

## **The Status and Future of International Law after the Libya Intervention**

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## Abstract

This article uses the case of the Libya intervention to address three general claims about international law. Firstly, it examines whether the reliance of the intervention on the mechanisms of collective security under the UN Charter suggests that international law relating to peace and security has finally overcome its post-9/11 crisis. It concludes that the resolution's vague wording – which makes the distinction between what is “legal” under the resolution, and what is not, hard to draw – undermines such an assumption. Secondly, it explores whether the Libya intervention has put new emphasis on what has been termed the “emerging right of democratic governance”. In spite of the underlying democracy-enhancing spirit of the execution of the intervention, Resolution 1973 was exclusively written in the language of human rights. It did little to indicate a changed attitude of States towards a norm of democratic governance. Finally, the article examines whether the case of Libya shows a renewed international attitude towards States which violate the most fundamental human rights of their citizens. The article concludes by suggesting that, in this third respect, a more muscular liberalism is indeed on the rise again in international law, challenging the formerly almighty concept of State sovereignty. In contributing to this subtle transformation, the Libyan case has made a genuine contribution to the development of the international legal order.

## A. Introduction

In a speech in Cairo in 2009, US President Barack Obama stated: “No system of government can or should be imposed upon one nation by another. [...] America does not presume to know what is best for everyone”.<sup>1</sup> Two years later, in April 2011, that same president, alongside his French and British colleagues, changed course. Commenting on the situation in Libya, President Obama insisted that only after regime change in Libya could “a genuine transition from dictatorship to an inclusive constitutional process [...] really begin” and that “in order for that transition to succeed, Colonel Gaddafi must go, and go for good”.<sup>2</sup>

<sup>1</sup> Obama's Speech in Cairo', *The New York Times* (4 June 2009).

<sup>2</sup> B. Obama, D. Cameron & N. Sarkozy, 'Libya's Pathway to Peace', *The New York Times* (14 April 2011).

The purpose of contrasting the two accounts above is not to criticise the inconsistency of the American government. Instead, it is to note that the parameters of international politics have dramatically shifted over the course of the preceding months. Not only the Arab world, but the wider community of nations, has been shaken by the 2011 popular uprisings in Northern Africa and in the Middle East. Democracy seemed to forge its way in places where democracy seemed unthinkable just a few years, or even months, before. The world marvelled at revolutions that in a domino-effect seemed to overturn one autocratic dictatorship after the other. This development, however, came to a sudden halt when one domino for a long time refused to fall: Colonel al-Gaddafi stood firm, leaving the international community in no doubt that he would not, under any circumstances, step down.

With this democratic wind beneath their wings, Western fighter jets, acting on a UN mandate, started to bomb the State of Libya, carrying out what is called an intervention on humanitarian and human rights grounds. However, in the weeks after the first air strike by this Western coalition, the humanitarian grounds as laid down in Resolutions 1970 and 1973,<sup>3</sup> which had originally justified the intervention, seemed quickly forgotten and were merged with wider commitments. The initial aim of the intervention – the protection of civilians – and its underlying aim as subsequently phrased by the UK, France and the US – regime change – were conflicting at best, irreconcilable at worst. By intervening in Libya the way it did, the international community has also re-ignited the fervent discussion on a right to democratic governance<sup>4</sup> and the idea of liberal interventionism<sup>5</sup> in international law.

Much has been said in countless op-eds, editorials and articles on the Libya intervention - on its moral imperatives and shortcomings, and its meaning for peace and security.<sup>6</sup> While these are all praiseworthy and

<sup>3</sup> SC Res. 1970, 26 February 2011; SC Res. 1973, 17 March 2011.

<sup>4</sup> Groundbreaking on this topic, T. M. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992) 1, 46-91.

<sup>5</sup> Already pointing in that direction since the 1980s and 1990s, W. M. Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)', 78 *The American Journal of International Law* (1984) 3, 642, 645; A. D'Amato, 'The Invasion of Panama was a Lawful Response to Tyranny', 84 *The American Journal of International Law* (1990) 2, 516-524; F. R. Tésou, 'Collective Humanitarian Intervention', 17 *Michigan Journal of International Law* (1996) 2, 323-371 [Tésou, *Michigan Journal of International Law*].

<sup>6</sup> Some of the most captivating contributions include M. Dowd, 'In Search of Monsters', *The New York Times* (12 March 2011); J. M. Fly, 'Libya is a problem from

important contributions, this article turns its attention to quite another question: it uses the Libya example to consider the current state of international law. The focus is thus converse to the usual one: the article does not ask what international law has to say about the Libya intervention; rather it asks what the Libya intervention has to say about international law.

After an examination of the most remarkable elements of Resolution 1973, the article addresses three far-reaching and, in some cases, contentious claims about international law. Firstly, the essay raises a rather general question: does the case of the Libyan intervention demonstrate a resurgence of international law? Given the reliance of the North Atlantic Treaty Organization (NATO) intervention on the mechanisms of collective security laid down in the UN Charter, is international law “after Libya” shining in renewed splendour? Such a thesis would suggest that the deep and prolonged identity crisis caused by the 2001 attacks on the World Trade Center has finally been overcome. The article concludes, however, that such an assumption would be premature, if not foolish. With a wording as spongy and vague as that of Resolution 1973, it is hardly possible to judge whether the intervention in all its forms was “within”, on the edges, or even outside of international law. The case of Libya thus represents more of a small success for international law than its glorious comeback.

The article, secondly, examines whether the developments surrounding the Libya intervention have led international law in a more democratic direction. Does the case of Libya emphasize an emergent norm of democratic governance? The article shows, however, that the case of Libya – in spite of its underlying democracy-enhancing spirit – cannot tip the scales in favour of such a norm: Resolution 1973 is clearly written in the spirit of an intervention to prevent gross human rights violations, not one

hell’, *Foreign Policy* (16 March 2011); L. Vinogradoff, ‘L’intervention en Libye critiquée sur le fond et sur la forme’, *Le Monde* (26 March 2011); N. Mills, ‘The power behind Obama’s Libyan intervention’, *The Guardian* (8 May 2011); R. Merkel, ‘Die Militärintervention gegen Gaddafi ist illegitim’, *Frankfurter Allgemeine Zeitung* (22 March 2011); C. Tomuschat, ‘Wenn Gaddafi mit blutiger Rache droht’, *Frankfurter Allgemeine Zeitung* (23 March 2011); R. Geiß & M. Kashgar, ‘UN Maßnahmen gegen Libyen: Eine völkerrechtliche Betrachtung’, *Vereinte Nationen* (2011) 3, 99-104; M. Payandeh, ‘The United Nations, Military Intervention, and Regime Change in Libya’, 52 *Virginia Journal of International Law* (2012) 2, 355-403 [Payandeh, *Virginia Journal of International Law*]; M. Payandeh ‘Die Militärintervention in Libyen zwischen Legalität und Legitimität’, 87 *Die Friedenswarte* (2012) 1, 59-84 (forthcoming; on file with author) [Payandeh, *Friedenswarte*].

which attempts to enforce the democratic rights of the Libyan people (even if this was the conflict's eventual outcome).

Thirdly, does the Libya intervention illustrate how – in international law – it is always a case of “*plus ça change, plus c’est la même chose*”; that the more things change, the more they stay the same? The article suggests the opposite: the case of Libya has shaken two of the most fundamental principles of international law to their core: the concepts of State sovereignty and international liberalism.<sup>7</sup> The traditional, rather liberal, understanding of the international legal framework assumes that State sovereignty only requires a sovereign State to hold an effective and independent government within its territory. The case of Libya, however, shows again that this is not always the case. Where States have proven their preparedness to systematically violate their citizens’ human rights, the international community is less prepared to accept them on equal grounds. A more muscular liberalism that challenges the formerly almighty concept of State sovereignty is on the rise. It is in the observance of this development that the intervention in Libya finds its true legal meaning.

## B. The Course of the Democratic Revolutions in the Arab World

In December 2010, a cascading and historic series of events in the Arab world was sparked in a small city near Tunis, where a young street vendor publicly set himself on fire, protesting against public harassment.<sup>8</sup> In the following weeks, Tunisia was flooded by a wave of street protests against democratic suppression, high unemployment and State corruption. Just a few weeks later, the Tunisian people had forced the downfall of their authoritarian president Zine el-Abidine Ben Ali: a president who had reigned over their country with an iron fist for more than 20 years. The “Jasmine Revolution”,<sup>9</sup> which had just sparked, had quickly claimed its first

<sup>7</sup> The notion of “liberalism” in international law is subject to controversial debate. For the purposes of this article I do not consider it necessary to engage with these debates in depth. I will restrict myself to introducing two conceptions of liberalism as it relates to international law, see under section D.III. of this article.

<sup>8</sup> Without mention of author, ‘How a fruit seller caused a revolution in Tunisia’, *CNN* (16 January 2011); Y. Ryan, ‘How Tunisia’s revolution began’, *Al Jazeera* (26 January 2011).

<sup>9</sup> Writer Z. E. Hani gave the movement the name of Tunisia’s national flower, Jasmine; see F. Frangeul, ‘D’où vient la “révolution du jasmine”’, *Europe 1* (17 January

scalp. The “democratic virus” rapidly spread by contagion to nearby Egypt. By the end of January 2011, thousands of Egyptians protested with marches on the streets and labour strikes against rigged elections, police brutality, uncontrollable corruption and their lack of civil and political rights.<sup>10</sup> In the course of only a few weeks, the democratic uprising had grown to include millions of Egyptians from across the country<sup>11</sup> – bringing demands that Mubarak’s authoritarian reign of 30 years be brought to an immediate end. Compared to Tunisia, the protests in Egypt received more State resistance, with reportedly 850 people killed and more than 6000 injured,<sup>12</sup> and fights continuing until the summer of 2011.<sup>13</sup> Nevertheless, as the external pressure grew, and internal support further disintegrated, President Hosni Mubarak had no choice but to resign from office, handing over power to the military until new elections could be held.

This “domino effect” did not, as we know, end in Egypt. Protests in Yemen, Bahrain and notably Syria soon followed.<sup>14</sup> Democracy’s great triumphs in Tunisia and Egypt led some observers to announce the end of the age of autocracies in the Middle East:<sup>15</sup> democracy had finally taken

2011); and without mention of author, “‘Révolution du jasmine’: une expression qui ne fait pas l’unanimité”, *Le Monde* (17 January 2011).

<sup>10</sup> K. Fahim & M. El-Naggar, ‘Violent Clashes Mark Protests Against Mubarak’s Rule’, *The New York Times* (25 January 2011); R. Hermann, ‘Revolution nach Plan’, *Frankfurter Allgemeine Zeitung* (15 February 2011).

<sup>11</sup> Without mention of author, ‘Egypt News Today: Protesters Prepare For “March of A Million People”’, *The Huffington Post* (1 February 2011).

<sup>12</sup> Office of the UN High Commissioner for Human Rights (OHCHR), ‘Report of the OHCHR Mission to Egypt 27 March – 4 April 2011’, 10 June 2011, para. 11, available at [http://www.ohchr.org/Documents/Countries/EG/OHCHR\\_MissiontoEgyp27March\\_4April.pdf](http://www.ohchr.org/Documents/Countries/EG/OHCHR_MissiontoEgyp27March_4April.pdf) (last visited 22 April 2012).

