

**Libya and Lessons from Iraq:**  
**International Law and the Use of Force by the United Kingdom**

**Nigel D. White\***

**Abstract**

Those countries, including the United Kingdom, using force in Libya in 2011 have taken much greater care to ensure that their actions are underpinned by legality. This suggests a return to respect for the jus ad bellum, but as the operation against Libya unfolded it became clearer that some of the problems that undermined the legality and legitimacy of the invasion of Iraq eight years earlier had not been avoided, which raises the question of how such operations can be kept within the strict bounds of the law.

**Keywords**

Libya, use of force, United Kingdom, responsibility to protect, Security Council resolutions, war powers

**1. Introduction**

In mid-February 2011 within the wider context of unrest and revolution in North Africa and the Middle East an uprising began against the regime of Colonel Muammar Gaddafi, ruler of Libya since 1969. The uprising gained momentum but was resisted by the regime and forces loyal to him, violence increased, leading to an internal armed

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\* Professor of Public International Law, University of Nottingham, UK. This article is based on evidence given to the House of Commons Political and Constitutional Reform Committee, 31 March 2011. This article was completed towards the end of June 2011 while the Libyan revolution and operation was, contrary to initial expectations, still in progress.

conflict between rebels with their base in the eastern city of Benghazi, and Gaddafi forces from their stronghold in the western capital of Tripoli. The imbalance between the sides (particularly in heavy weaponry and attack aircraft), and the reported systematic attacks on unarmed civilians by government forces, led to debate in Western capitals about the imperative of protecting civilians, initially primarily by means of the imposition of a no-fly zone aimed at preventing Gaddafi's airforce from attacking civilians, but the hidden pretext was to stop his forces blocking a successful rebellion.

The main protagonists in favour of the use of military force against Libya, France and the UK, were mindful of the lessons from Iraq, both in terms of the legality of the 2003 invasion (when the main protagonists were the UK and the US) and its state-building consequences. This short article considers, from the British perspective, whether those lessons have resulted in a use of force in 2011 against Libya, the legality and legitimacy of which is a significant improvement on the use of force in 2003 against Iraq. While the evidence presented at the Iraq Inquiry being held in the UK strongly indicates that the use of force against Iraq was unlawful,<sup>1</sup> the UK has taken much greater care in 2011 to ensure that its actions against Libya are underpinned by legality. This suggests a return to respect for the *jus ad bellum* by the UK, but as the operation against Libya has unfolded it has become clear that some of the problems that undermined the legality and legitimacy of the invasion of Iraq have not been avoided, which raises the question of how such operations can be kept within the strict bounds of the law. Nevertheless, with politicians in the UK debating the use of force in the Spring of 2011, almost exactly eight years after the invasion of Iraq, they are looking back to that controversial episode to learn crucial lessons, including lessons about the importance of international law.

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<sup>1</sup> UK Prime Minister Gordon Brown announced the establishment of the Iraq Inquiry in the House of Commons on 15 June 2009, its terms of reference being 'to consider the period from summer 2001, before military operations began in March 2003, and the UK's subsequent involvement in Iraq up to the end of July 2009. The Prime Minister told the House of Commons: "the Iraq Inquiry will look at the run-up to the conflict, the conflict itself and the reconstruction." The objective is to learn the lessons from the events surrounding the conflict'—<http://iraqinquiry.org.uk/faq.aspx>. See evidence given to the Inquiry by Sir Michael Wood, Foreign Office Legal Adviser in 2003, on 26 January 2010, <http://www.iraqinquiry.org.uk/media/43614/100126am-wood.pdf>; and Elizabeth Wilmshurst, Deputy Legal Adviser at the FCO in 2003—<http://www.iraqinquiry.org.uk/media/44211/20100126pm-wilmshurst-final.pdf>. Both considered the use of force against Iraq in 2003 to be illegal as a matter of international law. For Lord Goldsmith's (the Attorney-General at the time) more equivocal evidence of 27 January 2010 see <http://www.iraqinquiry.org.uk/media/43803/100127-goldsmith.pdf>.

## 2. UN Security Council Resolutions on Libya

Prior to the use of force by aircraft drawn from member states of the North Atlantic Treaty Organization (NATO), on 26 February 2011 the United Nations Security Council (UNSC) unanimously agreed to the imposition of an arms embargo against the whole of Libya and of targeted sanctions against Gaddafi and his supporters in the form of an assets freeze and travel ban.<sup>2</sup> That Resolution (1970) also referred the situation in Libya since 15 February 2011 to the Prosecutor of the International Criminal Court (ICC) after considering that the widespread and systematic attacks taking place in Libya may amount to crimes against humanity. Without any sense of irony the Resolution decided that the Libyan authorities shall cooperate fully with the ICC, while recognizing that states not party to the Rome Statute on the ICC (including the USA, Russia and China from the five permanent members of the Security Council – P5) have no obligations under the Statute.

