opposition is deemed to pursue a politically or morally valuable cause.³³

The General Assembly has stressed on numerous occasions that in general, no state has the right to intervene in civil conflicts within a state.³⁴ So has the Security Council.³⁵ In the absence of an invitation by the government of a state, pro-democratic unilateral military interventions are therefore illegal under international law. Although there is a certain amount of state practice to the contrary, the fact that states usually try to disguise their involvement and their support for opposition forces in another state reflects the conviction that such actions are generally illegal.³⁶ Open engagement in unilateral regime change — as with the U.S. and coalition actions that led to the overthrow of Saddam Hussein in Iraq — has remained the exception.

B. *Collective Military Action under the UN Charter*

A legal basis for military interventions aimed at regime change can therefore only be found in an authorization by the Security Council,³⁷ on which the UN Charter bestows the primary responsibility for the maintenance of international peace and security.³⁸ While Chapter VI of the Charter includes some limited entitlements for the Council to resort to when engaging in the peaceful settlement of disputes, the main competences of the Security Council are codified in Chapter VII. Measures under Chapter VII require that the Security Council first determine the existence of a threat to the peace, breach of the peace, or act of aggression according to Article 39 of the Charter.³⁹ The Council may then order measures not involving the use of armed force under Article 41⁴⁰ or military measures under Article 42.⁴¹ In order to enable the Security Council to carry out military measures, Article 43 obliges all UN member states to enter into special agreements with the Security Council and to make armed forces available to it.⁴² These forces are placed at the disposal

33. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 108–10 (June 27).

34. *See, e.g.*, G.A. Res. 2625, *supra* note 22; G.A. Res. 2131, U.N. Doc. A/RES/2131(XX) (Dec. 21, 1965); Draft Declaration on Rights and Duties of States arts. 3, 4, G.A. Res. 375, U.N. Doc. A/RES/375(IV) (Dec. 6, 1949).

35. *See, e.g.*, S.C. Res. 1234, U.N. Doc. S/RES/1234 (Apr. 9, 1999).

36. *See* GRAY, *supra* note 18, at 105–07; Byers & Chesterman, *supra* note 28, at 259, 279–80.

37. This question has to be distinguished from efforts of the UN to engage in regime change after a military intervention. *See* Steven Wheatley, *The Security Council, Democratic Legitimacy and Regime Change in Iraq*, 17 EUR. J. INT'L L. 531 (2006).

38. U.N. Charter art. 24, para. 1.

39. U.N. Charter art. 39.

40. U.N. Charter art. 41.

41. U.N. Charter art. 42.

42. U.N. Charter art. 43.

and under the command of the Security Council, which is in turn assisted by a Military Staff Committee consisting of the Chiefs of Staff of the permanent members of the Security Council.⁴³ The Charter thereby construes a relatively centralized military enforcement mechanism. The practice of the Security Council has, however, departed significantly from the system of collective security envisioned by the founders of the Charter. The Security Council has employed an expansive reading of Article 39 and has widened its scope of action. It has also applied a flexible approach with regard to the catalogue of measures it can resort to under Chapter VII.

1. *Scope of Action under Article 39 of the UN Charter*

The UN Charter was framed and approved in the aftermath of the two World Wars. Accordingly, the collective security system of the Charter is focused on wars and acts of aggression between states, and the Security Council was designed to act against states that intend to engage or actually engage in aggressive acts against other states.⁴⁴ However, the second half of the twentieth century has shown that threats to international peace and security increasingly originate not from conflicts *between* states but from conflicts *within* states.⁴⁵ In response, the Security Council has labeled not only interstate conflicts but also intrastate conflicts, such as civil wars or oppressive actions of a state against groups of individuals within a state, as “threats to the peace” under Article 39 of the Charter.⁴⁶

Early indications of the Security Council’s broader reading of Article 39 can be found in the Security Council’s characterization of the South African policy of apartheid and racially motivated killings. In 1960, the Security Council concluded that the “large-scale killings of unarmed and peaceful demonstrators against racial discrimination and segregation” in South Africa had led to “international friction” and “might endanger international peace and security.”⁴⁷ Later, it announced that the “policy of apartheid is a crime against the conscience and dignity of mankind and seriously disturbs international peace and security.”⁴⁸ The Security Council also noted that internal actions, such as the execution of death sentences,

43. U.N. Charter art. 47.

44. Jochen Frowein & Nico Krisch, *Article 39*, in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 8, at 717, 720.

45. Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW 615, 623 (Malcolm D. Evans ed., 3d ed. 2010).

46. For an overview, see Frowein & Krisch, *supra* note 44, at 723–26.

47. S.C. Res. 134, ¶ 1, 4, U.N. Doc. S/RES/4300 (Apr. 1, 1960); *see also* S.C. Res. 191, ¶¶ 2 & 4 U.N. Doc. S/5773 (June 18, 1964); S.C. Res. 182, ¶¶ 1–8, U.N. Doc. S/5386 (Dec. 4, 1963); S.C. Res. 181, ¶ 8, U.N. Doc. S/RES/5386 (Aug. 7, 1963).

48. S.C. Res. 473, ¶ 14, U.N. Doc. S/RES/473 (June 13, 1980); S.C. Res. 392, ¶ 7, U.N. Doc. S/RES/392 (June 19, 1976).

potentially aggravated the situation,⁴⁹ and it held that the violence in South Africa seriously jeopardized peace and security in the region.⁵⁰ On the basis of these determinations, it took different measures against South Africa, including an arms embargo, first on a voluntary basis,⁵¹ and later as a mandatory measure.⁵² Only when progress was made in establishing a more democratic, nonracial, and united South Africa did the Security Council conclude that the nation no longer constituted a threat to international peace and security.⁵³

Still, the Security Council's response to the South African conflict did not fully sidestep the requirement of an international — that is, inter-state — conflict for action under Article 39. South Africa's apartheid policy led to military conflicts with other states, which qualified as inter-state conflicts in the traditional sense. Consequently, the Security Council argued that the South African policy was a disturbance of international peace and security in southern Africa.⁵⁴

Since the end of the Cold War, however, the Security Council has more routinely qualified human rights violations and civil wars within a state as threats to international peace and security,⁵⁵ and it is now routine for the Security Council to do so — even without evidence that an internal crisis

49. See S.C. Res. 623, ¶¶ 1–2, U.N. Doc. S/RES/623 (Nov. 23, 1988); S.C. Res. 615, ¶¶ 1–2, U.N. Doc. S/RES/615 (June 17, 1988); S.C. Res. 610, ¶¶ 2–6, U.N. Doc. S/RES/610 (Mar. 16, 1988).

50. S.C. Res. 772, ¶ 5, U.N. Doc. S/RES/772 (Aug. 17, 1992); See S.C. Res. 765, ¶ 3, U.N. Doc. S/RES/765 (July 16, 1992).

51. S.C. Res. 181, U.N. Doc. S/RES/181 (Aug. 7, 1963).

52. S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977).

53. S.C. Res. 930, ¶¶ 2–7, U.N. Doc. S/RES/930 (June 27, 1994); S.C. Res. 894, U.N. Doc. S/RES/894 (Jan. 15, 1994). See, e.g., S.C. Res. 919, ¶¶ 2–5, U.N. Doc. S/RES/919 (May 25, 1994).

54. See, e.g., S.C. Res. 311, ¶¶ 5–7, U.N. Doc. S/RES/311 (Feb. 4, 1972); Frowein & Krisch, *supra* note 44, at 724.

55. The Security Council imposed sanctions on Iraq not only due to its invasion of Kuwait, but also because of the massive human rights violations directed against the Iraqi civilian population, which the Security Council qualified as a threat to international peace and security due to the subsequent flow of refugees. S.C. Res. 688, ¶¶ 3, 9–14, U.N. Doc. S/RES/688 (Apr. 5, 1991). The civil war within the former Republic of Yugoslavia was also qualified as a threat to the peace. See, e.g., S.C. Res. 815, U.N. Doc. S/RES/815 (Mar. 30, 1993); S.C. Res. 743, U.N. Doc. S/RES/743 (Feb. 21, 1992); S.C. Res. 713, ¶¶ 3–4, U.N. Doc. S/RES/713 (Sep. 25, 1991). In the case of war-torn Somalia, the Security Council initially found a threat to the peace in the possible consequences the deteriorating situation could have for the stability in the region. S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992). However, it later focused solely on the “magnitude of the human tragedy,” which in itself constituted a threat to international peace and security. S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992). See also Byers & Chesterman, *supra* note 28, at 285 (discussing the Security Council's reaction to the situation in Somalia). The deteriorating humanitarian situation was also at the center of the Security Council's attention when it determined that the situation in Haiti constituted a threat to peace and security. See S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994). In the case of Rwanda, the Security Council highlighted the magnitude of human suffering as a threat to peace and security. See, e.g., S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 929, U.N. Doc. S/RES/929 (June 22, 1994); S.C. Res. 918, U.N. Doc. S/RES/918 (May 17, 1994). With regard to Darfur, the Security Council referred to the humanitarian crisis and the widespread human rights violations. S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004).

actually has the potential to develop into an interstate conflict.⁵⁶ This practice has been widely accepted by the international community of states,⁵⁷ and international lawyers have justified its legality by pointing to the open wording of Article 39,⁵⁸ by employing a dynamic-evolutionary reading of the Charter as a whole,⁵⁹ by highlighting the fact that in modern international law human rights violations are not an internal issue but of international concern,⁶⁰ and by noting the wide margin of discretion the Security Council enjoys when determining a threat to peace and security.⁶¹ Most recently, the incremental acceptance of the concept of the international community's "responsibility to protect" supports the competence of the Security Council to intervene when massive human rights violations occur.⁶²

In conclusion, the Security Council tends to qualify not only traditional interstate conflicts but also internal conflicts as threats to the peace under Article 39. Massive human rights violations, a deteriorating humanitarian situation, and the negative effects of internal conflict on a region — for example, increasing refugee migration, possible military engagement in neighboring states, and spill-over effects — have become grounds for the Security Council to activate the Charter's peace enforcement mechanisms.

2. *Use of Military Force under Chapter VII of the UN Charter*

Once the Security Council has determined that a given situation is a threat to the peace, it can decide on nonmilitary (Article 41) or military measures (Article 42). The UN Charter envisions a centralization of the use of armed forces, with member states placing forces under the control of the Security Council and the Military Staff Committee.⁶³ However, agreements of the sort contemplated by Article 43 have never been concluded, the Military Staff Committee has never gained significance,⁶⁴ and the Charter's centralized mechanism of military enforcement has never

56. *But see* ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 133–37 (2004) (highlighting the limitations on the strategies of the Security Council in Article 39 matters); KENNETH MANUSAMA, THE UNITED NATIONS SECURITY COUNCIL IN THE POST-COLD WAR ERA 47–117 (2006) (highlighting how the Security Council tries to avoid determining an international threat merely on the basis of internal developments).

57. Frowein & Krisch, *supra* note 44, at 724.

58. W. Michael Reisman, Report, *Tenth Commission: Present Problems of the Use of Armed Force in International Law, Sub-group on Humanitarian Intervention*, 72 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 237, 243 (2007).

59. Payandeh, *supra* note 17, at 496.

60. *See* Frowein & Krisch, *supra* note 44, at 720–21.

61. *See* DE WET, *supra* note 56, at 133–77.

62. Payandeh, *supra* note 17, at 495–96.

63. *See supra* Part I.B.

64. Frowein & Kirsch, *supra* note 44, at 749, 755.

been implemented in practice.⁶⁵ Nevertheless, as the ICJ pointed out in 1962, “It cannot be said that the Charter has left the Security Council impotent in the face of an emergency situation when agreements under Article 43 have not been concluded.”⁶⁶

In compensating for the failure of the originally envisioned peace enforcement mechanism of Chapter VII, the Security Council has resorted to two different instruments: the deployment of peacekeeping forces and the authorization of the use of force by single states and groups of states. While peacekeeping forces are deployed in a centralized but non-coercive manner — the classical concept of peacekeeping requires the consent of the conflicting parties and allows the use of force only in self-defense⁶⁷ — the authorization of single states, groups of states, or regional organizations is the only possible way the Security Council can intervene militarily.⁶⁸ Since the early 1990s, and arguably even before,⁶⁹ the Security Council has authorized the use of force in numerous instances, usually employing the term “all necessary means.” After the invasion of Kuwait by Iraq, the Security Council qualified the attack as a breach of international peace and security⁷⁰ and authorized the member states “to use all necessary means” in order to force the Iraqi troops out of Kuwait and to restore international peace and security in the area.⁷¹ In the case of Somalia, the Security Council authorized the use of force by states in order “to establish as soon as possible a secure environment for humanitarian relief operations.”⁷² With regard to the conflicts in the former Yugoslavia,

65. ANTONIO CASSESE, *INTERNATIONAL LAW* 325 (2d ed. 2005).

66. *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. 151, 167 (July 20).

67. On the development of the concept of peacekeeping, see, for example, Michael Bothe, *Peacekeeping*, in 1 *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY*, *supra* note 8, at 648. Starting with the second United Nations Operation in Somalia (UNOSOM II), however, the Security Council has at times authorized the use of force in order to implement the objectives of the peacekeeping operation. *See* S.C. Res. 814, U.N. Doc. S/RES/814 (Mar. 26, 1993).

68. Jochen A. Frowein, *United Nations*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, ¶ 16 (Rüdiger Wolfrum ed., 2009).