<sup>13</sup> A. Dietrich, ‘Die arabische Revolution stockt’, *Die Welt* (27 May 2011); I. Gilmore, ‘Egypt erupts into new violence as dozens injured during Cairo protest’, *The Guardian* (24 July 2011).

<sup>14</sup> S. Raghavan, ‘Inspired by Tunisia and Egypt, Yemen is joining in anti-government protests’, *The Washington Post* (27 January 2011); without mention of author, ‘Thousands march in Syria, as fresh wave of protests erupts’, *The Telegraph* (21 March 2011); M. Chulov, ‘Bahrain protests: “The regime must fall, and we will make sure, it does”’, *The Guardian* (18 February 2011).

<sup>15</sup> See, for instance, Germany’s Minister of Foreign Affairs G. Westerwelle, ‘Tunisia – now is the time to lay the foundations for a stable democracy’ (speech of 27 January 2011) available at <http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Reden/2011/110127-BM-BT-Tunesien.html?nn=424204> (last visited 22 April 2012); for a voice from the media, see J. Rubin, ‘After the Jasmine Revolution in Tunisia’, *The Washington Post* (16 January 2011).

route, not through external coercion but through the will of the Arab citizens themselves. History, it seemed, was on the march.

The democratic enthusiasm, however, suffered a violent setback, when the revolution spilled over to another neighbour: Libya. The dreams dreamt during the peaceful revolutions in Tunisia and Egypt rapidly turned into ugly nightmares in the face of Colonel Muammar al-Gaddafi: the dictator was willing to fight the rebels back, through all necessary means.

In the course of the following weeks, these means became increasingly hard for the West to ignore, with mercenaries being drafted in from neighbouring countries and soldiers being widely reported to engage in torture, murder, rape and the use of cluster bombs against civilians.<sup>16</sup> Despite repeated calls for military assistance, the international community engaged in a lengthy period of collective foot-dragging – in particular with regard to a “no-fly-zone”.<sup>17</sup> The adoption of Resolution 1970, imposing sanctions against the Gaddafi regime including the freezing of bank accounts, a weapons-embargo, and a travel ban for the entire Gaddafi clan,<sup>18</sup> did little, if anything at all, to resolve the crisis.

The situation was aggravated on the night of the 17<sup>th</sup> of March 2011. Gaddafi’s troops stood dangerously close to conquering the last remaining rebel stronghold, the city of Benghazi. As Gaddafi laid bare his chilling plans to unleash mass killings on those who opposed him,<sup>19</sup> public demand that something be done to avert imminent bloodshed in Benghazi reached its peak. Backed by the support of the Arab League,<sup>20</sup> UK Prime Minister David Cameron and French President Nicolas Sarkozy convened an emergency meeting in the UN, seeking a resolution under Chapter VII of the

<sup>16</sup> C. J. Chivers, ‘Captive Soldiers Tell of Discord in Libyan Army’, *The New York Times* (13 May 2011); without mention of author, ‘After Libyan Woman’s Rape claims, methods of Gaddafi government put on display’, *The Washington Post* (26 March 2011); H. Sherwood, ‘NATO must send in troops to save Misrata, say rebels’, *The Guardian* (16 April 2011).

<sup>17</sup> See for instance J. M. Broder, ‘U.S. and Allies Weigh Libya No-Fly Zone’, *The New York Times* (27 February 2011); J. Kerry, ‘A No-Fly Zone for Libya’, *The Washington Post* (13 March 2011).

<sup>18</sup> SC Res. 1970, 26 February 2011, paras 9-10, 15, 17.

<sup>19</sup> K. Kirkpatrick & D. D. Fahim, ‘Qaddafi Warns of Assault on Benghazi as U.N. Vote Nears’, *The New York Times* (17 March 2011); T. Heneghan, ‘Gaddafi Tells Rebel City, Benghazi, “We Will Show No Mercy”’, *The Huffington Post* (17 March 2011).

<sup>20</sup> R. Leiby & M. Mansour, ‘Arab League asks U.N. for no-fly zone over Libya’, *The Washington Post* (12 March 2011); E. Bronner & D. E. Sanger, ‘Arab League Endorses No-Flight Zone Over Libya’, *The New York Times* (12 March 2011).

UN Charter. In a last-ditch triumph of diplomacy, Resolution 1973 was adopted by the Security Council – with China, Russia, Brazil, India and Germany abstaining.<sup>21</sup> Immediately after the resolution, the French-Anglo coalition started the bombardment of Gaddafi's troops, later on joined – as a matter of necessity as well as desire – by other NATO forces such as the US.<sup>22</sup>

Yet, in the weeks following, the bombing campaign seemed only to establish a bloody stalemate. On the one hand, small in number and without advanced weapons, the rebels seemed to be no match for Gaddafi's soldiers and mercenaries – and were hence unable to march on Tripoli; on the other, Gaddafi's armies – held back by the Western coalition's military bombardment – seemed to be unable to wipe out the rebellion in Benghazi and elsewhere. A catch-22 situation without any obvious escape route was set in stone for a long time. Only by the end of August, almost six months after the intervention had started, did the rebels win the upper hand, marching on Tripoli, storming Gaddafi's fortified compound and calling for new elections. The culmination of these efforts was the bloody assassination of Muammar al-Gaddafi himself, in the full view of the world's media.

### C. Resolution 1973 – Observations and Critique

The cornerstone of the Libyan intervention was Resolution 1973. Given that the main aim of the following sections is to consider the impact the Libyan conflict may have had on the current condition of international law, a legal analysis of the resolution itself is an important first step. As will be argued below, three important observations flow from the resolution's agreement – first, the very broad language employed in the resolution, second, the mismatch of the intervention's rationale expressed in the text of the resolution as opposed to the one which shone through its execution, and

<sup>21</sup> Press Release, Security Council, 'Security Council approves "No Fly Zone" over Libya, Authorizing "All Necessary Means" to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions', U.N. Press Release SC/10200, 17 March 2011, available at <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm> (last visited 22 April 2012).

<sup>22</sup> NATO, 'NATO and Libya - Operation Unified Protector' (13 January 2012) available at [www.nato.int/cps/en/SID-3B3D9776-8831BA53/natolive/topics\\_71652.htm?](http://www.nato.int/cps/en/SID-3B3D9776-8831BA53/natolive/topics_71652.htm?) (last visited 22 April 2012); on more recent NATO bombardments, see S. Denyer, 'Silence in Tripoli after day-long NATO bombardment', *The Washington Post* (8 June 2011).

third, the historic first time use of the responsibility to protect as an underlying concept for action taken under Chapter VII of the UN Charter.

### I. The Resolution's Starting Points: "Threat to Peace" and "All Necessary Measures"

Most importantly, in Resolution 1973 the Security Council condemned the actions of the Gaddafi regime as constituting a "threat to international peace and security".<sup>23</sup> In making a 'threat to international peace and security' out of what started rather clearly as an internal State conflict,<sup>24</sup> the Council extended the language of Art. 39 of the UN Charter considerably. Such a broad interpretation of a threat to peace and security is not easily in compliance with the way the collective security system was initially meant to function:<sup>25</sup> to eliminate cross border aggression and threats to regional security interests.

Nonetheless, the Libya intervention is nothing new in that respect. Already by the 1990s, after its paralysis during the Cold War, the Security Council had single-handedly extended its mandate audaciously. In various interventions – for instance in Iraq, Somalia and Haiti – determinations of a "threat to peace and security" under Article 39 of the UN Charter were also read very expansively to include internal humanitarian crises without any credible threat to the security of surrounding States.<sup>26</sup> As a consequence, some scholars indicated their doubt as to the seemingly limitless powers of the Council to auto-determine its own competence over issues of peace and security.<sup>27</sup> While Chapter VII of the UN Charter had always provided the Security Council with a flexible interpretative competence<sup>28</sup> to identify a

<sup>23</sup> SC Res. 1973, 17 March 2011, 22<sup>nd</sup> consideration of the preamble.

<sup>24</sup> H. J. Heintze, 'Anwendung des humanitären Völkerrechts in Libyen? – UN-Sicherheitsrat lässt die Frage offen', *Bofaxe: Short Commentaries on International Humanitarian Law* (Bofaxe) (2011) No. 369D; D. Banaszewska & R. Frau, 'Volle Breitseite – VN-Sicherheitsratsresolution 1970 zur Lage in Libyen', *Bofaxe* (2011) No. 371D.

<sup>25</sup> H. Fischer, 'Kollektive Sicherheit und Verteidigungsbündnisse', in K. Ipsen (ed.), *Völkerrecht*, 5th ed. (2005), 1007, 1111.

<sup>26</sup> SC Res. 688, 5 April 1991, 3<sup>rd</sup> consideration of the preamble; SC Res. 794, 3 December 1992, 3<sup>rd</sup> consideration of the preamble; SC Res. 940, 31 July 1994, 10<sup>th</sup> consideration of the preamble.

<sup>27</sup> J. A. Frowein, 'Article 39', in B. Simma (ed.), *The Charter of the United Nations – A Commentary* (2002), Art. 39, paras 7, 18-20.

<sup>28</sup> Fischer, *supra* note 25.

threat to international peace and security, even the minimal requirement to demonstrate such an effect outside the borders of a particular State seems to be steadily eroded.

Thus, even if arguably the conditions for a Chapter VII resolution were present,<sup>29</sup> it would have been preferable if the Security Council had found a few more words or explanations with regard to the reasons why the situation in Libya had an international dimension. The Council only briefly mentioned in the preamble trans-border refugees<sup>30</sup> and human rights,<sup>31</sup> the latter being assumed to be obligations “*erga omnes*” and thus having *per se* an international dimension.<sup>32</sup> This is a truly sub-par effort to demonstrate a trans-border effect.

Alongside the very generous subsumption of the situation in Libya under the term of a “threat to peace and security”, the resolution also employed remarkably open-ended language in reference to its legal consequences. It was very indistinct and “extraordinarily wide”<sup>33</sup> in determining which actions it permitted: it authorized “all necessary measures [...] to protect civilians and civilian populated areas under threat of attack”. It was in this way similar to other resolutions, for instance Resolution 678, with which the Council authorized “all necessary means” in Iraq in 1990.<sup>34</sup> The plain text of the resolution ruled out only one thing in absolute terms, “any foreign occupation force of any kind”.<sup>35</sup>

The haphazard circumstances under which the resolution was adopted – negotiated in the twilight hour in the face of a humanitarian disaster in Benghazi – created a regrettable example of diplomatic “fudging”. The wording reflects a trade-off between States like Britain and France, who

<sup>29</sup> See for instance Geiß & Kashgar, *supra* note 6, 99, who conclude that it is “without doubt” that the Security Council was allowed to intervene; also see Payandeh, Friedenswarte, *supra* note 6, 72.

<sup>30</sup> SC Res. 1973, 17 March 2011, 16<sup>th</sup> consideration of the preamble.