Considerations that a travel ban and a referral to the ICC may well have made Gaddafi more intransigent and trapped did not prevail, and with the Libyan authorities failing to adhere to the obligation to end the violence imposed by Resolution 1970, but also at a point when Gaddafi's forces were about to attempt the recapture of Benghazi from rebel forces, the UK, France, the US and Lebanon persuaded the UNSC to authorise military action in Resolution 1973 on the 17 March 2011.<sup>3</sup> This Resolution's provenance can be traced back to the Korean War in 1950 and Operation Desert Storm in 1991, when the UNSC authorised US-led Coalitions of the Willing to deal, by taking necessary measures (UN-speak for the use of military force), with breaches of international peace and security.<sup>4</sup> This form of authorization has been recognized in UN practice and in most jurisprudence as a lawful delegation of power to member states to take military action under Chapter VII, Article 42 of the Charter, to deal with threats to or breaches of the peace as a recognised exception, along with the right of self-defence, to the ban on the threat or use of force in the UN Charter.<sup>5</sup>

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<sup>2</sup> UNSC Res. 1970, 26 February 2011.

<sup>3</sup> UNSC Res. 1973, 17 March 2011.

<sup>4</sup> UNSC Res. 83, 28 June 1950; UNSC Res. 678, 29 November 1990.

<sup>5</sup> Arts. 2(4), 42 and 51 of the UN Charter. For discussion see N.D. White and O. Ulgren, 'The Security Council and the Decentralized Military Option: Constitutionality and Function', XLIV *NILR* (1997) p. 378; N. Blokker, 'Is Authorization Authorized? Powers and Practice of the United Nations Security Council to Authorize the Use of Force by Coalitions of the Able and Willing', 11 *EJIL* (2000) p. 541.

In Resolution 1973, after repeating its statement in Resolution 1970 that the Libyan government had the responsibility to protect the population, the UNSC authorized member states to take all necessary measures, 'to protect civilians and civilian populated areas under threat of attack' in Libya, 'including Benghazi, 'while excluding a foreign occupation force of any form on any part of Libyan territory'. As is common with such authorizations to use force under Chapter VII of the Charter, the obligation on member states to the UNSC was a reporting one, in this case to the United Nations Secretary General (UNSG), of the measures taken pursuant to the resolution. Resolution 1973 also imposed a no-fly zone in Libyan airspace 'in order to help protect civilians', and authorized member states 'to take all necessary measures to enforce compliance' with the no-fly zone.

Resolution 1973 thus contained an enforceable no-fly zone, a measure that had been mooted since early in the crisis, but it also allowed NATO states to go further and take military action to protect civilians, leading to an on-going debate in the UK as to whether this could include, for example, the targeting of Gaddafi himself on the basis that he was the ultimate source of the problem for civilians.<sup>6</sup> When an armed conflict is occurring between states or within a state, as is the case in Libya where there is both an internal armed conflict between rebels and government forces and an international one between Libya and the 'Coalition' or 'Allies' acting under Resolution 1973, then soldiers and their commanders are legitimate targets under the laws of war,<sup>7</sup> and in this sense Colonel Gaddafi is a legitimate target, but the law of war is not the only legal regime applicable here. Indeed it is arguably qualified by the UNSC resolution which authorised the prosecution of the war,<sup>8</sup> and which does not so readily bear such a wide

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<sup>6</sup> At Prime Minister's Question Time on 23 March 2011, the leader of the opposition, Ed Miliband asked the Prime Minister to 'clarify the Government's position on the targeting of Colonel Gaddafi? It is important that we stick to the terms of the UN resolution as we seek to maintain the coalition we have built on that resolution'. In response David Cameron stated that 'all our targets must be selected to be absolutely in line with UN Security Council resolution 1973. That allows us to take "all necessary measures" to enforce a no-fly zone and to put it in place as safely as possible as well as to take action to protect civilian life. All targets should be in line with that but I do not propose to give a running commentary on targets or, frankly, to say anything beyond that', *Hansard*, HC, Vol. 525, Col. 943, 23 March 2011. NATO clearly targeted Colonel Gaddafi and senior members of his regime – see <http://www.bbc.co.uk/news/world-africa-13846128>, 20 June 2011.

<sup>7</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, Cambridge University Press, 2004) pp. 88-94.

<sup>8</sup> On the overriding effects of Article 103 see R. Liivoja, 'The Scope of the Supremacy Clause of the United Nation Charter', 57 *ICLQ* (2008) p. 583. This has been interpreted too broadly by UK Courts as overriding inconsistent human rights obligations in *R (Al Jeddah) v Secretary of State of Defence* [2007] UKHL 58.

interpretation. Indeed, at the UNSC meeting at which Resolution 1973 was adopted,<sup>9</sup> there was controversy surrounding the common understanding of the Resolution suggesting that great caution should be exercised when subsequent attempts are made to place meanings on it that are difficult to reconcile with the text and background to the Resolution; bearing in mind the paragraph in the Resolution that authorized the protection of civilians was seemingly added late to the text to enable NATO forces to stop what appeared to be an imminent and brutal attack by Gadaffi forces on Benghazi.

