

THE RESPONSIBILITY TO PROTECT AFTER LIBYA AND SYRIA

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At the United Nations World Summit in 2005, global political leaders endorsed a new doctrine to govern international political behaviour entitled the 'responsibility to protect'. Pursuant to this doctrine, the nations of the world affirmed that the primary responsibility for the prevention of mass atrocity crimes rests with the sovereign state in which such crimes are anticipated or occurring. If, however, a state fails to exercise that responsibility, the international community may assume a corresponding duty to protect civilian populations from the commission of genocide and crimes against humanity. Only a short time later, in 2011, the international community was confronted with the prospect that large-scale civilian casualties may occur as a consequence of fighting between government and rebel forces in Libya. The UN Security Council, therefore, was confronted with the dilemma of whether to authorise an intervention to avert what seemed likely to be a humanitarian catastrophe. In this case, the UN Security Council sanctioned an intervention by NATO forces in accordance with the new doctrine. Soon after, the Syrian rebellion took hold and civilians began to be killed and injured in their thousands. In that case, however, the Security Council was paralysed. Neither sanctions nor military intervention could be agreed upon. In this article the Libyan and Syrian cases are analysed with a view to determining why the international community's response to the two conflicts has been so different and what these differences tell us about the current standing and practice of the responsibility to protect doctrine.

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'I watched a little baby die today. Absolutely horrific ... No one here can understand how the international community can let this happen. ... There is just shells, rockets and tank fire pouring into civilian areas of this city, and it is just unrelenting.'

— Sunday Times journalist Marie Colvin from Homs, Syria, the day before she was killed by Syrian military rocket fire.¹

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I INTRODUCTION

It is infrequently the case that one person by uttering one word can change the course of history. Yet Colonel Muammar Gaddafi of Libya did just that. The word was ‘cockroaches’ and he used it to describe those in the city of Benghazi who were rising against him in February 2011.² He vowed to search for them ‘house to house’.³ He said that protesters would be ‘hunted down door to door and executed’.⁴ His use of the word was eerily reminiscent of the same word used in the same context by Hutu radio in Rwanda prior to the massacre of Tutsi opponents in 1994. It is probable that ‘the responsibility to protect’ (‘R2P’) was born from that usage and at that time.⁵

Few in the international political and diplomatic communities could have imagined the international standing and influence the new doctrine succeeded in attaining in the decade since it was first conceived.⁶ Now, however, the doctrine faces the sternest test of its application and credibility in the wake of the recent Libyan and Syrian uprisings. In this article, I re-examine its standing following these bitter conflicts.

The rebellion against the Gaddafi regime commenced in February 2011, following closely upon revolutionary changes that were occurring in Tunisia and Egypt. However, whereas in those countries the autocrats in charge had reacted with a measure of restraint, Gaddafi declared war on the Libyan uprising. Soon, the number of protestors killed climbed from the hundreds to more than a thousand. As the Gaddafi forces gained strength and territory, so the opposition weakened to the extent that it appeared highly likely that it might be swept away in Benghazi, the city at the epicentre of the rebellion. It was at that point that Gaddafi threatened the disaffected population there with extinction. The prospect that some thousands of ‘cockroaches’ may be killed was no longer distant but imminent.

Following his words, the international community became deeply alarmed. The prospect of massacre and atrocity in Libya at the hands of the regime’s military forces was clear. The United Nations High Commissioner for Human Rights declared her concern and urged the UN’s Security Council and Human Rights Council to act. On 25 February, the Human Rights Council established a

¹ BBC News, ‘Journalist Marie Colvin in Homs: “I Saw a Baby Die Today”’, *Mid-East*, 21 February 2012 <<http://www.bbc.co.uk/news/world-middle-east-17120484>>.

² Kareem Fahim and David D Kirkpatrick, ‘Qaddafi’s Grip on the Capital Tightens as Revolt Grows’, *The New York Times* (online), 22 February 2011 <<http://www.nytimes.com/2011/02/23/world/africa/23libya.html?pagewanted=all>>.

³ *Ibid.*

⁴ ABC Radio National, ‘Defiant Gaddafi Issues Chilling Threat’, *The World Today*, 23 February 2011 <<http://www.abc.net.au/worldtoday/content/2011/s3146582.htm>>.

⁵ I trace the background to the development of the responsibility to protect in Spencer Zifcak, ‘The Responsibility to Protect’ in Malcolm D Evans (ed), *International Law* (Oxford University Press, 3rd ed, 2010). This article follows logically from that one. For recent book-length treatments of the responsibility to protect, see also Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Brookings Institution Press, 2008); Alex J Bellamy, *Responsibility to Protect* (Polity, 2009); Ramesh Thakur, *The Responsibility to Protect: Norms, Laws and the Use of Force in International Politics* (Routledge, 2010); Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

⁶ Gareth Evans et al, ‘The Responsibility to Protect’ (Report, International Commission on Intervention and State Sovereignty, December 2001).

fact-finding committee to examine the unfolding events and urged the General Assembly to expel Libya from Security Council membership. On 26 February, the Security Council debated and agreed to *Resolution 1970*.⁷ This condemned widespread and systematic attacks on civilians and demanded an end to state violence. The speed at which these UN sponsored measures were considered and adopted was almost unprecedented. In acting, the Security Council made it clear that the action derived from the responsibility of the Libyan Government to protect its own people. The first coercive intervention authorised by the Security Council and undertaken pursuant to R2P had begun.

In the discussion that follows, I first provide an account of the Libyan intervention, focusing in particular on the role of the UN Security Council in authorising and supervising it. From that account I draw conclusions as to the standing of R2P as a norm of international political behaviour immediately after the fall of the regime. Any conclusion as to the standing of R2P at that time has, nevertheless, to be preliminary. This is because international events since have already overtaken any assessment that may firmly have been made. The dramatic and tragic events in Syria have now made any settled conclusion as to R2P's relevance and status premature. At the time of writing, incontrovertible evidence has emerged that crimes against humanity of a similar scale and intensity to that which preceded the intervention in Libya are daily occurring in Syria. Yet no internationally mandated coercive intervention of the Libyan kind seems to be in prospect.

In the second part of the article, therefore, I examine the Syrian case through the prism of R2P and the Security Council deliberations with respect to intervention there, to determine how it is that the doctrine's application can differ so radically given grave political and humanitarian conditions that are at least superficially similar. The paper will conclude with a contingent assessment of where R2P stands given the mixed and seemingly contradictory circumstances of its effectuation in the two country situations under review.

II LIBYA

In response to the rapidly disintegrating situation in Libya, the relevant organs of the UN laid the ground for the subsequent intervention in a series of condemnatory statements. The UN High Commissioner for Human Rights issued a statement affirming that the protection of civilians should be the paramount consideration in maintaining national order and the rule of law. 'Widespread and systematic attacks against the civilian population may amount to crimes against humanity'.⁸ The Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect issued a release which sought to remind the Libyan regime of its international obligations. 'If the reported nature and scale of ... attacks are confirmed, they may well constitute crimes against

⁷ SC Res 1970, UN SCOR, 66th sess, 6491st mtg, UN Doc S/RES/1970 (26 February 2011) (*'Resolution 1970'*).