<sup>31</sup> *Id.*, at 5<sup>th</sup> and 10<sup>th</sup> considerations of the preamble.

<sup>32</sup> *Barcelona Traction Case (Belgium v. Spain)*, Judgment, ICJ Reports 1970, 3, 32, para. 33.

<sup>33</sup> M. Shaw, quoted after ‘Our Panel of legal experts discuss UK’s basis for military action in Libya’, *The Guardian* (21 March 2011) available at <http://www.guardian.co.uk/law/2011/mar/21/international-law-panel-libya-military> (last visited 22 April 2012).

<sup>34</sup> SC Res. 678, 29 November 1990, para. 2.

<sup>35</sup> SC Res. 1973, 17 March 2011, para. 4.

sought a mandate authorizing maximal military action,<sup>36</sup> and those States, like China and Russia, who would invoke their right to veto had the resolution not put a ceiling on the authorized measures.<sup>37</sup>

The result is mushy and vague wording. Many questions remained unanswered. Did the resolution, for instance, enable the coalition allies to supply the rebels with weapons, as explicitly assumed by France,<sup>38</sup> yet explicitly refused by others?<sup>39</sup> Could the coalition establish ground forces if their task was not occupation, but to give military training to the rebels<sup>40</sup> or to deal with a particular threat to the civilian population?<sup>41</sup> Were targeted attacks on senior Libyan officials such as Colonel Gaddafi and his family justified if there appeared to be no other way to protect civilians?<sup>42</sup> One can, of course, not expect the same linguistic clarity in the resolutions of the Security Council, which is a largely political organ, as in judgments by international courts like the International Court of Justice. However, what is the worth of a Security Council resolution if its wording reaches a level of

<sup>36</sup> UK Prime Minister D. Cameron, 'Prime Minister's statement on Libya' (28 February 2011) available at <http://www.number10.gov.uk/news/speeches-and-transcripts/2011/02/prime-ministers-statement-on-libya-61450> (last visited 22 April 2012); Statement by Mr. A. Juppé, Minister of Foreign and European Affairs before the SC (17 March 2011) available at <http://www.franceonu.org/spip.php?article5448> (last visited 22 April 2012).

<sup>37</sup> Statement by Li Baodong, Permanent Representative of China to the UN (17 March 2011) available at <http://www.china-un.org/eng/hyyfy/t824183.htm> (last visited 22 April 2012); Statement by Vitaly Churkin, Permanent Representative of the Russian Federation to the UN (17 March 2011) available at <http://www.rusembassy.ca/node/546> (last visited 22 April 2012).

<sup>38</sup> First reports on French arms delivery by P. Gelie, 'La France a parachuté des armes aux rebelles libyens', *Le Figaro* (28 June 2011); also see Geiß & Kashgar, *supra* note 6, 103-104.

<sup>39</sup> Russia's Foreign Affairs Minister, S. Lavrov called the French practice a 'flagrant violation' of Resolution 1970, quoted after 'Libya: Russia criticises France over Libya arms drop', *Al Jazeera* (30 June 2011); also see H. J. Heintze & J. Hertwig, 'Waffenlieferungen an libysche Rebellen', *Bofaxe* (2011) No. 380D.

<sup>40</sup> See R. Somaiya, 'Britain Will Send Military Advisers to Libya, Hoping to Tip Balance for Rebel Forces', *The New York Times* (19 April 2011); A. Cowell, 'France and Italy Will Also Send Advisers to Libya Rebels', *The New York Times* (20 April 2011).

<sup>41</sup> In favour of such an interpretation M. Shaw, A. Aust and, to a lesser degree, R. Piotrowicz, quoted after 'Our Panel of legal experts discuss UK's basis for military action in Libya', *supra* note 33; also Payandeh, Friedenswarte, *supra* note 6, 66; Geiß & Kashgar, *supra* note 6, 104.

<sup>42</sup> *Id.*, both Piotrowicz & Shaw support such an interpretation; Payandeh, Friedenswarte, *supra* note 6, 68-69.

ambiguity and vagueness whereby deciding what is authorised by a resolution, and what is not, is a difficult business, if not a “mission impossible”?

## II. The Resolution’s Rationale: Humanitarian Cause versus Regime Change

A second element of note in the resolution is its underlying purpose and rationale. Two rationales for intervention were muddled – a muddling which confused rather than clarified the legal and political justification for the intervention.

Firstly, there is the humanitarian rationale, which assumed that the mandate for the intervention was limited to pre-empting an imminent humanitarian crisis and to preventing future armed attacks on civilians. This rationale is reflected strongly in the language of Resolution 1973: it expresses grave concern at the escalation of violence and the heavy civilian casualties; it considers the attacks against the civilian population as potential crimes against humanity; it demands the immediate end to violence and all attacks against, and abuses of civilians; and it authorizes States to take all necessary measures to protect civilians under threat of attack.<sup>43</sup> The historical parallel that comes to mind here is the Kosovo intervention in 1999:<sup>44</sup> an intervention which also grew from an urgent moral sense that something had to be done to prevent possible crimes against humanity.<sup>45</sup> In the case of Kosovo, the intervening States failed to achieve a resolution authorizing the use of force. In the case of Libya, States did reach an agreement. The important question then is less whether the military intervention was generally lawful; the question is rather what limits it needed to adhere to in order to remain within the confines of legality.

Yet, there was also another rationale for the intervention, hardly to be found in the text of the resolution,<sup>46</sup> but more in its surrounding

<sup>43</sup> SC Res. 1973, 17 March 2011, 3<sup>rd</sup> and 6<sup>th</sup> considerations of the preamble, and paras 3-4. The resolution mentions the term “humanitarian” altogether twelve times.

<sup>44</sup> SC Res. 1244, 10 June 1999.

<sup>45</sup> L. Henkin, ‘Kosovo and the Law of “Humanitarian Intervention”’, 93 *American Journal of International Law* (1999) 4, 824-828.

<sup>46</sup> See Payandeh, *Virginia Journal of International Law*, *supra* note 6, 387-388, who suggests that some formulations in the resolutions imply regime change, e.g. “the legitimate demands of the population” (SC Res. 1970, 26 February 2011, para. 1) or the “legitimate demands of the Libyan people” (SC Res. 1973, 17 March 2011, para. 2). However, what is considered “legitimate” cannot easily be determined from the

circumstances and execution. If the prevailing “*raison d’être*” for the intervention had been purely humanitarian, as the language of Resolution 1973 suggests, the manner and form of the intervention would have needed to be a military engagement from a respectful distance, in which the intervening States maintained their respect for Libyan sovereignty. The military intervention would have needed to be stopped once the humanitarian disaster was averted.

In the course of the intervention, however, it became evident that the aim of the intervention was not just humanitarian purposes, but regime change.<sup>47</sup> It might be difficult to draw the line where several rationales for one intervention are at stake. However, by attacking regime troops while fighting rebel forces on the ground, the NATO governments were intervening in a civil war, with the aim of tilting the balance of force in favour of the rebels. US officials made clear that establishing a democratic regime in Libya had become the main force driving the intervention.<sup>48</sup> What had started as an intervention to protect human rights became a crusade against a tyrant who had for many years been a thorn in the Western community’s side.

Thus, there is little international agreement over the intervention’s ultimate rationale. This puts its standing under international law in doubt. The reasons that first had given rise to the intervention were replaced by wider political goals. Any pretence of “peace-keeping” neutrality was abandoned in favour of an urgent desire to remove the perceived root of the humanitarian problem. As the French-Anglo-American “*trio infernale*” explicitly confirmed, “Gaddafi ha[d] to go, and go for good.”<sup>49</sup>

### III. The Resolution’s Underlying Doctrine: The Responsibility to Protect

A final remarkable feature of Resolution 1973 is its novel reference to the “responsibility to protect”<sup>50</sup> in a Security Council resolution in order to

resolution; see the more relevant ambassadors’ statements alongside the adoption of the resolution at section D.II. of this article.

<sup>47</sup> Payandeh, *Virginia Journal of International Law*, *supra* note 6, 396.

<sup>48</sup> For instance ‘Hillary Clinton: Libya may become democracy or face civil war’, *BBC Report* (1 March 2011).

<sup>49</sup> Obama, Cameron & Sarkozy, *supra* note 2.

<sup>50</sup> See most notably R. J. Hamilton, ‘The Responsibility To Protect: From Document to Doctrine – But what of Implementation?’, 19 *Harvard Human Rights Journal* (2006),

justify an action under Chapter VII of the UN Charter. Secretary General Ban Ki-moon emphasized the historic dimension of Resolution 1973, as it “affirms, clearly and unequivocally, the international community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government”.<sup>51</sup>

According to the “responsibility to protect” doctrine, first developed by the International Commission on Intervention and State Sovereignty (ICISS) in 2001<sup>52</sup> and accepted in rudimentary form in the World Summit Outcome Document in 2005,<sup>53</sup> it is the States that have the primary responsibility to protect their population from the worst of all crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity. If a State, however, is unable or unwilling to protect its population, the international community has a secondary responsibility to intervene diplomatically, and as a last resort, with military force. The strengths of the doctrine are obvious: while recognizing the primary obligation of the state of nationality to protect people's rights, it also affirms that protection from the most severe crimes must be ensured under all circumstances. Thus, it endeavours a balance between the notion of State sovereignty and the utmost importance of human rights protection.

289-297; A. L. Bannon, ‘The Responsibility To Protect: The UN World Summit and The Question of Unilateralism’, 115 *Yale Law Journal* (2006) 5, 1157-1165; E. Strauss, *The Emperor's New Clothes?: The United Nations and the Implementation of the Responsibility to Protect* (2009), and C. Verlage, *Responsibility to Protect. Ein neuer Ansatz im Völkerrecht zur Verhinderung von Völkermord, Kriegsverbrechen und Verbrechen gegen die Menschlichkeit* (2009). For the case of Libya, see A. J. Bellamy, ‘Libya and the Responsibility to Protect: The Exception and the Norm’, 25 *Ethics & International Affairs* (2011) 3, 263-269; and J. Pattison, ‘The Ethics of Humanitarian Intervention in Libya’, 25 *Ethics & International Affairs* (2011) 3, 271-277.

<sup>51</sup> Press Release, Secretary-General Ban Ki-moon, ‘Secretary-General Says Security Council Action on Libya Affirms International Community's Determination to Protect Civilians from Own Government's Violence’, SG/SM 13454, SC/10201, AFR/2144, 17 March 2011, available at <http://www.un.org/News/Press/docs/2011/sgsm13454.doc.htm> (last visited 2 May 2012).

<sup>52</sup> International Commission on Intervention and State Sovereignty (ICISS), ‘The Responsibility to Protect’, Report of the International Commission on Intervention and State Sovereignty (December 2001) available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (last visited 22 April 2012).

<sup>53</sup> GA Res. 60/1, 24 October 2005, paras 138-139.

