The Responsibility to Protect and regime delegitimation

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1. Introduction

In the aftermath of NATO's intervention in Libya, a number of commentators have focused on the relationship between the responsibility to protect (RtoP) and regime change, considering whether the latter was allowed under Resolution 1973, which authorized Member States - in the name of RtoP - to take 'all necessary measures' to protect civilians and civilian populated areas under threat of attack.

Although the forcible replacement of a regime that is guilty of grave human rights violations is a potential means of implementing the responsibility to protect, at least in extreme cases, it would certainly not be a desirable application of the doctrine. This Author suggests a different reading of the impact of RtoP on States responsible for massive violations of fundamental rights: namely, their de-legitimation. Less critical than regime change, regime de-legitimation is a perfect application of one basic pillar of RtoP, the idea of sovereignty as responsibility towards people.

After a general survey of the impact on RtoP of the adoption of Resolutions 1970 and 1973, on one hand, and NATO's intervention, on the other (2), the paper goes on to consider regime change in Libya, achieved by foreign military intervention in an internal conflict (3). Then, having assessed the conditions at which the overthrow of Gaddafi could possibly be considered legitimate, the limits and ambiguities of this construct will be identified and a different reading will be proposed (4). Finally, based on the analysis of Resolution 1970, regime de-legitimation will be explored as a genuine application of RtoP (5).

2. Resolutions 1970 and 1973 and NATO's intervention in Libya: a fine line between major achievements and objectionable deviations

Security Council (UNSC) Resolutions 1970 and 1973 represent one of the most relevant achievements in the growing acceptance of RtoP within the framework of the United Nations (UN).

A number of factors make their approval ground-breaking.

First of all, for the first time these two documents call the doctrine by name, explicitly evoking 'the responsibility of the Libyan authorities to protect the Libyan population' in their preambles, rather than simply referring to paragraphs 138 and 139 of the 2005 World Summit Outcome, as earlier UNSC's documents did[1]. The doctrine has indeed made its official entrance in the lexicon of the UN organ, overcoming, once and for all, some States' hesitation in recognizing the Security Council as the correct venue to implement RtoP[2].

Secondly, using the means provided by the UN Charter, Resolutions 1970 and 1973 give a collective response to grave human rights violations. Although the reference to RtoP contained in the preambles is circumscribed to the less controversial dimension (ie the responsibility to protect bearing upon the State), these two documents - both based on Chapter VII - put into practice the

[1] UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894; UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706; UNSC 1755 (30 April 2007) UN Doc S/RES/1755.
[2] According to certain UN Members (in particular, the Russian Federation, China and Egypt), the doctrine would have to be discussed by the General Assembly, before any possible implementation can be considered: UNSC Verbatim Record (9 December 2005) UN Doc S/PV/5319.

international dimension of the doctrine (ie the responsibility to protect bearing upon the international community). This is the first time that the third pillar has been implemented.

Finally, although it is argued that NATO's intervention in Libya may have impacted destructively on general approval of RtoP, its basic criteria[3] are currently used to evaluate both the UNSC's decision to authorize military action in Libya and the way NATO has conducted the operation. Therefore, RtoP is still to be considered a parameter of legitimacy for the international response to grave human rights violations: whether the concrete action is objectionable or not, this does not completely invalidate the process of the doctrine's general acceptance.

More precisely, scholars generally consider the 'just cause threshold' and the 'last resort' requirements met in the Security Council's decision to authorize the use of force in the present case. Where the 'just cause threshold' is concerned, while some people consider that the gravity of the case was clear from the very beginning of the Libyan army's brutal reaction to pacific demonstrations[4], others recognize that the situation became intolerable when Gaddafi uttered serious threats against the insurgents, even calling them 'cockroaches' and thus terminologically evoking the spectre of Rwandan genocide[5]. Also, even those who regret that the Security Council did not carry out a serious and independent investigation into the crisis, but mainly relied on media reports[6], could not deny that the situation was serious and alarming[7]. As for the 'last resort' requirement, although some claim the lack of concrete support from the Security Council to the African Union's efforts for a peaceful settlement of the crisis[8], the adoption of Resolution 1970 undeniably illustrates that the Security Council concretely explored the possibility of settling the case with means that did not involve the use of force.

RtoP requirements have also been used to evaluate the intervention of the Atlantic Alliance.

In this regard, scholars have contested both the requirements of the 'right intention' and the proportionality of means used by NATO.

With regard to the humanitarian purpose, while Resolution 1973 clearly states, fully in line with RtoP, that the aim of the operation was the protection of civilians, the very manner of the intervention patently revealed the intervening forces' intention to pursue a different goal, namely regime change. As one author underlined, 'the actions of the coalition forces appeared to take the intervention well beyond the resolution's terms and, therefore, in all probability, beyond what the UN Charter could be interpreted to allow. Even the most ardent international advocates of R2P have acknowledged that the mandate was stretched to breaking point and maybe beyond it'[9]. The intervening countries made such a different purpose clear. In mid April 2011, 'Cameron, Sarkozy and Obama jointly wrote in a newspaper article: "Our duty and our mandate under UN Security

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[3] The International Commission on Intervention and State Sovereignty (ICISS) has identified criteria for military intervention for human protection purposes: 'just cause threshold' (i.e. the particular gravity of the situation, as a precondition for the authorization of the use of force), 'right authority', 'right intention', 'last resort', 'proportional means' and 'reasonable prospects'. ICISS, *The Responsibility to Protect* (International Development Research Centre, 2001) 32-37. As in the 'just war' theory, *jus ad bellum* and *jus in bello* are not clearly distinct spheres, but rather they actually complement each other, just as the way the operation is conducted is (at least partially) useful to assess its legitimacy.