⁸ Office of the High Commissioner for Human Rights, 'Pillay Calls for International Inquiry into Libyan Violence and Justice for Victims' (Press Release, 22 February 2011).

humanity, for which national authorities should be held accountable'.⁹ The Security Council issued a press release which covered similar ground.¹⁰ Deploying the R2P doctrine, the release called on the Libyan Government to meet its responsibility to protect its population. It should 'act with restraint, to respect human rights and international humanitarian law, and to allow immediate access for international human rights monitors and humanitarian agencies'.¹¹ The Security Council, it said, would follow the situation closely. In Libya, nothing changed.

The Human Rights Council convened a special session on the situation of human rights in the Libyan Arab Jamahiriya on 25 February.¹² Introducing the session, the High Commissioner for Human Rights described the Libyan descent into violence and chaos as 'shocking and brutal'.¹³ It represented a callous and worsening disregard for the rights and freedoms of the Libyan people, she said, that had been characteristic of the Libyan leadership for more than four decades.¹⁴ A statement from all special procedures mandate holders expressed concern that 'several hundred people have died. Many others have been arrested. Thousands are injured. The human suffering continues to rise'.¹⁵ On the same day, the Security Council adopted *Resolution S-15/1*.¹⁶ The resolution expressed deep concern with respect to the deteriorating situation and strongly condemned reported human rights violations including indiscriminate attacks on civilians, extrajudicial killings, arbitrary arrests and detention and torture of peaceful demonstrators. It called on the Libyan Government to 'meet its responsibility to protect its population [and] to immediately put an end to all human rights violations'.¹⁷ It recommended that the General Assembly consider the expulsion of Libya from Security Council membership.¹⁸ The Assembly suspended Libya on 1 March.

⁹ Office of the Special Adviser of the Secretary-General on the Prevention of Genocide, 'UN Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect on the Situation in Libya' (Press Release, 22 February 2011).

¹⁰ UN Security Council, 'Security Council Press Statement on Libya' (Press Statement, SC/10180, 22 February 2011).

¹¹ *Ibid.*

¹² Human Rights Council, *Letter Dated 22 February 2011 from the Permanent Representative of the Republic of Hungary to the United Nations Office and Other International Organizations in Geneva Addressed to the President of the Human Rights Council*, UN GAOR, 15th spec sess, UN Doc A/HRC/S-15/1 (24 February 2011).

¹³ Navi Pillay, 'Situation of Human Rights in the Libyan Arab Jamahiriya' (Speech delivered at the Human Rights Council, Geneva, 25 February 2011) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10760&LangID=E>>.

¹⁴ *Ibid.*

¹⁵ José-Luis Gómez del Prado, 'Statement Delivered on behalf of All Special Procedures Mandate Holders of the United Nations Human Rights Council at the Fifteenth Special Session of the Human Rights Council on the Human Rights Situation in the Libyan Arab Jamahiriya' (Speech delivered at the Human Rights Council, Geneva, 25 February 2011) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10761&LangID=E>>.

¹⁶ *Situation of Human Rights in the Libyan Arab Jamahiriya*, GA Res S-15/1, UN GAOR, 15th spec sess, 2nd mtg, UN Doc A/HRC/RES/S-15/1 (3 March 2011, adopted 25 February 2011) ('*Resolution S-15/1*'), adopted by the UN Security Council in *Resolution 1970*, UN Doc S/RES/1970.

¹⁷ *Resolution S-15/1*, UN Doc A/HRC/RES/S-15/1, para 2.

¹⁸ *Ibid* para 14.

It was highly significant that, immediately before the Human Rights Council met, the key regional organisations traditionally sympathetic to Middle Eastern and North African regimes joined the chorus of international protest and made recommendations for immediate ameliorative action.¹⁹ Between 20–23 February, the Security Council of the League of Arab States, the Secretary-General of the Organisation of Islamic Cooperation (‘OIC’) and the Peace and Security Council of the African Union all issued statements condemning the descent into violence in Libya and calling for the establishment of immediate talks between the contending parties to arrange a ceasefire and to work towards a mediated solution of the conflict.²⁰ In an unprecedented move, the Arab League went one step further and suspended Libya’s membership of the League.²¹

These statements and resolutions signalled the international community’s heightened concern with respect to events in Libya and provided the necessary backing for decisive action by the Security Council when it met to consider the Libyan crisis on 26 February. At this meeting the Security Council adopted *Resolution 1970*.²² The resolution expressed grave concern about the Libyan conflict. It deplored the gross and systematic violation of human rights in the country. It welcomed the condemnation by the Arab League, the African Union and the OIC. It condemned the deliberate killing of civilians and it recalled the Libyan authorities’ responsibility to protect its population. The resolution demanded an immediate end to hostilities; the observance of human rights; access for human rights monitors; and safe passage for humanitarian and medical workers and supplies into the country. It also set in place a set of coercive measures. It imposed an arms embargo; a travel ban on key figures in the Libyan administration; a freeze on their assets overseas; and it called for a review of progress with respect to these measures within 120 days. The Libyan Government responded on 2 March stating its belief that the Security Council resolution was premature and requesting that its operation be suspended until the claims made within it could be confirmed.²³ On the ground, the killings, torture and arbitrary detentions continued unabated.

Regional organisations became even more vocal as the violence escalated. The Gulf Cooperation Council released a statement on 7 March, which called upon the Security Council to ‘take all necessary measures to protect civilians, including enforcing a no-fly zone over Libya’ and further condemned the state-sponsored violence.²⁴ In a dramatic turn of events, the Libyan Ambassador to the UN defected from the regime and called upon UN member states to recognise the Libyan Interim Council as the legitimate Libyan authority. The OIC came in behind the Arab League and also endorsed the creation of a no-fly

¹⁹ Alex J Bellamy, ‘Libya and the Responsibility to Protect: The Exception and the Norm’ (2011) 25 *Ethics & International Affairs* 263, 266.

²⁰ UN Security Council, above n 10; Organisation of Islamic Cooperation, ‘OIC General Secretariat Condemns Strongly the Excessive Use of Force against Civilians in the Libyan Jamahiriya’ (Press Release, 22 February 2011); African Union Peace and Security Council, *Communiqué*, 261st mtg, AU Doc PSC/PR/COMM(CCLXI) (23 February 2011).

²¹ Paul D Williams, ‘Briefing: The Road to Humanitarian War in Libya’ (2011) 3 *Global Responsibility to Protect* 248, 251.

²² *Resolution 1970*, UN Doc S/RES/1970.

²³ Williams, above n 21, 252.

²⁴ *Ibid.*

zone. It stopped short, however, of endorsing foreign military intervention on the ground. On 12 March, the Arab League intervened forcefully to call upon the Security Council to establish a no-fly zone and to create safe areas in places exposed to shelling.²⁵ It urged the Security Council to set in place measures to protect the civilian population from widespread human rights abuse and declared that the existing Libyan authorities had lost all legitimacy.

The Security Council met again on 17 March to review the situation and determine what further action was required. The outcome of its deliberations was the groundbreaking *Resolution 1973*.²⁶ The resolution deplored the failure of the Libyan authorities to comply with *Resolution 1970*, expressed grave concern at the deteriorating human rights situation and escalating violence in the country and reiterated the responsibility of the Libyan Government to protect the Libyan population.²⁷ It recalled the condemnation of the Libyan regime by the Arab League, the African Union and the OIC, and their demand for the creation of a no-fly zone and of safe havens for civilians under threat of shelling. Following from this the Security Council, for the first time, authorised coercive military intervention in a sovereign state without the consent of that state's governing authorities. *Resolution 1973* strengthened and extended the arms embargo, asset freeze and travel restrictions imposed in *Resolution 1970*. It deplored the flow of armed mercenaries into the country to assist government forces in suppressing the rebellion. Most importantly, however, it authorised the use of force by a coalition of nations under the North Atlantic Treaty Organization's umbrella in two separate ways.