Although the Council did not use the responsibility to protect as a legal basis in the operative paragraphs of Resolution 1973,<sup>54</sup> it referenced this doctrine in the preamble as one of the guiding motives;<sup>55</sup> a similar statement had already been included in the preceding Resolution 1970.<sup>56</sup> Although the Council's reliance on the doctrine of the responsibility to protect is of major importance,<sup>57</sup> and has been a "trend-setter" for the subsequent resolution in the case of the Ivory Coast,<sup>58</sup> the way the Council referenced the responsibility to protect is ambivalent.

Firstly, the doctrine was initially laid out only for specific cases of the worst of all crimes, namely genocide, war crimes, ethnic cleansing and crimes against humanity. Resolution 1973, however, without stated reason, ignored this high threshold, rather broadly referring to "gross and systematic violation of human rights" instead.<sup>59</sup> Whether this omission was wilful or merely an example of negligence does not really matter: both are quite unflattering for the Council (in the first case, indicating an unexplained diversion from the existing doctrine; in the second, displaying a concerning ignorance of it).<sup>60</sup> Secondly, the Security Council made no mention of the "precautionary principles"; those principles that were developed in the ICISS Report to limit the use of the doctrine in an attempt to prevent its abuse.<sup>61</sup> Regardless of their similar omission in the 2005 World Summit Outcome Document, it is clear that some criteria are needed in order to limit the scope for arbitrary interventions waged on dubious human rights impulses and imperatives, while in truth serving other goals.<sup>62</sup> These criteria to limit the scope of arbitrary intervention might be of a lesser importance where a Security Council resolution mandates the intervention, as the procedures and voting rules within the Security Council are additional

<sup>54</sup> Banaszewska & Frau, *supra* note 24; M. C. Kettemann, 'UN-Sicherheitsrat beruft sich in Libyen-Resolutionen erstmals auf Responsibility to Protect', *Bofaxe* (2011) No. 377D.

<sup>55</sup> SC Res. 1973, 17 March 2011, 4<sup>th</sup> consideration of the preamble.

<sup>56</sup> SC Res. 1970, 26 February 2011, 9<sup>th</sup> consideration of the preamble.

<sup>57</sup> Kettemann, *supra* note 54.

<sup>58</sup> SC Res. 1975, 30 March 2011, 9<sup>th</sup> and 12<sup>th</sup> considerations of the preamble.

<sup>59</sup> SC Res. 1973, 17 March 2011, 5<sup>th</sup> consideration of the preamble.

<sup>60</sup> Kettemann, *supra* note 54, also remarks that this lower threshold is 'not without dangers'.

<sup>61</sup> ICISS, *supra* note 52, XII, para. 2.(A)-(D).

<sup>62</sup> See for an intriguing non-Western position, M. Ayoob, 'Third World Perspectives on Humanitarian Intervention and International Administration', 10 *Global Governance* (2004) 1, 99, 115.

safeguards against arbitrariness. However, given the largely political character of Security Council decisions and its huge margin of discretion, the Council should not simply disregard the “precautionary principles” in order to make its decisions more transparent and make them appear more legitimate.

Some Council members, such as Russia and China, pointed to the shortcomings of the resolution in this respect prior to the vote: the scope of the intervention was poorly defined, and the criteria limiting the intervention’s scope were underdeveloped.<sup>63</sup> Whether the situation in Libya would have in fact satisfied these criteria remains open to debate. Specifically the question whether all diplomatic measures were exhausted so that the authorisation was a “last resort” and whether there were “reasonable prospects” for success, remains unresolved. It is nevertheless remarkable that none of these considerations even found mention in the text of the resolution: something that ironically enough had to be pointed out by two States with relatively poor records in respecting international human rights norms.

While one may see the Security Council’s commitment to the emerging doctrine of the responsibility to protect in positive terms, it would have been preferable if the Council had done so in a more nuanced and balanced way. Resolution 1973 in fact may have been an opportunity to finally apply the responsibility to protect doctrine within its defined criteria and restrictions<sup>64</sup> in a given scenario; an opportunity that was, once again, declined.

#### D. The Broader Meaning of the Libya Intervention for International Law

With these observations in mind, the Libya intervention may be a useful barometer in identifying some of the most important contemporary developments in international law. In particular, it helps us to answer three questions: Firstly, is international law currently experiencing a renaissance, overcoming the crisis that the “war on terror” and other developments in the

<sup>63</sup> See statements of Russia and China on the occasion of the vote, *supra* note 37.

<sup>64</sup> M. Payandeh has argued that later endorsements of the originally clear concept of the responsibility to protect have remained vague, see for instance, M. Payandeh, ‘With Great Power Comes Great Responsibility? The Power of the Responsibility to Protect within the Process of International Lawmaking’, 35 *Yale Journal of International Law* (2010) 2, 469, 497-499 [Payandeh, *Yale Journal of International Law*].

2000s had inflicted upon it? Secondly, does Libya, alongside the other Arab revolutions, finally make the case for an emerged right to democratic governance, which some authors have claimed already for some 20 years? And thirdly, has the case of Libya changed the underlying parameters of international law as a whole, in particular two concepts central to its development: State sovereignty and liberalism?

It should be mentioned that, of course, a single event can hardly be a “proof” for an entire development in international law. However, what, if not an event of such global importance that triggered widespread and far-reaching discussions in international law and politics, could be a better indicator of traceable trends in international law?

## I. International Law – a New Moment in the Sun?

International law, as far as it concerns the Charter provisions relating to peace and security,<sup>65</sup> has a tendency in recent history of being assumed to be either in crisis,<sup>66</sup> putting its *raison d'être* into doubt, or surfing a wave of glory, stylizing it as one of the solutions to the world's biggest problems. Let us briefly recall the last two of these phases: the end of the Cold War era and the post-9/11 era: the first an example of euphoria; the second a time of significant scepticism as to international law's global place and relevance.

As is well known, in 1989, the world witnessed a historic moment – for some even a moment that ended traditional history: the triumph of liberalism over communism in a century-long war of ideas.<sup>67</sup> This moment would later prepare the ground for a wave of democratic reforms across Central and Eastern Europe. In 1989, the General Assembly declared the period of the 1990s to be the United Nations' “Decade of International

<sup>65</sup> Of course, as far as international law as a whole is concerned, the picture is far more diverse. Fields like international economic law might continue to be flourishing, regardless of the events on September, 11, 2001.

<sup>66</sup> The word ‘crisis’, often employed with various meanings, is used here to describe a time of intense difficulty or danger [see ‘Crisis’, Oxford Dictionaries available at <http://oxforddictionaries.com/definition/crisis> (last visited 22 April 2012)]. As for the case of international law, a crisis implies some degree of disrespect from the relevant actors, e.g. States and International Organizations. While disrespect is always a matter of degree and while sporadic cases of non-compliance might not be seen as a sufficient indicator of a crisis, such disrespect must at least be seen as turning into a crisis when it becomes systematic and prevalent within a variety of the relevant actors.

<sup>67</sup> See, most famously, F. Fukuyama, ‘The end of history?’, *The National Interest* (1989); also see F. Fukuyama, *The End of History and the Last Man* (1992).

Law”, during which the UN’s main goals should be, *inter alia*, to promote acceptance of and respect for the principles of international law, and to develop methods for the peaceful settlement of disputes between States.<sup>68</sup> Indeed, in the course of the 1990s, several humanitarian crises were explicitly attempted to be settled with the help of, and not against or without, international law.<sup>69</sup> The discipline of international law was becoming “*en vogue*” again; it started to appear as a real and credible system of dispute resolution and sanctions, backed, in the final instance, by the threat of force. Suddenly, international relations theorists, as well as many international lawyers of the age, began to reconcile their approaches.<sup>70</sup> Their perception seemed to be that collective intervention was somehow more “legitimate” than the unilateral interventions of the Cold War because it was being exercised through international institutions, reinforced by the presumption that the Council had assumed the responsibility of enforcing community morality, e.g. through the protection of human rights.

It was also a time where States and their people strongly expressed their wish to belong to the international community and solve global problems together, to accede to international treaties and institutions, and to agree to universal principles, such as through inserting human rights guarantees into their own constitutions, be it in Eastern Europe or in South Africa. The 1992 United Nations Conference on Environment and Development,<sup>71</sup> the establishment of the two *ad hoc* international criminal tribunals for Yugoslavia and Rwanda in 1993 and 1994,<sup>72</sup> the adoption of the Rome Statute of the International Criminal Court in 1998<sup>73</sup> as well as the codification of the rules of State responsibility<sup>74</sup> might serve as examples of

<sup>68</sup> GA Res. 44/23, 17 November 1989, paras 2(a), (b).

<sup>69</sup> See for instance the case of East Timor, SC Res. 1264, 15 September 1999; SC Res. 1272, 25 October 1999; and the case of Somalia, starting with SC Res. 794, 3 December 1992. However, the case of Somalia remained a rather unsuccessful attempt.

<sup>70</sup> A. M. Slaughter, A. S. Tulumello & S. Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’, 92 *American Journal of International Law* (1998) 3, 367-397.

<sup>71</sup> Report of the UN Conference on Environment and Development, UN Doc A/CONF.151/26 (Vol. I), 3-14 June 1992.

<sup>72</sup> SC Res. 827, 5 October 1993; SC Res. 955, 8 November 1994.

<sup>73</sup> *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, 17 July 1998.

<sup>74</sup> Draft Articles on Responsibility of States for internationally wrongful acts, Annex to GA Res. 56/83, 28 January 2002; also see GA Res. 59/35, 16 December 2004.

this successful era for international law. At the end of the decade, the General Assembly recognized the achievements in the development and promotion of international law during the 1990s, and emphasized that the rule of international law had been significantly strengthened during this period.<sup>75</sup>

By contrast, at the beginning of the 2000s, international law relating to international peace and security experienced a severe crisis. The post-9/11 period was a time which came to accept a kind of Schmittian exceptionalism:<sup>76</sup> an *à la carte* approach whereby international law had to step aside wherever it stood in the way of a fundamental national political goal.<sup>77</sup> The Bush administration and Tony Blair's UK government dispensed with legal niceties, demonstrating outright hostility to the institutions of, and the obligations owed under, international law, declaring a "war on terror" "whatever the technical or legal issues about the declaration of war" were.<sup>78</sup> In these times, international law had to turn a blind eye to its own breaches; a "legal vacuum" thereby emerged.<sup>79</sup> The rampant imperialism of other States like China, Russia and India worsened international law's historical crisis during this time.<sup>80</sup> The increased use of torture and rendition, the refusal of the Bush administration to abide by the terms of the Geneva Conventions in Guantanamo Bay and in the Afghan

<sup>75</sup> GA Res. 54/28, 21 January 2000, para. 2.

<sup>76</sup> C. Schmitt argues famously in his early works *Die Diktatur* (1921) and *Politische Theologie* (1922) that the sovereign is he who decides on the exception. On the case of exceptionalism and terrorism, see A. W. Neal, *Exceptionalism and the Politics of Counter-Terrorism: Liberty, Security and the War on Terror* (2010).

<sup>77</sup> A. Roberts, 'Righting Wrongs or Wronging Rights? The US and Human Rights Post-September 11', 15 *European Journal of International Law* (2004) 4, 721, 739; also see A. Cassese, 'The International Community's "Legal" Response to Terrorism', 38 *International and Comparative Law Quarterly* (1989) 3, 589-608.

