

From Libya to Syria

– Did the Nato forces in Libya really exceed the mandate given in SC Resolution 1973 (2011)?

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1. Introduction

In this article I will discuss the interpretation of resolutions adopted by the UN Security Council. It contains an analysis of how resolutions are interpreted as well as a study of the practical implications in a specific case, namely Libya, and the repercussions that interpretation might have had.

Unlike treaties, resolutions from the Security Council are not legal documents per se. They are the result of an expression of political will from a political body, imposing obligations upon states without their explicit consent. So the question arises if the rules regarding interpretation of treaties in the Vienna Convention on the Law of Treaties are sufficient or even relevant or if other modes of interpretation are necessary.

The question has relevance in regard to Syria, since it has been claimed that a main reason for the UN Security Council's inability to handle the civil war in Syria can be traced back to Libya, especially to the interpretation of SC Resolution 1973 (2011), adopted March 17, 2011.

In that resolution the Security Council, acting under Chapter VII of the Charter, in operative paragraph 4 "authorizes" Member States "to take all necessary measures (...) to protect civilians and civilian populated areas under threat of attack", and in operative paragraph 8 the Council "authorizes" Member States to take "all necessary measures" to enforce the ban on flights.

The result of the following Nato-led operation is well known – there was a military intervention and the Libyan dictator Muammar Qadhafi was killed. There was a regime change.

This is something that Russia and others have kept reminding the Council about when vetoing resolutions on Syria. In January 2018 the Russian delegate

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said that “in violation of a resolution of the Security Council, a military aggression was launched that ultimately led to the destruction of the Libyan State, which the United Nations is currently attempting to restore.”¹

So, the question is if the forces authorized by the Council acted outside the ambits of the mandate or if the mandate could be interpreted as authorizing states to protect civilians even at the cost of a military intervention and a regime change. Did the language of the resolution simply give Russia and others a convenient excuse to pursue a policy that would have been followed anyway?

The question is, to put it in more legal terms, how do you interpret a mandate given by Security Council? Are we supposed to look only at the text of the resolution or are we supposed to try to establish what the political will of the Council was at the time of the adoption of the resolution?

In this article I argue that a teleological, policy oriented interpretation is needed when you interpret documents from a political body. But, to be fair, the political will of the Council is not always easy to find. Sometimes we are not even supposed to find it.

Michael Byers points out that the Council members sometimes, as he puts it, are “agreeing to disagree.” He takes SC Resolution 1441 (2002) as an example. In that resolution the Council recalled its previous resolutions on Iraq, insisted on full cooperation with IAEA inspectors, required that Baghdad made full account for all its chemical, biological and nuclear weapons. Finally, the Council found that Iraq was in “material breach” of some of the earlier resolutions and that “serious consequences” were to be expected if the inspectors reported Iraqi failures to live up to the demands of the Council.

Deep disagreements soon emerged as to whether the text of the resolution actually authorized Member States to use force. When the US and UK invaded Iraq in March 2003 they claimed that it did.² Russia and France claimed that it did not.

“I conclude”, writes Byers, “that the potential for dispute over the resolution was not an accident, that the document contains intentional ambiguities – in other words, that the Council members negotiated and agreed to a language that they knew could be used to support arguments on both sides.”³

¹ S/PV.8159.

² SC Resolution 1441 (2002) was not the only argument put forward by the US and the UK. Bring even claims that it appears that in the British and American view, SC Resolution 1441 (2002) was not really needed. Bring, Ove. Irakkriget 2003: Om legalitet och legitimitet. In Bring/Mahmoudi. Internationell våldsanvändning och folkrätt, Norstedts juridik (2006), p. 94.

³ Byers, Michael. Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity. *Global Governance* 10 (2004) p. 165.

2. Interpretation of treaties

A good starting point for the analysis of interpretation of resolutions from the Security Council is the general rules concerning interpretation of treaties. In article 31:1 of the Vienna Convention on the Law of Treaties, under the heading “General rule of interpretation”, it is stated that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

At first glance this looks like a manual also for the interpretation of resolutions. The good faith-part is obvious, it can be derived already from article 2:2 of the UN Charter where it is stated that all members shall fulfill “in good faith the obligations assumed by them in accordance with the present Charter.” The emphasis on the ordinary meaning of the terms is also applicable to resolutions. Naturally, however, the text cannot be understood in total isolation but can only be understood in its context and in the light of its object and purpose. A teleological approach is thus clearly applicable even when it comes to treaties.