Thus even though there was a clear and current authorization to use force against Libya in Resolution 1973, there were shades of the debate that occurred in 2003 in relation to Iraq concerning the interpretation of older resolutions going back to Resolution 678 of 1990.<sup>10</sup> Nevertheless, there is a vast difference between the argument made by the UK in relation to Iraq in 2003, namely that a 1990 authorization to use force to implement Security Council resolutions in the context of removing Iraq from Kuwait was still a valid authority thirteen years later for invading Iraq and removing Saddam Hussein as well as his Weapons of Mass Destruction (WMD);<sup>11</sup> and the interpretation of a Resolution adopted in March 2011 sanctioning necessary measures to protect civilians and enforce a no-fly zone, which was being implemented by states within a week of its adoption by the UNSC.

The legal basis for the Libyan action is exponentially so much stronger, but the Libyan operation has not eliminated some fundamental problems of the UN collective security 'system' so starkly revealed by the Iraq crisis of 2003. The system is rudimentary and depends upon political consensus between the P5 being present, which it was in March 2011, but not in March 2003; but that precious Resolution of 2011 (1973) was, at the time of writing, likely (though not definitely),<sup>12</sup> to be the only source of authority for

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<sup>9</sup> UNSC 6498 mtg, 17 March 2011.

<sup>10</sup> N.D. White, 'The Will and Authority of the Security Council After Iraq', 17 *LJIL* (2004) p. 645.

<sup>11</sup> See the Attorney General's advice given to the House of Commons immediately prior to the invasion on 17 March 2003, which was to the effect that the authority to use force against Iraq given in SC Resolution 678 (1990) was revived by a material breach by Iraq of Resolution 1441 (2002) and earlier disarmament resolutions—see *Hansard* HC, Vol. 401, Col. 760, 18 March 2003 when Prime Minister Tony Blair relied on this argument in proposing a substantive vote. The Attorney General's full advice was not released until 28 April 2005, in which, in contrast, he concluded that 'if the matter ever came before a court', that court 'may well' conclude that Resolution 1441 did require a 'further Council decision in order to revive the authorization in' Resolution 687; <http://www.guardian.co.uk/politics/2005/apr/28/election2005.uk>, 28 April 2005.

<sup>12</sup> See discussion about the EU possibly seeking UNSC authority for a humanitarian aid military mission – EUFOR Libya – at the beginning of April – *The Guardian Weekly*, p. 5, 2 April 2011.

the use of force against Libya and therefore was subject to greater and greater demands placed upon it, potentially stretching the Resolution beyond its meaning and contrary to the collective understanding of that resolution. The problem is that the veto-dominated negotiating system is too unwieldy to allow nimble executive responses to constantly changing security situations. This means that decisions on implementation of Resolution 1973 take place at the regional level in NATO, or between France and the UK, or indeed within the political systems of each and every state contributing to the air campaign over Libya.<sup>13</sup> While this is to be expected, the absence of any control at the UN level is at the same time both alarming and unsurprising.<sup>14</sup>

During the UNSC meeting on the 17<sup>th</sup> March at which Resolution 1973 was adopted,<sup>15</sup> the unanimity behind Resolution 1970 was broken, but not to the extent of disabling the adoption of Resolution 1973 by 10 votes to 0 with 5 abstentions (Brazil, China, Germany, India, Russia). Those abstaining were not only the usual advocates of non-intervention (China and Russia) but equally important states, each with a strong case for permanent membership themselves. The change within the UNSC from the situation in Kosovo in 1999 where the UNSC could not agree on military action to protect the Kosovars,<sup>16</sup> to Libya in 2011 is marginal, but sufficient to give the initial action a sound legal basis. That marginal push may have been helped by the emergence in the early 21<sup>st</sup> century of the idea that there is a responsibility to protect (R2P) on the part of the international community, when a state has failed to protect its population from crimes

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<sup>13</sup> In a letter to national newspapers in France, the UK and US, President Obama, Prime Minister Cameron and President Sarkozy made it clear that ‘our duty and our mandate under UN Security Council Resolution 1973 is to protect civilians, and we are doing that. It is not to remove Gaddafi by force. But it is impossible to imagine a future for Libya with Gaddafi in power. The International Criminal Court is rightly investigating the crimes committed against civilians and the grievous violations of international law. It is unthinkable that someone who has tried to massacre his own people can play a part in their future government. The brave citizens of those towns that have held out against forces that have been mercilessly targeting them would face a fearful vengeance if the world accepted such an arrangement. It would be an unconscionable betrayal’ - available at <http://www.bbc.co.uk/news/world-africa-13090646>, 15 April 2011.