First, the Security Council resolved that 'all necessary measures' could be taken to protect civilians and civilian populated areas under threat of attack.²⁸ The measures, however, could not include the deployment of any 'foreign occupation force of any form on any part of Libyan territory'.²⁹ Secondly, the Security Council determined that a no-fly zone should be established over Libya in order to protect civilians and authorised NATO to take 'all necessary measures' to enforce the ban on flights.³⁰ The aim of all these measures was to force the Libyan regime to desist from grievous abuses of human rights and humanitarian law, abuses which by that time had clearly assumed the status of potential crimes against humanity.³¹ The designation of crimes against humanity having been advanced, R2P could be invoked by the Security Council to shape an international military intervention designed to prevent the occurrence of existing and probable atrocities.

It is important to note, however, that there were significant divisions in the Security Council with respect to *Resolution 1973*. Brazil, China, Germany, India

²⁵ SC Res 1973, UN SCOR, 66th sess, 6498th mtg, UN Doc S/RES/1973 (17 March 2011) Preamble para 12 ('*Resolution 1973*').

²⁶ *Ibid.*

²⁷ *Ibid* Preamble para 4.

²⁸ *Ibid* para 4.

²⁹ *Ibid.*

³⁰ *Ibid* paras 6–8.

³¹ *Ibid* Preamble para 7.

and Russia expressed reservations about it.³² These stemmed in part from the commitment of Russia and China in particular to the principle of nonintervention in the affairs of sovereign states and in part from disagreements between Security Council members as to the most appropriate strategies to be deployed to bring the violence quickly to an end.³³ I return to consider these divisions presently.

Two days after *Resolution 1973* was adopted, a military coalition under the umbrella of NATO began bombing Libyan Government positions from which attacks upon civilians were likely to be launched. This was the most obvious military measure taken to protect civilians but the intervention was multifaceted. The United States took out Libya's integrated air defence system to deprive it of the capacity to launch air strikes on Benghazi and elsewhere. The US also provided the majority of the intelligence information to monitor Gaddafi forces on the ground. This intelligence was converted into targets which could then be attacked from the air by British and French air force fighters. As weeks passed, a coalition of 14 NATO countries and four partner nations was created to combine both naval and aerial forces. France and Britain flew 40 per cent of the sorties. Spain, the Netherlands, Turkey, Greece and Romania supported the intervention by enforcing the no-fly zone and the arms embargo at sea. Initially, implementation of the UN mandate consisted principally of air attacks on tanks, artillery and other units engaged in front line combat. The protection of civilians remained the primary objective. Benghazi was secured within weeks.

However, when it became clear two months after the initial aerial intervention that Libyan Government resistance in other parts of the country was stronger than had been anticipated, NATO began to attack a wider range of targets in the Libyan capital, Tripoli, and elsewhere that had been identified as 'command and control' centres. On the weekend of 1 May, the Gaddafi family compound was hit, killing the leader's youngest son and three of his grandchildren.³⁴ Russia described the attack as a 'disproportionate use of force'.³⁵

As the fighting continued, reservations of a different kind began to be expressed from two different and complementary sources. Libyan fighters on the ground began to complain that the NATO bombing campaign was insufficient and misdirected.³⁶ Rebels in the west and in the port city of Misrata complained that without more intensive and extensive NATO bombardment, they lacked the firepower and military discipline to take charge on the ground.³⁷ NATO appeared to be stuck in second gear, despite *Resolution 1973* authorising all necessary means to protect civilians. NATO's military leadership became increasingly more convinced that this objective could not be achieved unless the

³² UN Security Council, 'Security Council Approves "No-Fly Zone" over Libya, Authorizing "All Necessary Measures" to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions' (Press Statement, SC/10200, 17 March 2011).

³³ Bellamy, above n 19, 267.

³⁴ Tim Hill, 'Muammar Gaddafi Son Killed by NATO Air Strike — Libyan Government', *The Guardian* (online), 1 May 2011 <<http://www.guardian.co.uk/world/2011/may/01/libya-muammar-gaddafi-son-nato>>.

³⁵ UN SCOR, 66th sess, 6528th mtg, UN Doc S/PV.6528 (4 May 2011) 9 (Vitaly Churkin).

³⁶ Rod Nordland, 'Many Libyan Rebels, Blaming NATO, Flee City in the East', *The New York Times* (New York), 18 April 2011, 10.

³⁷ C J Chivers and David D Kirkpatrick, 'Libyan Rebels Complain of Deadly Delays under NATO's Command', *The New York Times* (New York), 5 April 2011, 10.

Libyan leadership was destroyed.³⁸ With government forces still in charge of significant territory in the west of the country, including the capital Tripoli, the prospect of a stalemate had emerged, with the country divided between rebels in the east and Colonel Gaddafi still in charge in the west.³⁹ To the rebels on the ground and NATO commanders leading attacks in the air, any such partition was anathema.⁴⁰

The question then became whether more muscular NATO intervention — such as the destruction of infrastructure including government buildings, the electricity grid and fuel dumps, and the deliberate targeting of Libyan commanders including Colonel Gaddafi — could properly be regarded as falling within the UN ‘civilian protection’ mandate. In the end, the NATO strategy morphed progressively into one that embraced regime change. President Obama, after having initially rejected the idea that Libyan intervention should embrace regime change, encapsulated the altered objective in the following terms:

The goal is to make sure that the Libyan people can make a determination about how they want to proceed, and that they’ll be finally free of 40 years of tyranny and they can start creating the institutions required for self-determination.⁴¹

The argument made in defence of this expanded understanding was that the protection of civilians could not be achieved unless military victory was complete. On any account, this was to stretch the terms of *Resolution 1973* to their absolute limit, but it sufficed to underpin and rationalise NATO’s subsequent intensification of the war that, together with the bravery of the Libyans on the ground, finally brought the conflict substantially to an end in late August 2011.

The Security Council engaged in intensive negotiations for a further resolution, reflecting the altered situation on the ground, through the early weeks of September. Sporadic fighting continued around Sirte and Bani Walid where it was believed that Colonel Gaddafi still hid. The Security Council was sufficiently confident of the conclusion of wider hostilities, however, to turn its attention to the removal of some instruments of coercive intervention and to plan for the future. On 16 September, it adopted *Resolution 2009*.⁴²

This resolution established the mandate for a UN Support Mission in Libya (‘UNSMIL’). It lifted the arms embargo to enable the transfer of arms intended solely for security or disarmament assistance to the new Libyan authorities and for the protection of UN humanitarian and diplomatic personnel. It lifted the asset freeze on the Libyan National Oil Corporation and Zuetina Oil Company to permit revenues from oil to flow again and lifted the ban on flights on Libyan commercial aircraft, in order to facilitate normal economic activity. The priority

³⁸ NATO, ‘Statement on Libya’ (Press Release, (2011) 071, 8 June 2011) <http://www.nato.int/cps/en/natolive/news_75177.htm?mode=pressrelease>.