[4] James Pattison, 'The ethics of Humanitarian Intervention in Libya' (2011) Ethics & International Affairs 271, 272.

[5] Alex Bellamy, 'Libya and the Responsibility to Protect: the exception and the norm' (2011) Ethics & International Affairs 263, 265-266.

[6] Ugo Villani, 'L'intervento militare in Libia: responsibility to protect o… responsabilità per aggression?' (2011) I Diritti dell'Uomo – Cronache e Battaglie 53, 56-57; John Siebert, 'Libya and R2P: the failure of bombing raids to protect vulnerable civilians' (Ploughshares Briefing 2011) <http://ploughshares.arpi.ca/wp-content/uploads/2012/07/Briefing-11-021.pdf > accessed 2 February 2013. An independent international commission of inquiry has been established by the Human Rights Council (Res A/HRC/RES/S-15/1) on 25 February 2011, i.e. one day before the adoption of Res 1970.

[7] Siebert (6).

[8] Villani (6), 57.

[9] Spencer Zifcak, 'The Responsibility to Protect after Libya and Syria' (2012) Melbourne JIL 1, 12.

Council Resolution 1973 is to protect civilians, and we are doing that. It is not to remove Gadhafi by force. But it is impossible to imagine a future for Libya with Gadhafi in power"'[10].

Not surprisingly, then, the most critical profile of the intervention concerns the proportionality of the means used by the NATO forces. This profile is connected to the instrumental use of the humanitarian purpose, since the regime change was certainly accelerated by "NATO's choice of targets, whom it supplied and received intelligence to/from and the way it implemented the arms embargo"[11]. A number of authors, along with many States, have accused NATO of having interpreted its mandate too extensively. In particular, even if the first operations against the loyalist forces were considered fully in accordance with the mandate formulated in Resolution 1973, the decision to continue the bombing later, when Gaddafi's supporters were in a minority, was strongly criticized and considered an unlawful intervention in favour of the rebels in a civil war[12]. Additionally, some people consider the supply of weapons to insurgents – by the Atlantic Alliance (and France in the first place) – as a blatant violation of the arms embargo, set out in Resolution 1970 and reaffirmed in Resolution 1973[13]. In fact, the embargo was not limited to the weapons destined to Gaddafi's forces, but was formulated in very broad terms, pursuing the cessation of hostilities as the ultimate goal.

Although the adoption of Resolutions 1970 and 1973 marks a major achievement in the growing acceptance of the doctrine, 'the intervention in Libya, rather than extending the opportunities for RtoP to be applied, may have had the opposite effect. In this regard, various countries, including India, China, Brazil, Russia, and South Africa, have argued that the case of Libya has given RtoP a bad name'[14]. The most critical profile is regime change, which represents a clear departure from the original purpose of the operation as identified by the Security Council, and the main reason why NATO exceeded the mandate assigned, possibly violating Resolution 1973.

This may pose a strong limit to the future implementation of RtoP, but also for others kind of operations, since 'the perception of ulterior motives and agendas may make it more difficult in the future to forge a consensus on the use of force for protection purposes, within the context of either a peacekeeping operation or a potential humanitarian intervention'[15].

3. Regime change in Libya: foreign military intervention in an internal conflict authorized by the Security Council?

Regime change is certainly not a new issue in international relations. In fact, it has been carried out many times by States – mainly outside the framework of the UN – with the main aim of enhancing strategic, economic or ideological plans[16], and was often screened by the need to improve the humanitarian and/or social conditions of the local population.

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[10] International Institute for Strategic Studies (IISS), 'Early military lessons from Libya' (IISS Strategic Comments 2012) <http://www.iiss.org/publications/strategic-comments/past-issues/volume-17-2011/september/> accessed 2 February 2013.

[11] Robin Collins, 'Thinking About Libya, the Responsibility to Protect and Regime Change: A "Lessons Learned" Discussion Paper' (2011) *www.worldfederalistscanada.org/wfmcDraftLibyaRC5_oct19%204.pdf* accessed 2 February 2013.

[12] Natalino Ronzitti, 'Quale legittimità per le operazioni Nato e italiane in Libia?' (*Affari Internazionali*, 19 September 2011) <http://www.affarinternazionali.it/articolo.asp?ID=1859> accessed 2 February 2013.

[13] Villani (6), 57.

[14] Jeremy Sarkin, 'Is the Responsibility to Protect an Accepted Norm of International Law in the post-Libya Era? How its Third Pillar Ought to be Applied' (2012) GroJIL 11, 23.