<sup>14</sup> Towards the end of June 2011 there had been 8 further formal meetings of the UNSC on Libya since the adoption of UNSC Resolution 1973 on 17 March. These consisted of briefings by the UNSG, the representative of the UNSG, the Chairman of the Committee established by UNSC Resolution 1970, the prosecutor of the ICC, by UN officials on humanitarian aid and post-conflict rebuilding, and by the AU – see UNSC 6505<sup>th</sup> mtg, 24 March 2011; 6507<sup>th</sup> mtg, 28 March 2011; 6509<sup>th</sup> mtg, 4<sup>th</sup> April 2011; 6527<sup>th</sup> mtg, 3 May 2011; 6528<sup>th</sup> mtg, 4 May 2011; 6530<sup>th</sup> mtg, 9 May 2011; 6541<sup>st</sup> mtg, 31 May 2011; UNSC 6555<sup>th</sup> mtg, 15 June 2011.

<sup>15</sup> UNSC 6498<sup>th</sup> mtg, 17 March 2011.

<sup>16</sup> See UNSC Res. 1199, 23 September 1998; UNSC Res. 1203, 24 October 1998. Neither resolution expressly authorised ‘necessary measures’ to protect the people of Kosovo.

against humanity or other similar egregious acts.<sup>17</sup> The UN World Summit Outcome Document of 2005 placed this responsibility squarely on the UNSC if a state had failed to protect its population.<sup>18</sup> Both UNSC Resolution 1970 and 1973 on Libya stated in the preamble that the Libyan authorities bore responsibility to protect the population of Libya, which could be seen as a reference to R2P, though tellingly neither Resolution went on to state that since the Libyan government had failed to protect its population, the UNSC had a responsibility to do so. Instead, the UNSC makes it clear in Resolution 1970 that its responsibility is for the maintenance of international peace and security, its traditional concern, making no reference to any other form of responsibility it might have. Thus while there is no doubt that the Libyan crisis will be lauded as a precedent for R2P, the Resolutions themselves do not bear such an interpretation.

It is informative to look at the reasons given by those abstaining on Resolution 1973. Germany expressed concern about being drawn into a protracted conflict and about the intervention causing more harm than it might prevent. India could not vote for the Resolution because of lack of clear information on the ground, and lack of clarity about the enforcement measures to be taken under Resolution 1973. Brazil's concern was that the resolution went beyond a no-fly zone, which was the measure being discussed up until that point, and was also concerned that the measures taken to protect civilians would cause more harm than good to those very people. Russia criticised the way in which the draft resolution 'morphed' before the eyes of Council members by going beyond a no-fly zone, and criticised the drafters for not answering questions about rules of engagement and limits on the use of force. China was generally against use of force in international relations, but because of regional support from the Arab League for a limited form of intervention as well as the special circumstances of Libya, had decided not to vote against. Thus there were clear warnings to NATO states to be careful about the nature and extent of their military operations. Just as the US and the UK should have heeded the concerns of many members of the Security Council when Resolution 1441 was adopted in November 2002 in the build-up towards military action by those states against Iraq, to the effect that the Resolution did not provide for the use of force,<sup>19</sup>

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<sup>17</sup> See International Commission on Intervention and State Sovereignty, *The Responsibility To Protect* (International Development Research Centre, Ottawa, 2001); Report of the High Level Panel on 'Threats, Challenges and Change' (UN, 2004), recommendation 55; Report of the UNSG, 'In Larger Freedom: Towards Security, Development and Freedom for All' (UN, 2005), para. 135.

<sup>18</sup> UNGA Res. 60/1, 24 October 2005, para. 139.

<sup>19</sup> UNSC 4644<sup>th</sup> mtg, 8 November 2002.

so NATO states in the bombing campaign over Libya should heed the concerns of the members of the authorizing body as to the extent of the use of force.

Having said that Resolution 1973 does allow for greater use of force than was anticipated in the build-up to its adoption. From the initial debates about an enforced no-fly zone, the end result was an authorization to undertake a much greater use of force – necessary measures (mainly in the form of bombing) to protect civilians, necessitated by the imminent attack on Benghazi, thereby bringing it much closer to the military action over Kosovo in 1999 though that had not been authorised by the UNSC.<sup>20</sup> UNSC Resolution 1973 was rushed through even more quickly than is the norm, and promised much debate about its interpretation and meaning. The use of force by NATO planes towards the end of March and beginning of April seemed to be increasingly directed at supporting the rebels and in several respects went beyond the protection of civilians as mandated in Resolution 1973, by for example targeting battle tanks, though the argument was that these were being used to attack civilians and not simply in the fight against the rebels.<sup>21</sup> What started out in appearance at least, though not so evident in political rhetoric or in the UNSC Resolutions themselves, as an application of the emerging ‘responsibility to protect’ doctrine,<sup>22</sup> seemed by mid-June to be heading towards another instance of regime change as in Iraq in 2003, with all the problems that entailed.