69. In 1950, the Security Council determined that North Korea’s attack on the Republic of Korea constituted an armed attack. S.C. Res. 82, U.N. Doc. S/RES/82 (June 25, 1950). The Council “recommended” that states assist Korea with military forces against North Korea. *See* S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950); S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950). It is subject to debate whether this resolution was a mere affirmation of the right of collective self-defense under Article 51 or an authorization under Chapter VII of the Charter. *See* YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 154, 292–93 (4th ed. 2005) (arguing that the Security Council merely affirmed the right of states to act in collective self-defense). *But see* DANESH SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY* 169–74 (1999) (arguing that the Security Council authorized enforcement action and thereby delegated its Chapter VII powers to states). In 1966, the Security Council authorized the use of force to enforce an oil embargo against Southern Rhodesia. *See* S.C. Res. 221, ¶ 5, U.N. Doc. S/RES/221 (Apr. 9, 1966).

70. S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990).

71. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

72. S.C. Res. 794, ¶ 10, U.N. Doc. S/RES/794 (Dec. 3, 1992).

the Security Council authorized member states to use all necessary measures to implement a flight ban,⁷³ to support the United Nations Protection Force (UNPROFOR) in maintaining safe areas in Bosnia and Herzegovina,⁷⁴ and later to implement the Peace Agreement.⁷⁵ When the Security Council established an international security presence in Kosovo, it also authorized member states to use all necessary means to fulfill the responsibilities of this security force.⁷⁶ In the case of Rwanda, the Security Council authorized states to use force to implement humanitarian objectives.⁷⁷ When the military took over the government in Haiti, the Security Council authorized the use of all necessary means to re-install legitimately-elected President Jean-Bertrand Aristide.⁷⁸ Ten years later, after Aristide had been driven into exile, the Security Council authorized the use of all necessary measures to implement the mainly humanitarian mandate of a Multinational Interim Force.⁷⁹ Member states were furthermore authorized to use all necessary means in East Timor,⁸⁰ Liberia,⁸¹ and Côte d'Ivoire.⁸²

In conclusion, the Security Council has authorized the use of force by single states, groups of states, and regional organizations in numerous instances. In these instances, the Council has acted under Chapter VII of the Charter and routinely used the phrase "all necessary measures," which was and is commonly understood to involve the use of military force. This practice of the Security Council has not been met with serious criticism by the international community of states and has, at least in principle, also been accepted by the overwhelming majority of international lawyers.⁸³

3. "Pro-Democratic" Intervention in the Practice of the UN Security Council?

The Security Council has authorized military interventions in internal conflicts for numerous reasons: to avert or mitigate a humanitarian crisis, to interfere with massive human rights violations, or to avoid or contain destabilizing effects on neighboring states or a region. Many military interventions, in conjunction with the political involvement of the

73. S.C. Res. 816, ¶ 4, U.N. Doc. S/RES/816 (Mar. 31, 1993).

74. S.C. Res. 836, ¶ 10, U.N. Doc. S/RES/836 (June 4, 1993).

75. S.C. Res. 1031, ¶ 15, U.N. Doc. S/RES/1031 (Dec. 15, 1995).

76. S.C. Res. 1244, ¶ 7, U.N. Doc. S/RES/1244 (June 10, 1999).

77. S.C. Res. 929, ¶ 3, U.N. Doc. S/RES/929 (June 22, 1994).

78. S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

79. S.C. Res. 1529, ¶ 6, U.N. Doc. S/RES/1529 (Feb. 29, 2004).

80. S.C. Res. 1264, ¶ 3, U.N. Doc. S/RES/1264 (Aug. 15, 1999).

81. S.C. Res. 1497, ¶ 5, U.N. Doc. S/RES/1497 (Aug. 1, 2003).

82. S.C. Res. 1528, ¶ 16, U.N. Doc. S/RES/1528 (Feb. 27, 2004).

83. *See, e.g.*, ANTHONY AUST, HANDBOOK OF INTERNATIONAL LAW 206–07 (2d ed. 2010); CASSESE, *supra* note 65, at 350; DE WET, *supra* note 56, at 261–65; SAROOSHI, *supra* note 69, at 143–53.

international community, have led to or accelerated regime changes. In general, however, regime change is never the explicit aim or motive of Security Council mandates for intervention.

This was different with regard to the military interventions in Haiti and in Sierra Leone, in which governmental legitimacy played an important role in the Security Council's considerations. In 1990, Jean-Bertrand Aristide was elected President of Haiti.⁸⁴ In September 1991, he was forced out of office by a military coup d'état. After attempts by single states and by the Organization of American States to solve the conflict had failed, the Security Council imposed sanctions against the regime,⁸⁵ which led to the conclusion of the Governors Island Agreement between Aristide and the de facto authority of Haiti, the Commander-in-Chief of the Armed Forces.⁸⁶ In light of these developments, the Security Council suspended the sanctions⁸⁷ and decided to establish a peacekeeping force, the United Nations Mission in Haiti (UNMIH).⁸⁸ When the implementation of the Governors Island Agreement failed and violence flared up again, the Security Council terminated the suspension of the sanctions⁸⁹ and imposed additional sanctions.⁹⁰ Eventually, the Security Council authorized the member states to form a multinational force and to use all necessary means to facilitate the departure of the military leadership and the return of the legitimately-elected president.⁹¹ In conjunction with diplomatic efforts and under the U.S. leadership of the Multinational Interim Force, Aristide was reinstated as President of Haiti.⁹²

It would be too simplistic to regard the collective intervention in Haiti as a precedent for pro-democratic intervention and regime change, even if it represents a departure from previous Security Council action insofar as the change of the de facto regime was the explicit objective of the operation. First, the intervention did not aim at overthrowing a stable government in order to advance the ideal of democracy; it was aimed at reinstating the recognized President of Haiti, who had explicitly consented to the intervention.⁹³ In this way, the case of Haiti is not a precedent for collective intervention aimed at regime change, but rather a precedent for collective intervention aimed at reinstating the internationally recognized

84. As to the facts and development of the conflict, see, for example, Julia Leininger, *Haiti, Conflict*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 19, ¶¶ 11–15 (Rüdiger Wolfrum ed., 2008).

85. S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993).

86. S.C. Res. 861, U.N. Doc. S/RES/861 (Aug. 27, 1993).

87. *Id.*

88. S.C. Res. 867, ¶ 1, U.N. Doc. S/RES/867 (Sept. 23, 1993).

89. S.C. Res. 873, ¶ 1, U.N. Doc. S/RES/873 (Oct. 13, 1993).

90. S.C. Res. 917, ¶ 7, U.N. Doc. S/RES/917 (May 6, 1994).

91. S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

92. See Leininger, *supra* note 84, at para. 15.

93. BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 386 (1999).

government.⁹⁴ Second, while the restoration of the legitimate government was the explicit aim of the intervention, the Security Council did not base its action on the government takeover by the military de facto regime alone. Rather, it qualified the overall situation in Haiti as a threat to peace and security, citing the deteriorating humanitarian situation in the country, the increasing number of Haitians seeking refuge in neighboring states, and the failure of the de facto regime to comply with its obligations under the Governors Island Agreement.⁹⁵ It was therefore not the violation of democratic standards as such that constituted a threat to the peace, but rather the destabilizing and deteriorating conditions that went with the undemocratic change.⁹⁶

The military takeover of the democratically-elected president was also at the center of the Security Council's deliberations in the case of Sierra Leone. However, unlike in Haiti, the Security Council did not authorize a military intervention. The intervention by Nigerian troops within the framework of the Economic Community of West African States (ECOWAS) was carried out without a Security Council mandate, but upon the explicit invitation by the legitimate Sierra Leone government.⁹⁷ Nevertheless, the Security Council condemned the military coup, deplored the fact that the military junta had not allowed the restoration of the democratically-elected government, and imposed sanctions on the junta.⁹⁸ When President Kabbah was reinstated, the Security Council welcomed his return and terminated most of the sanctions.⁹⁹

The case of Sierra Leone shows again that the Security Council regards disturbances of the democratic order as cause for action when they lead to a threat to the peace. But again, it was not the military coup and its implications for the de jure recognized government as such that triggered Security Council action under Chapter VII, but rather the civil strife in Sierra Leone that posed a threat to international peace and security.

4. *Conclusion: Human Rights, Democracy, and Military Intervention*

A survey of the practice of the Security Council, especially after the end of the Cold War, reveals that it has followed an expansive reading of Article 39, allowing it to react not only to classical interstate conflicts but also to internal disturbances such as massive human rights violations. While it might seem surprising and counterintuitive to characterize human rights violations as threats to the peace, the case studies show that the

94. PETERSEN, *supra* note 26, at 135.

95. S.C. Res. 940, *supra* note 91, pmb. ¶¶ 3, 4.

96. Byers & Chesterman, *supra* note 28, at 287; Frowein & Krisch, *supra* note 44, at 725.

97. *See* GRAY, *supra* note 18, at 211.

98. S.C. Res. 1132, ¶ 6, U.N. Doc. S/RES/1132 (Oct. 8, 1997).

99. S.C. Res. 1156, ¶ 2, U.N. Doc. S/RES/1156 (Mar. 16, 1998).

Security Council usually does not only rely on internal disturbances in order to establish the existence of a threat to the peace, but routinely refers to the destabilizing effect that political violence and human rights violations can have for a region — namely, an increase in refugee streams or the military involvement of neighboring states. Initially, the Security Council was quite reluctant to characterize merely internal situations as threats to international peace, and it put more emphasis on the international consequences of internal disturbances. Later, it more openly embraced a broader understanding of peace. This was especially true in the case of Somalia, where the Security Council determined that the magnitude of the human tragedy constituted a threat to international peace and security and did not highlight or explicate any particular involvement of other states or destabilizing effects for the region.¹⁰⁰

Considerations of democratic legitimacy, on the other hand, have hardly played a role in the Security Council's determinations. In the cases of Haiti and Sierra Leone, the Security Council recognized the illegitimate occupation of power by a military junta and aimed at reinstating the legitimate government. But it determined that there existed a threat to the peace on the basis of an examination of the whole situation, including the humanitarian conditions, the increased number of refugees, and the stability of the region. The Security Council has never authorized an intervention solely on the grounds that a government was illegitimate and did not meet democratic standards. Regime change has never been the explicit objective of a Security Council mandate. Nevertheless, a regime change has often been the consequence of a military intervention authorized by the Security Council.

II. THE MILITARY INTERVENTION IN LIBYA

Having established the historical context and the framework of the collective security system, the analysis can now turn to a case study of the situation in Libya and examine the legal framework for the military intervention as well as the legality of forceful regime change. In order to provide the necessary factual context, Part II.A will first describe the situation in Libya and the reaction of the international community to the crisis. Part II.B will then examine the scope of the mandate of Security Council Resolution 1973 in order to determine to what extent it allowed for a forceful regime change in Libya. Finally, Part II.C will examine whether the Security Council was legally entitled to make such an authorization and, accordingly, what the legal limits of the military intervention in Libya were.

100. S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

A. *The Situation in Libya*¹⁰¹

1. *The Start of the Uprising*

Moammar Gadhafi came to power in Libya through a military *coup d'état* in 1969, and ran an authoritarian and repressive regime.¹⁰² Massive and systematic human rights violations were constantly reported, and the entanglement of the Gadhafi regime in numerous incidents of international terrorism is beyond question.¹⁰³ Moreover, the situation in Libya has to be viewed within the broader context of the uprising in North Africa and the Arabic world that culminated in revolutionary regime overthrows in Tunisia and Egypt and violent protests and conflicts in numerous other countries.

In Libya, protests started in January and February 2011 and were met with immediate violent resistance by the Gadhafi regime. At this early stage, the media and several NGOs reported that the government used tanks, machine guns, and snipers against protesters.¹⁰⁴ When the protests escalated, so did the violence. According to media reports, military aircrafts fired at protesters,¹⁰⁵ and even flew bombing raids.¹⁰⁶ The Libyan regime started hiring mercenaries to fight against the opposition forces. The media continued to report violence against protesters and civilians, including the execution of unarmed civilians.¹⁰⁷ Libyan government officials and ambassadors resigned out of protest against the violent reaction of the regime, and some members of the army refused to attack civilians, even defecting to the rebels.¹⁰⁸

101. At this point, it is difficult to examine the factual situation in Libya closely. The description in this Article is based on reports provided by the media and NGOs, as well as on statements of states and international organizations. Against the background of the obvious political interests involved, caution is warranted.

102. On the background and development of the revolution, see, for example, DIRK VANDEWALLE, *A HISTORY OF MODERN LIBYA* 77–96 (2006).

103. Libya's involvement in terrorist activities has been a constant item on the agenda of the Security Council and grounds for collective sanctions. See, e.g., S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993); S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992); S.C. Res. 731, U.N. Doc. S/RES/731 (Jan. 21, 1992). Only when the Libyan government acknowledged its responsibility for certain terrorist actions, agreed to provide compensation, and officially renounced all forms of terrorism, did the Security Council lift the sanctions. See S.C. Res. 1506, U.N. Doc. S/RES/1506 (Sept. 12, 2003).

104. See, e.g., *Libya: Commanders Should Face Justice for Killings*, HUMAN RIGHTS WATCH (Feb. 22, 2011), <http://tinyurl.com/4jyqyd4>; *Libya: Security Forces Fire on Protesters in Western City*, HUMAN RIGHTS WATCH (Feb. 26, 2011), <http://tinyurl.com/66bpofd>.