Klamberg writes that the teleological method suggests that the object and purpose may provide guidance even in cases when the text of the rule is unclear or silent. “Gaps can be filled, corrections made, texts expanded or supplemented, provided that it is consistent with the objects and purposes in question.”⁴ According to Villiger the teleological approach “enables consideration of the different aims of particular types of treaties.”⁵

Articles 31 to 33 of the Vienna Convention can be used as a starting point for the interpretation of resolutions, but some caution is advised. In its advisory opinion on Kosovo’s declaration of independence the International Court of Justice (ICJ) made a thorough analysis of articles 31 and 32 of the Vienna Convention and found them to be a useful tool, but the Court then went on to say that the analysis could not stop there, that interpretation of resolutions “require that other factors be taken into account”, not least because resolutions are “drafted through a very different process than that used for the conclusion of a treaty.”⁶ This obviously suggests a more expansive standard of interpretation.

A treaty is a legal document and it is usually carefully negotiated, sometimes for years. Unlike resolutions it has parties and it binds the parties that ratify it and states are (most of the times, at least) equal under the treaty.⁷ A state can choose not to become a party, to make reservations or to withdraw.

⁴ Klamberg, Mark. *Evidence in International Criminal Procedure*. Stockholm University (2012), p. 21.

⁵ Villiger, Mark. *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Martinus Nijhoff (2009) p. 428.

⁶ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. ICJ Report 2010 p. 403. Para 94.

⁷ One example of the opposite is the Non-proliferation Treaty where the nuclear powers are given a right that the non-nuclear states do not have.

None of that is applicable to a resolution from the Security Council. Indeed, pursuant to article 25 of the UN Charter all UN members have agreed to “accept and carry out the decisions of the Security Council.” The Council, as Kelsen put it already in 1951, exists to preserve the peace, not to enforce law.⁸ This provides even more support for a different standard of interpretation.

3. Security Council resolutions

Security Council resolutions are not treaties and the Council is more than anything a political body. The resolutions “resemble executive orders more than contracts, and the interpretive rules that apply to them might therefore be somewhat different,” writes Byers.⁹ And according to Wood they are “not legislation, nor are they judgements or quasi-judgements, nor are they treaties.”¹⁰

A resolution is nothing like a negotiated settlement between equal parties. It is an expression of the political will of the majority of the Council, including in particular the permanent members. Those affected by the resolution usually have no say in the matter. It imposes obligations upon states without their consent, even though you might argue that the consent is implicit since UN members according to Article 25 of the Charter have agreed to “accept and carry out the decisions of the Security Council in accordance with the present Charter.”

This calls for another method of interpretation. Frowein has advocated a more restrictive approach when resolutions are interpreted. He states that the resolution must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the resolution in their context and in the light of the object and purpose. However, he continues, “much more care must be exercised when the importance of practice under a specific resolution is to be evaluated.” In Frowein’s mind “the objective view” of the neutral observer must be the most important factor when it comes to interpretation, and he means that the subjective intentions of members of the Council can “at least in practice, not be seen as in any way decisive.”¹¹

⁸ Kelsen, Hans. *The Law of the United Nations* (1951) p. 294.

⁹ Byers p. 176. Papastavridis calls them “executive acts of an international organization.” Papastavridis, Efthymios. *Interpretation of Security Council Resolutions under Chapter VII in the Aftermath of the Iraqi Crisis*. *The International and Comparative Law Quarterly*. Vol. 56. No 1 (2007) p. 117.

¹⁰ Wood, Michael. *The Interpretation of Security Council Resolutions*. *Max Planck Yearbook of International Law* 73 (1998) p. 79.

¹¹ Frowein, Jochen. *Unilateral Interpretation of Security Council Resolutions – A Threat to Global Security?* in Volkmar Götz, Peter Selmer, and Rüdiger Wolfrum (eds), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (Berlin: Springer 1998) p. 99.

More common, however, than Frowein's standpoint is the view that interpretation of Council resolutions, being mainly political documents, must be done with an aim to establish the political will of the Council.¹²

The ordinary meaning of the terms, to use the terminology of the Vienna convention, is of course important even when it comes to resolutions. If the Council in clear and unequivocal terms demands that the member states do A, there is no argument about what the Council has decided. It is also obvious that the wording of a resolution should have primacy over any conflicting view not supported by the text.

Resolutions are, however, not always clear and unequivocal. Yes, "requests" is stronger than "recommends" but words can be treacherous when it comes to resolutions. It is far from certain that identical terms in different resolutions bear the same meaning. Vague language can also be interpreted as a sign that the Council wasn't able to agree on the exact meaning and therefore left it to the interpreters to decide what the 15 members really meant. The main goal might just have been to find a sentence that would appeal to the majority of the Council, hence securing an affirmative vote.

The opposite is also true. If the language is clear and not really open to interpretations, then the wording is an expression of the political will of the Council. This is, however, rarely the case.

Wood notes that SC Resolutions "are frequently not clear, simple concise or unambiguous. They are often drafted by non-lawyers, in haste, under considerable political pressure, and with a view to securing unanimity within the Council."¹³

The unclarity of a resolution is particularly troublesome when it comes to enforcement measures under Chapter VII of the Charter. The member states must be able to understand what is expected of them or what they are authorized to do. That is not always the case. So, the key question remains: how do you interpret a Council resolution?