### **3. The UK and Libya**

Early debates within the UK Parliament reflected this potential change in interpretation of Resolution 1973. Parliamentary debates on decisions to deploy troops to conflict zones have been shown by this writer elsewhere to provide a strong indication of the

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<sup>20</sup> *Supra* n 16.

<sup>21</sup> In a TV interview the Prime Minister stated that the terms of UNSC Resolution 1973 made it difficult for NATO forces though they would stick to the terms of the Resolution, but this would allow them ‘to actually take out Gaddafi’s tanks and artillery and command and control that are unleashing this hell on people in Misrata in Brega, and other towns up and down the Libyan coast’ - <http://www.bbc.co.uk/news/uk-politics-13107834>, 17 April 2011.

<sup>22</sup> On the responsibility to protect doctrine see C. Focarelli, ‘The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine’, 13 *Journal of Conflict and Security Law* (2008) p. 191.

attitude towards international law within the political establishment in the UK.<sup>23</sup> This is not so much a search for *opinio juris* in a classical sense, but an examination of a particular state's understandings of, and in broad terms respect for, international law. Given the UK's leading role in many of the recent uses of force, including Iraq in 2003 and Libya in 2011, that understanding and respect becomes all the more important. This section will consider the debates on Libya within Parliament in March –June 2011 to discern what lessons had been learned from the invasion of Iraq in 2003.

On 28 February 2011, the Prime Minister, David Cameron, informed the House of Commons as to how the UK would implement Resolution 1970, but also mentioned that the government was planning for different scenarios including a no-fly zone.<sup>24</sup> On Friday 18 March following the adoption of Resolution 1973, the Prime Minister informed the House about the implementation of that Resolution, and spoke about the urgency of the situation and the imminent attack on Benghazi where Gaddafi had threatened to show no mercy.<sup>25</sup> At this stage the Prime Minister was clear that Resolution 1973 had limits; to protect civilian and civilian populated areas and did not permit an occupation force in any form.<sup>26</sup> He repeated this when asked, with Iraq in mind, about the problem of how UNSC Resolutions had been misinterpreted in the past.<sup>27</sup>

Furthermore, the Prime Minister informed the House that the Cabinet had been given clear legal advice from the Attorney General, which he summarised for the House in terms that Resolution 1973, as a Chapter VII resolution clearly authorising necessary measures to protect civilians and enforce a no-fly zone, was a legally recognised basis on which to deploy and use force.<sup>28</sup> However, that legal advice did not appear to address the subsequent interpretation of Resolution 1973 and did not go to issues such as when force could be used to protect civilians; whether the arms embargo imposed in UNSC Resolution 1970 could be breached in favour of the rebels; and the issue of legitimate

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<sup>23</sup> N.D. White, *Democracy Goes to War: British Military Deployments under International Law* (Oxford, Oxford University Press, 2009); N.D. White, 'International Law, The United Kingdom and Decisions to Deploy Troops Overseas', 59 *ICLQ* (2010) p. 814.

<sup>24</sup> *Hansard* HC, Vol. 524, Cols. 23-26, 28 February 2011.

<sup>25</sup> *Hansard* HC, Vol. 525, Col. 611, 18 March 2011.

<sup>26</sup> *Ibid.*, Col. 612.

<sup>27</sup> *Ibid.*, Col. 628 (Mark Tami MP).

<sup>28</sup> *Ibid.*, Col. 613 (David Cameron MP). Legal advice available at [http://www.politics.co.uk/features/foreign-policy/legal-advice-on-libya-mission-in-full-\\$21387896.htm](http://www.politics.co.uk/features/foreign-policy/legal-advice-on-libya-mission-in-full-$21387896.htm), 21 March 2011.

targets. Resolution 1973 stated that force could be used ‘to protect civilians and civilian populated areas under threat of attack’, which suggested that the standard was somewhat wider than self-defence of third parties, which usually requires an imminent attack,<sup>29</sup> but not as wide as simply destroying any military target on the basis that it might be the source of a future attack against civilians. David Cameron was asked by one MP whether the phrase in UNSC Resolution 1973, where necessary measures to protect civilians were authorized ‘notwithstanding paragraph 9 of resolution 1970’, which had imposed the arms embargo against the whole of Libya, would permit the arming of the rebels.<sup>30</sup> The Prime Minister thought that the arms embargo was still in place for the whole of Libya and not just against the government.<sup>31</sup>