³⁹ John F Burns, ‘Qaddafi and Zuma Meet but Reach No Agreement’, *The New York Times* (New York), 30 May 2011, 10.

⁴⁰ John F Burns, ‘NATO Resumes Air Strikes after Qaddafi Vows to Fight On’, *The New York Times* (New York), 31 May 2011, 8.

⁴¹ Eric Schmitt and David E Sanger, ‘As Goal Shifts in Libya, Time Constrains NATO’, *The New York Times* (New York), 27 May 2011, 8.

⁴² SC Res 2009, UN SCOR, 66th sess, 6620th mtg, UN Doc S/RES/2009 (16 September 2011).

areas for UNSMIL were to restore security and public order and to promote the rule of law;⁴³ to undertake the task of constitution-making⁴⁴ and to promote national reconciliation;⁴⁵ to promote and protect human rights and to support transitional justice;⁴⁶ and to take immediate steps towards the pursuit of economic recovery.⁴⁷ The Security Council agreed to recognise the National Transitional Council as the official representative at the UN of the Libyan nation.

The magnitude of the task facing the Security Council and the UN Mission was great. The Chinese delegation summarised it as:

First, stability and order should be restored to the country as soon as possible ... Secondly, the aspirations and choices of the Libyan people must be respected. Libya's sovereignty, independence, unity and territorial integrity must be genuinely respected ... Thirdly, an inclusive political process should be launched as soon as possible ... enabling Libya to embark swiftly on the path of national reconciliation ... Fourthly, in assisting Libya in its reconstruction, the United Nations and the Security Council should play a leading role in accordance with the purposes and principles of the United Nations Charter.⁴⁸

The international community had exercised its 'responsibility to protect', but the 'responsibility to rebuild' remained an obligation and challenge of formidable proportions.

A *The Responsibility to Protect after Libya*

The Libyan intervention had presented considerable dangers for the future of the doctrine of R2P. As it was the first military intervention whose purpose was to protect a nation's civilian population against gross human rights abuses committed by their government, the risks attached to failure were considerable. If the intervention had failed, the entire doctrine may well have been called into question or, even, fallen into desuetude. As Professor Thomas Weiss put the matter:

If the Libyan intervention goes well, it will put teeth in the fledgling RtoP doctrine. Yet, if it goes badly, critics will redouble their opposition, and future decisions will be made more difficult — for one thing, because the decibel level of claims by contrarians about RtoP's potential to backfire through 'moral hazard' will increase.⁴⁹

In the event, the objective of protecting Libyan civilians against the grave human rights abuses threatened by their government was achieved. In the first instance, the citizens of Benghazi, termed 'cockroaches' by their leader, were spared the massacre that in all likelihood had awaited them. Then, the remainder

⁴³ Ibid para 2.

⁴⁴ Ibid para 5(c).

⁴⁵ Ibid para 4.

⁴⁶ Ibid para 2.

⁴⁷ Ibid para 12(e).

⁴⁸ UN SCOR, 66th sess, 6620th mtg, UN Doc S/PV.6620 (16 September 2011) 4–5 (Li Baodong).

⁴⁹ Thomas G Weiss, 'RtoP Alive and Well after Libya' (2011) 25 *Ethics & International Affairs* 287, 287. See also Thomas G Weiss, 'Whither R2P?' in *The Responsibility to Protect: Challenges and Opportunities in light of the Libyan Intervention* (e-International Relations, 2011) 7, 10 <<http://www.e-ir.info/wp-content/uploads/R2P.pdf>>.

of the country fell to Libyan rebels, assisted forcefully by the NATO coalition, thus ensuring that Colonel Gaddafi could not regain control and that, at least for the foreseeable future, the civilian population would be safe under the umbrella of the government of the former opposition National Transitional Council.

The fact of military victory on the ground is in itself sufficient to justify the conclusion that the Libyan R2P operation succeeded.⁵⁰ This is despite the strong protests against its methods, lodged not without reason, by those members of the Security Council who abstained from the vote on *Resolution 1973*.⁵¹ However, it was not just the military win that served to secure R2P as an international political doctrine of very considerable importance. The Libyan success had a number of novel aspects each of which consolidated the doctrine's gains.

Unlike prior humanitarian interventions, the Libyan one proceeded with the authorisation of the UN Security Council. This was not a unilateral intervention by Western forces such as that which had created such enormous legal controversy in Kosovo. The Libyan intervention fell squarely within the terms of the *Charter of the United Nations* ('UN Charter'). The fact that opponents amongst the Security Council's Permanent Five members ('P5') settled for criticism and abstention rather than the exercise of their veto suggested at the time that the persistent request, from the P5 amongst others, that permanent members refrain from the exercise of the veto when matters concerning genocide and large-scale human rights abuse were under consideration had achieved some resonance.⁵²

The Security Council acted following strong action by the Human Rights Council. It had condemned outright the human rights abuses being committed in Libya and, still in the early days of the conflict, recommended that the General Assembly expel Libya from the Security Council.⁵³ The role of regional organisations was even more important.⁵⁴ The Arab League in particular took firm action against Libya, condemning the government's attitudes and actions and expelling the country from its membership. In this it was joined by the Peace and Security Council of the African Union and the OIC. Buttressed by the support of these regional bodies, and following the League's recommendation that a no-fly zone be imposed as one means of staunching the bloodshed, the Security Council was in a far stronger position to act without courting the criticism of selectivity.⁵⁵

The extensive delays that had characterised previously authorised interventions in Rwanda, Darfur and Côte d'Ivoire for example, did not occur in the Libyan case. The Security Council's authorisation came quickly and NATO's

⁵⁰ Ramesh Thakur, 'R2P, Libya and International Politics as the Struggle for Competing Normative Architectures' in *The Responsibility to Protect: Challenges and Opportunities in light of the Libyan Intervention* (e-International Relations, 2011) 12, 13 <<http://www.e-ir.info/wp-content/uploads/R2P.pdf>>; Gareth Evans, 'End of the Argument' *Foreign Policy* (online), December 2011 <http://www.foreignpolicy.com/articles/2011/11/28/gareth_evans_end_of_the_argument>.

⁵¹ UN SCOR, 66th sess, 6498th mtg, UN Doc S/PV.6498 (17 March 2011).

⁵² See Ariela Blätter and Paul D Williams, 'The Responsibility Not to Veto' (2011) 3 *Global Responsibility to Protect* 301, 316–17.

⁵³ *Resolution S-15/1*, UN Doc A/HRC/RES/S-15/1, para 14.

⁵⁴ *Resolution 1973*, UN Doc S/RES/1973, para 5.

⁵⁵ Bellamy, above n 19, 266.

intervention only days later. This suggested that given certain critical preconditions, including the rapid formation of a capable international military coalition under unified leadership, the international community could act rapidly to stop impending massacres and related severe and systematic human rights abuse. This was a significant advance from which important military lessons could be learned.

Success in Libya came without the imposition of ‘boots on the ground’. *Resolution 1973* had explicitly excluded the deployment of forces of occupation. That exclusion had been critical to its adoption. Yet, despite that prohibition, military means had been found to achieve the protection of Libyan civilians from the depredations of their government, and to set the country on the road to security, national reconciliation and economic recovery. This success, and the strategies employed to achieve it, may similarly hold important lessons for any future Pillar 3 interventions that the Security Council may contemplate, not the least being the means by which international support for a Security Council sponsored resolution may most effectively be garnered.

