

INTERVENTION IN LIBYA: A CRIME OF AGGRESSION?

Niels Rijke



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ABSTRACT

Assuming that by 2017 at least thirty states will have ratified the 2010 Kampala amendments to the Statute of the International Criminal Court (ICC), from that year onwards the ICC will have jurisdiction over the crime of aggression. The Statute expressly prohibits retroactive application of its provisions; however, it would be interesting to see how a future case could work out. It is in this context that the author analyses the 2011 military intervention in Libya – authorised by UN Security Council Resolution 1973 (2011) – as a test case. The paper argues that the Resolution (including the intentions behind it) may have been unlawful, both in its adoption and in its execution by NATO. The nature of the act and the crime of aggression is examined as well. Applying the outcome on the Libya intervention, the author concludes that while the Resolution was not necessarily unlawful itself, the execution of the intervention – notably, the extent and amount of force used – may very well be qualified as act and crime of aggression.

I. INTRODUCTION

On the 17th of March 2011, the Security Council of the United Nations adopted Resolution 1973, authorising an intervention in Libya.¹ There has been strong debate about the intention behind and the lawfulness and legitimacy of the execution of the resolution by the intervening powers, in particular NATO. The concepts of ‘Responsibility to Protect’ (‘R2P’) and ‘humanitarian intervention’ received great attention. Nevertheless, it can be argued that the lawfulness of Security Council Resolution (SCRS) 1973 did not receive the attention it deserves. Both the lawfulness of the Resolution itself (Section 2) and its execution (Section 4) will be scrutinized in this brief in relation to the question whether the intervention in Libya could qualify as a crime of aggression. This latter concept will be further explored in Section 3.

Concerning this crime of aggression, it is relevant to examine the intervention in Libya as a theoretical test case for the International Criminal Court (ICC). Since the adoption of the amendments to the Rome Statute in Kampala in 2010, containing a compromise on the definition of the crime of aggression, there has been wide academic debate about the definition’s implications. From 2017 onwards, under the condition of ratification by 30 States Parties, the crime of aggression could be tried before the ICC.

¹ UN Security Council, [Security Council Resolution 1973 \(2011\)](#) on the situation in the Libyan Arab Jamahiriya, 17 March 2011, UN Doc. S/RES/1973(2011).

There will be no retroactive application of the crime of aggression. However, it would be interesting to find out whether the intervention in Libya, had it taken place after 2017, could qualify as a crime of aggression.

In order to answer this central question, it is necessary to study the lawfulness of SCRS 1973, the scope of the crime of aggression and whether SCRS 1973 and its execution could qualify as a crime of aggression. This brief will not give an exhaustive overview of possible ways of applying the crime of aggression and historical accounts of the intervention in Libya, but will rather focus on and assess the arguments that favour the viewpoint of qualifying the Libyan intervention as a crime of aggression.

II. LAWFULNESS OF SECURITY COUNCIL RESOLUTION 1973

At first the lawfulness of SCRS 1973 will be examined. This resolution determined “that the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security”.² Thereafter it authorised Member States under Chapter VII, “acting nationally or through regional organizations or arrangements ... to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory”. Thereto the resolution comprised a ‘no fly zone’, enforcement of the arms embargo, ban on flights and asset freeze of designated persons.

Concerning the lawfulness of SCRS 1973, one can refer in first instance to UN Charter provisions on the use of force (*jus ad bellum*).³ Art. 2(4) UN Charter provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Under Chapter VII of the UN Charter the only exceptions to the prohibition of the use of force are self-defence (Art. 51 UN Charter) and authorisation of force by the Security Council in order to maintain or restore international peace and security (Art. 39-42 UN Charter).

Accordingly, one could argue that since the Security Council under Chapter VII has authorised SCRS 1973, the lawfulness of the Resolution is obvious.⁴ This would be the legalistic answer. Still, there are strong arguments pointing at other aspects that could be taken into account here, such as the obligation of the Security Council to conform to international law. Primarily, Art. 1 UN Charter states that the purpose of the UN is to

² *Supra* note 1.

³ United Nations, [Charter of the United Nations](#), 24 October 1945, 1 UNTS XVI.

⁴ R.E. VanLandingham, [‘The Stars Aligned: The Legality, Legitimacy, and Legacy of 2011’s Humanitarian Intervention in Libya’](#), *Valparaiso University Law Review*, 2012, Vol. 46, pp. 859-892 (VanLandingham 2012).