One lesson from Iraq that does not seem to have been accepted in the Libyan crisis by the British government was the need for full advice on the international legal basis of the operation being made available to the House of Commons and not just to the Cabinet, before any debate leading to a vote in Parliament, in order to enable MPs to make an informed decision. Arguably such legal advice should draw upon wider expertise to ensure that it is balanced and represents an accurate view of international law to avoid the problems of Iraq, where there emerged several versions of the Attorney General’s advice.<sup>32</sup> It is anticipated that the Iraq inquiry will show that most international lawyers in the UK agreed that the military action in Iraq in 2003 was unlawful,<sup>33</sup> yet the advice given to Parliament immediately before the invasion was that it had a clear legal basis.<sup>34</sup> In contrast to Iraq, there is a clear Chapter VII resolution, Resolution 1973, authorizing the use of force in the case of Libya. Though a summary of the Attorney General’s legal advice on the current action in Libya was released the process still seems the same as in Iraq in 2003. Though the legal basis is clear – a chapter VII resolution authorising necessary measures to protect civilians and to enforce the no-fly zone - the legal advice does not anticipate the many problematic issues of interpretation and application that remain and were clearly foreseeable at the

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<sup>29</sup> G. Fletcher and J.D. Ohlin, *Defending Humanity: When Force is Justified and Why* (Oxford, Oxford University Press, 2008) pp. 63-72.

<sup>30</sup> *Hansard* HC, Vol. 525, Col. 627, 18 March 2011 (William Cash MP).

<sup>31</sup> *Ibid.*, (David Cameron MP).

<sup>32</sup> *Supra* n 11.

<sup>33</sup> See the Iraq Inquiry’s invitation to international lawyers to make submissions on the legal basis of the 2003 military action against Iraq available at <http://www.iraqinquiry.org.uk/background/100602-submissions-from-international-lawyers.aspx>, 24 June 2011.

<sup>34</sup> *Supra* n 11.

time of the Resolution's adoption. Unfortunately, the Attorney General's legal advice did not appear to be the full legal advice necessary for Parliament to make informed decisions.

During the initial Parliamentary debate David Cameron stated that the government 'will table a substantive motion for debate next week, but I am sure that the House will accept that the situation requires us to move forward on the basis of the Security Council Resolution immediately'.<sup>35</sup> Unlike in the case of Iraq where the slow build up to conflict allowed for a substantive vote in the House of Commons in favour of the military action before the invasion commenced,<sup>36</sup> there was no vote before the RAF used force in Libya, although the leader of the opposition, Ed Miliband, did offer his party's support.<sup>37</sup>

The UK's deployment of force to Libya has reignited the debate sparked by the invasion of Iraq in 2003, about whether there needs to be a formalised convention (a 'war powers' resolution) or even an Act of Parliament enshrining Parliament's right to have a say in the deployment of troops, which still remains a prerogative power of the executive in the UK.<sup>38</sup> Even if this happens the content of any normative framework purporting to govern such decisions will contain exceptions for necessity, for example where the use of force is unavoidable ('leaving no choice of means or no moment for deliberation'),<sup>39</sup> either in self-defence or in cases of humanitarian necessity.

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<sup>35</sup> *Hansard* HC, Vol. 525, Col. 613, 18 March 2011.

<sup>36</sup> *Hansard* HC, Vol. 401, cols 906-11, 18 March 2003.

<sup>37</sup> *Hansard*, HC, Vol. 525, Col. 615, 18 March 2011.

<sup>38</sup> Graham Allen MP raised the issue on the 21 March in a substantive debate two days after force had been used by the UK by stating that this 'House is not taking any decisions: the Government have already taken a decision and have graciously allowed us a debate today. Does he agree that if we are to ensure that we stay properly informed, which the Prime Minister and Leader of the Opposition have both talked about, we need to resolve the question of the House's rights in respect of when this country goes to war? As we are the elected Chamber there ought to be something in our Standing Orders or in the Cabinet manual or some other place that gives the Chamber the right to be consulted before or after an action takes place'. David Winnick MP stated 'I wish we could have had this debate before military action had been taken. I referred to that on a point of order and do not want to dwell on it because time is very short, but we must establish that, when military action is going to be taken, the House of Commons should debate the issue first. There is no doubt what the result of any vote tonight will be, and there would have been no difference if one had taken place on Saturday, but it would have been better if the House had so decided'. Foreign Secretary William Hague responded that 'We will ... enshrine in law for the future the necessity of consulting Parliament on military action' (*Hansard* HC, Vol. 525, Cols. 739, 752, 799, 21 March 2011).

<sup>39</sup> Following the criteria in the Caroline incident of 1837 – 29 *British and Foreign State Papers* 1137-8; 30 *British and State Papers* 195-6.