The first time the International Court of Justice (ICJ) dealt with the issue was in 1971, when the Court was answering the question whether a particular resolution was binding or not. The Court concluded that the text of the resolution "should be carefully analysed", but it also took into account "the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council."¹⁴

Thus, it is clear that we cannot just make a textual analysis. If the aim is to determine the political will of the Council everything that can lead us in that

¹² Papastavridis argues that it is "the will of the Council per se, as a distinct legal body, and not the aggregate of the separate will of the Member States of the Council which reflects the intent of the community." Papastavridis p. 105.

¹³ Wood p. 82.

¹⁴ Namibia Advisory Opinion. ICJ Reports 1971 p. 53.

direction – previous resolutions, statements, rules of international law, discussions in the Council, political realities in the Council and in the conflict being handled, etc. – is of interest.

Statements in a debate or even more so explanations of votes are important when interpreting SC Resolutions – the outcome is known in advance and explanations are usually given after the actual vote. The same is not true when it comes to treaties. Villiger concludes that statements at a diplomatic conference “appear irrelevant” as a supplementary tool for interpretation “as it is not clear whether the treaty will be concluded and which States will become parties.”¹⁵

Wood argues that two things are of particular importance when interpreting SC Resolutions. First, we need to know the background, both the overall political background and the background of related Council action. Second, we need to understand the role of the Council under the Charter of the United Nations, as well as its working methods and the way SC Resolutions are drafted.¹⁶

Wood means that knowledge of the background is important especially in those cases, which are the great majority, when the resolution deals with a particular situation or dispute. He writes: “In such cases it is necessary to have as full a knowledge as possible of the political background and of the whole of the Council’s involvement, both prior to and after the adoption of the resolution under consideration.”¹⁷

Wood then continues with the drafting process, and at this stage we can see obvious problems when it comes to determining what the Council actually wanted to do. The most important stage of the drafting process is when the draft resolution is discussed with other missions, discussions that are held far from the public eye, and Wood concludes that “most of the negotiating history of a resolution is not on the public record, and indeed may be known in full only to Council members or even a limited number of them.”¹⁸

Because of the way SC Resolutions are drafted, and because they usually are intended to have political and not legal effect, Wood argues that it “would be a mistake to approach the text as if it were drawn up with the care and legal input of a treaty.”¹⁹ SC Resolutions are, to put it differently, political documents and should be treated as such.

Wood’s approach is policy-oriented. His conclusions are that the aim of the interpretation is to give effect to the intentions of the Council, and that the circumstances of the adoption of the resolution and preparatory work may “often be of greater significance than in the case of treaties.”²⁰ For obvious reasons it

¹⁵ Villiger p. 429.

¹⁶ Wood p. 74.

¹⁷ Wood p. 79.

¹⁸ Wood p. 81.

¹⁹ Wood p. 89.

²⁰ Wood p. 95.

leaves the members of the Council, which have access to the drafting process, in a better position to influence the interpretation than others.

4. International courts and interpretation

The international war crimes tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) both had to interpret their statutes, which were resolutions adopted by the Security Council. In the Tadic case the ICTY started with a literal interpretation, but found that in order better to “ascertain the meaning and scope of these provisions” the Court needed to “consider the object and purpose behind the enactment of the statute.”²¹ So the Tribunal turned first to a teleological interpretation and then proceeded to a logical and systematic interpretation. This, however, is fully within the scope of the general rule of interpretation as set out in the Vienna Convention.

Klamberg states that even though these resolutions are not treaties, they are legal instruments and that “Article 31 of the Vienna Convention is applicable to matters of interpretation.”²² Klamberg finds support in a separate opinion from Judge McDonald and Judge Vorah in the ICTR. In their joint opinion they stated that the Statute resembles a treaty and that it shares “fundamental similarities” with a treaty. Therefore, they conclude, “recourse by analogy is appropriate to Article 31 (1) of the Vienna Convention in interpreting the provisions of the Statute.”²³

Caution is once again advised. It would not be correct to conclude that this applies to all SC Resolutions – only to those that resemble a treaty. The resolution containing the Statute shared “fundamental similarities” with a treaty, but the majority of the resolutions do not.

Above we have seen that the ICJ in the Namibia advisory opinion of 1971 took account of more than the wording of the resolution. In its advisory opinion on Kosovo’s declaration of independence the ICJ first declared that articles 31 and 32 of the Vienna Convention on the Law of Treaties might provide some guidance but that the differences between resolutions and treaties require that other factors be taken into account. And those differences are significant.

In clear terms the Court stated that “Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and

²¹ Prosecutor v Dusko Tadic. IT-94-1-AR 72 para 71.

²² Klamberg p. 19.