For these reasons, it may fairly be said that the Libyan intervention advanced the cause of the R2P doctrine, although a final judgment to this effect cannot of course be made until the country’s governance is inclusive, the protection of citizens’ human rights is substantially secure and economic recovery is on a sound footing.⁵⁶ Nevertheless, at the same time, the intervention revealed significant weaknesses in the manner of its implementation. These may have a counteractive negative effect on proposals for coercive incursions in the future, the first evidence of which is already apparent in the Syrian case.⁵⁷

The most severe criticism of the Libyan case has concerned the allegation of ‘mission creep’.⁵⁸ Those members of the Security Council who abstained from the vote on *Resolution 1973* have attacked forcefully what they see as the abuse of the Security Council’s mandate. In their view there was no way in which the relevant resolution could have permitted the extension of the conflict beyond the protection of civilians and towards the objective of regime change. Russia, China, India and Brazil all objected strongly to the alteration of NATO’s military stance from the relative neutrality of civilian protection to evident partiality in taking the rebel side.⁵⁹ As one ambassador of the India, Brazil, South Africa Dialogue Forum (‘IBSA’) put the matter to me in interview:

The resolution was always concerned with the protection of civilians. It did not mean that NATO could decimate one side, arm rebels, worsen tribal animosities, declare victory and look the other way from extrajudicial killings.⁶⁰

Secondly, forceful opposition was expressed towards the shift from civilian protection to the overthrow of the Gaddafi regime. Here, the argument was that *Resolution 1973* could not be stretched to cover actions such as intervention in a

⁵⁶ Nicolas Pelham, ‘Libya: How They Did It’, *The New York Review of Books* (New York), 29 September 2011; Ivo H Daalder and James G Stavridis, ‘NATO’s Success in Libya’, *The International Herald Tribune* (New York), 30 October 2011, 9.

⁵⁷ David Rieff, ‘R2P, RIP’, *The New York Times* (New York), 7 November 2011, 6.

⁵⁸ James Pattison, ‘The Ethics of Humanitarian Intervention in Libya’ (2011) 25 *Ethics & International Affairs* 271, 273–4.

⁵⁹ UN SCOR, 66th sess, 6528th mtg, UN Doc S/PV.6528 (4 May 2011) 7–10.

⁶⁰ Interview with IBSA ambassador (New York, November 2011).

civil war, the assassination of a government's leadership and the overthrow of the regime.⁶¹ Security Council endorsement was critical to the legality of the intervention, particularly as it took place without Libyan consent, but the actions of the coalition forces appeared to take the intervention well beyond the resolution's terms and, therefore, in all probability, beyond what the *UN Charter* could be interpreted to allow. Even the most ardent international advocates of R2P have acknowledged that the mandate was stretched to breaking point and maybe beyond it.⁶² The cost of this for future Security Council authorisation for military intervention may well be high.

Thirdly, the nature of the military campaign raised starkly the question whether it could have taken a different form and still been as effective. If so, then evidently, a more targeted and limited form of military intervention should have been preferred. Gareth Evans, for example, while declaring that R2P's application in Libya had been a success,⁶³ expressed the view that:

Many of us would have been much more comfortable if NATO had confined its role, after neutralising the Libyan air force and halting the ground forces moving on Benghazi ... essentially to a watching-brief role: maintaining the no-fly zone and being prepared to attack whenever civilians or civilian areas were being put at risk by reachable targets.⁶⁴

Arguments of this kind raise perhaps the most difficult of all questions concerning an R2P military intervention. In every case a military assessment will need to be made of the minimum force required to achieve a mission's core objective — that is, the protection of the civilian population from genocide, crimes against humanity and other gross human rights abuses. That assessment may not always be containable within the terms of a Security Council mandate determined in advance. And it will rarely be practicable or sensible to go back to the Security Council for an extension of the mandate in the midst of war. The Security Council is in no position to make minute by minute, strategic military decisions. The line between the protection of civilians and regime change, therefore, will not always be easily drawn. Occasionally, but hopefully not too frequently, regime change may be determined to be the only viable strategy to prevent the commission of governmental atrocities.⁶⁵ In that circumstance, one has little choice but to accept that conditions on the ground may, in the end, trump all other considerations.⁶⁶

A final consideration affecting a judgment on whether or not the Libyan intervention will be regarded as a success is the extent to which the 'responsibility to rebuild' proceeds effectively.⁶⁷ The National Transitional

⁶¹ UN SCOR, 66th sess, 6566th mtg, UN Doc S/PV.6566 (27 June 2011) 4.

⁶² Gareth Evans, 'Interview: The R2P Balance Sheet after Libya' in *The Responsibility to Protect: Challenges and Opportunities in light of the Libyan Intervention* (e-International Relations, 2011) 34, 41 <<http://www.e-ir.info/wp-content/uploads/R2P.pdf>>. See also Thakur, 'R2P, Libya and International Politics', above n 50, 13.

⁶³ Evans, 'Interview: The R2P Balance Sheet after Libya', above n 62, 40.

⁶⁴ *Ibid* 41.

⁶⁵ Thakur, 'R2P, Libya and International Politics', above n 50, 13.

⁶⁶ Bernard Gwertzman, 'Will Syria Follow Libya?', *Council on Foreign Relations* (online), 1 September 2011 <<http://www.cfr.org/syria/syria-follow-libya/p25745>>.

⁶⁷ Jon Weston and Joshua S Goldstein, 'Humanitarian Intervention Comes of Age' (2011) 90 *Foreign Affairs* 48, 59; Thakur, above n 50, 14.

Council has declared that the country will become a democracy, a new constitution will be written and elections will be held within the space of a few months.⁶⁸ All that is promising. It is also apparent that foreign investment is returning to Libya, albeit slowly, making economic recovery more likely. When combined with the re-commencement of oil exports, the economic future may be bright, but much work still needs to be done in re-establishing effective financial infrastructure.⁶⁹

What has been less promising is the difficulty that the Security Council has had in persuading different rebel groups to hand in their arms. For this reason, the prospect that Libya will move towards the establishment of a unified military force under government control still appears to be a far distant one. This problem is a particularly serious one given that, at the time of writing, signs are appearing that revenge attacks directed at former Gaddafi loyalists have begun.⁷⁰ At the same time, forces loyal to the former dictator re-took his strongholds in Sirte and Bani Walid but were subsequently pushed back.⁷¹ While such fighting may presently be characterised as skirmishing, the danger is that it may widen to violence between competing armed factions and tribal warlords. The central government, which remains fledgling and weak, is not yet in any position to control such fighting. Any outbreak of this kind would severely damage the progress of societal reconstruction which is so necessary to underpin Libya's economic and political future.⁷² The jury on rebuilding remains out.

Given these different and competing political perspectives on the Libyan intervention, it is difficult to encapsulate the standing of the R2P doctrine at its close with any great certainty. That uncertainty is magnified by the fact that, as shall be demonstrated, the absence of will to intervene similarly in Syria has made the doctrine's status in international law and international relations even harder to determine or predict. At the risk of over simplification, however, the following conclusions may very tentatively be proposed:

- The Libyan intervention can be considered a successful application of R2P because the military campaign succeeded in protecting Libyan citizens from the commission of further and certain crimes against humanity and grave human rights abuses.
- In so doing, the intervention lent legitimacy and weight to the appropriateness of Pillar 3 intervention in emergency circumstances.
- Further, in this regard, it solidified the view that the application of Pillars 1, 2 and 3 need not proceed sequentially. From time to time, there will be desperately urgent cases in which Pillar 3 intervention must be the first option to be considered, not the last.