The prospect of enshrining the constitutional process of troop deployment in an Act of Parliament raises the prospect of judicial review of decisions to go to war, which may help ensure that Parliament scrutinises the legality of any decision very carefully and is prepared not to vote for any proposed deployment or use of force that has no grounding in international law. But to do this Parliament must be given full legal advice, otherwise it is being asked to vote for a decision without being given the necessary information. However, the prospect, even if a distant one, of the Courts becoming involved in issues of troop deployment will probably deter MPs from voting for such a piece of legislation, therefore making a non-statutory war powers resolution the more realistic option. This would still instil a necessary democratic balance to conflict decision-making, but also would enable MPs to consider the legality as well as the wider objectives of the proposed war. They might if given clear and full legal opinion decide to vote against a war if the legality is doubtful; though they might disregard those legal doubts if it was felt that a use of force may not be clearly lawful but was nevertheless legitimate,<sup>40</sup> and they could do so without fear of being subject to judicial review. But again to be able to make this informed choice MPs must have full access to clear and comprehensive legal advice. By these means international law should become an important determining factor in political decisions to go to war or otherwise to use force, which is surely a positive, indeed unarguable, development. As yet, a war powers resolution remains unadopted.<sup>41</sup>

In contrast to debates during the build-up towards NATO's previous humanitarian-inspired bombing campaign in 1999 over Kosovo, when the UNSC was blocked by China and Russia, the Prime Minister saw the abstention of China and Russia on Resolution 1973 as a positive step forward for international law, stating that this would not have occurred in the past;<sup>42</sup> thereby suggesting the possible dawn of a new era of humanitarian intervention under UN authority. This issue was taken further when there was a full debate in the House on a substantive motion on Monday 21 March, two days

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<sup>40</sup> This was essentially the view of the House of Commons Foreign Affairs Committee in its review of the Kosovo operation in 1999 – *Hansard* HC, Foreign Affairs Committee, Fourth Report 1999-2000, HC 28-I, para.124-44, 7 June 2000.

<sup>41</sup> In its report on the subject the Political and Constitutional Reform Committee of the House of Commons recommended that 'the Government should as a first step bring forward a draft detailed parliamentary resolution, for consultation with us among others, and for debate and decision by the end of 2011', See Political and Constitutional Reform Committee, Eighth Report, 'Parliament's Role in Conflict Decisions', 17 May 2011.

<sup>42</sup> *Hansard* HC, Vol. 525, Col. 627, 18 March 2011.

after the RAF had become involved in the military action over Libya. The substantive motion debated and voted upon welcomed UNSC Resolution 1973, indicated that there was humanitarian necessity, regional support and a clear legal basis for action, and therefore supported the government in taking necessary measures to protect civilians and enforce the no-fly zone.<sup>43</sup> When asked why not intervene in other countries as well where on-going repression of discontent was brutal (Yemen was the example given),<sup>44</sup> the Prime Minister replied that ‘because we cannot do the right thing everywhere does not mean we should not do it when we have clear permission for and a national interest in doing so’.<sup>45</sup> He finished by saying that ‘this is not going into a country and knocking over its Government, and then owning and being responsible for everything that happens subsequently. This is about protecting people and giving the Libyan people a chance to reshape their country’. He made it clear that UNSC Resolution 1973 ‘explicitly does not provide legal authority for action to bring about Gaddafi’s removal from power by military means’.<sup>46</sup>

In order to emphasise the limited nature of the intervention and the desire to keep within the bounds of the law Foreign Secretary William Hague stated at the outset of the air campaign on 21 March 2011 that:

‘We are clear that we are engaged in this action to protect the civilian population and we were clear, as last week went on, that we had to act with all possible speed. That is why we moved heaven and earth, diplomatically, to pass the UN resolution on Thursday night. Yes, we took a risk in doing that because nine positive votes are required in the Security Council and there can be no vetoes. To have been defeated on that resolution would have made it hard to take any subsequent action, but any later would have been too late. Once the resolution was passed, we had to move with all possible speed. As the House knows, the Cabinet met on Friday morning to consider the UN resolution at length, with the legal advice of the Attorney-General in front of us for all members to read, and the Prime Minister came to the House at the earliest possible moment to state our intention. Some hon. Members have asked whether the House should

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<sup>43</sup> *Hansard* HC, Vol. 525, Col. 700, 21 March 2011 (David Cameron MP).

<sup>44</sup> *Ibid.*, Col. 708, 21 March 2011 (Andrew George MP).

<sup>45</sup> *Ibid.*, (David Cameron MP).

<sup>46</sup> *Ibid.*, Col. 710-13.

have sat on Saturday to consider the motion; of course, in future instances, that can be considered, but they should be clear that to effect the situation, we had to give the orders for military action on Saturday afternoon. Other hon. Members have asked that there be no mission creep. I am happy to assure them that if the Government ever fundamentally change the nature of the mission that we have described to the House, we will return to the House for a further debate to consult it again'.<sup>47</sup>

The motion was adopted by 557 votes to 13.