²³ Prosecutor v Kanyabashi. ICTR-96-15. Joint and Separate Opinion of Judge McDonald and Judge Vorah, 3 June 1999, para 15.

the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all member states, irrespective of whether they played any part in their formulation.”

The Court continued and held that the interpretation of SC Resolutions therefore “may require the Court to analyze statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as subsequent practice of relevant United Nations organs and of states affected by those given resolutions.”²⁴

Svanberg concludes that the Namibia case from 1971 and the advisory opinion on Kosovo shows that the ICJ holds that a teleological approach is more important when interpreting resolutions than treaties.²⁵

5. Can the Security Council adopt resolutions in violation of the UN Charter?

The Security Council is in many ways sovereign. It has, for example, an unlimited right to decide what actions amounts to a threat to the peace or a breach of the peace in accordance with article 39 of the Charter.

But do the resolutions have to be legal? The answer must be yes. The Council is powerful but it is not above the law. Svanberg writes that one must assume that the Council is acting in accordance with international law,²⁶ and Stahn argues that “a strong case” can be made that decisions of the Council taken in violation of the Charter are not binding upon member states, since article 25 of the UN Charter says that members agree to accept and carry out decisions of the Security Council “in accordance with the present Charter.”²⁷

If we assume, as we shall, that the Security Council respect international law, especially the part of law that is considered *jus cogens*, it has implications for interpretation. When the Council in SC Resolution 242 (1967) called for a “just settlement” of the refugee problem in Palestine, it cannot, writes Orakhelshvili, “have meant mass deportation or displacement.”²⁸

²⁴ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo. ICJ Reports 2010 p. 405 para 94.

²⁵ Svanberg. FN:s säkerhetsråd i rättens tjänst. *Jure* (2014) p. 40.

²⁶ Svanberg p. 41. See also Papastavridis p. 108.

²⁷ Stahn, Carsten. The Ambiguities of Security Council Resolution 1422 (2002). *EJIL* 14 (2003) p. 97.

²⁸ Orakhelashvili, Alexander. The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions. *EJIL* 16 (2005) p. 80.

6. Russian vetoes on Syria

When the war in Syria was discussed six months after the adoption of resolution 1973 (2011) the Russian delegate made a clear statement that the situation in Syria could not be considered in the Council separately from the Libyan experience. “For us, Members of the United Nations,” he stated in an explanation of the Russian veto on draft resolution S/2011/612, “it is very important to know how the resolution was implemented and how a Security Council resolution turned into its opposite. The demand for a quick ceasefire turned into a full-fledged civil war, the humanitarian, social, economic and military consequences of which transcend Libyan borders. The situation in connection with the no-fly zone has morphed into the bombing of oil refineries, television stations and other civilian sites. The arms embargo has morphed into a naval blockade in western Libya, including a blockade of humanitarian goods.”²⁹

South Africa also recalled Libya when it abstained from voting for the draft resolution because the South African government was “concerned” that the resolution was part of a “hidden agenda aimed at once again instituting regime change.”³⁰

Five years later, in explaining the Russian veto on draft resolution S/2016/846, the Russian delegate was still referring to Libya and as shown in the beginning of this article, this was still the case in 2018.

“We all know the background to the Syrian crisis”, the Russian delegate said in 2016. “After destroying Libya and considering that a great success, the troika of the three western permanent members of the Security Council turned on Syria.”³¹

The question is therefore if the passivity of the Security Council in regard to Syria in legal terms can be traced back to SC Resolution 1973 (2011) and the events following the adoption of the resolution, or if the language of the resolution just gives Russia and other states a convenient excuse to follow a policy that would have been followed anyway, regardless of what happened in Libya.

It might be noted that Russia has vetoed draft resolutions on Syria that have no connection with SC Resolution 1973 (2011).³² Brockmeier, Stuenkel and Tourinho conclude that “the Libya controversies have contributed to, but have not been the primary cause of, the deadlocks in the Security Council over Syria.”³³

²⁹ S/PV.6627.

³⁰ Ibid.

³¹ S/PV.7785.

³² Draft resolutions S/2017/315 and S/2017/970, both on chemical weapons, are two examples.

³³ Sarah Brockmeier, Oliver Stuenkel and Marcos Tourinho. *The Impact of the Libya Intervention Debates on Norms of Protection*. Global Society, Vol 30, Issue 1, 2016 p. 131.

7. SC Resolution 1970 (2011)

Wood writes that SC Resolutions, unlike most treaties, often are “part of a series and it is only possible to understand them as such.”³⁴ In the case of SC Resolution 1973 (2011) it is clear that it cannot be understood without also taking SC Resolution 1970 (2011) into account. In that unanimously adopted resolution the Council – “Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41” – imposed an arms embargo on Libya, referred the situation to the International Criminal Court, decided on a travel ban and asset freeze.