<sup>78</sup> See T. Blair, 'Prime Minister's Interview with CNN: "We are at War with Terrorism"', *CNN* (16 September 2001); and T. Blair, 'At War with Terrorism', *BBC News* (16 September 2001); also see G. W. Bush, 'Address to a Joint Session of Congress Following 9/11 Attack' (20 September 2001), transcript available at [http://articles.cnn.com/2001-09-20/us/gen.bush.transcript\\_1\\_joint-session-national-anthem-citizens?\\_s=PM:US](http://articles.cnn.com/2001-09-20/us/gen.bush.transcript_1_joint-session-national-anthem-citizens?_s=PM:US) (last visited 22 April 2012).

<sup>79</sup> Roberts, *supra* note 77, 742.

<sup>80</sup> R. Domingo, 'The Crisis of International Law', 42 *Vanderbilt Journal of Transnational Law* (2009) 5, 1543, 1544.

War,<sup>81</sup> the failure of the Copenhagen summit,<sup>82</sup> the refusal of the US and others to ratify neither the Kyoto Protocol nor the Rome Statute, might all serve as examples to underline this crisis of international law. The sidelining of the UN during the Iraq conflict<sup>83</sup> and the refusal of two of the world's foremost Courts – the ECJ and US Supreme Court – to fully accept the primacy of the UN Charter in the *Kadi*<sup>84</sup> and *Medellin*<sup>85</sup> cases arguably even deepened this crisis. It almost seemed that international law and the UN system found themselves in their death throes; without serious and far-reaching reform, they seemed likely to meet a sudden death.<sup>86</sup>

The intervention in Libya might suggest another turning point in the development of international law. The intervention in Libya has been considered a “success”<sup>87</sup> – unlike the involvements in Kosovo and Iraq, this was a conflict which many of the principal actors were attempting to solve through law, rather than without it. Resolution 1973 could in this sense be perceived as a triumph for the rule of international law.<sup>88</sup> The Western coalition had accepted that a legal basis for the intervention was needed, and vigorously pursued it. In contrast with the before mentioned gung-ho relish of the Bush administration towards armed intervention overseas, the current US-administration has been clear to distance itself from the policies of its predecessor. Long gone are the blunt references to the “war on terror” and the “axis of evil”.<sup>89</sup> Debates over the Libya intervention have re-introduced

<sup>81</sup> S. D. Murphy, ‘Contemporary Practice of the United States Relating to International Law: Decision not to regard Persons Detained in Afghanistan as POWs’, 96 *American Journal of International Law* (2002) 2, 461, 477; Roberts, *supra* note 77, 731.

<sup>82</sup> Only few authors consider the Copenhagen summit a success, see R. L. Ottinger, ‘Copenhagen Climate Conference – Success or Failure?’, 27 *Pace Environmental Law Review* (2010) 2, 411-419.

<sup>83</sup> C. Tomuschat, ‘Iraq – Demise of International Law?’, 78 *Die Friedenswarte* (2003), 141-160; M. J. Glennon, ‘Why the Security Council failed’, 82 *Foreign Affairs* (2003) 3, 16-35.

<sup>84</sup> Joined Cases 402/05 and 415/05, *P. Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, [2005] ECR II-3649.

<sup>85</sup> *Medellin v. Texas*, 552 U.S. 491 (2008).

<sup>86</sup> Domingo, *supra* note 80, 1544.

<sup>87</sup> See, for instance, Payandeh, *Virginia Journal of International Law*, *supra* note 6, 402.

<sup>88</sup> Obama, Cameron & Sarkozy, *supra* note 2, called the resolution a ‘historic decision’; some other observers even proclaimed the ‘victory for humanity’, see P. Hipold, ‘Ein Sieg der Humanität, der auch Österreich fordert’, *Der Standard* (22 March 2011).

<sup>89</sup> Term first used by President G. W. Bush in his State of the Union Address (29 January 2002) available at <http://millercenter.org/president/speeches/detail/4540> (last visited 22 April 2012).

the language of humanitarianism and human rights protection. Arguably this was then the starting point for international law's vindication: breathing new life into the UN Charter system and its collective security system – a system which had been reduced to a shadowy presence in the post-9/11 era.

However, the previous analysis of Resolution 1973 indicates that such a conclusion is not entirely correct. Is international law really “back in the game”? There is reason for scepticism; scepticism that rests on three arguments.

A first reason for scepticism can be discerned from the wider history of international law. International law has, as I have argued before, recently moved from glory to disenchantment. Only one decade separates international law's “moment in the sun” following 1989 and its “shadowy existence” past 2001. Just because another decade has passed, it is not worth worshipping at the shrine of international law just yet. One should rather see how the aftermath of the Libya intervention and potential other interventions in the Arab world develop in the future. The aggravating situation in Syria, and the inability of the international community to react to it, suggests that the “success” of the Libya intervention did not last very long. To the contrary, it seems that the way Resolution 1973 was executed has provided Russia and China with further arguments corroborating their position with regard to the case of Syria. A single resolution is thus not sufficient to salvage international law. Whether international law has re-assumed a front seat in international politics is something that only time can answer. In this respect, whether the Libya intervention was *initiated* in accordance with international law is secondary to the question of whether it will be *carried out* until the very end in accordance with international legal standards.

Secondly, the appeal to international law in the case of Libya occurred just because such an appeal was possible. What would have happened if China or Russia had vetoed the resolution? Would the Western coalition have abstained from any intervention in Libya? A unilateral intervention without a Security Council resolution *à la* Kosovo and Iraq appears at least within the realm of realistic scenarios. Will international law be obeyed where it is not a practical tool to justify an intervention, but an annoying obstacle to be overcome? The recent targeted killing of Osama bin-Laden, for instance, has indicated that international law is, still today, boldly ignored at times: here we have an operation in the territory of another country without the permission of that country's government as well as the

shooting of an unarmed civilian: clear violations of general international law and international humanitarian law.<sup>90</sup> This is only one incident, yet coupled with other continued operations in pursuit of the fight against terrorism – such as the prevalence of attacks by un-manned drones in Pakistan<sup>91</sup> – it shows that the Obama administration, like its predecessor, will comply with international law where possible, yet is prepared to disregard it where international law conflicts with a key national security interest.

Lastly, and most importantly, although the Libya intervention received the general blessing of international law in Resolution 1973, it is not at all clear whether all strands of its execution do so. As the analysis has shown, what exactly was possible and impossible within the resolution is open to debate. This, however, is decisive in answering the question of whether the intervention was ultimately in compliance with international law or not. The French have in the meantime admitted to having provided the rebels with weapons – for some this is exactly in accordance with the resolution, for others it is a clear breach.<sup>92</sup> Thus, where the wording of a Council resolution allows for nothing, but also forbids (almost) nothing at the same time, how can we credibly call the adoption of this resolution a significant success for international law? It is easy to be in compliance with a law with ambiguous boundaries; boundaries which should be able to hold international actors to account. In order to celebrate the start of a new rule of international law, the law would have needed to lay down clear guidelines as to what it rules in, and what it rules out.

The given legal situation was nonetheless more preferable to the one in Kosovo or in Iraq, where there was no resolution to justify the initial use of force at all. The different actors have turned *to* international law to find a solution, not *against* it. However, the above mentioned reasons indicate that this is not yet a time when international law's next moment in the sun can be celebrated. Resolution 1973 and the Libya intervention have placed international law back in the spotlight, but they lack the precision and

<sup>90</sup> In the view of the author, the former constituted a violation of Art. 2(1) and (4) of the UN Charter and the latter was in breach of Art. 51(3) of Additional Protocol I to the Geneva Conventions (while the USA is not a member to the Protocol, the Protocol is undoubtedly also part of international custom).

<sup>91</sup> On recent incidents, see without mention of an author 'Suspected US Drones kill 38 in Pakistan', *The Guardian* (12 July 2011); F. Boor, 'Der Drohnenkrieg in Afghanistan und Pakistan', and W. Richter, 'Kampfdrohnen versus Völkerrecht? Zum „Drohnenkrieg“ in Afghanistan und Pakistan', both in 24 *Journal of International Law of Peace and Armed Conflict* (2011) 2, 97-104, and 105-113.

<sup>92</sup> See the different views presented at *supra* note 38 and 39

consistency of practice to fully rehabilitate international law's uncertain reputation following the post-9/11 era.

## II. Democratic Governance – finally a fully-fledged right?

A second question arising from Libya with respect to general international law is to what extent the current events have finally paved the way for a “right to democracy”?<sup>93</sup>

International lawyer Thomas Franck famously proposed an emerging norm of democratic governance some 20 years ago.<sup>94</sup> The right to democratic governance, according to Franck, is embodied and instantiated in a variety of developments, such as the widespread acceptance and ratification of human rights instruments which recognize democracy enhancing provisions, such as the provisions on free speech of the International Covenant on Civil and Political Rights (ICCPR).<sup>95</sup> Membership in the international community for Franck is grounded in the legitimacy of a State's authority; an authority which, in turn, is derived from the peoples' right to self-determination.<sup>96</sup> In order to constantly renew this legitimacy, so Franck argues, an entitlement to periodic elections is on its way to becoming a customary legal norm.<sup>97</sup> Making democracy an entitlement, according to Franck, would also be the best way to promote global non-aggression and peace.<sup>98</sup>

<sup>93</sup> Finding an exact definition of ‘democracy’, which would be a pre-condition to effectively assume such a right (see T.J. Farer, ‘Elections, Democracy and Human Rights: Toward Union’, 11 *Human Rights Quarterly* (1989) 4, 504-521) is difficult, if not impossible. However, this should not lead one to exclude the discussion altogether.

<sup>94</sup> Franck, *supra* note 4.

<sup>95</sup> *Id.*, 61.

<sup>96</sup> *Id.*, 57.

<sup>97</sup> *Id.*, 64.

<sup>98</sup> *Id.*, 88. A short critique must be permitted: Franck bases his claim on empirical evidence, yet the empirical evidence is evidently conflicting: undemocratic practices are frequently permitted or endured (see for instance E.-U. Petersmann, ‘Constitutionalism, International Law and “We the Peoples of the United Nations”’, *Festschrift für Steinberger* (2001), 291, 311). Even more, membership rules of the UN do not require States to prove any democratic credentials (different from the ECHR; S. Marks, ‘The European Convention on Human Rights and its Democratic Society’, 66 *British Yearbook of International Law* (1995) 1, 209-238 [Marks, *British Yearbook of International Law*]).

Franck's work has been commented on by various authors, most recently for instance by Susan Marks and Jean d'Aspremont.<sup>99</sup> While, in combination, these essays leave little to add to the general question "What has become of the Emerging Right to Democratic Governance?", as Susan Marks phrases it, both comments were written before the Arab spring and the Libya intervention. Both authors seem to remain rather sceptical about a fully emerged right to democratic governance;<sup>100</sup> however, they would agree, I would think, that it is worth re-evaluating this question after the recent historic events. I will limit my considerations to this specific sub-question in order not to repeat what Marks and d'Aspremont have already skilfully explained. Thus, could Libya potentially be the "breakthrough" in favour of an emergent customary right to democratic governance?