105. *Libya Air Force Bombs Protesters Heading for Army Base*, HAARETZ (Feb. 21, 2011), <http://tinyurl.com/66zqa9p>; *Libyan Protesters Fired On*, AL JAZEERA (Feb. 21, 2011), <http://tinyurl.com/69an884>.

106. *Fresh Violence Rages in Libya*, AL JAZEERA (Feb. 22, 2011), <http://tinyurl.com/4hpajpw>.

107. David Kirkpatrick, *In Libya Capital, Long Bread Lines and Barricades*, N.Y. TIMES, Feb. 26, 2011, at A1, available at <http://tinyurl.com/4ztkrjf>.

108. See, e.g., Colin Moynihan, *Libya's U.N. Diplomats Break With Qaddafi*, N.Y. TIMES (Feb. 21,

In March, the opposition forces — consisting of civilians and former members of the Gadhafi regime and of the armed forces that had defected — began to organize. They formed the National Transitional Council, which soon claimed to be the legitimate representative organ of the Libyan people.¹⁰⁹ On March 10, 2011, France recognized the National Transitional Council as the legitimate government of Libya.¹¹⁰ The next day, the European Council issued a declaration condemning the violence against civilians in Libya and recognizing the National Transitional Council as a “political interlocutor.”¹¹¹

In Libya, the opposition gained control of Benghazi, and Gadhafi’s troops flew air attacks against them.¹¹² Following the opposition’s initial military gains, fights between the regime and the rebels continued. Attacks were met with counterattacks, and both sides struggled for control over the country.

2. *Initial Reaction of the International Community*

From the early stages of the conflict, the violent reaction of the Gadhafi regime against protesters and insurgents was harshly criticized by the international community. In February 2011, UN Secretary-General Ban Ki-moon expressed his outrage in light of press accounts that reported that Libyan authorities had been firing at demonstrators from warplanes and helicopters.¹¹³ He referred to “allegations of indiscriminate killings, arbitrary arrests, shooting of peaceful demonstrators, the detention and torture of the opposition and the use of foreign mercenaries,” based on reports that he found to be “credible and consistent.”¹¹⁴ The Security Council issued a press statement in which its members expressed grave concern at the situation in Libya, condemned the violence and use of force against civilians, and deplored the repression of peaceful demonstrators.¹¹⁵

2011), <http://tinyurl.com/5v84fk>; *Libyan Justice Minister ‘Resigns over Excessive Violence,’* THE NATIONAL (Feb. 22, 2011), <http://tinyurl.com/62wlxao>.

109. Anthony Shadid & Kareem Fahim, *Opposition in Libya Struggles to Form a United Front*, N.Y. TIMES, Mar. 8, 2011, at A1.

110. David Gauthier-Villars, Adam Entous & Charles Levinson, *France, U.S. Reach Out to Rebels*, WALL ST. J., Mar. 11, 2011, at A6.

111. European Council Declaration (EC) No. 7/1/11 of 11 Mar. 2011, ¶ 8.

112. Julian Borger, Patrick Wintour & Martin Chulov, *US Tightens Military Grip on Gaddafi*, GUARDIAN, Feb. 28, 2011, at 1.

113. Press Release, Secretary-General, *Outraged Secretary-General Calls for Immediate End to Violence in Libya*, U.N. Press Release SG/SM/13408, AFR/2119 (Feb. 22, 2011).

114. Press Release, Secretary-General, *Secretary-General Tells Security Council Time to Consider Concrete Action in Libya, As Loss of Time Means More Loss of Lives*, U.N. Press Release SG/SM/13418, SC/10186, AFR/2124 (Feb. 25, 2011).

115. Press Release, Security Council, *Press Statement on Libya*, U.N. Press Release SC/10180, AFR/2120 (Feb. 22, 2011).

That month, the UN High Commissioner for Human Rights condemned the excessive use of lethal force against peaceful protesters and expressed her concern in light of reports of arbitrary killings, arrests, and detentions, as well as torture and enforced disappearances.¹¹⁶ Other UN human rights experts joined in, raising their concern that the use of lethal force against peaceful protesters violated human rights.¹¹⁷ In light of the reported use of machine guns, snipers, and military planes against demonstrators, the High Commissioner demanded an immediate cessation of the grave human rights violations and called for an independent international investigation.¹¹⁸ Other human rights experts warned that the reported violations could amount to crimes against humanity and called for an immediate stop to what they termed a “massacre.”¹¹⁹ On February 25, 2011, the UN Human Rights Council strongly condemned “the gross and systematic human rights violations committed in Libya, including indiscriminate armed attacks against civilians, extrajudicial killings, arbitrary arrests, detention and torture of peaceful demonstrators, some of which may also amount to crimes against humanity.”¹²⁰ It established an independent international commission of inquiry to investigate the alleged human rights violations, and recommended that the General Assembly suspend Libya’s membership in the Human Rights Council.¹²¹ The General Assembly did so on March 1, 2011.¹²²

The international community also voiced its concern through regional organizations. The Council of the European Union condemned the repression against demonstrators in Libya and deplored the violence and the death of civilians.¹²³ The Council of the League of Arab States held an emergency meeting and decided to suspend Libya’s membership.¹²⁴ On the same day, the General Secretariat of the Organisation of the Islamic

116. Press Release, UN High Commissioner for Human Rights, Pillay Denounces Violence by Security Forces in Libya, Bahrain and Other Countries in Middle East and North Africa (Feb. 18, 2011), *available at* <http://tinyurl.com/5wepc63>.

117. Press Release, UN High Commissioner for Human Rights, Bahrain / Libya: UN Experts Urge Authorities to Guarantee Right to Protest Without Fear of Being Injured or Killed (Feb. 18, 2011), *available at* <http://tinyurl.com/63n6q2t>.

118. Press Release, UN High Commissioner for Human Rights, Pillay Calls for International Inquiry into Libyan Violence and Justice for Victims (Feb. 22, 2011), *available at* <http://tinyurl.com/66zqs74>.

119. Press Release, UN High Commissioner for Human Rights, Libya: “Stop the Massacre” — UN Experts (Feb. 22, 2011), *available at* <http://tinyurl.com/6da65f8>.

120. Human Rights Council Res. S-15/1, Rep. of the Human Rights Council, 15th Spec. Sess., Feb. 25, 2011, U.N. Doc. A/HRC/S-15/1 ¶ 1 (Feb. 25, 2011).

121. *Id.* ¶¶ 11, 14.

122. G.A. Res. 65/265, ¶ 1, U.N. Doc. A/RES/65/265 (Mar. 3, 2011).

123. Council of the European Union, Draft Council Conclusions on Developments in the Southern Neighbourhood (Feb. 21, 2011), *available at* <http://tinyurl.com/5uz23fm>.

124. Matt Bradley & Charles Levinson, *Arab League Urges Libya ‘No-Fly’ Zone*, WALL ST. J. (Mar. 14, 2011), <http://tinyurl.com/6ylbc2a>.

Conference strongly condemned the excessive use of force against civilians in Libya and called the ongoing coercion and oppression a “humanitarian catastrophe.”¹²⁵ The Committee of Permanent Representatives to the Organisation of the Islamic Conference endorsed this statement.¹²⁶ The Peace and Security Council of the African Union also strongly condemned the “indiscriminate and excessive use of force and lethal weapons against peaceful protesters, in violation of human rights and international Humanitarian Law.”¹²⁷ Furthermore, the Council called the aspirations of the Libyan people for democracy and political reform “legitimate.”¹²⁸ The African Commission on Human and Peoples’ Rights condemned the violence and use of force against civilians and the suppression of peaceful demonstrators, and called on the government of Libya to immediately end the violence and to ensure the respect for human rights in Libya.¹²⁹ Others, including the Gulf Cooperation Council¹³⁰ and the Foreign Minister of Luxembourg,¹³¹ have gone so far as to call the action of the Gadhafi regime “genocide” against its own people.

The reports of massive human rights violations triggered discussions among the members of the Security Council, which eventually led to the adoption of Resolution 1970 on February 26, 2011.¹³² In the preambular paragraphs of the resolution, the Security Council referred to the statements and condemnations made by other organs of the United Nations as well as by regional organizations.¹³³ Elaborating on the alleged human rights violations, the Security Council expressed its concern at the situation in Libya and condemned the violence and the use of force before it deplored more specifically the gross and systematic violation of human rights and “the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government.”¹³⁴ In

125. Press Release, Organisation of the Islamic Conference, OIC General Secretariat Condemns Strongly the Excessive Use of Force against Civilians in the Libyan *Jamahiriyah* (Feb. 22, 2011), available at <http://tinyurl.com/62rmq75>.

126. Press Release, Organisation of the Islamic Conference, Final Communique Issued by the Emergency Meeting of the Committee of Permanent Representatives to the Organisation of the Islamic Conference on the Alarming Developments in Libyan *Jamahiriyah* (Mar. 8, 2011), available at <http://tinyurl.com/6l3jlqv>.

127. African Union Peace and Security Council, Dec. PSC/PR/COMM (CCLXI), ¶ 2 (Feb. 23, 2011).

128. *Id.* ¶ 5.

129. Press Release, African Union, African Commission, Statement on the Human Rights Situation in North Africa (Feb. 25, 2011), available at <http://tinyurl.com/5vcpe7y>.

130. *Libyan Leader Muammar Qaddafi Vows to ‘Die as a Martyr’*, THE NATIONAL (Feb. 23, 2011), <http://tinyurl.com/63rya2e>.

131. *Das System Gaddafi steht vor dem Fall*, TAGESBLATT ONLINE (Feb. 23, 2011), <http://tinyurl.com/6cyujj8>.

132. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

133. *Id.* pmb. ¶¶ 3, 5.

134. *Id.* pmb. ¶ 2.

evaluating the situation, it continued to stipulate that the “widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity.”¹³⁵

Without explicitly determining the existence of a threat to the peace under Article 39, the Security Council concluded that it had authority to act under Chapter VII and took measures under Article 41.¹³⁶ It demanded an immediate end to the violence and called upon Libya to respect its obligations under human rights law and international humanitarian law.¹³⁷ Furthermore, it referred the situation in Libya to the International Criminal Court,¹³⁸ and it imposed sanctions on the Gadhafi regime, including an arms embargo, a travel ban, and an asset freeze.¹³⁹

3. *Events Leading to the Adoption of Security Council Resolution 1973*

Neither the sanctions nor the imminent threat of criminal prosecution through the International Criminal Court led to an end of the violence in Libya. On the contrary, the deterioration of the humanitarian situation and the increase in violence soon resulted in demands for further action by the international community. In early March 2011, the opposition forces had brought numerous Libyan cities, strategically important sites, and oil infrastructure under their control. The Gadhafi regime reacted with increased counterattacks and recaptured parts of the area under rebel control.¹⁴⁰ The regime used military airplanes, and reports continued to describe indiscriminate air strikes against the civilian population as well as heavy artillery fire.¹⁴¹ In light of these attacks, calls for the establishment of a no-fly zone over Libya became stronger. France and the United Kingdom made initial proposals,¹⁴² and the U.S. Senate adopted a resolution in which it urged the Security Council to impose a no-fly zone.¹⁴³ On March 8, the Secretary General of the Organisation of the Islamic Conference also called for a no-fly zone over Libya.¹⁴⁴ Other

135. *Id.* pmb1. ¶ 6.

136. *Id.* pmb1. ¶ 16.

137. *Id.* ¶¶ 1–2.

138. *Id.* ¶¶ 4–8.

139. *Id.* ¶¶ 9–25.

140. *See, e.g., Libya: 21 Killed in Misrata Weekend Fighting*, THE TELEGRAPH (Mar. 7, 2011), <http://tinyurl.com/5vmkvb7>.

141. *See, e.g., Press Release, Secretary-General, United Nations Response to Violence Against Civilians in Libya Sends Strong Message*, U.N. Press Release SG/SM/13425 (Mar. 1, 2011).

142. Alistair MacDonald, *Cameron Doesn't Rule Out Military Force in Libya*, WALL ST. J. (Mar. 1, 2011), <http://tinyurl.com/6ym7ae3>; Tim Shipman, *David Cameron Backs Sarkozy Calls for Libya Air Strikes*, DAILY MAIL (Mar. 11, 2011), <http://tinyurl.com/6qavxw7>.