The resolution contains wordings that all UN members shall “take all the necessary measures” to prevent the direct or indirect sale, supply or transfer of arms and “take the necessary measures” to prevent the entry or transfer of persons affected by the travel-ban.

In their explanations of vote, however, no state made reference to any authorization of force by the Council. The delegates focused on the Libyan authorities’ responsibilities, and noted that the referral to the Criminal Court meant that the Libyan authorities were made aware of the consequences of their actions. “A settlement of the situation in Libya is possible only through political means. In fact, that is the purpose of the resolution adopted by the Council,” the Russian delegate stated.³⁵

8. SC Resolution 1973 (2011)

Upon adoption of SC Resolution 1973 (2011), many delegates made a direct reference to the fact that the measures in SC Resolution 1970 (2011) had not been sufficient. A direct reference is also made to SC Resolution 1970 (2011) in the preamble of SC Resolution 1973 (2011), where the Council sharpens its tone. The Council now explicitly “authorizes” member states first to take “all necessary measures” to protect civilians (paragraph 4) and then to take “all necessary measures” to enforce compliance with the no-fly zone (paragraph 8). Looking back in Council history, starting with SC Resolution 678 (1990), these wordings must be interpreted as a clear authorization to use military force.

Also the wording in paragraph 4, where the Council excludes “a foreign occupation force of any form on any part of Libyan territory” is a clear sign that the Council had the use of force in mind, force short of occupation.

One question that occurs is if “a foreign occupation force” is the same as ground forces, meaning that the resolution explicitly forbids foreign military

³⁴ Wood p. 87.

³⁵ S/PV.6491.

presence on the ground. Turning back to the standard of interpretation of resolutions analyzed above, we find that if the wording of the resolution in its context and object and purpose is clear, there is no need to go further. The wording in this resolution is as clear as it can be. The Council refers to occupation, which is a legal term regulated in the Hague Conventions from 1907 and the Geneva Conventions from 1949, it does not explicitly say ground forces.

This leads us to the assumption that the Council is aware of the rules of international law and abides by them. And occupation has as already stated a distinct meaning in international law. It refers to temporary but effective control of another state's territory, or part thereof.³⁶ To solely put armed forces on the ground does not amount to occupation.

Sometimes useful help in determining the intentions of the Council can be found in what is not said in the resolution. If the Council had the intention to rule out the presence of ground troops in Libya, it would have said so in the resolution. It did not.

9. Explanations of vote

To determine the political will of the Council, explanations of votes are an important tool. The wording in them is often carefully chosen, sometimes after acceptance from the highest political level.

SC Resolution 1973 (2011) was adopted by ten votes in favor and five abstaining (Brazil, China, Germany, India, Russia). It is clear from the debate³⁷ that the council members interpreted the resolution as a tool to protect civilians in Libya. Many also made statements that the wording of the resolution ruled out foreign occupation – South Africa even stated that it did not vote in favor of “unlimited military intervention under the pretext of protecting civilians.” No one argued against the fact that the resolution authorized the use of force, even though abstaining states like Russia and China clearly declared that every use of force against the civilian population of Libya was unacceptable.

At that point no state explicitly mentioned that regime change was out of the question – that criticism came later. In fact, it could be argued that regime change was if not a stated goal of some members of the Council, at least it was a foreseeable outcome. As will be shown below, in cases like this it might be important to separate the goal of the operation from the means necessary to achieve that goal.

The UK, for example, stated that one purpose of the resolution was to allow the people of Libya to determine their own future, “free from the tyranny of the

³⁶ Shaw, Malcolm, *International Law*, 7th ed., Cambridge University Press (2014) p. 855.

³⁷ S/PV.6498.

Al-Qadhafi regime,” and Germany made it clear that Al-Qadhafi “must relinquish power immediately,” and that a German aim was to “promote the political transformation of Libya.” We might also recall that SC Resolution 1970 (2011) referred the situation in Libya to the International Criminal Court, meaning that the oppressive government should stand trial in the Hague and not resume office in Tripoli. The goal was to ensure that the Libyans could have a future without Qadhafi in power.

Granted, all of this refers to peaceful transitions, but the question of changing the regime in Libya was on the Council’s agenda and must therefore be included in the interpretation of the mandate.

One can also argue that regime change might be an unavoidable consequence if the regime is the oppressor, and the international forces – using “all necessary measures” – are fighting the oppressor’s forces in order to protect civilians. Bellamy and Williams argue that the lines between protection and other agendas such as regime change are blurred.