[15] Alex J Bellamy and Paul D Williams, 'The new Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect' (2011) International Affairs 825, 848.

[16] Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2012) VirginiaJIL 355, 357.

The specious reference to a humanitarian aim to camouflage the removal of an undesirable regime had already emerged, for example, during the US intervention in Iraq in 2003. Although, at one point, the American administration affirmed (even evoking the vocabulary of RtoP[17]) that it was intervening in order to help the Iraqi people get rid of a bloody regime, it was clear that the intervention was actually aimed at eliminating Saddam Hussein.

From a legal point of view, the issue is far more complex in the case of Libya, where the intervention, explicitly mandated by the UNSC to protect civilians, took place during a crisis that had already become a civil war. In fact, while international law certainly prohibits military intervention in a civil war in support of the insurgents and aimed at defeating the effective government, in some extreme cases the protection of civilians (as the mandate contained in Resolution 1973) can be achieved by just eliminating the oppression at its origin, ie a regime responsible for grave violations.

Three different profiles must be analysed to assess the legitimacy of NATO's intervention aimed at regime change in Libya: (a) whether foreign military intervention in an internal conflict is consistent with international law; (b) whether the UNSC can legitimately authorize intervention to lend support to insurgents against the government in power; and, (c) whether Resolution 1973 was intended to permit such an operation (even implicitly), at least as a means to achieve the protection of civilians.

a) *Regime change and international law: the legitimacy of foreign military intervention in internal conflicts*

While intervention in an internal conflict in support of rebels is certainly unlawful under international law, one could argue that – at some point – NATO's military operation was based on the consent expressed by the new government of Libya, ie the insurgents organized in the Libyan National Transitional Council (NTC). In other words, the conflict in Libya, while originally a mixed one (an international armed conflict between Libya and NATO, and a non-international armed conflict between Gaddafi and the insurgents) underwent a process of internalization[18].

A major problem of this reconstruction is identifying exactly when the rebels became subjects who could legitimately call for external armed intervention.

It is certainly not sufficient to maintain that 'during later stages of the Libyan armed conflict there was a change in the international legal status of the Libyan rebel-insurgents to belligerents, and they consented to and welcomed U.S. and NATO uses of force'[19]. This position reflects the identification of three different stages in the evolution of an internal conflict. According to a similar reconstruction (commonly accepted before the adoption of the UN Charter), at the beginning of the conflict (a phase defined as 'rebellion', in which the government maintains control over most of the territory), third States could support the central government, but should refrain from providing help to different forces. When, however, these forces gain more control, the situation becomes 'insurgency' and other parties should refrain from responding to any request for support, regardless of which side formulates it. Once the opponents have increased their control over the territory, leading to the emergence of a real state of 'belligerency', third States should recognize both sides as belligerents, and intervention would then be lawful if exercised at the request of one of them[20].

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[17] Rebecca Hamilton, 'The Responsibility to Protect: from document to doctrine - but what of implementation?' (2006) HarvardHRJ 289, 291 ff.

[18] Marko Milanovic, 'How to Qualify the Armed Conflict in Libya?' (*EJIL: Talk!,* 1 September 2011) <http://www.ejiltalk.org/how-to-qualify-the-armed-conflict-in-libya/> accessed 2 February 2013

[19] Jordan J. Paust, 'International Law, Dignity, Democracy, and the Arab Spring' (2012) The University of Houston Accepted Paper Series Index, 33-34 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991432##> accessed 2 February 2013.

[20] Christopher Le Mon, '*Unilateral intervention* by invitation in civil wars: the effective control test tested' (2003) N.Y.U. Journal of International Law and Politics 741, 746-748; François van As, 'African peacekeeping: past practices, future prospects and its contribution to international law' (2006) MLLWR 329, 335-336.

As many scholars have clarified, this idea is now to be considered obsolete[21]: thus, while intervention at the government's invitation is admissible, a request made by different parties could not justify foreign intervention. The International Court of Justice confirmed the point in the case of Nicaragua v. USA, stating: 'it is difficult to say what would remain of the principle of non-intervention in international law if intervention, which is already permitted at the request of the government of a State, were to be allowed also at the request of the opposition'[22].

It is true, however, that at a certain point the National Transitional Council was recognized by a number of States as the legitimate representative of the Libyan people[23], or even as the legitimate government of the country[24]. The UNSC maintained a more cautious position, encouraging the NTC as 'the Libyan authorities' to implement its plans[25], while the Libya Contact Group expressed a stronger opinion, declaring that 'the Qaddafi regime no longer has any legitimate authority in Libya and that Qaddafi and certain members of his family must go. Henceforth and until an interim authority is in place, participants agreed to deal with the National Transitional Council as the legitimate governing authority in Libya'[26].

