

Intervention or interference?

Khawar Qureshi QC examines the legality of the UN's stance on Libya

Since early 2011, what appears to have begun as expression of dissent and dissatisfaction at the Gaddafi regime has developed, from around the middle of February 2011, into an internal armed conflict. This has led, (for the time being at least), to the de facto division of Libya into an Eastern (oil rich sector) which is controlled by opposition forces, whilst the Gaddafi hold remains strong in Tripoli and the Western part of Libya.

In the midst of such rapid developments at the diplomatic and military level concerning the Gaddafi regime, it is important to remember that Libya is no stranger to UN sanctions or bombing by NATO member state warplanes.

On 15 April 1986, in purported retaliation for alleged involvement of the Libyan regime in terrorist attacks, US planes dropped bombs on Libyan territory. From 1993 to 2003, Libya was subjected to UN Security Council Resolution based economic sanctions as a result of alleged involvement in the destruction of Pan Am Flight 103 (the Lockerbie bombing). The UN Sanctions, (specifically UNSC Res. 748 (31/3/1992) and UNSC Res. 883 (11/11/1993)), were lifted when Libya paid compensation to the families of victims, and also agreed to transfer two Libyan nationals to be tried (one of whom was subsequently convicted) at the Hague for involvement in the bombing.

Legal issues

Events in Libya are raising important questions as to the justification for the use of armed force by NATO members against Libyan state forces. Nearly 3,000 sorties have been flown over Libya since March 2011 by NATO aircraft, and more than a third of the military assets of the Gaddafi regime are said to have been destroyed. Was this lawful?

In this article I will consider the following questions in overview:

- What is the legal basis for Chapter VII UN Security Council Resolutions (UNSCR)?

- What is the key content and legal effect of the measures adopted by the UN Security Council (principally UNSCR 1970 and 1973)?
- What is the legal basis for the announcement on 19 April 2011 that a small number of UK and French “non-combat” troops will be sent to Libya to assist the opposition groups?

Use of force & UN sanctions.

More than 190 States are signatories to the UN Charter, and as such, they have all agreed to adhere to its principles. Moreover, UN Security Council Resolutions promulgated pursuant to Chapter VII of the UN Charter are

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binding on all UN member states.

There are three core principles with regard to the use of force by or against a state;

- The starting point is one of non-intervention in the domestic affairs, territorial integrity or political independence of a state (Arts 2(4) and 2(7))
- A state, (and those states seeking to assist in this regard), may use force to respond to an imminent or actual armed attack by way of self defence/ collective self defence (Art 51)
- The UN Security Council acting pursuant to Chapter VII of the UN Charter may by majority vote (so long as none of the permanent members exercise a veto), authorise the use of measures falling short of the use of force (Art 41), and if the Security Council considers Art 41 measures are, or would be inadequate, it may authorise “measures” (which include

the use of force) “as may be necessary to maintain or restore international peace and security” (Art 42).

The “gateway” for Chapter VII is a determination by the UN Security Council that there is “any threat to the peace, breach of the peace...” which enables measures to be taken pursuant to Arts 41 and 42 “to maintain or restore international peace and security”. It is apparent from this wording that the UN Security Council is endowed with a power to make determinations of fact (which in practice are unlikely to be susceptible to judicial review before the International Court of Justice), which in turn may trigger resolutions authorising the use of force, and otherwise binding upon all UN member states. The wording of Art 39 would suggest that what constitutes a “threat to the peace, breach of the peace”

must impact upon “international peace and security”.

In the context of Libya, all recent events have taken place within Libyan territory and essentially involve an armed insurrection by the Libyan people. As we will see when we examine the relevant UN Security Council Resolutions, it is the alleged gross violation of the human rights of the Libyan people which the UNSC considered engaged Art 39 of the UN Charter.

Publicly available estimates indicate that around 300,000 people have fled Libya since early February 2011, and between 2,000 to 8,000 persons have been either injured or killed up to mid-April 2011.

The so-called doctrine of “humanitarian intervention” is considered by many commentators as providing the legal justification for economic and military measures against a state which abuses human rights of persons within its territory. This doctrine has been riddled

with controversy from its inception, with suggestions from commentators that it is used as a cloak for “regime change”, and is often only applied where strategic or economic considerations are significant.

UNSCR 1970 & 1973.

On 22 February 2011, the UNSC issued a press statement calling for “an immediate end to the violence [in Libya] and for steps to address the legitimate demands of the population”.

UNSC Resolution 1970.