143. S. Res. 85, ¶ 7, 112th Cong. (Mar. 1, 2011).

144. Press Release, Organisation of the Islamic Conference, Ihsanoglu Support No-Fly Decision at OIC Meeting on Libya, Calls for an Islamic Humanitarian Programme in and Outside Libya (Mar. 8, 2011), *available at* <http://tinyurl.com/5rz4zpu>.

regional organizations continued to voice their concern. On March 1, 2011, the African Commission on Human and Peoples' Rights again condemned the human rights violations in Libya and called on "the responsibility of the African Union, the Peace and Security Council of the African Union, and the International Community to take all the necessary political and legal measures for the protection of the Libyan population and for the establishment of genuine democratic governance in the State Party."¹⁴⁵ On March 10, 2011, the African Union Peace and Security Council reiterated its condemnation of the loss of life in Libya and of the legitimacy of the Libyan people's struggle, while at the same time expressing its opposition to any form of foreign military intervention.¹⁴⁶ It also established an Ad-hoc High Level Committee on Libya.¹⁴⁷ On March 12, the Council of the League of Arab States adopted Resolution 7360, in which it referred to the crimes and violations committed by the Libyan authorities against the Libyan people. In particular, the resolution referred to the use of military aircraft, cannons, and heavy weaponry against the population.¹⁴⁸ While the resolution rejected all forms of foreign intervention, it called on the Security Council to impose a no-fly zone in order to protect the civilian population. Two days prior to the adoption of this resolution, the European Parliament, referring to the concept of the "Responsibility to Protect," also stressed the need to protect the civilian population, which could include a no-fly zone established by the Security Council.¹⁴⁹

With the Libyan troops narrowing in on Benghazi, a city held by the opposition and the location of the headquarters of the National Transitional Council, Mustafa Abdul-Jalil, the head of the National Transitional Council, called upon the international community to impose a no-fly zone.¹⁵⁰ He warned that if Gadhafi recaptured the city, it would result in the death of half a million people.¹⁵¹ In a speech to the nation, Gadhafi himself announced the imminent attack on Benghazi and said that

145. African Union, African Commission on Human and Peoples' Rights, Resolution on the Human Rights Situation in the Great Socialist Peoples' Libyan Arab *Jamahiriyya*, ACHPR/RES.181(EXT.OS/IX)2011, (Mar. 1, 2011), *available at* <http://tinyurl.com/6682rpl>.

146. African Union Peace and Security Council, Decision PSC/PR/COMM.2(CCLXV), ¶¶ 3–6 (Mar. 10, 2011).

147. *Id.* ¶¶ 8–9.

148. Permanent Observer of the League of Arab States to the U.N., Letter from the Permanent Observer of the League of Arab States to the President of the Security Council, U.N. Doc. S/2011/137 (Mar. 14, 2011).

149. Resolution on the Southern Neighbourhood, and Libya in particular, EUR. PARL. DOC. (P7_TA-PROV(2011)0095) para. 10 (Mar. 10, 2011).

150. *Rebel Leader Calls for 'Immediate Action' on No-fly Zone*, CNN ONLINE (Mar. 10, 2011), <http://tinyurl.com/69gmf6l>.

151. Chris McGreal, *Gaddafi's Army Will Kill Half a Million, Warn Libyan Rebels*, GUARDIAN (Mar. 12, 2011), <http://tinyurl.com/625jhsv>.

he would show “no mercy” to those who did not surrender.¹⁵² In light of the preceding human rights violations, NGOs also expressed their concern with regard to the fate of the opposition forces and of civilians in Benghazi should Gadhafi recapture the city.¹⁵³

It was in this environment that the Security Council adopted Resolution 1973 on March 17, 2011.¹⁵⁴ In the preambular paragraphs, the Security Council elaborated on the deteriorating humanitarian situation in Libya and expressed its concern at the continuous, gross, and systematic human rights violations, in particular the attacks against the civilian population, which could amount to crimes against humanity.¹⁵⁵ It explicitly determined that the situation in Libya continued to constitute a threat to international peace and security and that it acted under Chapter VII of the UN Charter.¹⁵⁶ The Security Council demanded an immediate ceasefire as well as an end to the attacks against civilians,¹⁵⁷ and it authorized member states “to take all necessary measures” in order “to protect civilians and civilian populated areas under threat of attack” in Libya while “excluding a foreign occupation force of any form on any part of Libyan territory.”¹⁵⁸ Furthermore, it established a no-fly zone, banning all flights in Libyan airspace in order to help protect civilians, and authorized member states “to take all necessary measures to enforce compliance.”¹⁵⁹ Resolution 1973 was adopted by a vote of ten in favor, none against, and five abstentions: permanent members China and the Russian Federation, plus nonpermanent members Brazil, Germany, and India.¹⁶⁰

4. *Military Intervention and International Responses*

After the resolution was adopted, the Libyan government declared a ceasefire, which it quickly violated by commencing an attack on Benghazi.¹⁶¹ On March 19, 2011, a coalition of Western states began a

152. Douglas Stanglin, *Gadhafi Vows to Attack Benghazi and Show 'No Mercy'*, USA TODAY (Mar. 17, 2011), <http://tinyurl.com/6atpca3>.

153. See, e.g., Press Release, Human Rights Watch, *Libya: Benghazi Civilians Face Grave Risk* (Mar. 17, 2011), available at <http://tinyurl.com/4vgsvs2>.

154. S.C. Res. 1973, *supra* note 4.

155. *Id.* pmb. ¶¶ 3, 5–7.

156. *Id.* pmb. ¶¶ 21–22.

157. *Id.* ¶ 1.

158. *Id.* ¶ 4.

159. *Id.* ¶¶ 6, 8. On the legal framework regulating the no-fly zone, see Michael N. Schmitt, *Wings over Libya: The No-Fly Zone in Legal Perspective*, 36 YALE J. INT'L L. ONLINE 45 (2011).

160. Press Release, Security Council, *Security Council Approves 'No-fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians*, U.N. Press Release SC/10200 (Mar. 17, 2011).

161. *Gaddafi Forces Encroaching on Benghazi*, AL JAZEERA (Mar. 19, 2011, 4:30 PM), <http://tinyurl.com/63kbjhx>; Ian Pannell, *Libya: Gaddafi Forces Attacking Rebel-Held Benghazi*, BBC NEWS (Mar. 19, 2011, 10:22 AM), <http://tinyurl.com/6kjk8z>.

military intervention in Libya by launching missiles against Libyan air defense systems and flying air strikes against military units outside of Benghazi. Within days, coalition forces declared that the Libyan air defense and air force had been destroyed.¹⁶² The fights between the Libyan government and the opposition forces continued, with both sides struggling for control and experiencing military gains and losses. Alongside these battles, the military attacks by the coalition forces continued, and NATO took over the command of the military operation in Libya as NATO forces continued to carry out attacks against military targets. On April 19, 2011, NATO forces carried out attacks against Gadhafi's command center in Tripoli,¹⁶³ which was destroyed on April 21.¹⁶⁴ Four days later, NATO destroyed a military building near Tripoli that was also used by Gadhafi.¹⁶⁵ On April 30, 2011, NATO bombed another building in Tripoli, killing one of Gadhafi's sons and three of his grandchildren. The media reported that Gadhafi himself was present but that he had survived the attack.¹⁶⁶ NATO officials claimed that the building was a command and control center and therefore a legitimate military target. They emphasized, however, that neither Gadhafi nor any other individuals would be specific targets of NATO attacks.¹⁶⁷

During the period of March to October 2011, NATO carried out numerous military attacks against Libya. At the time of writing,¹⁶⁸ the opposition forces have — with the support of the intervening states — prevailed over the Gadhafi regime. In August 2011, the rebels gained control over Tripoli.¹⁶⁹ The National Transitional Council was increasingly recognized by the international community, and on September 16, the UN General Assembly decided that the representatives of the Transitional Council would, for the following year, represent Libya in the General Assembly.¹⁷⁰ On the same day, the Security Council passed Resolution

162. *Libyan Air Force 'No Longer Exists'*, AL JAZEERA (Mar. 23, 2011, 10:33 PM), <http://tinyurl.com/67dg3tz>; *World Divided over Libya*, CNC WORLD (Mar. 22, 2011), <http://tinyurl.com/3cu2lwr>.

163. *NATO Missiles Strike Tripoli, Sirte: Libyan TV*, REUTERS (Apr. 19, 2011, 6:20 AM), <http://tinyurl.com/43xn7mf>.

164. Allan Little, *Libya: Missile Strike Destroys Gaddafi 'Command Centre'*, BBC (Mar. 21, 2011, 7:53 AM), <http://tinyurl.com/5wha336>.

165. *NATO Bombardiert Gaddafi-Residenz in Tripolis*, SÜDDEUTSCHE ZEITUNG, Apr. 26, 2011, at 8; Harriet Sherwood, *Gaddafi Compound Hit in NATO Attack*, GUARDIAN, Apr. 25, 2011, at 26.

166. Kareem Fahim & David D. Kirkpatrick, *Qaddafi is Said to Survive NATO Airstrike That Kills Son*, N.Y. TIMES, Apr. 30, 2011, at A1.

167. *Id.*

168. October 2011.

169. Kareem Fahim & David D. Kirkpatrick, *Jubilant Rebels Control Much of Tripoli*, N.Y. TIMES, Aug. 21, 2011, at A1.

170. Press Release, General Assembly, After Much Wrangling, General Assembly Seats National Transitional Council of Libya as Country's Representative for Sixty-Sixth Session, U.N. Press Release GA/11137 (Sept. 16, 2011).

2009, thereby easing the sanctions on Libya¹⁷¹ and establishing a United Nations Support Mission in Libya (UNSMIL)¹⁷² in order to support the country's political and economic transition. Eventually, on October 20, the insurgents gained control over Sirte, Gadhafi's hometown and the last major city under the regime's control. During the fight for Sirte, Gadhafi was killed,¹⁷³ though the exact circumstances of his death have yet to be clarified. Three days later, the National Transitional Council declared the liberation of Libya.¹⁷⁴ On October 27, the Security Council passed Resolution 2016, thereby terminating the authorization to use force and ending the no-fly zone over Libya.¹⁷⁵ The next day, NATO decided that it would end its mission in Libya on October 31.¹⁷⁶

Political actors have reacted in different ways to the military intervention. Some have welcomed the intervention and expressed their support; others have criticized it as an illegitimate interference with the civil war. Others — representatives of the opposition forces in particular — have complained that the military intervention did not go far enough.

The Organisation of the Islamic Conference has largely supported the intervention. The Ministerial Executive Committee of the Organisation of the Islamic Conference issued a communiqué in which it welcomed Security Council Resolution 1973.¹⁷⁷ The Secretary General of the Organisation of the Islamic Conference, however, called for maximum restraint in the ongoing military operation.¹⁷⁸ Later, he argued for the need for a political solution, while at the same time expressing continuous support for Security Council Resolutions 1970 and 1973.¹⁷⁹ In subsequent

171. S.C. Res. 2009, ¶¶ 13–19, U.N. Doc. S/RES/2009 (Sept. 16, 2011).

172. *Id.* at ¶ 12.

173. Kareem Fahim, Anthony Shadid & Rick Gladstone, *Violent End to an Era as Qaddafi Dies in Libya*, N.Y. TIMES, Oct. 20, 2011, at A1.

174. *Libya's New Rulers Declare Country Liberated*, BBC NEWS (Oct. 23, 2011), <http://tinyurl.com/5vj6uf5>.

175. S.C. Res. 2016, ¶¶ 5–6, U.N. Doc. S/RES/2016 (Oct. 27, 2011).

176. Press Release, NATO, NATO Secretary General Statement on End of Libya Mission, NATO Press Release (2011) 136 (Oct. 28, 2011).

177. Press Release, Organisation of the Islamic Conference, Final Communiqué Issued by the Emergency Open Ended Ministerial Meeting of the OIC Executive Committee on the Alarming Developments in Libyan *Jamabiriya* (Mar. 19, 2011), http://www.oic-oci.org/topic_detail.asp?t_id=5057.

178. Press Release, Organisation of the Islamic Conference, Address by H.E. Prof. Ekmeleddin Ihsanoglu, Secretary General of the Organisation of the Islamic Conference (Mar. 29, 2011), http://www.oic-oci.org/topic_detail.asp?t_id=5115; Press Release, Organisation of the Islamic Conference, Ihsanoglu Calls on All Parties in the Military Operations in Libya to Avoid Targeting Civilians (Mar. 23, 2011), http://www.oic-oci.org/topic_detail.asp?t_id=5089.

179. Press Release, Organisation of the Islamic Conference, Ihsanoglu Addresses the Third Meeting of the International Contact Group on Libya (June 8, 2011), http://www.oic-oci.org/topic_detail.asp?t_id=5417; Press Release, Organisation of the Islamic Conference, Ihsanoglu Emphasizes the Need for a Political Solution to the Libyan Crisis (Apr. 16, 2011),

statements, he repeatedly emphasized the need for a political solution and called on all parties involved in the military conflict to exercise maximum restraint.¹⁸⁰

After the military intervention had begun, the African Union High Level Committee expressed its general support for Resolution 1973, but it also raised concerns regarding military intervention and declared the need for a peaceful solution within an African framework.¹⁸¹ Political actors of the African Union said they were actively working towards a ceasefire between the conflicting parties in Libya.¹⁸² Meanwhile, the African Court on Human and Peoples' Rights issued its first binding ruling against a state, ordering Libya to "immediately refrain from any action that would result in loss of life or violation of physical integrity of persons" and stating that failure to do so could constitute a breach of human rights obligations.¹⁸³ The African Court referred to numerous complaints involving violent suppression of demonstrations, random firing on demonstrators, and excessive use of heavy weapons and machine guns against the population.

The position of the Arab League was ambivalent. While it had called for the establishment of a no-fly zone in the first place, Amr Moussa, Secretary-General of the Arab League, said on March 20, 2011, that the military intervention had already gone too far.¹⁸⁴ Two days later, however, he reiterated the League's general support for Resolution 1973 and for the no-fly zone.¹⁸⁵ The next day, he emphasized that the sole goal of Resolution 1973 was the protection of civilians and that it proposed neither general support for the rebels nor regime change in Libya.¹⁸⁶

http://www.oic-oci.org/topic_detail.asp?t_id=5201.