⁶⁸ Transitional National Council of Libya, 'Draft Constitutional Charter for the Transitional Stage: The Constitutional Declaration' (Draft Constitution, 3 August 2011).

⁶⁹ Borzou Daragahi, 'Reconstructing Libya: In a Ruinous State', *Financial Times* (London), 17 November 2011, 9.

⁷⁰ Liam Stack, 'Protests in Benghazi Shake Libya's Interim Council', *The New York Times* (New York), 23 January 2012, 8.

⁷¹ Liam Stack, 'Pro-Government Libyan Militia Routed from a Qaddafi Bastion', *The New York Times* (New York), 25 January 2012, 10.

⁷² See generally *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN SCOR, 66th sess, UN Doc S/2011/727 (22 November 2011).

- The intervention also signalled that R2P would no longer be considered at the UN to consist exclusively or even principally of measures of prevention. Coercive intervention is now part of the package and at the top of the agenda for discussion and debate.
- The intervention confirmed the absolutely central role of the Security Council in providing authorisation, on behalf of the international community, for military intervention to take place in emergency circumstances. Such authorisation lends essential political legitimacy and legal force to any intervention that may be contemplated within R2P's rubric.
- The intervention also established the crucial role that can and should be played by recognised regional organisations in determining whether an intervention may be appropriate and if so, what form it might best take. Without the backing of relevant regional organisations, it is far less likely that the Security Council will be moved to endorse a Pillar 3 incursion upon the sovereignty of a state, not least so as to avoid the charge of selective implementation.
- The Libyan intervention demonstrated clearly, however, that much work remains to be done in determining the nature and limits of military strategy and tactics in the implementation of a Pillar 3 intervention. There is little doubt that the Security Council will be more minded to define the parameters of an intervention much more precisely than previously. That, in turn, may hinder the pursuit of the protection of civilians on the ground if military imperatives dictate that measures beyond those defined are necessary to achieve the mandated objective.
- It seems clear, following the 'mission creep' that occurred in the Libyan case, that it is highly unlikely that the Security Council will be able to agree to endorse a Pillar 3 intervention whose declared objective is a change in regime.

A senior UN official summarised the matter more succinctly:

Libya didn't kill R2P. But it raised a host of new and complex political and policy questions. We have a lot of work to do.⁷³

III SYRIA

At the time of writing, the death toll of Syrian rebels, protestors and civilians has been estimated at approximately 5400.⁷⁴ Many hundreds of members of the Syrian armed forces and police appear also to have perished.⁷⁵ Yet, the international community, represented by the membership of the Security Council, has been unable to agree upon any interventionist action to stem the

⁷³ Interview with senior UN official (New York, November 2011). See also Jennifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into RtoP' (2011) 25 *Ethics & International Affairs* 255, 261.

⁷⁴ Ellen Barry, 'As Nations Line Up against Syrian Government, Russia Sides Firmly with Assad', *The New York Times* (New York), 28 January 2012, 8.

⁷⁵ Liz Sly, 'Fear of War is Palpable in Divided Syrian City', *The Washington Post* (Washington DC), 24 January 2012, A12.

bloodshed. The Syrian Government, too, remains resolute in its rejection of any foreign interference in its domestic affairs and hostile to suggestions by other nations and coalitions of nations that its repressive violence must cease. In the second part of this article I seek to explain how it is that the Security Council can have chosen to act so decisively in Libya but seem chained to the ground when state-sponsored violence in Syria is considered. The apparent irreconcilability of these two positions, in turn, provides critical insights into the present and future dynamics of R2P's application.

Protests in Syria followed those that had occurred in Tunisia and Egypt. In February 2011, demonstrations against the government occurred initially in relation to issues such as poverty, inequality, restrictions upon freedom of speech, the desire for democracy and the demand that human rights be respected. In mid-March, large but peaceful protests commenced in Dar'a after a group of children accused of painting anti-government graffiti on public buildings were detained and tortured by government intelligence agents. Syrian armed forces responded violently however, attacking protesters and firing at a funeral procession.⁷⁶ After this, the protests spread rapidly to other cities including Damascus, Homs, Hama and Idlib.⁷⁷ On 30 March, the President of Syria, Bashar al-Assad, denounced the cumulative protests, alleging that Syria was facing a grand conspiracy by imperialist forces. Internal conspirators, he said, were spreading lies about the government, inciting sectarian tension and using violence against government security forces.⁷⁸ The problem was not with his government but with 'armed gangs and terrorists'.⁷⁹

On 16 April, President al-Assad, in a tactic designed to placate the protesters, swore in a new government,⁸⁰ lifted the state of emergency that had been in place since 1963,⁸¹ abolished the High Security Court and recognised the right to peaceful protest while strictly regulating it.⁸² One week later, on 22 April, the largest demonstrations yet seen occurred across the country. Protesters accused the government of providing too little too late.⁸³ More than 100 people were killed by government forces in the immediate aftermath of the demonstrations.

As the protests endured, the government deployed the army backed by armoured personnel carriers to quell them. The first systematic military deployment occurred on 25 April in Dar'a.⁸⁴ From that time, protests continued to expand across the country and the reaction of the military forces became increasingly violent. The protest movement responded to the repression by shifting its focus from demanding reforms to the regime to advocating its

⁷⁶ Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN GAOR, 17th spec sess, UN Doc A/HRC/S-17/2/Add.1 (23 November 2011) [27] ('*Commission Report*').

⁷⁷ *Ibid.*

⁷⁸ *Ibid* [30].

⁷⁹ *Ibid.*

⁸⁰ Bassem Mroue, 'Syrian President Orders Release of Some Protesters; Cabinet is Named', *The Washington Post* (Washington DC), 15 April 2011, A13.

⁸¹ Liam Stack, 'In Syria, an Attempt to Placate Protesters', *The New York Times* (New York), 17 April 2011, 10.

⁸² Nicholas Blanford, 'Repeal of Hated Emergency Law is "Too Little Too Late"', *The Times* (London), 22 April 2011, 29.