“While the demand that these agendas be kept separate is politically understandable and conceptually appealing, it will often be hard to meet”, they write. “When the principal threat to civilians comes from the regime, those demanding strict separation need to explain how peacekeepers or coalitions authorized to use force to protect civilians can do so effectively without facilitating regime change.”³⁸ Brozus writes that Germany during the Holocaust and Cambodia under the Khmer Rouge are two examples of the fact that regime change may be necessary in order to protect the population.³⁹

Breaky agrees. He points out that a brutal state massacres its people up to the point of risking international intervention only when it perceives this as necessary for it to hold on to power. “Even the most restrained protective intervention, therefore, prevents the regime from doing what it perceived it needed to do in order to guarantee survival,” Breaky writes.⁴⁰

Payandeh makes a distinction between means and ends. “While regime change might not have been a legitimate goal in itself,” he writes, “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.”⁴¹

³⁸ Bellamy, Alex and Williams, Paul. The new politics of protection? Côte d’Ivoire, Libya and the responsibility to protect. *International Affairs* 87:4 (2011) p. 849.

³⁹ Brozus, Lars. Improving Mass Atrocities Prevention: Guidelines for Effective and Legitimate Implementation of the Responsibility to Protect. SWP Comments. December 2012 p. 2.

⁴⁰ Breaky, Hugh. The Responsibility to Protect: Game Change and Regime Change p. 29. In Sampford, Francis, Popovski (ed.), *Norms of Protection: Responsibility to Protect, Protection of Civilians and their Interaction*. United Nations University Press, 2012.

⁴¹ Payandeh, Mehrad. The United Nations, Military Intervention and Regime Change in Libya. *Virginia Journal of International Law* (2012) p. 388. Edward Luck, then special advisor to the Secretary General for the responsibility to protect argued along the same line. “I should say that it isn’t the goal of the responsibility to protect to change regimes. The goal is to protect populations. It may be in some cases that the only way to protect populations is to change the regime,

The question of whether you can protect civilians without deliberately attacking government forces came clear about two months after the adoption of SC Resolution 1973 (2011), when the Security Council discussed the protection of civilians in armed conflict.⁴² France declared that the Security Council authorized the forces of the coalition “to protect civilians under bombardment ordered by their leaders. By striking colonel Al-Qadafi’s forces before they entered Benghazi, France and its partners helped to prevent a massacre there.” In other words – in order to fulfill the mandate given by the Security Council to protect civilians, government forces had to be defeated.

And, one may ask, what would have happened if the Nato-led forces had terminated their operation after liberating Benghazi? According to Brozus “there would have been the danger of massive regime retaliation the following weeks, months or even years.”⁴³

At this stage, in May 2011, many states made clear statements to the fact that the mandate, in their interpretation, did not allow mass bombardment or regime change. In her opening briefing to the Council, Under Secretary General Valerie Amos stated that “the interpretation of the Council’s decision must be exclusively limited to promoting and ensuring the protection of civilians.”

But, again, the question is what “protection of civilians” actually means in a situation like that in Libya. Can you “protect” the population without using military force and without ousting the oppressor from power?

It depends on whom you ask. The UK was obviously of the opinion that military force was needed to fulfill the mandate. The UK delegate stated that “the action being undertaken by the coalition forces is to protect the civilian population on the ground in Libya.”

Russia made another interpretation of the mandate. With clear reference to UK’s statement the Russian delegate said: “The noble goal of protecting civilians should not be compromised by attempts to resolve in parallel any unrelated issue. In that regard, we share the concern expressed today by Ms. Amos with regard to the situation in Libya. The statement by a representative of the coalition with regard to resolution 1973 (2011) is not in line with the reality.”

As stated above, at this point many states expressed doubts over whether the coalition was acting in accordance with the mandate. South Africa was concerned that the implementation of the resolutions went “beyond their letter and spirit” and stated that the states in the coalition should “refrain from advancing political agendas that go beyond the protection of civilians mandate, including regime change.”

but that certainly is not the goal of the R2P per se,” he stated. Gwertzman, Bernard. Will Syria follow Libya? Interview with Edward C. Luck, Special Advisor to the UN Secretary-General. Council on Foreign Relations, 1 September 2011.

⁴² S/PV.6531.

⁴³ Brozus p. 2.

China said that there “must be no attempt at regime change” and that it was “opposed to any attempt to willfully interpret the resolutions or to take actions that exceed those mandated by the resolutions.” Nicaragua, not a member of the Council but invited to the debate, felt that the meaning of protection of civilians had been manipulated “for dishonorable political purposes, seeking unequivocally and blatantly to impose regime change.”

But it is also important to remember that at this stage, two months after the adoption of SC Resolution 1973 (2011) when coalition forces were fighting in Libya, many states also came out in support of the resolution, support that must lead us to the conclusion that they accepted that the force used by the coalition was within the mandate.

10. Was the mandate exceeded?

Judging just from the above-mentioned debate more states came out in support of the resolution and the actions taken by the coalition forces, than the opposite. To be honest, the support was given in broad terms, whereas the opponents clearly stated what they felt that the mandate didn’t allow the coalition forces to do.