180. Press Release, Organisation of the Islamic Conference, Ihsanoglu: Political Solution to the Libyan Crisis is the Only Way to Bring Lasting Peace to Libya (May 7, 2011), http://www.oic-oci.org/topic_detail.asp?t_id=5279.

181. Press Release, African Union, Communiqué: Meeting of the AU High-Level Ad Hoc Committee on Libya, (Mar. 19, 2011), <http://tinyurl.com/442kltf>; see also Press Release, African Union, Communiqué: Consultative Meeting on the Situation in Libya (Mar. 25, 2011), <http://tinyurl.com/3z6jwpo>.

182. See, e.g., Aaron Maasho, *African Union Chief Asks West for Dialogue on Libya*, REUTERS AFRICA (Mar. 25, 2011), <http://tinyurl.com/4xosuer>.

183. *In re Afr. Comm'n on Human & Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Application No. 004/2011, Order for Provisional Measures, at 7 (Afr. Ct. on Human & Peoples' Rts., Mar. 25, 2011), available at <http://tinyurl.com/3erdlm>; see also Anna Dolidze, *African Court on Human and Peoples' Rights — Response to the Situation in Libya*, 51 INSIGHTS (Am. Soc'y Int'l Law, Washington, D.C.), July 26, 2011.

184. Michael Slackman, *Dislike for Qaddafi Gives Arabs a Point of Unity*, N.Y. TIMES, Mar. 21, 2011, at A12, available at <http://tinyurl.com/3hzh93s>; Edward Cody, *Arab League Condemns Broad Western Bombing Campaign in Libya*, WASH. POST (Mar. 20, 2011), <http://tinyurl.com/4tdw7sr>.

185. Martin Chulov, *Arab League to Reiterate Backing for Libya No-fly Zone*, GUARDIAN (Mar. 22, 2011), <http://tinyurl.com/4dxglac>.

186. *The Goal in Libya Is Not Regime Change*, N. Y. TIMES (Mar. 23, 2011), <http://tinyurl.com/3oyyqzm> (Interview with Amr. Moussa, Ex-Secretary General of the Arab

Latin American states have been strongly divided on the resolution. While a large number of states — led by Bolivia, Venezuela, and Cuba — strongly condemned the military intervention,¹⁸⁷ others — such as Mexico and Colombia, the latter having voted in favor of Resolution 1973 in the Security Council — expressed their support.¹⁸⁸

Statements by China and Russia, the two permanent members of the Security Council who abstained in the vote on Resolution 1973, were largely critical. The Chinese Foreign Ministry expressed “serious reservations” about the military intervention, while Chinese newspapers more strongly condemned the operation.¹⁸⁹ The Russian position was also ambivalent. While Russia abstained in the vote on Resolution 1973, Prime Minister Vladimir Putin harshly criticized the military intervention, shortly after it began, as a Western “crusade,” a comment that President Dmitry Medvedev later called “unacceptable.”¹⁹⁰

Shortly after the intervention started, the intervening states more openly acknowledged that regime change was, in fact, the final objective of the military operation. In an open letter dated April 15, 2011, U.S. President Barack Obama, French President Nicolas Sarkozy, and U.K. Prime Minister David Cameron, while emphasizing that their duty and mandate under Resolution 1973 was not to remove Gadhafi by force, held that “it is impossible to imagine a future for Libya with Qaddafi in power” and that it is “unthinkable that someone who has tried to massacre his own people can play a part in their future government.”¹⁹¹ The Group of Eight met at a summit in France on May 26 and 27 and issued a final communiqué that, in surprisingly clear terms, emphasized that regime change was the ultimate goal of the international community’s efforts in Libya: “Gaddafi and the Libyan government have failed to fulfill their responsibility to protect the Libyan population and have lost all legitimacy. He has no future in a free, democratic Libya. He must go.”¹⁹² Russia also supported this statement.¹⁹³

League).

187. *Latin America Condemns US/UN Invasion of Libya*, COTO REPORT (Mar. 22, 2011, 9:16 AM), <http://tinyurl.com/3s6ecxx>.

188. *Latin American Leaders React to Libya Conflict*, AMERICAS Q. (Mar. 23, 2011, 1:10 PM), <http://www.americasquarterly.org/node/2341>.

189. Chris Buckley, *China Intensifies Condemnation of Libya Air Strikes*, REUTERS (Mar. 21, 2011), <http://tinyurl.com/4heprz3>.

190. *Putin Downplays Alleged Tiff with Medvedev over Libya*, INT’L BUS. TIMES (Mar. 22, 2011), <http://tinyurl.com/3gmxfx7>.

191. Barack Obama, David Cameron & Nicolas Sarkozy, Editorial, *Libya’s Pathway to Peace*, INT’L HERALD TRIB., Apr. 15, 2011, at 7.

192. Patrick Wintour & Kim Willsher, *G8 Summit: Gaddafi Isolated as Russia Joins Demand for Libyan Leader to Go*, GUARDIAN, May 27, 2011, at 2.

193. *Id.*

5. *Preliminary Conclusions*

The violent reaction of the Libyan regime against the protests has been condemned almost universally by international and regional organizations, as well as by individual states and NGOs. There was a general consensus that the regime's reaction was intolerable and constituted an evident and massive violation of human rights. As the African Court on Human and Peoples' Rights pointed out, the situation in Libya has been condemned not only on the global level, but also by regional organizations.¹⁹⁴ With the imminent threat of Gadhafi recapturing Benghazi and the rising fear that this would result in massive civilian casualties, the international community's support for the establishment of a no-fly zone and the authorization of measures for the protection of civilians was overwhelming. It was also generally understood that this authorization would include military measures. Soon after the intervention started, however, criticism was voiced with regard to the implementation and the goals of the operation. This ongoing criticism renders it vital to analyze in more depth the scope of the Security Council's authorization with regard to admissible measures as well as the admissible objectives of the military intervention.

B. *Interpreting Security Council Resolution 1973*

The public debate over Security Council Resolution 1973 has focused on a specific set of limitations to the authorization. These include the exclusion of ground forces and the illegitimacy of regime change under the resolution. In fact, statements made by delegates from Russia and China during the deliberations that led to the adoption of Resolution 1973 indicate that the exact scope of the authorization is not entirely clear.¹⁹⁵ The following section, therefore, will closely analyze the Security Council's authorization in order to assess the scope and the limits of the mandate.¹⁹⁶

1. *The General Scope of the Authorization*

The broad language of Resolution 1973 is its most striking characteristic. In the resolution, the Security Council authorized member states "to take all necessary measures" for the protection of civilians and

194. See, e.g., *In re Afr. Comm'n on Human & Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*, Application No. 004/2011, Order for Provisional Measures, at 7 (Afr. Ct. on Human & Peoples' Rts., Mar. 25, 2011), available at <http://tinyurl.com/3erdrfm>.

195. See Press Release, Security Council, *supra* note 160.

196. On the interpretation of Security Council resolutions in general, see Alexander Orakhelashvili, *The Acts of the Security Council: Meaning and Standards of Review*, 11 MAX PLANCK Y.B. U.N. L. 143, 151–75 (2007); Michael C. Wood, *The Interpretation of Security Council Resolutions*, 2 MAX PLANCK Y.B. U.N. L. 73 (1998).

civilian populated areas. Resolution 1973 thus employs the term the Council constantly uses to authorize the use of force under Chapter VII of the UN Charter.¹⁹⁷ The authorization includes only limited restrictions and requires member states that want to act on the basis of the authorization to notify the Secretary-General, who shall report to the Security Council.¹⁹⁸ Furthermore, member states are required to cooperate with the Secretary-General.¹⁹⁹ With regard to the admissible measures, the resolution explicitly excludes the deployment of “a foreign occupation force of any form on any part of Libyan territory.”²⁰⁰ Apart from these limitations, the resolution does not specify the particular objective of the authorization or when the authorization expires: It is not limited with regard to time, nor does it stipulate that when a certain goal is achieved — for example, a ceasefire between the government and the opposition — the authorization will cease to apply. With regard to the legitimate objectives of the use of force, the Council authorized all necessary measures not only to enforce compliance with the no-fly zone,²⁰¹ but also to protect civilians and civilian-populated areas under threat of attack.²⁰² Military measures under Resolution 1973 are therefore allowed beyond the scope of the implementation of the no-fly zone. In light of the general consensus that the Libyan regime committed illegal violence against civilians, the authorization of the use of force to protect civilians is considerably broad and includes military action against the regime whenever there is a threat that the regime attacks civilians or civilian-populated areas. Accordingly, the authorization was valid and applicable as long as there was a threat to civilians and civilian-populated areas.

2. *All Necessary Measures*

The authorization encompasses all measures that are *necessary*. In legal doctrine, necessary can have different meanings. As the term is known from constitutional rights doctrine as part of the proportionality requirement — and as it has become a dominant theme in transnational and comparative constitutional law²⁰³ — it requires a least-restrictive means test. A measure may not go beyond what is strictly necessary in order to achieve a certain goal. If milder means are available to pursue the objective in the same way, the authority has to resort to this milder means.

197. Christian Henderson, *International Measures for the Protection of Civilians in Libya and Côte d'Ivoire*, 60 INT'L & COMP. L.Q. 767, 770 (2011).

198. S.C. Res. 1973, *supra* note 4, ¶ 4.

199. *Id.*

200. *Id.*

201. *Id.* ¶ 8.

202. *Id.* ¶ 4.

203. *See, e.g.*, Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008).

According to this understanding of “necessary,” the scope of the Security Council authorization would be severely restricted. The intervening states would have to show that every action they take is essential with regard to the objective they are pursuing, namely the protection of civilians and civilian-populated areas.

This is, however, not the way the Security Council’s use of the phrase “all necessary measures” has been understood in the past.²⁰⁴ The expression has rather been a cipher for the authorization to use military force. In fact, in the context of the use of military force, an understanding of “necessary” as strict as the least-restrictive means test of constitutional rights doctrine is unusual and incongruous. International law is deeply concerned with avoiding the use of force and provides rather strict rules for this purpose. But once the use of force is admissible — on the grounds of Article 51 of the UN Charter or on the basis of a Security Council resolution — international humanitarian law (*jus in bello*) provides less strict rules concerning the use of force. Under international humanitarian law, no least-restrictive means test applies. The laws of war instead deem certain targets, instruments, and measures of warfare illegal, while generally allowing for the destruction and killing of military targets.

Against this background, “necessary” as used in Resolution 1973 means that the use of force may not be excessive and that it must bear a relation to the objectives of the resolution. It is not required that each single act is strictly necessary to avoid violations of human rights in the sense that no alternative, less intrusive means is available.

3. *Excluding Ground Forces?*

The Security Council authorized the use of force but explicitly excluded “a foreign occupation force of any form on any part of Libyan territory.”²⁰⁵ On the basis of this formulation, it has been argued that the Security Council mandate categorically excluded the deployment of ground forces.²⁰⁶ This reading, however, overlooks the fact that the Security Council did not use the term “ground forces,” but instead resorted to the technical phrase “occupation force.” Under international law, the concept of occupation can be defined as the exercise of effective control over the territory of a state by another state.²⁰⁷ Such a reading is supported by Article 42 of the Annex to the Fourth Hague Convention of 1907, which

204. See Dapo Akande, *What Does UN Security Council Resolution 1973 Permit?*, EJIL: TALK! (March 23, 2011), <http://tinyurl.com/ccq272h>.

205. S.C. Res. 1973, *supra* note 4, at ¶ 4.

206. See, e.g., Dergham, *supra* note 186; NATO *After Libya, A Troubling Victory*, ECONOMIST, Sept. 3, 2011, at 51.

207. Eyal Benvenisti, *Belligerent Occupation*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 68, ¶ 1 (Rüdiger Wolfrum ed., 2009).

reads, "Territory is considered occupied when it is actually placed under the authority of the hostile army."²⁰⁸ A state does not gain effective control over the territory of another state simply by deploying ground forces. Military operations can include ground forces without occupation of the territory. Accordingly, the deployment of ground troops in order to gather information or to mark possible targets for air strikes is encompassed by the authorization. Furthermore, ground troops were allowed to be deployed to fight directly against Libyan troops, though they were prohibited to besiege Libyan territory. This reading of Resolution 1973 fits the political context and the intentions of the Security Council members. Statements made by the delegations of Lebanon and Nigeria during the Security Council meeting reflect that the recent occupations of Afghanistan and Iraq may have influenced the language of Resolution 1973. These statements suggest that the Security Council wanted to rule out the possibility that a military intervention would result in the occupation of Libya.²⁰⁹ The language does not, however, imply that the Council wanted to exclude the deployment of ground forces in general.

4. *Distinguishing Between Civilians and Insurgents*

One might be compelled to argue that the resolution authorizes the use of force in order to protect civilians but not insurgents. Such a reading would trace the pivotal distinction between civilians and combatants in international humanitarian law.²¹⁰ This distinction, however, does not necessarily hold for authorizations by the Security Council. While international humanitarian law prohibits attacks on civilians and allows attacks on combatants, this does not necessarily mean that the Security Council excluded the protection of insurgents from the authorization. To the contrary, the Security Council authorized the use of force not only to protect civilians, but also to protect civilian-populated areas under threat of attack, explicitly mentioning the opposition stronghold Benghazi.²¹¹ Some commentators have argued that Resolution 1973 allows humanitarian action for the protection of civilians but prohibits any measures that would support the insurgents and therefore constitute illegitimate partisanship of the intervening states in a civil war.²¹² This

208. International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* (Oct. 18, 1907), available at <http://tinyurl.com/3t2ehvv>.