⁸³ *Ibid.*

⁸⁴ *Commission Report*, UN Doc A/HRC/S-17/2/Add.1, [28].

removal,⁸⁵ thus reflecting the calls that had been heard in other parts of the region.⁸⁶

The April demonstrations marked a significant alteration in the form and intensity of governmental repression. Sources regarded as reliable by the Office of the UN High Commissioner for Human Rights ('OHCHR') reported the use of

artillery fire against unarmed civilians, door-to-door arrest campaigns, the shooting of medical personnel who attempt to aid the wounded, raids against hospitals, clinics and mosques and the purposeful destruction of medical supplies and arrests of medical personnel.⁸⁷

Electricity, water and communications systems in the city were cut.⁸⁸ The OHCHR received information of mass, arbitrary arrests and the torture of protesters, lawyers, journalists, human rights defenders and others.⁸⁹

The Security Council met on 27 April to consider the worsening Syrian situation. The French representative condemned the actions of the Syrian Government in the strongest of terms:

I would like to express, before the Council, France's deep concern at the violent actions of the Syrian authorities against civilian demonstrators. We unreservedly condemn such unacceptable brutality, which has already caused not only hundreds of deaths among Syrian civilians, but also numerous disappearances of demonstrators, journalists and human rights activists. For the past three days, Dar'a has been a city besieged by the Syrian army, deprived of water, electricity and contact with the outside world, surrounded by tanks and threatened with heavy artillery.⁹⁰

Every member of the Security Council expressed deep concern at the rapidly deteriorating Syrian situation. However, different emphases were plainly visible when its members considered what action should be taken. The United Kingdom, reflecting a broadly Western position, proposed that four measures should immediately be instituted. The violence had to stop, the Syrian regime had immediately to respond to the legitimate demands of its people for genuine reform, those responsible for the violence should be made accountable for their actions and the international community should speak with one voice in condemning the killings and abuses of human rights.⁹¹ The Russian delegation responded, however, by making clear its view that this was essentially a domestic matter for the Syrian authorities to resolve. The situation in Syria, it pointed out, was not one that constituted a threat to international peace and security.⁹² Violence, it asserted, had been committed by both the government and opposition.⁹³ It argued that any outside interference should be eschewed because

⁸⁵ Blanford, above n 82, 29.

⁸⁶ Barry, above n 74, 8.

⁸⁷ UN SCOR, 66th sess, 6524th mtg, UN Doc S/PV.6524 (27 April 2011) 2 (Lynn Pascoe).

⁸⁸ *Ibid* 3.

⁸⁹ *Ibid*.

⁹⁰ *Ibid* 5 (Gérard Araud).

⁹¹ *Ibid* 5 (Sir Mark Lyall Grant).

⁹² *Ibid* 7 (Alexander Pankin).

⁹³ *Ibid*.

it might provoke undesirable and considerable regional instability.⁹⁴ Syria, Russia said, was ‘the cornerstone of the Middle East security architecture’.⁹⁵ Destabilising it could lead to significant regional complications.⁹⁶ The Indian delegation added that the primary responsibility of the Security Council in the circumstances was to abjure violence in any form and seek a resolution of internal differences through peaceful means.⁹⁷ Even at this early stage, then, reservations concerning the prospect of any intervention by the international community to address the Syrian crisis were being clearly expressed.

Two days later, on 29 April, the Human Rights Council met to consider Syria. It carried *Resolution S-16/1*,⁹⁸ which strongly condemned the use of lethal violence against peaceful protesters. It called on the Syrian Government immediately to put an end to any and all human rights abuse, including reaffirming the rights to freedom of expression and assembly, lifting censorship restrictions, permitting reporting within Syria, calling for the prohibition on foreign journalists to be lifted, and demanding the immediate release of all political prisoners.⁹⁹ The Security Council resolved urgently to despatch a mission to Syria to investigate all alleged human rights violations and called upon the Syrian Government to cooperate with its inquiries.¹⁰⁰ *Resolution S-16/1* was adopted by a substantial majority of the Security Council but there was notable opposition and abstention. China, Russia, Pakistan and Malaysia were amongst those nations that voted against the resolution. The abstainers included Nigeria and Saudi Arabia. Neither the Security Council’s nor the Human Rights Council’s condemnation had any effect on the ground. As the killing became more prevalent, the demonstrations grew larger and more widespread.

By the end of May, the UN reported that 850 people had been killed by government forces and some 8000 had been arbitrarily detained. Media reports at the time indicated that mass graves had been found in Dar’a, where the death toll reached 1100.¹⁰¹ On 25 May, France, Germany, Portugal and the UK introduced a draft resolution into the Security Council condemning the government crackdown.¹⁰² The draft resolution recalled the Syrian Government’s responsibility to protect its citizens, stressed the need for those responsible for government-sponsored violence to be brought to account and called for an end to killings, arbitrary detention, disappearances and torture. It demanded that the siege of Dar’a cease and that all media and communications restrictions be lifted. It urged the Syrian Government to cooperate with the Human Rights Council’s investigative mission. The Syrian Government refused.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid 8 (Hardeep Singh Puri).

⁹⁸ *The Current Human Rights Situation in the Syrian Arab Republic in the context of Recent Events*, GA Res S-16/1, UN GAOR, 16th spec sess, 2nd mtg, UN Doc A/HRC/RES/S-16/1 (4 May 2011, adopted 29 April 2011).

⁹⁹ Ibid paras 1–2.

¹⁰⁰ Ibid paras 7–8.

¹⁰¹ Khalid Ali, ‘Woman and Child among up to 26 Bodies “Found in Mass Graves” outside City’, *The Independent* (London), 18 May 2011, 24–5.

¹⁰² ‘Europeans on UN Council Offer Syria Resolution’, *Agence France-Presse* (France), 26 May 2011.

Intensive discussion then ensued among Security Council members of an amended form of the European resolution. Russia, China, India, Brazil and South Africa expressed their concern that a Security Council resolution should not seek to dictate the nature of the reform program that the Syrian Government should undertake. That, they felt, was essentially an internal matter. They sought also to remove what they saw as muscular language in the draft resolution. In doing so, they wished to avoid any suggestion in the draft resolution's terms that the Security Council's involvement may presage any form of external military intervention.

It was significant, in this context, that Russia and China raised directly their reservations regarding the manner in which *Resolution 1973*, dealing with Libya, had been interpreted expansively. However, the prior argument that the Syrian crisis should be considered a purely domestic one had evaporated. This followed developments in Jisr al-Shughour in north-west Syria, where Syrians had begun to flee the violence across the border to Turkey. Similarly, 4000 people had demonstrated against the government near the Golan Heights and some 100 of these had subsequently crossed the border to Israel. The movement of Syrian refugees across borders had become another major source of international concern.¹⁰³

On 21 July the Secretary-General's Special Advisers on the Prevention of Genocide and the Responsibility to Protect issued a statement on Syria.¹⁰⁴ They observed that the scale and ferocity of the violence in Syria indicated that crimes against humanity may have been committed there.¹⁰⁵ More in hope than anticipation, they urged the Syrian Government to fulfil its responsibility to protect its population and to ensure that its security forces complied with their obligations under international human rights law.¹⁰⁶ Meanwhile, negotiations on the draft Security Council resolution were foundering. The killings and the torture intensified.¹⁰⁷

In an attempt to break the deadlock, the President of the Security Council issued a presidential statement on Syria on 3 August.¹⁰⁸ In the statement the Security Council expressed its grave concern with respect to the worsening crisis in Syria and recorded its regret at the deaths of many hundreds of people.¹⁰⁹ It condemned the widespread violations of human rights that had occurred and called on both sides of the conflict to end the violence immediately.¹¹⁰ Reflecting the compromise that it was, however, the statement nevertheless affirmed the Security Council's commitment to the sovereignty, independence and territorial integrity of Syria and stressed that the only solution to the crisis was through an

¹⁰³ United Nations High Commissioner for Refugees, *UNHCR Works with Lebanon to Help Thousands Fleeing Syria Violence* (20 May 2011) <<http://www.unhcr.org/4dd66d3e6.html>>.