Nevertheless, recognition of the NTC as the legitimate representative of the Libyan population may confer a number of advantages[27] on the insurgents, but 'leaves intact the international legal status of the incumbent Qaddafi government as the government of Libya'[28]. Moreover, recognition of the National Transitional Council as the legitimate government of the State would not per se be sufficient to convert it into the effective government of Libya, with the authority to call for foreign military aid. As one author efficiently explained, together with 'broad international recognition', two more requirements should be met: on one hand, the old regime [must have] lost control over most of the country, and the likelihood of it regaining such control in the short to medium term [must be] small or none (negative element)' and, on the other, 'the new regime [must have] established control over a significant part of the country, and [must be] legitimized in an inclusive process that makes it broadly representative of the people (positive element)'[29]. If it is not accompanied by these elements, the recognition of a group of opponents as a new government of a State, would be 'premature and would arguably constitute an illegal interference in the internal affairs' of such a State[30].

In conclusion, even if it cannot be excluded that, at a certain point, the conflict did become a purely internal one, with NATO forces fighting in support of the new legitimate government of Libya, this was not so at the beginning, unless one considers the call for UN intervention, made by the Libyan

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[21] Louise Doswald-Beck, 'The legal validity of military intervention by invitation of the government' (1986) British YBIL 189, 252; van As (20) 336; Le Mon (20) 748.

[22] *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*) (Merits) [1986] <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=66&case=70&code=nus&p3=4> accessed 2 February 2013 [246].

[23] France, followed by Qatar, the Maldives, Gambia, Senegal, Turkey, Jordan, Spain, and Germany: Stefan Talmon, 'Recognition of the Libyan National Transitional Council' (*ASIL Insights*, 16 June 2011) <http://www.asil.org/insights110616.cfm> accessed 2 February 2013.

[24] Italy, France and the United Arab Emirates: ibid.

[25] UNSC Res 2009 (16 September 2011) UN Doc S/RES/2009.

[26] Fourth Meeting of the Libya Contact Group, Chair's Statement (Istanbul, 15 July 2011) [4] <http://www.state.gov/p/nea/rls/rm/168764.htm> accessed 2 February 2013.

[27] Namely, '*(1) it legitimizes the struggle of the group against the incumbent government; (2) it provides international acceptance; (3) it allows the group to speak for the people in international organizations and represent it in other States by opening "representative offices"; and (4) it usually results in financial aid*': Stefan Talmon, 'Recognition of the Libyan National Transitional Council' (*ASIL Insights*, 16 June 2011) <www.asil.org/insights110616.cfm> accessed 2 February 2013.

[28] Ibid.

[29] Milanovic (18).

[30] Talmon (27).

representative at the UN, Ambassador Shalgam[31], as an invitation from an accredited government representative. Whereas, according to one author, such consent 'partially vitiated concerns about violating state sovereignty'[32] it should be recognized that Ambassador Shalgam was clearly speaking in a personal capacity, and not expressing the position of the central government he was called to represent. Hence, at least at the beginning, the NATO operation - aimed at overthrowing Gaddafi from power - should be considered not consistent with international law, which prohibits armed intervention in internal conflicts, against the will of the government.

Since the intervention was, nevertheless, based on a Security Council mandate, it has to be established whether (and to what extent) regime change could have been authorized by Resolution 1973.

b) *Regime change and the Security Council's discretionary power*

Although regime change has sometimes been the main result of military intervention authorized by the Security Council, it was never defined as the main objective by the UN organ. In particular, 'the Security Council has never authorized an intervention solely on the grounds that a government was illegitimate and did not meet democratic standards'[33]. In Haiti, for example, 'it was (…) 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'[34]. The intervention in that case, was 'not a precedent for collective intervention aimed at regime change, but rather a precedent for collective intervention aimed at reinstating the internationally recognized government'[35]. Furthermore, in spite of the broad discretion it enjoys, the Security Council is not completely *legibus solutus*, as the provisions of the Charter 'constitute legal boundaries for [its] action, and resolutions that transcend these boundaries are *ultra vires* and illegal'[36].

However, while the Charter confirms principles such as equality among sovereign states and the prohibition of interference in domestic affairs, it also provides for a major exception as far as 'the application of enforcement measures under Chapter VII' is concerned (art. 2.7).

Moreover, the Security Council has complete discretion in deciding whether to take measures under Chapter VII, and, in particular, it is completely free when determining the existence of a threat to peace *ex* article 39. Since the end of the Cold War, the Security Council has gradually come to appreciate how economic, social, humanitarian and environmental instability can undermine peace efforts no less than conflict between states. The case of Somalia, in particular, established once and for all that serious violations of human rights are a threat to international peace and security, which can lead to a reaction from the Security Council.

As a result of this evolution, it cannot be excluded that the Security Council may authorize an intervention to lend support to insurgents against the government in power, whenever the latter, because of its behaviour, represents a threat to international peace and security. This option would not 'shake the foundations of international community and (...) de-stabilize international law, posing

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[31] Jon Swaine, 'Libya's UN Ambassador denounces Gaddafi' *The Telegraph* (New York, 25 February 2011) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8349048/Libyas-UN-ambassador-denounces-Gaddafi.html> accessed 2 February 2013.

[32] Kristen Boon, 'The Responsibility to Protect' (*Opinio Juris*, 13 November 2012) <http://opiniojuris.org/2012/11/13/the-responsibility-to-protect/> accessed 2 February 2013.