“maintain international peace and security ... in conformity with the principles of justice and international law”. Moreover, some scholars refer to the Lockerbie case of the International Court of Justice (ICJ) to argue that Security Council Resolutions are submitted to judicial scrutiny.⁵ Others dispute this, probably resulting from disagreement on the ICJ bench.⁶ Nevertheless, also the International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed in the Tadić case that the Security Council has to act in accordance with international law.⁷ Therefore, one could maintain that the lawfulness of Security Council Resolutions depends on compliance with international law.

And indeed, there are arguably a number of problematic aspects when looking at SCRS 1973's conformity with international law. First, there is the question whether the situation in Libya really endangered international peace and security. As has been pointed out by many academics, there was a non-international armed conflict between Gadhafi's regime and rebel forces, which did not affect other countries.⁸ According to VanLandingham there is growing international consensus that a domestic conflict can also constitute a threat to international peace and security, which is confirmed by the Libyan intervention.⁹ Other scholars argue that a conflict has to involve at least two countries in order to constitute a threat to international peace and security in accordance with (the original intention of) the provisions of the UN Charter safeguarding state sovereignty.¹⁰ Accordingly, it could be argued that the Libyan conflict should not have been designated as a threat to international peace and security, which formed the basis for action under Chapter VII.¹¹

Secondly, the Resolution enabled Member States to take all necessary measures to protect civilians, including the use of force, whilst not all other means were exhausted. According to the UN Charter, the use of force should only be applied as a matter of last resort.¹² Other means to solve the conflict, including different types of sanctions like an

⁵ R. McLaughlin, [‘The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising ‘All Necessary Means’](#)’, *JCSL*, 2007, Vol. 12, pp. 389-417 (McLaughlin 2007); J.M. Lehmann, [‘All Necessary Means to Protect Civilians: What the Intervention in Libya Says about the Relationship between the Jus in Bello and the Jus ad Bellum’](#), *JCSL*, 2012, Vol. 17(1), pp. 117-146 (Lehmann 2012); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, Provisional Measures (Libya v. UK), ICJ Reports 1992, 3, 114.

⁶ A. Paulus, [‘Second Thoughts on the Crime of Aggression’](#), *EJIL*, 2009, Vol. 20(4), pp. 1117-1128 (Paulus 2009); R. Falk, [‘Preliminary Libyan Scorecard: Acting Beyond the UN Mandate’](#), *Global Justice in the 21st Century*, 6 September 2011 (Falk 2011).

⁷ ICTY Appeals Chamber, Decision on Jurisdiction, [Prosecutor v. Dusko Tadić](#), IT-94-1-A, 2 October 1995.

⁸ L. Moderne, [‘The Libya Humanitarian Intervention: Is It Lawful In International Law’](#), 2011 (Moderne 2011); A.J. Kuperman, ‘A Model Humanitarian Intervention?: Reassessing NATO's Libya Campaign’, *International Security*, 2013, Vol. 38(1), pp. 105-136. (Kuperman 2013); Lehmann 2012.

⁹ VanLandingham 2012.

¹⁰ *Supra* note 8. See also Art. 2 UN Charter.

¹¹ Moderne 2011.

¹² *Supra* note 3; R.D. Sloane, [‘The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War’](#), *Yale Journal of International Law*, 2009, Vol. 34, pp. 47-112 (Sloane 2009).

arms embargo, travel ban and assets freeze, were part of previous resolutions and SCRS 1973, but the effect of this was not awaited before military action was authorised.¹³

Lastly, SCRS 1973 contained reference to the protection of civilians, and leaders of NATO countries have also invoked this to justify the Libya intervention.¹⁴ There is disagreement, however, about the question if, and to what extent, protection of civilians was a ground for the Resolution.¹⁵ This is also related to the contentious issue if this can be invoked at all as a lawful ground for intervention – the spurious debate about concepts as ‘humanitarian intervention’ and the successive ‘Responsibility to Protect’ (‘R2P’).¹⁶ The central question is whether the sovereignty of a state can be breached when its leadership threatens the lives of its citizens in order to protect these citizens. Over the last decade there has been a trend among academics and policymakers to give an affirmative answer to this question.¹⁷

If one were to accept that ‘R2P’ is a lawful ground for intervention as a norm of customary international law, it is important to test whether SCRS 1973 is in agreement with this norm. In this regard it is imperative to refer to the six principles of the International Commission on Intervention and State Sovereignty, which need to be fulfilled in order to justify intervention: just cause, right intention, last resort, proportional means, reasonable prospects and proper authority.¹⁸ The last requirement could be seen as fulfilled with respect to the Libya resolution, as the Security Council authorised the intervention in accordance with Chapter VII of the UN Charter. But with respect to the other conditions for ‘R2P’, as already signalled there is at least considerable contention whether these were fulfilled in the situation of Libya.¹⁹ The military intervention has been considered as unjust, as the goal would have been to topple the Gadhafi regime; its effect would have been a protracted conflict involving even more suffering; other means to solve the conflict (more) peacefully were not exhausted; and the prospects for a peaceful resolution of the conflict by military means were lacking.²⁰ Thus, even if ‘R2P’ were to be accepted as a lawful ground for intervention authorised by the Security Council, it could be argued that the factual situation in Libya at the time would not qualify to lawfully invoke ‘R2P’.