209. This reading is reflected in the statements made by the delegates from Lebanon and Nigeria during the 6498th Security Council meeting, which led to the adoption of Resolution 1973. See Security Council, Press Release, U.N. Doc. SC/10200 (Mar. 17, 2011).

210. See, e.g., David Turns, *The Law of Armed Conflict (International Humanitarian Law)*, in INTERNATIONAL LAW, *supra* note 45, at 825.

211. S.C. Res. 1973, *supra* note 4, at ¶ 4.

212. See, e.g., Reinhard Merkel, *Die Militärintervention gegen Gaddafi ist illegitim*, FRANKFURTER

argument is rather unconvincing. It neglects the fact that the threat to civilians that justifies the military intervention emanated from the Gadhafi regime, so that any military action against the origin of the human rights violations necessarily supported the opponents of the regime. The intervening states could hardly have protected civilians in Benghazi and other places against the Libyan armed forces without at the same time strengthening the opposition. Even if the NATO forces deliberately had wanted to protect only civilians and not insurgents, such an approach would have been impossible to implement in practice. In a civil war, the combating parties necessarily act within civilian territories. The insurgents were Libyan people, living among civilians, and Libyan attacks against insurgents were therefore in most instances carried out against territories inhabited by civilians.²¹³

5. *Excluding Regime Change?*

The most controversial question surrounding the military intervention is whether the intervening states were allowed to actively pursue regime change in Libya. This question has been vehemently answered in the negative by numerous political actors and commentators. For example, Amr Moussa, the Secretary-General of the Arab League, has pointed out that the Security Council authorized only the protection of civilians and not regime change.²¹⁴ Others have emphasized that the Security Council never approved a military mission to overthrow the Libyan government.²¹⁵ A look at Resolution 1973 seems to support this view because regime change is not explicitly mentioned in the text.

On the other hand, there are indications that the Security Council mandate did not categorically rule out the possibility of regime change in Libya on the basis of Resolution 1973. First, while the Security Council focused on the protection of human rights, it did not ignore the democratic dimension of the conflict. Resolution 1970 called for steps “to fulfill the legitimate demands of the population.”²¹⁶ In Resolution 1973, the Security Council emphasized that a solution to the crisis must respond

ALLGEMEINE ZEITUNG, Mar. 22, 2011, at 32 (arguing that military action for humanitarian intervention does not justify supporting the insurgency).

213. It should be noted that the Security Council mandate applies, of course, not only to acts of the Libyan regime but also to acts of the opposition. Accordingly, when a rebel fighter jet violated the no-fly zone, NATO warplanes intercepted and forced it to land. *NATO Forces Libyan Rebel's Fighter Jet to Land*, CHANNEL NEWS ASIA (Apr. 10, 2011), <http://tinyurl.com/3e53csy>. Nevertheless, it is clear that the overwhelming majority of NATO's action was directed against the Libyan regime.

214. *The Goal in Libya Is Not Regime Change*, *supra* note 185.

215. Robert Naiman, *Surprise War for Regime Change in Libya is the Wrong Path*, FOREIGN POLY FOCUS (Apr. 4, 2011), <http://tinyurl.com/3hwe7nv>.

216. S.C. Res. 1970, *supra* note 132, ¶ 1.

to the legitimate demands of the Libyan people.²¹⁷ While the issue is open to debate, it is highly doubtful whether the legitimate demands of the population could have been fulfilled with Gadhafi still in power. Even if the Security Council was well aware that the overthrow of Gadhafi was at least a possible outcome of the conflict, though, the mere reference to the legitimate demands of the population alone is, of course, an insufficient basis on which to conclude that the resolution was a legal entitlement for forceful regime change. Still, Resolution 1973 does indicate that the authorization to use force has to be regarded within the overall context of the conflict, which was not only about human rights violations, but also about the realization of the political rights of the Libyan people.

Secondly, while the Security Council did not explicitly authorize the use of force in order to overthrow the Gadhafi regime, it took a number of other measures directed against the regime. In Resolution 1970, the Council decided on a travel ban and asset freeze specifically aimed at Gadhafi, his family, and other high-ranking officials of the regime. While the Security Council referred the situation in Libya as a whole to the International Criminal Court, the referral primarily affects members of the Libyan regime, as the resolution explicitly refers to the violence against the civilian population made from the highest level of the Libyan government.²¹⁸ In Resolution 1973, the Security Council expanded the scope of the financial sanctions to all financial assets owned or controlled, directly or indirectly, by the Libyan authorities.²¹⁹ While the objective of these sanctions was primarily to force the Libyan government to end the attacks on the civilian population, they also supported the struggle of the Libyan opposition against the regime.

This leads to the third and most important argument against the assumption that Resolution 1973 categorically excluded regime change through the intervening states. This argument is based on the distinction between means and goals in a Security Council authorization:²²⁰ While Resolution 1973 specifies the goal of the authorization — that is, the protection of civilians and civilian populated areas — it does not elaborate on the admissible means that may be employed in order to implement and achieve this goal. This distinction allows for the argument that while regime change may not have been a legitimate *goal* to be pursued on the basis of Resolution 1973, it might have been a legitimate *means* to pursue the objective of the Security Council mandate, namely the protection of civilians. This argument is supported by the fact that, as the conflict in

217. S.C. Res. 1973, *supra* note 4, ¶ 2.

218. S.C. Res. 1970, *supra* note 132, ¶ 2, pmb.

219. S.C. Res. 1973, *supra* note 4, ¶ 19.

220. *See also* Linarelli, *supra* note 2, at 343 (distinguishing between regime change as the reason for intervention and regime change as the consequence of intervention).

Libya continued, it became more and more clear that the safety of the civilians and of the opposition could not be guaranteed as long as Gadhafi was in power. The calls for the departure of Gadhafi had grown more pronounced since the beginning of the conflict. While ceasefire and political dialogue could have been achieved, regime change was not strictly necessary for the protection of the civilian population. When it turned out that such a dialogue and all other peaceful means to settle the dispute were futile, this evaluation changed, and states began to consider regime change a necessary prerequisite for the protection of civilians and civilian-populated areas in Libya.

While regime change might not have been a legitimate goal in itself, the distinction between means and ends suggests that it might constitute a legitimate consequence of measures that were carried out for the protection of civilians. Measures that were employed in order to keep the Gadhafi regime from attacking the civilian population at the same time contributed to the actions of the opposition against the regime. Therefore, a strict distinction between the objective of human rights protection and measures that might lead to regime change cannot be upheld. Every attack against Gadhafi's armed forces weakened the regime and strengthened the opposition.

Accordingly, an intermediary approach to the question of regime change under Resolution 1973 is required. On the one hand, forceful regime change is a far-reaching measure that impinges seriously on pivotal paradigms of international law such as sovereignty, the prohibition of intervention, and international law's general neutrality with regard to the internal political structure of a state. The legality of forceful regime change should not be easily presumed, and authorizations of the Security Council to use force should not be interpreted extensively. On the other hand, the Security Council deliberately authorized military measures knowing that this action would be aimed primarily against the Gadhafi regime and would contribute to the opposition movement. Measures necessary for the protection of civilians and civilian-populated areas might at the same time have promoted regime change in Libya. In light of the Libyan air strikes against civilians, the destruction of the Libyan air force and air defense systems was necessary to protect human rights, but at the same time it significantly weakened the Gadhafi regime. Accordingly, measures were encompassed by Resolution 1973 as long as they were necessary, even though they might have promoted regime change in Libya. The mere fact that the intervening states were at the same time also contributing to the overthrow of Gadhafi or even acting with the political intention of achieving this goal does not render their attacks illegal.²²¹ For the

221. *But see* Henderson, *supra* note 197, at 771 (“[A]ny actions undertaken by the coalition with

evaluation of the legality of a certain act under international law, the intention of the acting state is irrelevant.²²²

Measures that cannot convincingly be understood as necessary for the protection of civilians or civilian-populated areas, on the other hand, were impermissible under the Security Council resolution. Attacks on military facilities were therefore generally encompassed by Resolution 1973, as were attacks on political institutions that were directly responsible for and involved with the Libyan attacks on civilians. Resolution 1973 did not allow, however, attacks on Libyan governmental institutions that lacked any reasonable relation to the Libyan attacks. It would, for example, be hard to justify attacks on the ministry of education, unless it could be proven that this institution was somehow involved in or supporting the attacks.

Ultimately, the question arises whether Gadhafi himself was a legitimate target under Resolution 1973. This issue had gained practical importance with the NATO attack of April 30, which, according to media reports, resulted in the death of one of Gadhafi's sons and three of his grandchildren. The attack targeted a building in which, presumably, Gadhafi himself was present. In light of the analysis carried out above, it cannot be maintained that Gadhafi was per se an illegitimate target. The authorization to use all necessary means is broad enough to encompass targeting Gadhafi and other members of the Libyan regime when they were responsible for attacks on civilians.²²³ Since it can hardly be questioned that Gadhafi as "Supreme Commander of Armed Forces"²²⁴ was responsible for and in control of such attacks, there is no compelling reason why he should not have been a legitimate target under Resolution 1973. As the commander of the Libyan armed forces, Gadhafi was also a legitimate target under international humanitarian law.²²⁵

It is, however, a different question whether the killing of Gadhafi on October 20 was in accordance with international law. While Gadhafi was a legitimate target under Resolution 1973 and under international humanitarian law in general, different rules applied once he was captured and in the custody of the rebels. At the time of writing, the circumstances surrounding his death are still disputed. Should further investigations

the aims of achieving other goals constitutes an action taken outside of the terms of the resolution.").

222. Accordingly, the ICJ held in the *Nicaragua* case that it was not necessary to examine whether the United States intended to overthrow the government of Nicaragua. The Court rather evaluated the U.S. intervention on the basis of the objective facts. *See* Military and Paramilitary Activities in and Against Nicaragua, *supra* note 33.

223. *See* Philippe Sands, *UN's Libya Resolution 1973 is Better Late Than Never*, *GUARDIAN*, Mar. 18, 2011, at 9.

224. S.C. Res. 1970, *supra* note 132, at Annex I.

225. *See also* Henderson, *supra* note 197, at 775 (analyzing the specific rules of international humanitarian law more closely).

conclude that Gadhafi was deliberately killed while he was in the custody of the rebels, this would amount to a serious violation of international humanitarian law.²²⁶

6. Conclusion

Resolution 1973 constitutes an unexpectedly broad authorization for the use of force in Libya. The mandate does not allude to a time limit, nor is it substantially restrained. With regard to admissible measures, only occupation forces are explicitly excluded, which means that the deployment of ground troops was generally allowed as long as they did not seize effective control over parts of the Libyan territory. And while the authorization has a humanitarian mandate and is not explicitly aimed at regime change, the open-textured and wide objective of the resolution — the protection of civilians *and* civilian populated areas — allowed for military measures that facilitated and advanced the overthrowing of the Gadhafi regime while protecting human rights.

C. The Legality of Resolution 1973 and of the Military Intervention

Against the background of the factual situation in Libya and the interpretation of Resolution 1973, it can now be assessed whether the authorization of the Security Council is legal under international law or transgresses the competences of the Security Council as an *ultra vires* act.

1. Legal Limits to Security Council Action

The legal limits of Security Council action are subject to debate.²²⁷ The debate takes place on two different levels, dealing on the one hand with the legal restraints placed on the Security Council by the UN Charter and on the other hand with those placed on the Security Council by international law beyond the Charter. On the first level, there is a far-reaching consensus that the rules of the Charter constitute legal limits to the powers of the Security Council.²²⁸ The debate, however, surrounds the

226. Accordingly, human rights NGOs are already calling for an investigation into the circumstances of Gadhafi's death. See *Libya: Investigate Deaths of Gaddafi and Son*, HUM. RTS. WATCH (Oct. 22, 2011), <http://tinyurl.com/5t688nw>.

227. MEHRDAD PAYANDEH, INTERNATIONALES GEMEINSCHAFTSRECHT 142–44 (2010).

228. See, e.g., Jochen Frowein & Nico Krisch, *Introduction to Chapter VII*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 8, at 701, 710. For a more skeptical view, see Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 91 (1993). Similarly, from the perspective of political science, see Allen Buchanan & Robert O. Keohane, *Precommitment Regimes for Intervention: Supplementing the Security Council*, 25 ETHICS & INT'L AFFAIRS 41, 47 (2011) (“[W]hen the Security Council acts, with the approval of all Great Powers and sufficient other support, its legal powers are essentially unlimited.”).

questions of how concrete those legal limits are and how far they restrain the Security Council.

Numerous particularities of the Charter system lead to weak normative boundaries for Security Council action. First, the relevant norms in Chapter VII are open-textured and open to interpretation. The threshold for Security Council action according to Article 39 is the determination of the Security Council that a threat to the peace exists. While the founders of the Charter formulated the provision against the historical background of classical inter-state wars, the text is open enough to allow for more extensive interpretations.²²⁹ The drafters did not clearly define the term “threat to the peace,” but intentionally decided “to leave to the Council the entire decision as to what constitutes a threat to the peace, a breach of the peace, or an act of aggression.”²³⁰

Second, the competences of the Security Council are formulated in a goal-oriented way with a focus on the maintenance of international peace and security, allowing for a strongly functional interpretation.²³¹ Commentators therefore seldom pay much attention to the text of the Charter provisions, but rather highlight that a specific reading is most appropriate to provide the Security Council with the necessary instruments in order for it to live up to its responsibility to ensure peace and security.