[33] Payandeh (16) 371.

[34] Payandeh (16) 369-370: '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 neighbouring states, and the failure of the de facto regime to comply with its obligations under the Governors Island Agreement'

[35] Ibid.

[36] Payandeh (16) 393.

great risks'[37], any more than the international community's apathy in the face of a grave humanitarian tragedy would undermine the credibility of the UN system.

c) *Regime change under Resolution 1973: do the ends justify the means?*

Since regime change is not explicitly considered under Resolution 1973, the question is whether the purpose of protecting civilians was broad enough to cover this option.

According to one author, although it did not explicitly provide for it, the mandate 'did not categorically rule out the possibility of regime change in Libya on the basis of Resolution 1973'. In particular, the Security Council 'did not ignore the democratic dimension of the conflict'[38]: neither in Resolution 1970 (calling for steps to fulfil the legitimate demands of the population), nor in Resolution 1973 (emphasizing that a solution to the crisis must respond to the legitimate demands of the Libyan people).

However, given the vague formulation of the Resolution, which authorized Member States 'to take all necessary measures (…) to protect civilians and civilian populated areas under threat of attack'[39], it is no surprise that differences emerged on its interpretation soon after its adoption.

While NATO (and some of its allies, like Qatar and Jordan) interpreted the mandate as 'providing the basis for a wide range of military activities including the suppression of Libya's air defences, air force and other aviation capacities, as well as the use of force against Libya's fielded forces, its capacity to sustain fielded forces, and its command and control capacities, on the basis that Libya's armed forces constituted a threat to civilians'[40], a number of UN member States disagreed. Among others[41], Nicaragua and Venezuela expressed strong disapproval. The Nicaraguan government lamented 'the shameful manipulation of the slogan "protection of civilians" for dishonourable political purposes' and accused: 'once again, the logic of interventionism and hegemony has prevailed through a disastrous decision with incalculable potential consequences for tens of millions of individuals worldwide'[42]. Venezuela complained of a violation of the UN Charter and of Resolution 1973, 'which calls for respect for the sovereignty and territorial integrity of Libya'[43].

On the other side, a number of scholars consider that 'the line between the protection of civilians and regime change [can] not always be easily drawn. Occasionally, but hopefully not too frequently, regime change may be determined to be the only viable strategy to prevent the commission of governmental atrocities'[44]. As a consequence, even acknowledging that regime change and protection of civilians are two completely separate goals[45], one must admit that, 'while

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[37] Temistoklis Tzimas, 'Legal Criteria for Regime Change Under the Responsibility to Protect Doctrine: A Legal Evaluation of the Intervention in Libya and the Overthrow of the Gaddafi Regime' (2012) paper presented at the 5th Biannual ESIL Conference on Regionalism and International Law, 4-5 <www.uv.es/esil2012/pdf/Tzimas.pdf> accessed 2 February 2013

[38] Payandeh (16) 387. Other scholars consider that the formula contained in the Resolution was broad enough to cover regime change: Paust (x) 33; Christian Pippan, 'The 2011 Libyan Uprising, Foreign Military Intervention, and International Law' (2011) Juridikum, 159, 168 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878444> accessed 2 February 2013.

[39] UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973 [4].

[40] Bellamy and Williams (15) 845. According to the authors: 'this interpretation seems consistent with a plain text reading of Resolution 1973 as noted by several prominent international lawyers, including Philippe Sands, Malcolm Shaw and Ryszard Piotrowicz'.

[41] Russia, China, Brazil and South Africa: Alex Bellamy, 'The Responsibility to Protect and the Problem of Regime Change' (*e-International Relations* 27 September 2011) <http://www.e-ir.info/2011/09/27/the-responsibility-to-protect-and-the-problem-of-regime-change/> accessed 2 February 2013.

[42] Ibid.

[43] Ibid.

[44] Zifcak (9) 12.

[45] 'It is true that the language of the UN resolution is vague, possibly deliberately, and therefore gives ground to broad interpretation. However, exploiting this broadness in order to pursuit a goal different to those clearly defined in the resolution becomes a quibbler and arbitrary interpretation, which if accepted as mainstream can lead to other cases of total manipulation of the SC by state-centred interests, contradictory to the international legal system. (…) Regime

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 to protect civilians[46].

4. Limits and ambiguities of regime change in Libya as an application of RtoP; another possible interpretation: regime de-legitimation

The previous analysis demonstrates that military intervention in favour of insurgents is not compatible with international law and that, in the case of Libya, an invitation by a new legitimate government cannot be recognized at the beginning of NATO's bombing campaign. Although the Security Council may legitimately authorize an intervention against a government in power (in particular, when it represents a threat to international peace and security), in the present case the authorization was formulated with a different explicit purpose, ie the protection of civilians and civilian populated areas under threat of attack. Thus, to consider regime change as admitted by Resolution 1973, a similar option should be deemed necessary to protect civilians, as the unique legitimate goal identified by the Security Council for the operation.

This is complicated for a number of reasons.