On 26 February 2011, by way of a unanimous UNSC Resolution (1970) which invoked Chapter VII/Art 41 on the basis, inter-alia of “gross and systematic violation of human rights” and, noting that “widespread and systematic attacks currently taking place against the civilian population may amount to crimes against humanity”, the UNSC has:

- referred the situation in Libya since 15 February 2011 to the International Criminal Court;
- imposed an arms embargo;
- imposed a travel ban on 16 named individuals;
- imposed an asset freeze on “all funds, other financial assets and economic resources which.. are owned or controlled, directly or indirectly.. [by six named persons [Gaddafi family]”; and
- established a Sanctions Committee to monitor implementation of sanction measures

UNSC Resolution 1973

In the face of non compliance with UNSC Res 1970, several cease-fire declarations by the Gaddafi regime which were not honoured, and a continued threat of force against civilian populations, on 17 March 2011, a majority of the UNSC (five members abstaining namely Brazil, Germany, India, Russia and China) invoked Chapter VII, re-iterated the references to gross human rights abuses and adopted the following additional measures:

- Invoking Art 42, authorised UN member states “to take all necessary measures ...to protect civilians and civilian populated areas under threat of attack...while excluding a foreign occupation force of any form on any part of the Libyan territory” [para 4].
- Established a ban on all flights in the airspace of Libya “in order to help

protect civilians” and authorised UN member state enforcement of the ban [paras 6 and 8].

- Expanded the asset freeze to 13 persons and five entities (including the Libyan Investment Authority and Libyan National Oil Corporation), as well as empowering the Sanctions Committee to expand the list of designated entities and persons

Observations.

It is of considerable significance that UNSC Res 1973 did not command the support of five major UN member States, including two permanent members.

It is also of significance that the three pronged approach – no-fly zone/aerial patrols/bombardment coupled with wide ranging asset freeze has not as yet yielded any apparent abatement of the situation on the ground for civilians, almost two months after violence erupted.

Many commentators recall the legal ambiguity underpinning the second Gulf War in March 2003, and ask, “who is planning for an outcome and what outcome?”. Phrases such as “mission creep” and “power vacuum” are populating many observations upon the present situation.

Indeed, the reality on the ground indicates that a war of attrition appears likely over coming weeks, unless the balance of power shifts militarily in a significant manner, or the Gaddafi regime capitulates.

On 15 April 2011, Messrs Obama, Cameron and Sarkozy saw fit to explain their collective position by way of a letter published in various newspapers. They suggested that UNSC Res 1973 had prevented a bloodbath in Benghazi. They also stated that the “duty and.. mandate under [Res. 1973] is to protect civilians...It is not to remove Gaddafi by force. But it is impossible to imagine a future for Libya with Gaddafi in power... It is unthinkable that someone who has tried to massacre his own people can play a part in their future government... Colonel Gaddafi must go, and go for good”.

The immediate response to this declaration was that it was manifesting an intention which went far beyond UNSC Res 1973. Others contend that, in fact, the declaration is simply stating the obvious as to the present situation. As such, it disavows any intent to remove Gaddafi. It simply states he must go.

Whether there is in fact a more (or less) subtle message whereby the declaration leaves open the possibility that “all necessary measures” includes “all means” to support

the opposition forces achieve a situation whereby Gaddafi feels compelled to leave, or is removed, is perhaps reflected in the announcement on 19 April 2011 that the UK would send Military Officers to Benghazi to “improve [the opposition] military organizational structures, communications and logistics”. It would appear that France and Italy either already have such advisors on the ground, or are soon to send them.

Concluding Observations.

In terms of the UN Charter, UNSC Res. 1973 plainly overrides the restriction on interference in the internal affairs of a State (see Article 2(7)).

However, whether grounds for “humanitarian intervention” can or should be characterized as a threat to, or breach of the peace, such as to justify measures to “maintain international peace and security” is a vexed question, commentators having largely focused upon the perceived lack of consistency in the approach of the UNSC in determining whether Chapter VII has been engaged in specific situations all over the world, the political/economic/strategic considerations at play (ulterior motives), and the dangers of “humanitarian intervention” being used as a tool for regime change.

Nevertheless, the fact remains that Chapter VII is drafted as it is, and the body empowered to make determinations of fact which engage Chapter VII, (rightly or wrongly) is the UNSC.

Perhaps unsurprisingly, within 1 month of UNSC Res. 1973 being adopted, we are witnessing division emerging within the UNSC, and a growing perception in certain quarters that some States are using the Resolution as cover to effect regime change, or (some have suggested), a de facto partition of Libya. Time will tell whether the Resolution has been deployed in good faith or, as commentators suggest with regard to some other UNSC resolutions, been the subject of “creative interpretation” to realize ulterior motives.

What is clear is that the UNSC is endowed with great powers which can and should be used consistently to address grave violations of human rights, where the evidence is clear and compelling. The skeptics have yet to be satisfied that the UNSC can (or will) act in this way. The moral authority and legitimacy of the UNSC is being tested yet again by the events in Libya.