¹³ *Supra* note 8.

¹⁴ A. Hehir, ‘[The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect](#)’, *International Security*, 2013, Vol. 38(1), pp. 137-159 (Hehir 2013); Kuperman 2013; R. Tarnogórski, ‘[Libya and Syria: Responsibility to Protect at a Crossroads](#)’, *The Polish Institute of International Affairs*, November 2012; VanLandingham 2012; C. Stahn, ‘[Syria and the Semantics of Intervention, Aggression and Punishment](#)’, *EJIL*, September 2013 (Stahn 2013).

¹⁵ *Id.*

¹⁶ On this debate see *Id.*; and ICRtoP, ‘[Paragraphs 138-139 of the World Summit Outcome Document](#)’.

¹⁷ *Id.*

¹⁸ ICISS, ‘[The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty](#)’, 2001.

¹⁹ *Supra* note 14; see Lehmann 2012 on the problems concerning the proportionality assessment.

²⁰ *Id.*

Therefore, one can defend the position that even though the Security Council authorised intervention in Libya, SCRS 1973 is unlawful under international law. With respect to the consequences of this position in relation to the crime of aggression, the content of the crime of aggression has to be established first.

III. THE CRIME OF AGGRESSION

At the time of its adoption in Rome in 1998, the ICC or Rome Statute (RS) did in fact contain the crime of aggression. However, only after the Review Conference in Kampala in 2010, there was a compromise on a definition of this crime.²¹ From 2017, when 30 countries ratify the amendment on the crime of aggression, the ICC will be able to actually try this crime. There are still many hurdles to take, but there is a real chance that the ICC will look into situations where aggression has taken place. As explained before, this will not be possible for the current ICC examination of the situation in Libya, due to prohibition of retroactivity, but from a more theoretical perspective, it is nevertheless interesting to see whether NATO's intervention in Libya could in principle be seen as a crime of aggression that could be prosecuted by the ICC. Before going into this case, it is important to give a brief overview of the content of the crime of aggression.

In essence, the crime of aggression (Art. 8bis (1) RS) involves a person in a position effectively to exercise control over or to direct the political or military action of a State, who was involved in the planning, preparation, initiation or execution of a State act of aggression, which is in accordance with GA Resolution 3314 and constitutes by its character, gravity and scale, a manifest violation of the UN Charter. An act of aggression (Art. 8bis (2) RS) is "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other matter inconsistent with

²¹ On the crime of aggression see D. Akande, ['What Exactly was Agreed in Kampala on the Crime of Aggression?'](#), *EJIL Talk*, 21 June 2010 (Akande 2010); K. Ambos, ['The Crime of Aggression after Kampala'](#), *German Yearbook of International Law* 53, 2010, pp. 463-509 (Ambos 2012); A.T. Boas, ['The Definition of the Crime of Aggression and its Relevance for Contemporary Armed Conflict'](#), *ICD Brief 1*, June 2013 (Boas 2013); M. Glennon, ['The Blank-Prose Crime of Aggression'](#), *Yale Journal of International Law*, 2010, Vol. 35, pp. 71-115 (Glennon 2010); International Crimes Database, ['Crime of Aggression'](#), 2013 (ICD 2013); C. Kress, ['Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression'](#), *EJIL*, 2009, Vol. 20(4), pp. 1129-1146 (Kress 2009); C. Kress & L. von Holtzendorff, ['The Kampala Compromise on the Crime of Aggression'](#), *JICJ*, 2010, Vol. 8, pp. 1179-1217 (Kress & Von Holtzendorff 2010); T. Lavers, ['Aggression, Intervention and Powerful States: Missed lessons from Feminist Methodologies on Peace and Security Issues'](#), *Amsterdam Law Forum*, 2013, Vol. 5(2), pp. 122-138 (Lavers 2013); M. Milanovic, ['Aggression and Legality'](#), *JICJ*, 2012, Vol. 10, pp. 165-187 (Milanovic 2012); S.D. Murphy, ['The Crime of Aggression at the ICC'](#), *Legal Studies Research Paper 2012*, Vol. 50 (Murphy 2012); S.D. Murphy, ['Aggression, Legitimacy and the International Criminal Court'](#), *EJIL*, 2009, Vol. 20(4), pp. 1147-1156 (Murphy 2009); Paulus 2009; M. Politi, ['The ICC and the Crime of Aggression'](#), *JICJ*, 2012, Vol. 10, pp. 267-288; D. Scheffer, ['The Complex Crime of Aggression under the Rome Statute'](#), *LJIL*, 2010, Vol. 23, pp. 897-904 (Scheffer 2010); Sloane 2009; The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, ['Handbook Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC'](#), 2013 (Global Campaign 2013).