Firstly, from an international lawyer's perspective, in the absence of precise knowledge of military data and factual assessment, the answer can only be approximate and, most probably, highly conditioned by personal views on the need to give prominence to the respect of sovereignty (as a guarantee of the international order), or to immediate and efficient protection of human rights, at any cost.

Secondly, and from a more concrete perspective, even admitting that the overthrow of Gaddafi was crucial to save a high number of lives, this only became evident after a while, and not from the very beginning of the intervention. In fact, at least potentially, the military intervention could have been a deterrent to Gaddafi's proposition to destroy his enemies. Accordingly, when NATO began the operation, the intervention was unlawfully directed against a government in power, and it only became legitimate at a certain point, when the removal of Gaddafi proved necessary to fulfil the mandate.

Last, but not least, although *realpolitik* suggests that regime change should not be excluded from the range of potential means adopted to implement the responsibility to protect[47], it is certainly not a

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change is a different goal compared to that of protection of civilians. It cannot be simply regarded as means for a greater goal and therefore become a legitimate and justifiable decision taken by the military commander of an operation': Tzimas (37) 8-9.

[46] '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', Payandeh (16) 389.

[47] In this perspective, regime change appears in line with the doctrine of RtoP, as originally conceived by ICISS, and as currently understood within the UN context. In fact - in the 2001 Report, which gave birth to RtoP – the Commission admitted that, even if not representing *per se* a legitimate aim, regime change may be the way in which the protection is assured in concrete terms: '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', ICISS (3) 35.

More recently, Edward Luck has confirmed the point in an interview: '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, but that certainly is not the goal of the R2P per se', Bernard Gwertzman, 'Will Syria Follow Libya? Interview with Edward Luck (*Council on Foreign Relations*, 1 September 2011) <http://www.cfr.org/syria/syria-follow-libya/p25745> accessed 2 February 2013.

The international community should be involved in protection only when the State (which has the primary responsibility) is unwilling or unable to accomplish to its own task but, as the author states, the 'language of inability or unwillingness is overly diplomatic. It obscures the reality that in many modern conflicts, (…) the state itself, or at least

desirable application of RtoP. First of all, possible abuses connected to a misleading use of the humanitarian purpose, represent the major obstacle to a broad acceptance of the doctrine, which is essential for its complete and suitable implementation. Moreover, even admitting that, in some exceptional cases, regime change can be genuinely pursued because it is strictly necessary to protect people, militarily imposed regime change does not offer any guarantee of sustainability, unlike a democratic transition based on political negotiations.

For all these reasons, rather than the tolerability of regime change as an exceptional measure to implement the international community's responsibility to protect, a different reading, based more strictly on the main concepts of RtoP, is preferable in Libya's case.

In fact, the general endorsement of RtoP through the adoption of the 2005 World Summit Outcome (when States solemnly proclaimed that they had 'responsibility to protect [their] populations from genocide, war crimes, ethnic cleansing and crimes against humanity' and formally accepted that responsibility, undertaking 'to act in accordance with it'[48]) validated, once and for all, the transformation of sovereignty from a simple container of privileges to a more complex mix of prerogatives and duties.

Some authors, according to whom 'the sovereign state's responsibility and accountability to both domestic and external constituencies must be affirmed as interconnected principles of the national and international order', have supported the idea since 1996[49]. More precisely, 'sovereignty is not merely the right to be undisturbed from without, but the responsibility to perform the tasks expected of an effective government'[50]. The point was later developed by the International Commission on Intervention and State Sovereignty in 2001, and clearly confirmed in 2004 by the High Level Panel on Threats, Challenges and Change, which pointed out that 'in signing the Charter of the UN, States not only benefit from the privileges of sovereignty but also accept its responsibilities. Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community'[51].

Such changes in the perception of the most fundamental element of the international legal order, have certainly established a two-way tie between the rights and responsibilities of States, confirmed by the idea that the international community plays a complementary role in providing protection. Sovereignty directly implies the duty to protect people from atrocities, to the extent that, when a State is unable or unwilling to fulfil such an obligation, the international community has the complementary duty to step in its place and protect its citizens. The unconditional non-intervention principle conclusively gives way, in the case of a State's failure to safeguard its people, to the international community's complementary onus to protect, which can indeed override the strict fences of (formerly unchallenged) sovereignty.

Although this theory cannot *sic et simpliciter* negate the sovereign status of a government that seriously violates human rights, it is possible to affirm that whenever a State fails to protect its own citizens (or, even worse, plays a primary role in their repression), it loses an essential part of its sovereignty, and is progressively de-legitimated.

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its officials, have embarked on a deliberate rampage against part of the population. This is a huge leap from "unwilling or unable"',

Louise Arbour, 'For Justice and Civilians, Don't Rule out Regime Change?, *The Globe and Mail* (Brussels, 26 June 2012) <http://www.theglobeandmail.com/commentary/for-justice-and-civilians-dont-rule-out-regime-change/article4372211/> accessed 2 February 2013. Rejecting regime change from the measures applicable to implement the international responsibility to protect would be tantamount to excluding the application of the doctrine where it is more needed.

[48] UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1 '2005 World Summit Outcome' [138].