As is laid down in Art. 38 I lit. b. of the ICJ Statute, a customary norm requires evidence of general practice ("State practice") accepted as law ("*opinio iuris*"). Modern approaches suggest a more flexible interplay between these two elements, or the need to "reconcile" them;<sup>101</sup> however, a minimum level of both elements remains required to establish the existence of such a norm.

<sup>99</sup> See for instance a comment at the time, M. H. Halperin, 'Guaranteeing Democracy', 91 *Foreign Policy* (1993), 105-122; for a recent comment, see S. Marks, 'What has Become of the Emerging Right to Democratic Governance?', 22 *European Journal of International Law* (2011) 2, 507-524 [Marks, *European Journal of International Law*]; J. d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks', 22 *European Journal of International Law* (2011) 2, 549-570. For an intriguing modern approach to democratic governance rather as a teleological principle than as a right, see N. Petersen, 'The Principle of Democratic Teleology in International Law', 34 *The Brooklyn Journal of International Law* (2008) 1, 33-84.

<sup>100</sup> Marks expressed her severe criticism also previously in J. Crawford & S. Marks, 'The Global Democracy Deficit: an Essay in International Law', in D. Archibugi *et al.* (eds), *Re-imagining political community: Studies in Cosmopolitan Democracy* (1998), 72, 85. D'Aspremont does not seem to deny a right to democratic governance in its entirety, but must certainly also be taken as a skeptic with regard to its role and purpose.

<sup>101</sup> A. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *American Journal of International Law* (2001) 4, 757-791; F. L. Kirgis, 'Custom on a Sliding Scale', 81 *American Journal of International Law* (1987) 1, 146-151; J. Tasioulas, 'In Defense of Relative Normativity: Communitarian Values and the Nicaragua Case', 16 *Oxford Journal of Legal Studies* (1996) 1, 85-128.

Turning to the case of Libya, were there any signs inherent in the international reaction to the Libyan case to assume that a customary norm of democratic governance is emerging at an accelerated pace?

As has been argued before, no reference is made to democracy in the text of the resolution itself. Mehrdad Payandeh has recently argued that democratic regime-change should not be seen as excluded by Resolution 1973, as it was the only means to achieve the resolution's goal, namely to protect human rights.<sup>102</sup> Also, some statements<sup>103</sup> of different UN ambassadors alongside the vote on Resolution 1973 seem to speak in pro-democratic language. The UN ambassadors from the United Kingdom, Lebanon and Colombia for instance claimed in the debate that the Libyan government had lost all its legitimacy;<sup>104</sup> did this implicitly presuppose that only governments supported by the will of their people are legitimate, just the way Franck suggested? The ambassador from South Africa stated that the conflict in Libya must be resolved "in accordance to the will of the Libyan people", and that a "holistic political solution must be found which would need to respect democracy [...]".<sup>105</sup> The ambassador from Brazil emphasized that the Libyans were claiming their "legitimate demands for better governance" and "more political participation".<sup>106</sup> The German ambassador affirmed that "aspirations for democracy, human and individual rights merit our full support" and that "the people of Libya who have so clearly expressed their aspirations for democracy should be supported."<sup>107</sup> The US ambassador added that "[t]he United States stands with the Libyan

<sup>102</sup> Payandeh, *Virginia Journal of International Law*, *supra* note 6, 388.

<sup>103</sup> It is contested whether voting behavior constitutes either State practice or *opinio iuris*. In the opinion of the author, it should be seen as the latter; see also Roberts, *supra* note 101, 758; for the opposite opinion, see A d'Amato, *The concept of custom in international law* (1971), 89.

<sup>104</sup> A summary of all statements is available at: Report of the 6498<sup>th</sup> Meeting of the SC, S/PV.6498 (17 March 2011). Full texts can be found on the respective webpages of the missions to the UN.

<sup>105</sup> Statement by H.E. Ambassador B. Sangqu of South Africa, full text available on the mission's website.

<sup>106</sup> Statement by H.E. Ambassador M. L. Ribeiro Viotti of Brazil, full text available on the mission's website.

<sup>107</sup> Statement of H.E. Ambassador Dr. P. Wittig of Germany. His country, however, abstained, because it would 'not contribute to such a military effort with its own forces'. Where this logic – a positive vote on a resolution as an obligation to provide troops – comes from, is unclear. It has no bearing in international law.

people in support of their universal rights” and “the future of Libya should be decided by the Libyan people”.<sup>108</sup>

However, does this indicate that a right to democratic governance has been born or is in the last stages of being born (“*in statu nascendi*”)?<sup>109</sup> Two important reasons stand against such an assumption as far as the Libya intervention is concerned.

Firstly, even if one wanted to find a “democracy enhancing” spirit in the resolution, five countries did not vote in favour of Resolution 1973. All of them are of major global significance: Russia, China, Brazil, India and Germany. One might disagree on the motives of the respective states behind the vote, and on the general question of whether the opinions and actions of larger and more powerful States count more than those of smaller and less powerful States in determining custom.<sup>110</sup> However, whatever stance one takes on these issues, it is safe to say that without a positive statement from all of these major States, whatever their underlying motives, a sufficiently widely accepted custom cannot be considered as newly born.<sup>111</sup> This is even more true given the high threshold that needs to be passed for the modification of a *ius cogens* norm as the principle of non-intervention is considered to be<sup>112</sup> – a principle which is implicated if democracy is to be imposed on a State.

<sup>108</sup> H.E. Ambassador S. E. Rice of the USA, full text available on the mission’s website.

<sup>109</sup> Georges Abi-Saab outlined many years ago how a right can be in a phase between ‘existing’ and ‘non-existing’, namely ‘*in statu nascendi*’. Although the suggestion concerns the right to development, it seems appropriate also for the formation of other ‘new’ rights; see G. Abi-Saab, ‘The Legal Formulation of the Right to Development’, in R-J Dupuy (ed.), *Le droit au développement au plan international* (1980), 159, 170.

<sup>110</sup> M. Bedjaoui, *Towards a new international economic Order* (1979), 51-52; O. Schachter, *International Law in Theory and Practice* (1991), 6; J. Kelly, ‘The Twilight of Customary International Law’, 40 *Virginia Journal of International Law* (2000) 2, 449, 469.

<sup>111</sup> Two caveats must be acknowledged to this argument. Firstly, it is hard to prove a causal link between voting behavior and a legal conviction. There are often several legal and political reasons influencing a voting decision, some of which might be purely domestically motivated. Secondly, abstentions do not always bar the emergence of new custom. However, firstly, voting behavior is one of the few means to identify legal convictions and we cannot afford to disregard it just because it is not always unambiguous. Secondly, a vote of 15 States whereby five abstained cannot be considered a sufficiently broad acceptance of a new norm. This does not contradict the assumption that single abstentions cannot bar the emergence of new custom.

<sup>112</sup> ILC Report on the work of its eighteenth session, Yearbook of the International Law Commission (1966), Vol. II, 247-248.

Secondly, the very premise of this first argument is that on the day of the vote of Resolution 1973, the pro-democratic rationale of the intervention was clear for all to see. It was not. In fact, it was only in the aftermath of the resolution that the pro-democratic dimension came fully to the surface. The text itself, on which the vote is based, abstains with almost clinical care, as I have argued, from references to an intervention supporting democracy or promoting regime-change. Otherwise, Russia or China would have most likely vetoed the resolution. When the execution of the intervention later on moved more and more in the direction of regime change, the support for the intervention disintegrated drastically: within a short timeframe, the African Union called for an end to the Libya intervention,<sup>113</sup> while South Africa, which had originally voted in favour of Resolution 1973, criticized NATO air raids accusing the West of seeking regime change in Libya.<sup>114</sup> Even the Arab League – whose support had been crucial for legitimating the intervention in the eyes of the Arab world – started to backtrack from the mission.<sup>115</sup> Thus, the claim that Resolution 1973 indirectly justifies regime change<sup>116</sup> is hard to maintain; at least, it is not maintained by many States nor by other actors involved.

Altogether, a custom establishing or giving new force to an entitlement to democratic governance is not observable. The case of Libya has not altered this in the least. To the contrary, when – if not in the case of Libya – will States ever show their willingness to agree on a resolution recognizing the right of a people so desperately striving for democracy?

<sup>113</sup> Statement by E. Mwencha, Deputy Chairperson of the Commission of the African Union during the 4th meeting of the Libya Contact Group (15 July 2011).

<sup>114</sup> See for instance remarks by RSA President J. Zuma at the meeting of the AU High Level Ad Hoc Committee on Libya, 26 June 2011 (*'The [...] bombing by NATO [...] is a concern [...] because the intention of Resolution 1973 was [...] not to authorize a campaign for regime change or political assassination.'*), available at <http://www.thepresidency.gov.za/pebble.asp?relid=4367&t=79> (last visited 22 April 2012).

<sup>115</sup> Arab League Secretary-General A. Moussa criticised that 'what is happening in Libya differs from the aim of imposing a no-fly zone' (quoted after 'Arab league condemns broad Western bombing campaign in Libya', *The Washington Post* (20 March 2011)).

<sup>116</sup> M. Payandeh's point to distinguish between aims and means, *supra* note 102, is well-argued. The international coalition necessarily (as a 'necessary means') had to weaken Gaddafi's regime while preventing a massacre in Benghazi. However, the intervention continued even when the bloodshed in Benghazi was long averted and when Gaddafi's troops were no longer in a position to commit human rights violations of a similar gravity. Thus, it is hard to see the manner in which the intervention sought regime change as being in compliance with Resolution 1973.

Instead, Libya is a case of an intervention whose *legal basis* could only be phrased in humanitarian and human right terms, while its *execution* was increasingly driven by pro-democratic regime change. This constellation gives little hope for the idea that Libya may blow wind into the sails of the “emerging right to democratic governance”; for such a right, stormy prospects remain.

### III. Outlaw States – Liberal towards the Illiberal?

So, if the case of Libya has not instigated a significant turn towards international law, and if it has also not brought the emergence of a right to democratic governance to its conclusion – has it done anything of significance for international law at all? In the opinion of the author, the answer is a clear yes: the intervention in Libya suggests a renewed readiness of the international community to deal with States which trample that community’s utmost values.

International law is not an abstract entity set in stone. It is better understood as a formation of ideas and conceptions, assumptions and convictions of States and other international actors which are in permanent flux. To see any change in international law’s architecture, its building blocks need to change first: to use a simple analogy, only if the puzzle pieces themselves change, can the overall picture of the puzzle evolve.

One of the most important puzzle pieces of international law is certainly that of sovereignty. The analysis here will again limit itself to the question of what the case of Libya has added, and what trend, if any, currently emerges. Do States, without reservation, respect the equal sovereignty of other States that fundamentally disagree with the ideals of liberty and human rights on which the system of international law is increasingly based?