But still, can you really draw the conclusion that the mandate was exceeded? Clearly it could be argued that this conclusion is too simplistic. Regime change, meaning the overthrow of the Qadhafi regime, was within the mandate of the resolution – it was a means to achieve the goal, i.e. protection of civilians. After the fall of the tyranny, however, it was up to the Libyans to build their own future.

To decide whether the mandate was exceeded we need to establish what the will of the Council really was, and to do that we need to start by examining SC Resolution 1970 (2011). In that unanimously adopted resolution the Council rejected unequivocally “the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government”, recalled the Libyan authorities’ responsibility to protect its population and referred the situation to the prosecutor of the International Criminal Court. The Council also imposed a travel ban on 16 named individuals, including Muammar Qadhafi himself.

In their explanations of votes following the adoption of SC Resolution 1970 (2011) no state explicitly came out against regime change. It was obvious, however, that especially the UK, US and France did not rule it out. The US delegate clearly stated that Qadhafi “has lost the legitimacy to rule and needs to do what is right for his country, by leaving now.”⁴⁴ If that statement wasn’t clear enough

⁴⁴ S/PV.6491.

regarding what was to be expected, the invited Libyan delegate was unequivocal in his interpretation of the resolution. “This resolution”, he stated, “will send a signal for a definitive end to the fascist regime that is still in place in Tripoli.” And he added that the most important thing for the people was “to put an end to this regime.”⁴⁵

This is what happened. It could be argued that it is one thing to overthrow a brutal dictator, and another thing to instigate regime change – the difference being that it should be up to the people, and not the international community, to decide what their future should be after the tyrant is gone.⁴⁶ But, as Payandeh, puts it “it is highly doubtful whether the legitimate demands of the population could have been fulfilled with Gadhafi still in power.”⁴⁷

It should also be noted that the Security Council took steps to assist the Libyans in their pursuit of a future without the tyranny of the former regime. Assist, not dictate. In SC Resolution 2009 (2011) the Council declared its determination to ensure that the assets frozen should be made available to the Libyans “in conformity with the needs and wishes of the Libyan people.” The Council also established UNSMIL to assist in the transition. “In Libya, we are deploying a new UN support mission to assist the Libyan authorities establish a new government and legal order, consistent with the aspirations of the Libyan people,” the Secretary General stated.⁴⁸

In SC Resolution 2016 (2011), adopted just days after the death of Gadhafi, the authorization to use force was terminated as were the no-fly zones.

The operation in Libya was the first implementation of the principle of responsibility to protect (R2P) in practice. The day before the adoption of SC Resolution 1970 (2011) the Secretary General stated that “when a State manifestly fails to protect its population from serious international crimes, the international community has the responsibility to step in and take protective action in a collective, timely and decisive manner.” He continued by saying that the challenge “for us now is how to provide real protection and to do all we can to halt the ongoing violence.”⁴⁹

All Council members accepted the inclusion of R2P in the preamble of the resolution. And that, I would argue, is at least an indication that the use of mili-

⁴⁵ Ibid.

⁴⁶ One example may be that the ICC has issued two arrest warrants for Omar Hassan Ahmad Al Basir, President of the Sudan. ICC-02/05-01/09.

⁴⁷ Payandeh p. 387.

⁴⁸ The Secretary General Report to the General Assembly. “We the peoples”. New York, 21 September 2011. GA/11148. Following the adoption of SC Resolution 2009 (2011) the UK-delegate stated that it for the Libyans themselves “to tackle those challenges and shape their future, but they can be assured that the international community stands ready to support them as they set about the considerable tasks ahead.” S/PV.6620.

⁴⁹ S/PV.6490.

tary force on the ground and regime change were outcomes of the operation that couldn't be ruled out in advance.

It could be argued that R2P only means what was included in the World Summit Outcome 2005. In that document the gathered heads of states and governments accepted the principle and declared to be "prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, /.../, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations."⁵⁰

This wording clearly covers military measures although it does not say how this force might be used and what the outcome might be. To establish that, we can seek guidance in the report of the International Commission on Intervention and State Sovereignty (ICISS), that launched the principle of a responsibility to protect 2001. It is not a formal source of law, but it gives an understanding of the context and the intentions behind the concept.

According to the Commission a regime-change may be impossible to avoid. "Overthrow of regimes is not, as such, a legitimate objective, although disabling that regime's capacity to harm its own people may be essential to discharging the mandate of protection – and what is necessary to achieve that disabling will vary from case to case," the report says.⁵¹

The ICISS also stated that occupation of a territory might be unavoidable, "but it should not be an objective as such."

So, judging from the concept of R2P in the Commission's sense, regime-change, military force and occupation may be consequences of a foreign intervention to protect civilians. Occupation is, however, clearly precluded in SC Resolution 1973 (2011) – regime-change and the use of ground troops are not.

Even after the adoption of SC Resolution 1973 (2011) no state explicitly argued that the mandate did not allow a regime change in Libya, but some states, like Brazil, expressed concern that the use of force might lead to an escalation of violence.