[49] Francis M Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I William Zartman (eds.), *Sovereignty as Responsibility – Conflict Management in Africa* (The Brookings Institution, 1996) xvii.

[50] Ibid, xviii.

[51] High Level Panel on Threats, Challenges and Change, *A more Secure World. Our Shared Responsibility* (United Nations Department of Public Information, 2004) 17.

This is easily ascertained in the case of Libya, where the sovereign prerogatives of Gaddafi's government were weakened at the hands of the Security Council, even before the military intervention by NATO, and as a direct consequence of the grave violations of the fundamental rights of its own population. This process, implemented mainly through Resolution 1970, is founded on a renewed definition of sovereignty inspired by RtoP.

5. UNSC Res. 1970 and the de-legitimation of Gaddafi's government as an application of RtoP

Although the adoption of Resolution 1973 (passed with the abstention of five States[52], including two permanent members) was much more controversial than the adoption of Resolution 1970, which was passed unanimously, the latter had a by no means minor impact on the regime. In fact, Resolution 1970 certified the occurring de-legitimation of Gaddafi's government.

One author has expressed serious concerns about the possibility of recognizing that the Security Council has the power of de-legitimation, as it would imply recognition of the UN organ as a governmental authority, 'totally chang[ing] the way we comprehend international law and international community shifting it from a mainly state-centered, to a SC-centered [approach]' . Also considering that the Security Council 'is not a democratically elected, 'government-type' organ, nor it was intended to be', the attribution of this type of authority 'would contradict the very foundations of the UN Charter, which establish the equality of all states but also the formation of international community as a community of equal states'[53].

However, if one correctly applies the RtoP theories, it becomes clear that regimes lose legitimacy not because of an international reaction, but as a direct consequence of their own behaviour, and as the result of the current idea of sovereignty as the responsibility to protect. While regime de-legitimation is not determined by the reaction of the international community (and the UNSC in first place) to a criminal government, this reaction is what concretely detects de-legitimation.

In the present case, Resolution 1970 triggered the process of de-legitimation of the Libyan government by (a) imposing a travel ban and asset freeze on Gaddafi, his family, and other high-ranking officials, and (b) referring the situation in Libya to the International Criminal Court (ICC). Resolution 1973 has then completed the process (c).

a) *Targeted sanctions against a sitting Head of State as a means of regime de-legitimation*

Although Gaddafi's government was not a complete stranger to sanctions, they had previously been adopted as comprehensive measures (i.e. against the State) and mainly in order to inhibit the regime's support to international terrorism[54]. On the contrary, in Libya, Resolution 1970 applied sanctions against individuals for the first time, strictly motivated by the regime's behaviour which was detrimental to the civilian population.

As we all know, since the end of the cold war, a renewed willingness on the part of the permanent members of the Security Council to use the instruments of Chapter VII, has produced an increase in the number of sanctions imposed on States by the UN organ. The range of the measures adopted

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[52] Russia, China, Brazil, Germany and India.

[53] Tzimas (37) 4. The author expresses his support for a different use of force aimed at neutralizing or destroying 'infrastructure and organs of the regime, which are responsible for the commitment of the atrocities'. It would be 'an intensive type of use of force, turning against specific parts of a regime. However the scope is totally different from regime change. It is not an "offensive" strategy by the SC in order to impose a new regime, substituting the one already existing. Through "neutralization", the UN SC is using force in a defensive way, in order to halt the commitment of specific crimes', ibid, 5.

[54] UNSC Res 748 (31 March 1992) UN Doc S/RES/748 provided sanctions against the Libyan Arab Jamahiriya, as a consequence of the destruction of Pan Am flight 103 over Lockerbie, Scotland, and the destruction of Union de transports aeriens flight 772 over Niger.

was varied and covered economic and trade sanctions, arms embargoes, and diplomatic restrictions[55]. However, after the experience matured in Iraq in the 1990's, a number of States and many humanitarian organizations expressed serious concern about the negative humanitarian impact of comprehensive sanctions, which mainly affect the most vulnerable members of the population. To reduce such adverse effects and to increase the effectiveness of sanctions, the United Nations developed and stepped up the use of targeted sanctions, ie measures imposed against individuals and entities, rather than against the State as a whole.

These measures are employed consistently to fight international terrorism, being 'typically applied either as incentives to change behaviour or as preventive measures'[56]. Understandably, indeed, 'sanctions to stem the financing of terrorism or to deny safe haven or travel by terrorists have become valuable tools in the global effort to counter terrorism'[57]. Nevertheless, 'smart' sanctions have been and are also imposed on rebel leaders and/or groups, warlords, and even businessmen in league with culpable political elites or involved in arm trafficking. In a few cases they have been used against former Heads of State: the sanctions adopted against Saddam Hussein[58], Charles Taylor[59] and Laurent Gbagbo[60] are worthy of mention.