In 2001, Gerry Simpson wrote a captivating article in which he described two overall approaches to the sovereignty of outlaw States in international law: an article which is once again, more than 10 years later, becoming as topical as ever. Simpson called those two approaches “Two Liberalisms”.<sup>117</sup> The one, “charter-based liberalism”, heavily relies on a classical idea of sovereignty, on a black-letter reading of the UN Charter.<sup>118</sup>

<sup>117</sup> G. Simpson, ‘Two Liberalisms’, 12 *European Journal of International Law* (2001) 3, 537.

<sup>118</sup> *Id.*, 541.

It accords equal weight to each State,<sup>119</sup> regardless of any qualifying internal conditions such as democratic legitimisation, respect for human rights or the rule of law. In this view, even if governments conduct themselves in ways inimical to the most fundamental values safeguarded in international law, they are still entitled to full and equal membership in the international community, regardless of their political or social ideology.<sup>120</sup> In an extreme sense, “a fascist dictatorship is entitled to as much respect as the government of a social democracy.”<sup>121</sup> This approach was predominant in international law for most of the 20<sup>th</sup> century.<sup>122</sup> The means through which a government establishes and maintains its authority, as long as it does so, lie outside the scope and concern of international law – and do not give grounds to withhold its protections and recognitions. Consequently, charter-based liberalism governs the relations between an anarchy of internally sovereign States: it is a liberalism that is both ideology-immune and morality-agnostic.<sup>123</sup>

However, Simpson suggests there is also an alternative approach to the outlaw State in international law – he calls it “liberal anti-pluralism”. Under this form of liberalism, prevalent at other times in the history of international law,<sup>124</sup> democratic consent, human rights and the rule of law are conceived of as conditions for equal sovereignty. Only a State which obeys essential basic principles can rely on the full respect of the international community for its sovereignty.<sup>125</sup> The normative structure of the internal State construct thereby becomes the subject of serious

<sup>119</sup> An important inequality is, of course, the distinction between the Permanent Members of the Security Council and all other States. However, this favouritism is clearly not based on internal (democratic) credentials, with States like China (being an openly authoritarian regime) and Russia (being a democracy only in the minimal sense of Schumpeter, as recent elections have shown) being Permanent Members.

<sup>120</sup> W. Friedman, ‘Intervention, Civil War and the Role of International Law’, in R. Falk (ed.), *The Vietnam War and International Law* (1968), 151.

<sup>121</sup> A. X. Fellsmeth, ‘Feminism and International Law: Theory, Methodology and Substantive Reform’, 22 *Human Rights Quarterly* (2000) 3, 658, 703; but see, e.g., GA Res. 36/162, 16 December 1981, and GA Res. 38/99, 16 December 1983.

<sup>122</sup> Simpson argues that this is particular true from the founding of the United Nations onwards (1945) until the end of the Cold War, *supra* note 117, 549-556.

<sup>123</sup> Simpson, *supra* note 117, 539; also see Friedman, *supra* note 120, 151.

<sup>124</sup> Simpson, *supra* note 117., 544-549 and 557-559. Simpson suggests this to be the late Victorian era on the one hand, and, to a lesser degree, the times after the Cold War.

<sup>125</sup> *Id.*, 541. It was famously Anne-Marie Slaughter suggesting a distinction between different ‘categories of states’, see A.-M. Slaughter, ‘International Law in a World of Liberal States’, 6 *European Journal of International Law* (1995) 1, 503-538.

international scrutiny, or even a pre-condition for entering the international community as a full and equal partner. Under this reading, the international order, with its explicit respect for human rights and liberal ideas, is transcending State voluntarism by giving voice to Neo-Kantian or liberal internationalist ideals.<sup>126</sup> It places more emphasis on the individuals behind the State than on the State itself.<sup>127</sup> It is a liberalism that favours, and views as equals, only those States that are in themselves liberal, both in their internal attitudes towards the basic human rights of their citizens, and in their external commitment to aiding the spread of liberal ideals throughout the international order.

Simpson, in concluding his article, suggested that the interplay of both of these approaches – charter-based liberalism and liberal anti-pluralism – has inspired the development of international law in the past, and would continue to do so in the future.<sup>128</sup> This picture resembles a pendulum swinging from one liberalism to the other: in doing so, the interaction between these visions “keeps the time” of international law. The true meaningfulness of the Libya intervention may similarly be in helping us to identify in which direction this pendulum is currently moving: which vision of liberalism currently dominates the international legal order?

Gaddafi’s Libya was clearly what Simpson would call an illiberal outlaw State, regardless of which exact definition of an outlaw State one follows.<sup>129</sup> Libya’s government had not only been denying its people any civil and democratic rights for decades; it had shown its preparedness to go further, violently suppressing civil society movements of any form and using some of the worst military means thinkable against its own population.

If charter-based liberalism was prevalent, the international community would (at least) have needed to withdraw its forces the moment the most imminent threat of a massacre in Benghazi was overcome. A systematic and

<sup>126</sup> Simpson, *supra* note 117, 541.

<sup>127</sup> *Id.*, 542; also see F. R. Tésou’s thesis on ‘normative individualism’ expressed in ‘The Kantian Theory of International Law’, 92 *Columbia Law Review* (1992) 1, 53, 54 [Tésou, *Columbia Law Review*].

<sup>128</sup> Simpson, *supra* note 117, 571.

<sup>129</sup> Simpson, *supra* note 117, 560-565, suggests different ways how outlaw States have been identified by different authors. They include ‘tyrannical governments’ (Tésou), ‘rejecting the rules of internal relations altogether’ (Franck) or ‘gross violators of human rights’ (Rawls). Two observations are important: a ‘merely’ undemocratic State is not automatically an outlaw State; and States that have not engaged in military interventions against other States can still be outlaws.

continued targeted bombing of governmental facilities is irreconcilable with this approach to international law. Instead, the international community was seeking regime change in order to pave the way for a regime respecting liberal ideas and human rights. Libya is thus an example of the pendulum moving in the direction of what Simpson described as liberal anti-pluralism: the international community of States seems increasingly less willing to accept violations of human rights and liberal ideas by outlaw States.

Two possible reactions from the international community towards these States are exclusion and coercion. For Simpson, this distinction divides anti-pluralists into mild anti-pluralist liberals (who remain sceptical about exclusion and even more about intervention) and strong anti-pluralist liberals (who have fewer qualms about these actions).<sup>130</sup>

Mild anti-pluralists, for Simpson, are scholars like Thomas Franck and Anne-Marie Slaughter:<sup>131</sup> they declare a favouritism in international law for States obeying principles of democracy and the rule of law, but remain more sceptical about all forms of enforcement towards States that choose otherwise. The most prominent scholars in the more contentious strong anti-pluralist line are Fernando Téson and Michael Reisman. Téson, coming from a Kantian tradition, argues that democracy and human rights ultimately have a superior moral standing in international law than the States' claim to sovereignty, and that the use of force can be the last resort in the defence of these rights.<sup>132</sup> Reisman takes the standpoint that sovereignty does not belong to States in the first place, but to their peoples; thus, sovereignty is not violated where an intervention aims to enforce the will of the people against its government.<sup>133</sup> However, the dangers of abuse, and the populist potential, of such a line of argument remain substantial. Most scholars have thus refused to follow the logic of the strong anti-pluralist liberals.<sup>134</sup>

I want to argue that the case of Libya indicates that international law is currently caught exactly in between these two forms of liberal anti-pluralism that Simpson suggested 10 years ago (mild and strong). This

<sup>130</sup> *Id.*, 571.

<sup>131</sup> Franck, *supra* note 4; Slaughter, *supra* note 125.

<sup>132</sup> Téson, *Columbia Law Review*, *supra* note 127, 53; and Téson, *Michigan Journal of International Law*, *supra* note 5, 323.

<sup>133</sup> Reisman, *supra* note 5, 642.

<sup>134</sup> For a comprehensive analysis of State practice and academic writing on this issue, see M. Byers & S. Chesterman, "‘You the people’: Pro-democratic intervention in International Law", in G. H. Fox & B. R. Roth (eds), *Democratic Governance and International Law* (2000), 259-292.

“middle” position rests on the assumption that exclusion from the international community is almost fully accepted as a means for dealing with outlaw States, while intervention in order to impose respect for human rights and liberal ideas upon States by means of regime change – i.e. any intervention that lies outside the concrete prevention of an imminent humanitarian disaster – is not accepted under international law.

Let me explain this thesis in two steps: firstly, by explaining what factors might lead us to believe that the exclusion of outlaw States is by now broadly accepted within the international community; and secondly, why the right to intervention remains limited to preventing imminent humanitarian crisis, without permitting interventions necessary to establish sustainable value-driven alternative regimes.

Firstly, the States’ willingness to exclude a State from the international community if it subscribes to illiberal practices which severely compromise human rights standards, might not be entirely new, but it has been remarkably reaffirmed in the case of Libya. This was emphasized by two events in 2011. Firstly, on 1 March 2011, the General Assembly unanimously temporarily suspended Libya’s membership in the Human Rights Council.<sup>135</sup> This is a remarkable first time event in the history of the Human Rights Council (and its predecessor, the Human Rights Commission). It is important to note that the suspension of Council membership was not linked to the imminent massacre in Benghazi but happened on the 1<sup>st</sup> of March, two weeks before Resolution 1973. It was rather a protest against Gaddafi’s suppression of the pro-liberal movement in his country. Secondly, and even more significantly, for only the second time in its history, the UN Security Council in Resolution 1970 mandated the ICC chief prosecutor with jurisdiction to examine the situation in Libya, thereby overruling Libya’s earlier decision not to become a member of the Rome Statute of the ICC.<sup>136</sup> On the basis of this referral, the ICC issued an arrest warrant against Colonel Gaddafi (prior to his later demise).<sup>137</sup> This was not only an affront against Libyan sovereignty (given that State immunity, which the arrest warrant sought to overcome, is a right of the State, not the individual), but the ultimate signal that Colonel Gaddafi would

<sup>135</sup> GA Res. 65/265, 1 March 2011, para. 1.

<sup>136</sup> SC Res. 1970, 26 February 2011, para. 4. The only previous case had been the one of Sudan in the event of the Darfur-crisis in 2005, SC Res. 1593, 31 March 2005, para. 1.

<sup>137</sup> *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Arrest Warrant, ICC-01/11, Pre-Trial Chamber I, 27 June 2011, 7.

be from now on excluded from the circle of accepted heads of States.<sup>138</sup> Thus, the international community seems prepared to exclude the outlaw State, and its government, if it disregards liberal ideas in a sufficiently extreme way; a threshold that the Gaddafi regime seemed to have comfortably reached.

As a second step, I want to argue that the community of States, however, is not at all prepared to accept any imposition of liberal ideas upon States by military intervention, bar the minimal intervention necessary to avert immediate bloodshed and humanitarian catastrophe.