The UK, one of the sponsors of the draft resolution, on the other hand left no doubt over what the core purpose of the resolution was, namely to allow the people of Libya to determine their own future "free from the tyranny of the Al-Qadhafi regime."⁵²

It is clear that many states saw regime change in Libya as a possibility – clear statements in that regard was made when the resolutions were adopted. No state, at that point, objected or stated that regime change was not an acceptable out-

⁵⁰ A/RES/60/1.

⁵¹ The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty (2001) Para 4:33.

⁵² S/PV.6498. Germany, who abstained since it wanted to strengthen the sanctions regime and not authorize force, also made a clear statement that Al-Qadhafi "must relinquish power immediately."

come (every state voted yes to the referral of Libya to the ICC, meaning that Al-Qadhafi had to resign from power).

This suggests that at the time of the adoption of SC Resolutions 1970 (2011) and 1973 (2011) there was at least no collective will in the Council against a possible regime change in Libya, or rather a realization that the regime had to go in order for the civilians to feel protected. “Measures necessary for the protection of civilians and civilian populated areas might at the same time have promoted regime change,” Payandeh notes.⁵³ Again – it is of importance to separate between the goal and the means necessary to achieve the goal.

As mentioned above, the critique that the mandate did not allow a regime change came later, when the Council in May of 2011 discussed the protection of civilians in armed conflict.⁵⁴

As noted earlier, only four states in the Security Council explicitly came out against regime change. Brazil said that we must avoid excessively broad interpretations of the protection of civilians that could “create the perception that it is being used as a smokescreen for intervention or regime change.” South Africa was concerned that the interpretation of the resolutions went beyond their letter and spirit and said that external actors should “refrain from advancing political agendas that go beyond the protection of civilians mandate, including regime change. China claimed that there “must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians.” And finally Nicaragua, not a member of the Council but invited to participate in the discussion, talked about a “shameful manipulation” of the slogan protection of civilians for dishonorable political purposes, “seeking unequivocally and blatantly to impose regime change.”

It should however be noted that many states came out in support of the resolution and the operation, which must be seen as an acceptance on the part of these states that the mandate was not exceeded.

11. Conclusion

In this article it is concluded that the standard of interpretation of Security Council resolutions is not identical to the rules of interpretation of treaties. In particular it is argued that a more teleological approach is appropriate and that explanations of votes and other statements made in connection with the adoption of a resolution are important material to this end.

The practical relevance of the distinction between the standard of interpretation of Security Council resolutions and the rules of interpretation of treaties

⁵³ Payandeh p. 388.

⁵⁴ S/PV.6531.

has been shown through a discussion of the Security Council mandate in respect of Libya. Despite the views of many others it has been argued that the mandate given by the Security Council was not exceeded in the ensuing intervention.

Since the aim of the resolution was to protect civilians, it must be considered quite clear that the mandate could not be interpreted as authorizing the intervening states to pursue a wider political agenda, and foreign occupation was clearly not covered by the mandate.

But I would argue that both foreign intervention and the eventual regime change was in line with the mandate given by the Security Council.

Regime change (however a peaceful one) was undoubtedly one goal when the Security Council unanimously referred the situation in Libya to the International Criminal Court. Statements made by several states, as well as the writings of the commission that launched the concept of R2P also points in that direction. It is clear that the purpose of the resolutions was that the Libyan people should be able to create a future without the Qadhafi regime. Of importance in this context is also what was *not* said by states who later claimed that the mandate was exceeded – allowing military force, they must have realized what might happen once the operation started.

The wording “all necessary measures” is habitually interpreted as allowing use of force, and the fact that the Council explicitly ruled out foreign occupation but not ground forces is a clear indication that the Council had a military intervention in mind.

At the same time the term “necessary” serves as a limit regarding how much force the mandate permits to serve the purpose of protecting civilians. It is not necessary to pursue an ambitious political agenda to protect civilians, but it might, as we have seen above, be necessary to get rid of the very regime that is the oppressor. That might be exactly what protection of civilians means under dire circumstances.⁵⁵

The French delegate clearly summarized the dilemma when he explained that the foreign troops had prevented a massacre by striking Al-Qadhafis forces before they reached Benghazi.⁵⁶ In other words, to protect civilians you need to attack the oppressor and if the regime is the oppressor, it needs to be defeated – if necessary with military force on the ground. It is, as stated above, a matter of a distinction between means and ends.

Then, when the oppressor is defeated, it’s up to the oppressed people to decide their own future, which is also exactly how the Security Council handled the issue after Qadhafi was gone.

⁵⁵ Payandeh writes that “measures were encompassed by Resolution 1973 as long as they were necessary even though they might have promoted regime change in Libya.” Payandeh p. 388.

⁵⁶ S/PV.6531.