Unlike the precedents mentioned above, Resolution 1970 imposed an asset freeze and a travel ban on a sitting Head of State for the first time in the history of the UN. Moreover, while the hostile activities of Saddam Hussein, Charles Taylor and Laurent Gbagbo were undermining UN efforts to re-establish peace and security, in Iraq, Liberia, and Cote d'Ivoire respectively, in Libya's case, Gaddafi's conduct was at the very origin of the Security Council's concerns for the country. Although Resolution 1970 does not clearly identify the threat to international peace and security, it *de facto* characterises the Libyan government's behaviour in these terms.

b) ***The referral to the ICC and the arrest warrant against Gaddafi: a* coup de grace *for the regime***

Resolution 1970 refers a situation in a non-member State to the ICC. As set out in art. 13 (b) of the Rome Statute, the referral pertains, in general terms, to the overall situation existing in Libya since 15 February 2011[61]. Nonetheless, the Security Council, 'considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity', undoubtedly intended to bring to the Prosecutor's attention the conduct of the 'highest level of the Libyan government', which was explicitly blamed for 'incitement to hostility and violence against the civilian population'[62].

One author affirmed that 'a major purpose of the International Criminal Court is to indict culpable sitting heads of state, and that purpose necessarily (and not coincidentally) imports regime change'[63]. In fact, the experiences in Sudan and Libya tell us a different story, respectively demonstrating that the ICC cannot even work as a deterrent, if it encounters resistance from the States called to cooperate with it, and that (not surprisingly at all) military intervention has far greater chances of (rapid) success in forcing a change of regime.

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[55] The most extensively applied type of sanction is probably the arms embargo, while the UNSC has also used commodity embargoes (diamond exports from Angola, Sierra Leone, Liberia and Côte d'Ivoire; timber exports from Liberia; charcoal exports from Somalia): Andrea Charron, *UN Sanctions and Conflict: Responding to Peace and Security Threats* (Routledge, 2011).

[56] Watson Institute Targeted Sanctions Project, Brown University, *Strengthening Targeted Sanctions Through Fair and Clear Procedures* (30 March 2006) 5 <http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf > accessed 2 February 2013.

[57] Ibid.

[58] UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483.

[59] UNSC Res 1521 (22 December 2003) UN Doc S/RES/1521; UNSC Res 1532 (12 March 2004) UN Doc S/RES/1532.

[60] UNSC Res. 1975 (30 March 2011) UN Doc S/RES/1975.

[61] UNSC Res 1790 (26 February 2011) UN Doc S/RES/1790 [4].

[62] Ibid, preamble.

[63] W. Michael Reisman, 'Why Regime Change Is (Almost Always) a Bad Idea' (2004) AJIL 516, 517.

However, regardless of its success or failure in each individual case, the main consequence of the ICC's involvement, especially if based on a Security Council referral, is the decreased legitimacy of the government, whenever its members are accused. In fact, what can be more destructive for a government's legitimacy than a well-grounded accusation against the Head of State of having committed international crimes against his own population?

While the referral was *per se* a strong indication of the government's diminished legitimacy, the issue of an arrest warrant against Gaddafi was certainly the 'last nail in its coffin' for his regime.

c) *The significance of Resolution 1973 in the de-legitimation process, and regime change as a possible final outcome*

In this construction, the authorization to use 'all necessary means' to protect civilians at risk crowned the process of de-legitimation of the Gaddafi regime, implementing the international community's complementary duty to protect. In fact, 'Resolution 1973 (…) marked the first time the Council had authorized the use of force for human protection purposes against the wishes of a functioning state. (…) In passing Resolution 1973, the Council showed that it will not be inhibited as a matter of principle from authorizing enforcement for protection purposes by the absence of host state consent'[64].

Certainly, brought to the extreme consequences, this de-legitimation could make a regime change more feasible. As a matter of fact, as correctly noted by another author, the sanctions contained in Resolution 1970, while they aimed to induce Gaddafi's government to stop attacking civilians, 'also supported the struggle of the Libyan opposition against the regime'[65]. Moreover, regime change could probably be more easily considered as legitimate (although still not entirely lawful) if it is seen the peak of a gradual process. But, nonetheless and most importantly, from this perspective regime change would not be too strictly related to RtoP, threatening a widespread and correct application of the doctrine.

6. Concluding remarks

UNSC Resolutions 1970 and 1973 are some of the most relevant achievements in the acceptance of RtoP within the United Nations framework. On the other hand, NATO's intervention in Libya represents one of the most controversial applications of RtoP in practice.

One major critical issue is the instrumental use of the humanitarian purpose to justify an operation aimed at effecting (or supporting) regime change. Admitting regime change in Libya as included within the mandate provided by the UNSC in Resolution 1973 is neither linear nor immediate. Most importantly, this recognition (though not completely unrelated to the RtoP logic) could have a potential negative impact on the doctrine's future development.

If an application of the RtoP doctrine has to be detected in the Libya case, it would be more correctly identified in the de-legitimation of Gaddafi's regime rather than in its overthrow. Rather than being a simple paradigm to verify the lawfulness of militarily imposed regime change, RtoP is the material basis for a different reading (regime de-legitimation), as a major application of the current idea of sovereignty as responsibility

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[64] Bellamy and Williams (15) 825.
[65] Payandeh (16) 388.