Third, this mode of interpretation is consistent with the tendency to interpret the Charter not in a strictly text-bound way, but rather in a dynamic-evolutionary way,²³² which is oftentimes based on the constitutional character of the Charter.²³³ In interpreting the Charter, the subsequent practice of states as well as of the UN organs is taken into consideration,²³⁴ an interpretative approach that is incorporated in the Vienna Convention on the Law of Treaties.²³⁵

229. See also Reisman, *supra* note 228, at 93 (arguing that the “threat to the peace” criteria in Article 39 was designed to be determined subjectively).

230. United Nations Conference on International Organization, Apr. 25–June 26, 1945, *Report of the Rapporteur of Committee 3 to Commission III*, U.N. Doc. 881, III/3/46, reprinted in 12 U.N.C.I.O. Docs. 502, 505 (1945).

231. See, e.g., U.N. Charter art. 42 (allowing the Security Council to take action “as may be necessary to maintain or restore international peace and security”).

232. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21).

233. See, e.g., Brun-Otto Bryde, *International Democratic Constitutionalism*, in TOWARDS WORLD CONSTITUTIONALISM 103, 109 (Ronald St. John MacDonald & Douglas M. Johnston eds., 2005); Georg Ress, *The Interpretation of the Charter*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 8, at 13, 23–25; Eric Rosand, *The Security Council as “Global Legislator”: Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT’L L. J. 542, 570 (2005); cf. Gaetano Arangio-Ruiz, *The “Federal Analogy” and UN Charter Interpretation: A Crucial Issue*, 8 EUR. J. INT’L L. 1 (1997).

234. BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO 136–37 (1998); Ress, *supra* note 233, at 27–33.

235. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31, para. 3.

Fourth, although the legal rules of the Charter are meant to limit the competences of the specific UN organs, there is no general procedure for determining the legality of an act by a UN organ within the UN system. Confronted with this reality, the ICJ held that “each organ must, in the first place at least, determine its own jurisdiction.”²³⁶ The ICJ recognizes that each organ of the UN has a certain level of interpretative autonomy with regard to its competences. It is therefore widely recognized that the Security Council enjoys rather broad discretion when it determines measures under Chapter VII, and in particular with regard to the determination whether a threat to the peace exists according to Article 39.²³⁷ Nevertheless, the provisions of Chapter VII constitute legal boundaries for Security Council action, and resolutions that transcend these boundaries are *ultra vires* and illegal.²³⁸

2. Requirements of Article 39 of the UN Charter

In analyzing the legality of Resolution 1973, the first question to address is whether the Security Council was entitled to determine the existence of a threat to the peace under Article 39. The situation in Libya certainly did not constitute an international threat in the way the founders of the Charter had envisioned it, as the Security Council declined to point out any specific trans-boundary effects of the situation in Libya. However, Resolution 1973 is in accordance with the generally settled and accepted practice of the Security Council to characterize massive human rights violations and atrocities against the civilian population as a threat to the peace, which justify action under Chapter VII.²³⁹

Some argue that violations of human rights law by Libya have not been proven yet, and that the attacks of the Libyan regime against insurgents cannot be easily qualified as violations of international law.²⁴⁰ Certainly, a state may defend itself against insurgents, but the Gadhafi regime’s indiscriminate attacks against unarmed protesters do not fall within the bounds of attacks against insurgents. Moreover, action by the Security

236. Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 151, 168 (July 20).

237. International Criminal Tribunal for the Former Yugoslavia Appeals Chamber, October 2, 1995 Decision in *Prosecutor v. Tadić*, 35 INT’L LEGAL MATERIALS 32, 42 (1996); DE WET, *supra* note 56, at 133; MANUSAMA, *supra* note 56, at 1–46; Michael Wood, *United Nations, Security Council*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶¶ 18, 25–30 (Rüdiger Wolfrum ed., 2007).

238. A separate question is whether single states — and in particular, the courts of states and of regional organizations — are entitled to scrutinize decisions of the Security Council and to determine whether they remain within the boundaries of the Charter. See Mehrdad Payandeh, *Rechtskontrolle des UN-Sicherheitsrates durch staatliche und überstaatliche Gerichte*, 66 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 41 (2006).

239. See *supra* Part I.B.1.; see also Simon Chesterman, “Leading from Behind”: *The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya*, 25 ETHICS & INT’L AFF. 279 (2011).

240. Merkel, *supra* note 212, at 32.

Council does not require proof of actual human rights violations. The determination of whether the available information about and indications of serious human rights violations justify military measures falls within the discretion of the Security Council. Since the existence of massive human rights violations had been ascertained and deplored by numerous organs of the United Nations, human rights NGOs, as well as the League of Arab States, the Organization of the Islamic Conference, the Gulf Cooperation Council, and the African Union, it is difficult to claim that the Security Council's reference to human rights violations is a mere pretext for the Western states' regime-change efforts in Libya for political, strategic, or economic reasons.

3. *Admissible Measures under Chapter VII of the UN Charter*

Once the Security Council has determined the existence of a threat to peace and security, and once it considers that measures not involving the use of force are inadequate, it may take enforcement action under Article 42. As has already been pointed out, this provision encompasses the entitlement to authorize member states to use military force.²⁴¹ However, the question arises whether there are limitations with regard to the objectives of a military intervention authorized by the Security Council. The text of Resolution 1973 is focused on the human rights situation in Libya; the human rights violations constitute the justifying grounds for the authorization, and their cessation is the goal of the authorization. As has been shown above, the mandate under Resolution 1973 not only encompasses measures to protect human rights, but also measures that might have led to or at least promoted the overthrow of the Gadhafi regime. While regime change is not an explicit ground for or goal of the authorization, the Security Council has authorized the use of military force that might have led to regime change and that even enabled the intervening states to actively and openly pursue such a course.²⁴² Nevertheless, while regime change as such might not be an admissible measure for the Security Council to authorize, there is no reason why it should be barred from authorizing a military intervention that could contribute to a change in government.²⁴³ The prohibition on intervention in domestic matters, which is based in Article 2(7) of the Charter, does not apply to enforcement measures under Chapter VII. Once the threshold of Article 39 is passed, the Security Council may order military measures against a regime, even when such military action might result in an overthrow of the government or at least facilitate regime change.

241. *See supra* Part I.B.2.

242. *See supra* Part II.B.5.

243. *See also* Henderson, *supra* note 197, at 776.

III. THE POLICY AND LEGITIMACY OF REGIME CHANGE THROUGH THE UNITED NATIONS

Until this point, this Article's examination has centered on the legality of the military intervention and regime change on the basis of an authorization by the Security Council. The analysis has shown that Resolution 1973 provided a broad mandate for military action against the Libyan regime. As long as there was a credible threat by Libya against civilians and civilian-populated territories, military measures against Gadhafi's forces were legal. In light of the generally accepted practice of the Security Council—both with regard to qualifying human rights violations as threats to the peace according to Article 39 and to authorizing the use of force by single states despite the lack of a clear Charter provision—the resolution and the authorization to use military force are compatible with Chapter VII of the UN Charter. The Security Council did not act *ultra vires*. However, the military intervention in Libya cannot be evaluated with regard to its legality alone. The legitimacy of the intervention and its policy dimension also have to be taken into account, especially insofar as they are part of a broader development in the practice of the Security Council.²⁴⁴

A. Human Rights Violations as Grounds for Military Intervention

The conflict in Libya revitalizes the old discussion of whether human rights violations constitute a threat to international peace and security and whether the Security Council may take action under Chapter VII of the Charter. In light of the constant practice of the Security Council to determine human rights violations as a threat to the peace, the growing international awareness that massive human rights violations cannot be tolerated, and the incremental recognition of a responsibility to protect people from human rights violations, if necessary with the use of military force, the legality and legitimacy of Security Council-mandated humanitarian intervention in general can hardly be disputed. Nevertheless, the military intervention in Libya exhibits essential problems of this human rights-based approach to intervention.

First, the question arises regarding the appropriate threshold for military intervention. While it is certain that not every human rights violation justifies intervention, there are no clear criteria for when intervention is

244. I am aware that the very notion of "legitimacy" is subject to controversial academic debate, as is its relationship with the notion of "legality." For the purposes of this Article, I do not consider it necessary to engage in these debates in depth. Legitimacy has, however, a sociological or empirical side, referring to the acceptance of a specific conduct or institution by the other members of the international community. It also has a normative side, referring to the moral or political evaluation of a certain conduct, thereby going beyond legal analysis. *See, e.g.,* Buchanan & Keohane, *supra* note 228, at 43.

legitimate. While, for example, the initial reports on the concept of the “responsibility to protect” developed criteria for intervention,²⁴⁵ later endorsements of the concept remained rather vague.²⁴⁶ The 2005 World Summit Outcome Document, for example, refers to the possibility of collective action under Chapter VII, “should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁴⁷ This reference to international criminal law gives some guidance, but the rather vague concept of crimes against humanity allows for a wide discretionary power of the Security Council when the Council decides on military intervention. In the case of Libya, the Security Council outlined the possible human rights violations taking place in some depths. In Resolution 1973, it condemned the gross and systematic violation of human rights and determined that the widespread, organized attacks against the civilian population may amount to crimes against humanity.

Nevertheless, some commentators have argued that there is no proof that the Gadhafi regime engaged in crimes against humanity. These commentators have noted that, as a matter of principle, it is legitimate for a regime to fight against armed insurgents.²⁴⁸ Furthermore, Michael Walzer has argued that the threshold for intervention had not been passed in the case of Libya.²⁴⁹ While these comments are, at least in their sweeping generality, unconvincing,²⁵⁰ given the near-universal condemnation of Libya, not just by the UN but by numerous regional organizations and NGOs, they do highlight the general problem that Security Council action will often be made on the basis of unclear and even biased information. Moreover, in many cases, it will be subject to controversy whether a specific humanitarian situation has already passed the threshold for military intervention.

Second, the intervention in Libya illustrates the difficulty in separating humanitarian considerations from other policy goals. Other concurrent revolutionary movements in the Middle East and North Africa seem to suggest that the intervention in Libya was not only about protecting civilians, but also about advancing democracy and aiding the opposition

245. See INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, *supra* note 16, para. 4.19 (2001).

246. Payandeh, *supra* note 17, at 497–99 (2010).

247. G.A. Res. 60/1, *supra* note 16, at ¶ 139.

248. Merkel, *supra* note 212, at 32.

249. Michael Walzer, *The Case Against Our Attack on Libya*, NEW REPUBLIC (Mar. 20, 2011), <http://tinyurl.com/6epeey2> (“[A] military attack of the sort now in progress is defensible only in the most extreme case.”).

250. See Alex J. Bellamy, *Libya and the Responsibility to Protect: The Exception and the Norm*, 25 ETHICS & INT’L AFF. 263, 265 (2011) (speaking of “the extraordinary clarity of the threat of mass atrocities”); James Pattison, *The Ethics of Humanitarian Intervention in Libya*, 25 ETHICS & INT’L AFF. 271 (2011).

forces in pursuing their demands. Soon after the crisis began, it became clear that the intervening states preferred to see a regime change in Libya, notwithstanding the uncertainties about the objectives of the rebel forces.²⁵¹ As has already been pointed out,²⁵² this mix of political motivations in general does not affect the legality of the intervention. However, the loss of a clear distinction between humanitarian intervention and pro-democratic intervention threatens to weaken the legitimacy of the operation. In a civil war scenario in which human rights violations are carried out by the regime, no clear distinction between humanitarian intervention and intervention in order to overthrow the regime can be upheld. However, the mixing of the two concepts makes the UN-mandated intervention vulnerable to the accusation that the reference to human rights violations and to the need to protect civilians is a mere pretext for military intervention to pursue other policy objectives.

Third, a focus only on the human rights violations that have taken place in Libya would ignore the fact that many Western states have had a rather cooperative relationship with the Gadhafi regime for many years, during which time the regime was perpetuating human rights violations. Western states knew of the regime's actions for decades but refrained from rigid criticism or active support of opposition forces due to political and economic interests in a stable relationship with Gadhafi. Certainly, the intervening states could claim a higher degree of legitimacy if their foreign policy towards Libya had always been more coherently focused on the advancement and protection of human rights.

B. *The Problem of Selectivity*

The military operation in Libya has fueled speculations as to which other countries are also likely candidates for intervention. These considerations highlight a general challenge for the legitimacy of UN-authorized interventions. While the massive human rights violations in Libya justified an intervention, they raise the question of why the UN does not intervene in a similar way in other comparable or even worse situations. Most currently, the violent reaction of the Syrian regime against protesters seems as unacceptable as the Libyan case. Until now, however, the reaction of the international community has been much more modest, sanctions are imposed only reluctantly, and for now, military intervention does not seem to be a realistic option.²⁵³

251. *See supra* Part II.A.4.

252. *See supra* Part II.B.5.

253. *See Unfriended: Arab Leaders are at Last Starting to Desert the Syrian Regime*, ECONOMIST, Aug. 13, 2011, at 43 (“No one expects a Libya-like military intervention.”).