the Charter of the United Nations.” Seven types of acts are listed as exemplary acts of aggression, which are in fact violations of Art. 2(4) UN Charter, and possibly all acts which GA Resolution 3314 qualifies as an act of aggression. The word “possibly” is used here, as there is still uncertainty on the exact scope and understanding of an act of aggression.²²

There is also uncertainty concerning ‘a manifest violation of the UN Charter’.²³ The attached understandings in the adopted Resolution in Kampala are incoherent and do not have legal effect.²⁴ Thus, it depends on the practice at the ICC after 2017 how the crime of aggression will be interpreted exactly. For now, only scenarios of interpretation of the crime of aggression can be sketched.

Regarding the interpretation of ‘a manifest violation of the UN Charter’, there are different options one could look at. Though an objective qualification,²⁵ it depends on concepts open for interpretation, such as ‘character’, ‘gravity’ and ‘scale’.²⁶ One could interpret this as unlawful use of force involving coercion of a very high level, or when conduct is widely regarded as clearly or obviously unlawful. Another option is that less coercive and less obviously unlawful use of force is also covered, only excluding minor incidents. As there is disagreement about the lawfulness of the use of force with respect to ‘Libya’, only the latter option would possibly bring the situation of Libya within the ambit of the crime of aggression with reference to the signalled legality problems of the intervention.²⁷

With respect to the mental element (*mens rea*) that needs to be met in order to qualify as a crime of aggression, there is no requirement of a legal evaluation with respect to whether the use of armed force was inconsistent with the UN Charter, and whether this violation was manifest.²⁸ The person has to be aware of the factual circumstances that established that such use of force was inconsistent with and such a manifest violation of the UN Charter. These requirements with respect to intent and knowledge are coherent with Articles 30-33 Rome Statute concerning the mental element. There is no requirement of a specific collective intent, related to the invasion of another country, which has been suggested.²⁹

As for the situation of Libya it is clear that a similar Security Council referral in the future could also comprise an act or a crime of aggression. Therefore, the brief will

²² Sloane 2009; Paulus 2009; Murphy 2009; Murphy 2012.

²³ Kress & von Holtendorff 2010; Murphy 2009; Paulus 2009; Akande 2010; Milanovic 2012; Scheffer 2010; Murphy 2012; Glennon 2010.

²⁴ Global Campaign 2013; Scheffer 2010.

²⁵ International Criminal Court (ICC), [Elements of Crimes](#), Art. 8*bis*, Introduction, para. 3, 2011.

²⁶ Murphy 2009; Paulus 2009; Stahn 2013; Murphy 2012.

²⁷ Murphy 2012.

²⁸ International Criminal Court (ICC), [Elements of Crimes](#), Art. 8*bis*, Introduction, paras. 2, 4, 2011.

²⁹ Milanovic 2012; Ambos 2010; C. Stahn, ‘[Libya, the International Criminal Court and Complementarity, A Test for Shared Responsibility](#)’, *JICJ*, 2012, Vol. 10, pp. 325-349 (Stahn 2012).

hereafter analyse whether SCRS 1973 and its execution could qualify as a crime of aggression.

IV. SCRS 1973 AND ITS EXECUTION: A CRIME OF AGGRESSION

Before considering whether SCRS 1973 and its execution qualify as a crime of aggression it is important to look at the lawfulness of Security Council resolutions in relation to the crime of aggression. As observed earlier one can reason legalistically that Security Council resolutions are lawful per definition, as the UN Charter grants the Security Council power to order resolutions. But if one assesses the lawfulness of resolutions along substantive norms of international law, it is also possible to conclude that resolutions might be unlawful. After all, the UN Charter prohibits unlawful use of force, arguably also when flowing from Security Council resolutions.