The matter returned to Parliament on a number of occasions in the period under review (until the end of June 2011), but no further votes were taken despite significant changes of events on the ground and an increasing range of targets being hit by NATO forces, including Colonel Gaddafi's compound. In these debates the government was very forceful in its statements that the military action was being taken to fulfil the purposes of UNSC Resolution 1973 in order to stop an 'Arab Srebrenica' in Benghazi,<sup>48</sup> and then the protection of civilians which remained the aim of the operation though the government left no doubt that the future of Libya was without Gaddafi.<sup>49</sup> The concerns of some Members of Parliament that the government was deliberately going beyond the terms of the Resolution and that such mission creep should lead to the government seeking fresh Parliamentary endorsement did not prevail in the period under review. When the Foreign Secretary was reminded of the Prime Minister's statement to the House of Commons of 21 March 2011 that UNSC Resolution 1973 did not allow for the removal of Gaddafi by military means,<sup>50</sup> William Hague stated that the 'military mission remains defined by the UN Security Council resolution, and there has been no change in the Government's approach to that'. He also made it clear that another UNSC Resolution was unlikely as was the need for a further vote in the House of Commons,<sup>51</sup> thus removing the need for proper accountability for British military actions at both international and national levels. Given that the military action in Libya derives its constitutionality as well as its legitimacy from the UNSC at the international level, and

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<sup>47</sup> *Ibid.*, Col. 799 (William Hague MP).

<sup>48</sup> *Hansard* HC, Vol. 526, Col. 920, 5 April 2011 (Andrew Mitchell MP).

<sup>49</sup> *Ibid.*, Col. 966.

<sup>50</sup> *Hansard* HC Vol. 527, Col. 37, 26 April 2011 (Douglas Alexander MP).

<sup>51</sup> *Hansard* HC Vol. 527, Cols. 40, 47, 50, 26 April 2011.

the House of Commons at national level, such responses,<sup>52</sup> though entirely predictable, suggest less progress has been made since the Iraq crisis of 2003 than was commonly perceived at the time UNSC Resolution 1973 was adopted.

#### **4. Conclusion: Lessons Learned or Lessons Ignored?**

What such debates in the House of Commons on Libya showed was a government intent on not making the same mistakes as the previous government did in relation to Iraq in 2003, by securing UN authority for the use of force and by limiting the use of force to that necessary for the protection of civilians, thereby bringing itself at least initially fully within the *jus ad bellum* as well as the wider political consensus of there being a responsibility to protect when genocide or crimes against humanity are being committed. The swiftness of the diplomacy to secure an authorizing resolution from the UNSC, and support from the House of Commons, was driven by humanitarian necessity – to have waited any longer would have led to the destruction of Benghazi and the potential deaths of thousands of civilians.

However, as with the more traditional doctrines of humanitarian intervention, this ‘responsibility’ did not stretch to other countries in the Middle East where violent repression was prevalent. It may be that the determination in Resolution 1970 that there was evidence of crimes against humanity being committed in Libya distinguishes that country from other Arab countries, though there was no attempt to determine whether such crimes had been committed elsewhere in North Africa and the Middle East during the so called ‘Arab Spring’ of 2011. Selectivity is still the order of the day in the UN collective security system, but at least there was much greater effort to keep the military action within the parameters of international law. At the time of writing (towards the end of June 2011), the problem was that the longer the civil war in Libya continued, and the more NATO wanted to end it, the more problematic the military action became in reconciling it with the terms of Resolution 1973. The British government could bring the issue back to Parliament if it wished domestic approval to change its military strategy and tactics to include for instance ground troops (though by the end of June it

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<sup>52</sup> Repeated by government ministers - *Hansard* HC Vol. 528, Cols. 3-4, 16 May 2011 (Liam Fox MP); *Hansard* HC Vol. 528, Cols. 779-84, 24 May 2011 (Nick Harvey MP); *Hansard* HC Vol. 529, Col. 628, 14 June 2011 (William Hague MP).

had not done so at least by any formal vote), and further it could seek agreement with its allies and in NATO, but unless another UNSC resolution was sought and secured,<sup>53</sup> that military action would not then be authorized by the very body under which the UK and NATO were purporting to act – the UNSC.

The further in time the military action against Libya stretched away from UNSC Resolution 1973 adopted on 17 March 2011, the further it seemed to depart from the level of force authorised by that Resolution. Resolution 1973 was intended to authorise military action to prevent imminent attacks on Benghazi and other centres of civilian population such as Misrata. Instead of making it clear to Colonel Gaddafi and his forces, by statements and by action, that attacks or threats of attacks on civilian targets would not be tolerated, NATO, led by France and the UK, increasingly engaged government forces in a coordinated effort with rebel forces to defeat government forces and dislodge Gaddafi from power. The response to the crisis moved from an immediate and necessary protection of civilians towards regime change, illustrating that the UN collective security system does not appear to be capable of governing or regulating the use of force, even force which was initially taken under its authority, so that attaining a legally-grounded UN collective security system increasingly seems as far away in 2011 as it did in 2003.

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<sup>53</sup> ‘Libya Conflict: France Eyes another UN Resolution’, <http://www.bbc.co.uk/news/world-africa-13096829>, 15 April 2011.