There can be different reasons for selective action on the part of the UN, with the political, economic, and strategic interests of states — and in particular, of the permanent members of the Security Council — playing a pivotal role. From a legal perspective, the selectivity of a course of action is, at least to a large extent, irrelevant: No state could convincingly argue that intervention against its massive human rights violations is illegal because intervention was omitted in comparable situations elsewhere. However, even if the selectivity of Security Council intervention does not affect the legality of military interventions, it does call into question their legitimacy.²⁵⁴ From the perspective of political science, scholars diagnose a discrepancy between the professed goals and the behavior of the Security Council.²⁵⁵ While selectivity has always been a problem of Security Council action,²⁵⁶ the issue of legitimacy has been raised more urgently since the increase in Security Council activity after the end of the Cold War. As the Security Council becomes more active, its selective course of action becomes ever more apparent. And with the increasing awareness of this selectivity the international community's acceptance of the Security Council practice might decline significantly.

C. *The Decentralization of the Chapter VII Enforcement Mechanism*

The authorization of the use of force through Resolution 1973 falls within the well-established practice of the Security Council since its authorization of the use of force against Iraq through Resolution 678 in November 1990.²⁵⁷ As has already been pointed out, this practice of the Security Council is deemed legal although it departs substantially from the enforcement mechanism envisioned by the UN Charter. This, however, does not mean that the Security Council's competence to authorize the use of force by single states or coalitions of states is without limits. International lawyers have argued that the Security Council must retain overall authority and control over an intervention when it authorizes the use of force by single states.²⁵⁸ While it is open to debate whether this is, in fact, a requirement for the legality of an authorization by the Security Council,²⁵⁹ a too far-reaching delegation of powers can, in any case, impair

254. See, e.g., Anne Orford, *What Kind of Law is This?*, LONDON REV. BOOKS BLOG (Mar. 29, 2011), <http://tinyurl.com/44g4ndv>. See generally David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 560 (1993) (discussing the legitimacy of the Security Council in general).

255. Buchanan & Keohane, *supra* note 228, at 48.

256. See, e.g., CASSESE, *supra* note 65, at 347.

257. See *supra* Part I.B.2.

258. See, e.g., DE WET, *supra* note 56, at 265–73 (2004) (further references); SAROOSHI, *supra* note 69, at 153–63.

259. Legitimate doubts are expressed by, for example, Bardo Fassbender, *Quis Judicabit? The Security Council, Its Powers and Its Legal Control*, 11 EUR. J. INT'L L. 219, 231 (2000).

the legitimacy of an international military operation and of the international standing of the Security Council. This problem was identified by then-Secretary-General Boutros Boutros-Ghali in 1995, when he emphasized that the authorization of the use of force by single states “can have a negative impact on the Organization’s stature and credibility. There is also the danger that the States concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the Security Council when it gave its authorization to them.”²⁶⁰

The precarious nature of Security Council authorizations came to the attention of scholars and the public after the 1990–91 war against Iraq on the basis of Resolution 678. Resolution 678 authorized the use of all necessary means to uphold and implement Resolution 660,²⁶¹ and Resolution 660 demanded the immediate withdrawal of Iraq from Kuwait.²⁶² On first view, this reference to Resolution 660 indicates that the liberation of Kuwait was the only objective of the authorization, but Resolution 678 also referred to the restoration of peace and security in the region, which provided grounds for debate.²⁶³ Furthermore, Resolution 678 in no way restricted the intervening states’ admissible means, and it did not set any time limit.²⁶⁴ The Security Council thereby left all further decisions to the intervening states, and a retraction of the mandate would have been precluded by the “reverse veto.”²⁶⁵

In the years that followed, the members of the Security Council seemed to have learned from the case of Iraq. Subsequent authorizations of the use of force were more restrictive and provided for a stronger involvement of the United Nations in the operations.²⁶⁶ Resolution 1973, however, constitutes a return to the problematic approach employed by Resolution 678. With the “protection of civilians and civilian populated areas under threat of attack,”²⁶⁷ the resolution chooses a considerably broad objective, the exact scope of which is open to debate. Apart from the exclusion of occupation forces, the resolution does not contain any meaningful

260. U.N. Secretary-General, *Supplement to An Agenda For Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, ¶ 80, U.N. Doc. A/50/60-S/1995/1 (Jan. 3, 1995).

261. S.C. Res. 678, *supra* note 71, at ¶ 2.

262. S.C. Res. 660, *supra* note 70, at ¶ 2.

263. For the advancement of the argument that Resolution 678 could provide a basis for the 2003 military action against Iraq, see, for example, William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT’L L. 557, 558 (2003). *But see* Gray, *supra* note 45, at 638.

264. *See, e.g.*, Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision-Making: Precarious Legitimacy*, 85 AM. J. INT’L L. 516, 525–26 (1991).

265. Caron, *supra* note 254, at 577.

266. *See, e.g.*, CASSESE, *supra* note 65, at 348–49; Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by “Coalitions of the Able and Willing”*, 11 EUR. J. INT’L L. 541, 559–60 (2000).

267. S.C. Res. 1973, *supra* note 4, at ¶4.

restrictions. Most importantly, the authorization does not provide a time limit, leaving it to the intervening states to decide whether and when the objective of Resolution 1973 is accomplished. Through the authorization of the use of force in the case of Libya, the Security Council, to a considerable degree, transferred its Chapter VII powers to the intervening states. It retained neither authority nor control over the intervention. Subsequent adjustments to the authorization or its complete retraction were subject to the “reverse veto” of the permanent members.

The approach chosen by Resolution 1973 is problematic in light of the structure and system of the UN Charter’s collective security system. The Charter embodies the principle that the use of force is prohibited and allows for exceptions only under specific and quite restrictive circumstances.²⁶⁸ A far-reaching and unrestricted authorization to use force seems incompatible with this foundational principle of the Charter. Moreover, the Charter envisioned a centralized system of peace enforcement, with the Security Council not only making the decision on the use of force, but also implementing this decision through armed forces under its command. While this mechanism failed in practice, the idea of a centralization of military force should be pursued even when the Security Council authorizes the use of force. The Charter bestows the primary responsibility for the maintenance of international peace and security on the Security Council,²⁶⁹ and the Security Council cannot simply dispose of this responsibility by conveying control of a military operation to intervening states.

In conclusion, the Security Council should have defined the objective of Resolution 1973 and the means acceptable to accomplish this objective in more detail. It also should have seriously considered a time limit for the intervention, forcing the members of the Security Council to re-evaluate the situation and the intervention and, if necessary, to make adjustments to the mandate. Unpredicted developments of the military intervention as well as controversial debate about the scope of the mandate significantly weakened the legitimacy of the intervention and its backing by the international community.

D. The United Nations: Peacemaker or Warrior?

Eventually, the military intervention in Libya raises the general question of the role and perception of the United Nations as an international political actor. While the UN has long been identified with concepts such as peaceful and consensual dispute settlement, de-escalation, and pacifism, the end of the Cold War has seen a rise of military action within its

268. *See supra* Part I.A.

269. U.N. Charter art. 24, ¶ 1.

institutional framework. At the beginning of the 1990s, a clear distinction could be drawn between two different kinds of measures by the Security Council. On the one hand, the Security Council initiated peacekeeping, a consent-based, noncoercive instrument, with peacekeeping troops (“blue helmets”) deployed under the control of the Security Council and the Secretary-General.²⁷⁰ On the other hand, the Council directed peace enforcement through military measures by single states and groups of states with the authorization of the Security Council but with the armed forces under the control and command of single states, coalitions of states, or regional organizations.²⁷¹ While peacekeeping forces could be directly attributed to the United Nations, military enforcement action was taken by states themselves with the mere authorization by the United Nations. This distinction between *centralized* peacekeeping and *decentralized* peace enforcement has become blurry with the development of “robust peacekeeping”: While initially peacekeeping operations were only authorized to use force in self-defense, the Security Council has incrementally authorized peacekeeping operations to use force also in order to implement their mandate.²⁷² This change in practice might have contributed to the success of peacekeeping operations, but at the same time, it has eroded the perception of the UN as a neutral actor. Peacekeeping forces are increasingly involved in armed activities and regarded not as a neutral force, but as a party to the conflict.

The loss of a clear distinction between peacekeeping and peace enforcement is also visible in comments on the intervention in Libya. While the military intervention was not carried out directly by the United Nations, but by single states and NATO with a Security Council mandate, it has at times been characterized as a UN military mission with “UN soldiers and helicopters fighting in Libya.”²⁷³ While this constitutes a distorted and unfounded view of the mission, it nevertheless reflects a picture of the United Nations as a military actor intervening directly in armed conflicts and taking sides in domestic power struggles.²⁷⁴

This change in perception might complicate the exercise of the United Nations’ activities in the realm of peaceful dispute settlement. Since the United Nations had been viewed as a direct party to the conflict, the ability of its organs and agencies to engage in mediation between the Gadhafi regime and the opposition and to advance a peaceful solution had been

270. See, e.g., Frowein & Krisch, *supra* note 44, at 755–56.

271. See *supra* Part I.B.2.

272. See, e.g., GRAY, *supra* note 18, at 302–06.

273. See, e.g., Jonathan Powers, *Is the United Nations Becoming a Warrior?*, ARAB NEWS (Apr. 21, 2011, 10:34 AM), <http://tinyurl.com/3kam2fn>.

274. See also Jennifer Welsh, *Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP*, 25 ETHICS & INT’L AFF. 255, 258–60 (2011) (emphasizing the UN’s shift from impartiality to “taking sides” that is embodied in Resolution 1973).

significantly impaired. However, complaints about the increasingly militaristic activities of the United Nations should not overlook the fact that its pacifistic image is due more to the factual restrictions put on the Security Council during the Cold War than to the original conception of the organization. According to the institutional design of the Charter, the Security Council was meant to deploy military forces itself, with the Military Staff Committee commanding and controlling the operation.²⁷⁵ Any critique of the United Nations' turn to more coercive action should not overlook the fact that the organization was, from the very beginning, designed not only as a forum for the peaceful settlement of disputes, but also as an institution capable of intervening militarily in order to ensure international peace and security.

The use of military force is always regrettable. However, in light of Gadhafi's refusal with regard to political negotiations, critics of the military intervention have yet failed to provide a convincing alternative to coercive action. With Benghazi threatening to fall, and with the danger of a massacre carried out by the Libyan regime against insurgents and civilians alike, immediate action seemed necessary and had the general support of the international community.

CONCLUSION

At the time of writing, the battle between the Gadhafi regime and the opposition forces has been decided in favor of the latter. The opposition forces have gained control over Tripoli and every other major city. The National Transitional Council is recognized as the legitimate representative of Libya by an increasing number of states and other international actors, frozen Libyan assets are made available to them, and plans for a Libya after Gadhafi are being discussed. The further development and the prospects for a sustainable political solution to the conflict are hard to foresee, though. At the moment, the rebellion and the NATO intervention have to be considered a success. This outcome will, presumably, mitigate significantly the criticism that has been passed on of the United Nations and NATO's engagement in Libya. On the other hand, allegations that the insurgents themselves have committed serious violations of international humanitarian law and human rights law,²⁷⁶ and the yet unclear circumstances surrounding the killing of Gadhafi, might further undermine the legitimacy of the intervention. Beyond the case of Libya, the Security Council's authorization and the military intervention have raised questions that touch upon the very foundations of the international order, and that

275. *See supra* Part I.A.2.

276. *See* S.C. Res. 2016, *supra* note 175, pmb. ¶¶ 9–10; AMNESTY INT'L, THE BATTLE FOR LIBYA (2011), available at <http://tinyurl.com/3k27yuw>.

will be raised again in the short or medium term, when the issue of military intervention for humanitarian or pro-democratic reasons is brought again to the attention of the international community, and to the Security Council in particular.

Simon Chesterman has rightly pointed out that from the perspective of international law, the intervention in Libya is “interesting but not exactly groundbreaking.”²⁷⁷ It follows the well-established practice of the Security Council to authorize the use of force by single states in order to prevent or contain humanitarian catastrophes. The authorization is, nevertheless, remarkable for its focus on human rights violations and the absence of references to any transboundary, and thereby — in the traditional sense — international elements of the conflict. Moreover, the scope of the authorization is unusually broad, making it difficult to determine the exact limits of the authorization. While the authorization and the military intervention are legal, an evaluation of the Security Council’s action in Libya from a policy perspective and with regard to its legitimacy is more precarious, and the final assessment of the intervention will depend to a considerable degree on whether it will result in a stable and peaceful Libya.

Beyond the case of Libya, Resolution 1973 is part of the broader development of the Security Council’s practice after the end of the Cold War. It illustrates that international law and the provisions of the UN Charter cannot provide more than a normative framework for collective security. The Charter provisions can hardly predetermine in what way the members of the international community and, in particular, the permanent members of the Security Council will make use of this framework. In the absence of strong legal bounds, the question of legitimacy gains particular importance. While there is a growing consensus that military intervention can be legal, legitimate, and feasible in order to prevent or contain atrocious human rights violations, military operations that openly pursue the aim of overthrowing the regime in place are subject to even closer scrutiny and criticism. As a case study, the intervention in Libya reveals general weaknesses and shortcomings in the international system of collective security, deficits that have the potential to significantly weaken the international community’s enduring acceptance and support of the system. When single states and coalitions of states seem to resort to the use of force primarily motivated by their own interests and not so much for the benefit of the international community and of the people that are affected by military intervention, any assessment of the intervention will always be ambivalent, regardless of the fact that the intervening states acted with the blessing of the UN Security Council and, therefore, under the banner of international legality.

277. See Chesterman, *supra* note 239.