As concluded, a violation of the UN Charter's prohibition on the use of force could amount to an act of aggression. Depending on the manifest nature of the violation one can also come to a determination of a crime of aggression. The execution of the Resolution should also be taken into account to determine this in retrospect as will also be clarified. Whether this could be true for SCRS 1973 and its execution will be examined below.

Since Resolution 1973 aimed to restore international peace and security in Libya, including protection of civilians, by means of a 'no fly zone', enforcement of the arms embargo, ban on flights and asset freeze of designated persons, except an occupation force, there appears to be no indication of an act of aggression. But as established this Resolution could well be considered an authorisation of unlawful use of force. Thereto the execution of the Resolution should also be taken into account.

Accordingly, when regarding the behaviour of interventionist powers in Libya (Operation Odyssey Dawn and Operation Unified Protector), NATO and the Arab League, there are many reports indicating transgression of the boundaries of SCRS 1973.³⁰ These reports indicate that the intervening forces wanted to oust Gadhafi's regime.³¹ As regime change was not part of the Resolution and according to one point of view not necessary to protect civilians and restore international peace and security, this can be seen as unlawful use of force. Additionally, violations of international humanitarian law by intervening powers could account for this conclusion.³² Admittedly, taking violations of the laws of war during the execution of SCRS 1973 into account when judging the Resolution is controversial, as this is in fact a conflation of *jus ad bellum* and *jus in bello*. However, there

³⁰ Falk 2011; Kuperman 2013; Stahn 2012; UN, A/HRC/19/68, International Commission of Inquiry Report, paras. 228, 235; ICC, Second Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1970 (2011), para. 55.

³¹ *Id.*

³² Lehmann 2012.

is disagreement among academics on whether to maintain the traditional strict division between the law of going to war (*jus ad bellum*) and the laws of war (*jus in bello*).³³ Usually this debate focuses on the question whether unlawful resort to war may be taken into account when judging behaviour of parties at war. Here, the question is whether violations of humanitarian law can add meaning to the determination of the lawfulness of the war itself. A more recent position taken by some scholars is that the dualistic axiom on *jus in bello* and *jus ad bellum* should be departed. According to this position the behaviour of parties at war should be taken into account when judging the lawfulness of the war itself. This implies that a war cannot be lawfully fought if a party (severely) transgresses the limits of the laws of war. The lawfulness of the war itself and of behaviour at war are conflated, causing distress with scholars who insist for good reasons (mainly involving the clarity of legal evaluation) on separating these domains. Both positions can be defended on the basis of reasonable arguments, although the more dualistic position is still generally adhered to.³⁴

Following the position of conflating the *jus ad bellum* and *jus in bello* regimes, the behaviour of intervening powers in Libya can be taken into account when ruling on the lawfulness of the war.³⁵ With reference to reports on violations of the laws of war, there is additional ground to consider SCRS 1973 unlawful.³⁶ The fact that intervening powers illegally helped rebels in Libya is an additional factor in this regard.³⁷

After establishing an act of aggression by the intervening states, individual criminal responsibility of the leaders of these states would have to be attributed. This would include the mental element. Thereto the Prosecutor would have to prove awareness of the factual circumstances that established that such use of force was inconsistent with and such a manifest violation of the UN Charter.³⁸ The fact that the leaders of the intervening countries publicly mentioned humanitarian motives for their invasion in Libya, does not influence the evaluation of the *mens rea* requirement.

V. CONCLUSION

After considering the grounds for unlawfulness of SCRS 1973, also in relation to its execution, ground has been established to possibly qualify this as an act of aggression.

³³ *Id.*; A. Roberts, 'The Equal Application of the Laws of War: A Principle under Pressure', *IRRC*, 2008, Vol. 90, pp. 931-962; A. Orakhelashvili, 'Overlap and Convergence: The Interaction between *Jus ad Bellum* and *Jus in Bello*', *JCSL*, 2007, Vol. 12, pp. 157-196; Sloane 2009; F. Mégret, 'Jus in Bello and Jus ad Bellum' (Proceedings of the Annual Meeting), *American Society of International Law*, 29 March – 1 April 2006, Vol. 100, pp. 121-123 (Mégret 2006).

³⁴ *Id.*

³⁵ Lehmann 2012.

³⁶ Kuperman 2013.

³⁷ International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. US) ICJ Reports 1986, 14.

³⁸ Milanovic 2012; Ambos 2010; Stahn 2012.

Depending on the standard chosen for 'manifest violation of the UN Charter' this could also qualify as a crime of aggression. This would lead to the conclusion that it might be legally possible to qualify the intervention in Libya as a crime of aggression.