For one, there are no convincing examples of interventions before Libya which promoted liberal and democratic ideas with the blessing of international law. In the case of Grenada, where the US overthrew a Marxist junta and re-instated an elected government in 1983, as well as in the case of Panama, where the US forced military un-democratic leader Manuel Noriega out of power in 1989, the intervening force (the US) claimed that the main reasons for the interventions were not to support liberal or democratic ideas, but rather the invitation to invade made by parts of the government, the protection of US nationals and the enforcement of existing treaties.<sup>139</sup> Even more importantly, the General Assembly explicitly condemned both interventions as clearly illegal, making it apparent that a norm of international custom to justify such interventions had not emerged.<sup>140</sup>

The case of Haiti is even more intriguing.<sup>141</sup> The Security Council had given its blessing for an intervention under Chapter VII; a rather unconvincing move given that an international dimension of the conflict was not apparent. Precisely because of this, the Council wanted to ensure that the Haitian intervention was not understood as an emerging trend. It

<sup>138</sup> Jurisdiction can only be established by assuming a customary norm equivalent to Art. 27(2) of the Rome Statute, see P. Thielbörger, 'Haftbefehl gegen Muammar al-Gaddafi – Keine Immunität vor dem IStGH?', *Bofaxe* (2011) No. 387D.

<sup>139</sup> Byers & Chesterman, *supra* note 134, 272, 274 - 279.

<sup>140</sup> GA Res. 38/7, 2 November 1983, in the case of Grenada and GA Res. 44/240, 29 December 1989, in the case of Panama; also see J. Wouters, B. de Meester & C. Ryngaert, 'Democracy and International Law', 34 *Netherlands Yearbook of International Law* (2003), 139, 169.

<sup>141</sup> For a comprehensive and recent analysis: Marks, *European Journal of International Law*, *supra* note 99, 519-522.

claimed that these had been “unique and exceptional circumstances”.<sup>142</sup> For the Security Council, Haiti was, rightly or wrongly, a case of a humanitarian intervention rather than one aimed at regime change to promote a liberal government.<sup>143</sup> There had also been an “invitation” from the toppled President Aristide.<sup>144</sup> Thus, while part of the UN’s motives to act in Haiti in 1993 were surely to promote liberal democracy, it would still be hard to assume a generally accepted trend pointing in this direction.

However, could the case of Libya be a game-changer, the tipping point where the international community, with the blessing of international law, has finally managed to overturn a ruler which had become too illiberal for the world to bear? After all, the international coalition *did*, in fact, intervene in Libya, and *was*, in fact, eventually successful in promoting regime change.

In answering this question it is crucial to keep the previous analysis of Resolution 1973 in mind: the resolution the Security Council agreed upon is strictly termed in human rights and humanitarian language. It calls for preventing an imminent massacre, not the construction of a liberal government in a country calling for freedom and democracy. Even the use of the concept of the responsibility to protect shows the reluctance of the international community to go beyond the boundaries of prior practice: it is a concept which generally *accepts* rather than *undermines* the sovereignty of States and the responsibility of the State for its citizens, while allowing the international community to intervene only in the most extreme of scenarios. While it is a significant achievement that the international community has re-characterised “sovereignty as responsibility”,<sup>145</sup> the concept does not suggest a breach of the idea of State sovereignty by justifying the replacement of one regime by another.

The lesson then from Libya about the direction of the liberal pendulum of international law is therefore twofold: the concept of State sovereignty does still protect the illiberal dictators of the world from military intervention as long as they abstain from the most violent acts of suppression and violence. Beyond that – when they either seek to engage the

<sup>142</sup> SC Res. 841, 16 June 1993, 14<sup>th</sup> consideration of the preamble. It had, however, used the same term already in SC Res. 794, 3 December 1992, 2<sup>nd</sup> consideration of the preamble.

<sup>143</sup> Byers & Chesterman, *supra* note 134, 287; Wouters, de Meester & Ryngaert, *supra* note 140, disagree with this conclusion, 173.

<sup>144</sup> Wouters, de Meester & Ryngaert, *supra* note 140, 173.

<sup>145</sup> ICISS Report, *supra* note 52, paras 2.14 & 2.15.

international community as full partners in bodies such as the Human Rights Council, or take a course towards serious human rights violations – they face increasing marginalisation and exclusion from the international community. The ongoing and violent attempt by the Syrian government to suppress the pro-democracy and human rights movements in that country is likely to test this increased willingness of the international community to repeat its Libyan experiment. However, the execution of the intervention in Libya, as so far as it went beyond the clearly defined mandate of Resolution 1973, will provide sceptics such as Russia and China with significant arguments to oppose such a future intervention in Syria.

## E. Conclusion

This article has, on a micro-level, examined the most relevant legal problems of the Libya intervention, in particular the instrument used to justify it, Resolution 1973. While it is favourable for the status and place of international law more broadly that the Libya intervention was undertaken in accordance with, not in contrast to, international law, Resolution 1973 itself shows some flaws, if not major defects. Firstly, the determination of a threat to international peace and security by the Security Council is, once again, anything but convincing. It remains insufficiently explained why the conflict, in particular at the early stages of Resolution 1970 and 1973, had any international dimension. Even more, the array of actions legitimized by Resolution 1973 (“all necessary measures to protect civilians”) is blurry. Inevitable diplomatic compromise mashed what could otherwise have been clear language. Secondly, the ultimate aim of the intervention remains unclear. There is a mismatch between the humanitarian language of the resolution itself (“to protect civilians”) and the pro-regime-change attitude of the triumvirate of States that have most fiercely advocated, and carried-out, the intervention (“Gaddafi must go, and go for good”). At least so much is clear – that much of the intervention’s final execution corresponded more with the latter motivation than with the first. Thirdly, the reference to the responsibility to protect as an underlying motivation for the intervention is remarkable and welcome, and the first of its kind. However, there is still a drop of bitterness: the reference is incomplete. Instead of using the concise and well-balanced recommendations developed by the ICISS in 2001 and re-formulated in rudimentary form in the World Summit Outcome Document in 2005, the resolution rather bluntly referred to the concept without considering its exact aims or limitations.

On the macro-level, this article has used the case of Libya as a snap-shot to identify the current condition of international law, considering recent events in light of some broader debates in international law. It is the opinion of the author both that the practice of international law needs the over-arching parameters of theory to be understood, and that broader debates in international law need to be measured against contemporary developments if they are to maintain their relevance. Looking beyond the narrow question of the legality of the intervention, this article has addressed three broader questions about international law. Firstly, in the aftermath of the attacks on the World Trade Center on 11 September 2001, international law was in danger during the “war on terror” of degenerating into a decorative decoy: if handy, it was considered; if not, it was ignored. Those who now announce the “success” of Libya seem to suggest that this crisis that lasted a decade is (almost) overcome. There is some reason to agree with this statement: Resolution 1973 proves the serious attempt of international actors to comply with, rather than avoid, the system of collective security under international law. However, there are also some grave caveats: the highly vague language of Resolution 1973 and the continued stretch of the term “threat to international peace and security” temper any rush to suggest that international law is in a State of wider ascendancy. International law seems to be making a respectable comeback in the international arena, but we do not know yet whether this will be anything more than a “one hit wonder”. Secondly, I have raised the question of whether the case of Libya is an indicator, or even game-changer, in favour of a norm of democratic governance. As a recent analysis of Susan Marks and others suggests, such a right remains “emergent” rather than “existent” in international law. The case of Libya has not altered this finding. Any reference to democracy has been carefully avoided in Resolution 1973; had it not, there is sound reason to assume that the resolution would have been vetoed. The overarching motivation for many States to agree to Resolution 1973 was to prevent the imminent massacre in Benghazi, a macabre event that Colonel Gaddafi had threatened to schedule the day after the resolution was agreed. Only in the aftermath did the intervention start to seek broader democratic goals – to eliminate the West’s former favourite *bête noire*, Colonel Gaddafi. It became, thus, an intervention that followed its own logic and own rules, beginning to emancipate itself from its original mandate. This, however, does not mean that a majority of States still approved of this new line of action.

Finally, I have examined the renewed attitude in international law towards outlaw States which to a high degree disregard human rights and liberal

ideas in their internal sphere. In allusion to a distinction Gerry Simpson suggested in 2001 – between charter-based liberalism which does not question a State’s internal credentials, and liberal anti-pluralism which fully accepts States only if they are themselves liberal in their interior order – the analysis suggests that Libya has, indeed, invoked a further shift towards the latter model. The international liberal order has reaffirmed its preparedness to withhold full respect to a State’s equal sovereignty where this State rides roughshod over liberal ideas in its own territory. This move, from one liberalism to another, is of course a subtle one, but other States might need to be prepared that future acts of international law may bear more of the marks of this liberal anti-pluralist approach.

I have though argued that the case of Libya shows that not all means to deal with the outlaw State suggested by the liberal anti-pluralist literature are in fact accepted under international law. While branding and excluding the outlaw is becoming more and more accepted and prominent (e.g. Libya’s suspension of the Human Rights Council and even more so the release of the arrest warrant against Colonel Gaddafi), invasion is still not. Those interventions sometimes considered as pro-liberal or pro-democratic interventions in the past – Grenada, Panama and Haiti – all had at the same time other motivations apart from promoting liberal ideas; many of them were even condemned by the UN General Assembly as breaches of international law. The case of Libya is not ground-breaking in this respect:<sup>146</sup> by referencing the responsibility to protect (for the first time), the Security Council made clear that *only* in extreme cases – namely in the case of continued and gross human rights violations that need to be stopped immediately – would it stand up against an outlaw State with military force by declaring a situation a threat to international peace and security.

However, the case of Libya teaches us one more lesson, or provides one more question to ponder upon. What is the distinction between interventions with different rationales worth, where these rationales are hopelessly intermingled?<sup>147</sup> International actors in the case of Libya have shown themselves to be prepared to exchange (if not to hide) the rationale really driving military intervention. What was begun as an intervention designed to protect human rights can easily be turned into a resolution to seek regime change,

<sup>146</sup> See S. Chesterman, ‘Leading from Behind: The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention after Libya’, 25 *Ethics and International Affairs* (2011) 3, 279-285, who concludes (more broadly) that the Libya intervention is altogether “interesting, but not exactly groundbreaking”.

<sup>147</sup> Pointing also in this direction, Geiß & Kashgar, *supra* note 6, 103.

once international law has given its formal blessing in the form of a Security Council resolution. Sometimes an intervention may even have different rationales from the beginning (humanitarian and regime change), depending on the viewpoints of the different actors involved: how do we distinguish between the dominant motivation<sup>148</sup> of the international community to intervene and ancillary motives; and what are the implications for international law when the contours of an international intervention change? Villains and evildoers amongst State leaders will at least need to understand that their protection under the Charter system – a protection that many have abused for so long in order to preserve their own power – is degenerating. Admittedly, it is a grotesque idea that it was out of all people Colonel Muammar al-Gaddafi – a perverted “prince charming” – who has kissed away a spell keeping international law asleep for such a long time.

<sup>148</sup> Geiß & Kashgar, *supra* note 6, suggest to judge each action according to its dominant aim (*‘vorrangiger Zweck’*), 103; Payandeh, *Friedenswarte*, *supra* note 6, 68, however, suggests that it makes no difference whether an intervention’s rationale of regime change is secret or explicit, as interventions should be judged along their objective meaning and effects, not by the intentions of the acting parties.