¹⁰⁴ Francis Deng and Edward Luck, 'Special Advisers of the United Nations Secretary-General on the Prevention of Genocide, Francis Deng, and on the Responsibility to Protect, Edward Luck, on the Situation in Syria' (Press Release, 21 July 2011).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

¹⁰⁷ See *Commission Report*, UN Doc A/HRC/S-17/2/Add.1, [80].

¹⁰⁸ *Statement by the President of the Security Council*, UN SCOR, 66th sess, 6598th mtg, UN Doc S/PRST/2011/16 (3 August 2011).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

inclusive and Syrian-led political process whose object was the recognition of the legitimate aspirations of the Syrian population.¹¹¹ On the same day, the Assistant Secretary-General for Political Affairs, Oscar Fernandez-Taranco, told the Security Council that close to 2000 people had been killed since the conflict's commencement and provided evidence that Syrian security forces had opened fire on those of its troops who had refused to fire on civilians.

Finally, five months after negotiations on the European draft resolution had begun, France, Germany, Portugal and the UK introduced their final, amended draft resolution for discussion and adoption.¹¹² Russia also introduced its own draft but did not call for a meeting to discuss it. In summary, the resolution recalled the Syrian Government's responsibility to protect its population; regretted the government's lack of progress in introducing its promised reforms; and expressed its deep concern with respect to the deteriorating political situation in Syria and the prospect of a further escalation of violence. The resolution demanded an immediate end to the violence; the restoration of freedom of expression and assembly; the cessation of the use of lethal force against civilians; and the government's support for the alleviation of the humanitarian crisis that had resulted from the continuing conflict. It called for an inclusive Syrian-led political process, conducted free from fear and intimidation, to address the legitimate concerns of Syria's population. As in the Libyan case, the resolution called for the Arab League to use its influence to end the violence. Significantly, the European draft dropped paragraphs concerning the imposition of sanctions but conveyed an intention to introduce such measures should Syria not comply with the resolution's terms within a designated time. The sanctions issue had appeared to be the major stumbling block to Security Council agreement and the European adjustment was designed to finesse that difference.

On 4 October, the Security Council rejected the resolution. Nine members voted in its favour, four — Brazil, India, Lebanon and South Africa — abstained, and two — China and Russia — voted against it, exercising their veto.¹¹³ The arguments advanced for the adoption of the resolution are reasonably well understood, having to do principally with the protection of Syrian civilians. What is of more interest for present purposes is the content and character of those mounted against it.

In the debate following the resolution's defeat, Russia set down four arguments.¹¹⁴ First, the resolution did not pay sufficient respect to Syria's national sovereignty and territorial integrity and to the principle of nonintervention into its domestic affairs.¹¹⁵ Secondly, in Russia's view, the resolution was founded upon the logic of confrontation.¹¹⁶ It should, instead, reflect a clear preference for even-handed dialogue amongst the Syrian parties

¹¹¹ *Ibid.*

¹¹² *France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: Draft Resolution*, UN SCOR, 66th sess, UN Doc S/2011/612 (4 October 2011).

¹¹³ UN Department of Public Information, 'Security Council Fails to Adopt Draft Resolution Condemning Syria's Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China' (Press Release, SC/10403, 4 October 2011).

¹¹⁴ UN SCOR, 66th sess, 6627th mtg, UN Doc S/PV.6627 (4 October 2011) 3–4 (Vitaly Churkin).

¹¹⁵ *Ibid.* 3.

¹¹⁶ *Ibid.*

aimed at achieving peace and national agreement concerning the reforms necessary to advance the country's social and political life.¹¹⁷ Thirdly, Russia asserted that the violence in Syria was inflicted by both sides.¹¹⁸ Adopting the stance of the Syrian President, it asserted that the Syrian Government was confronted by a radical opposition of extremist bent that relied upon terrorist tactics to advance its cause.¹¹⁹ Fourthly, and crucially, Russia was intensely critical of the Libyan intervention and its possible implications for Syria.¹²⁰ Regarding that intervention, the Russian Permanent Representative, Vitaly Churkin, said that the Security Council's mandate in Libya had been turned into the opposite of what had been intended:

The situation in Syria cannot be considered in the Council separately from the Libyan experience. The international community is alarmed by statements that compliance with Security Council resolutions on Libya in the NATO interpretation is a model for the future actions of NATO in implementing the responsibility to protect ...

The demand for a quick ceasefire turned into a full-fledged civil war ... The situation in connection with the no-fly zone has morphed into the bombing of oil refineries, television stations and other civilian sites. The arms embargo has morphed into a naval blockade in western Libya ... Today the tragedy of Benghazi has spread to other western Libyan towns ... These types of models should be excluded from global practices once and for all.¹²¹

China's arguments were similar. It affirmed the principle of nonintervention as set down in the *UN Charter*. It believed that the imposition of sanctions or the threat thereof would be likely to complicate the situation rather than assist in resolving it.¹²² The draft resolution focused solely on exerting pressure on Syria. That approach would not make any constructive contribution to ending the conflict.¹²³ India and South Africa swung behind this position. In their opinion, the tabled resolution did not condemn the violence perpetrated by the Syrian opposition and it did not place any responsibility upon the opposition to engage constructively with the government in seeking a route towards the redress of popular grievances through a peaceful political process.¹²⁴

The American response was scathing:

the Syrian Government's efforts to mask its continued atrocities are as transparent as its promises of reform are empty.

Others claim that strong Security Council action on Syria would merely be a pretext for military intervention. Let there be no doubt: this is not about military intervention; this is not about Libya. That is a cheap ruse by those who would rather sell arms to the Syrian regime than stand with the Syrian people.¹²⁵

117 Ibid 3–4.

118 Ibid 4.

119 Ibid.

120 Ibid.

121 Ibid.

122 Ibid 5 (Li Baodong).

123 Ibid.

124 Ibid 6–7 (Hardeep Singh Puri), 11 (Baso Sangqu).

125 Ibid 8 (Susan Rice).

The debate ended in stalemate and no action was taken.

The position of the opponents of firm Security Council action was weakened significantly, however, by two related events that occurred in November. On 16 November, the Arab League intervened strongly, as it had in the Libyan conflict. It suspended Syria from its membership and gave the regime three days to comply with the terms of a detailed initiative or else it would face economic and political sanctions. The sanctions were subsequently imposed. The key elements of the initiative were the demand that there be an immediate cessation of the violence and the withdrawal of Syrian military forces from the streets. Political prisoners should be released and political reform should be accelerated and kept to a strict and realistic timeline; a serious dialogue should be opened with representatives of the Syrian opposition and a team of Arab League observers should be admitted to the country as soon as possible to monitor Syria's compliance with the initiative's terms. The League also urged its members to withdraw their ambassadors from Damascus. On 22 December, 150 Arab League monitors arrived in Syria and deployed throughout the country to determine the extent to which the Syrian authorities were complying with the Arab League initiative.¹²⁶ As at the end of 2011, their presence does not seem to have had any impact on reducing the violence whatsoever.

Secondly, the independent international Commission of Inquiry, established by the Human Rights Council in August,¹²⁷ following from a critical report by the Security Council's fact-finding mission earlier in the year, presented its report on 23 November. On any account it was a devastating critique of the actions of the Syrian regime. The report's key findings and recommendations were as follows.

It concluded that gross violations of human rights by the Syrian military and security forces had occurred in Syria since the commencement of the protests in March 2011.¹²⁸ The violations were such as to persuade the Commission that the Syrian Government had been responsible for the commission of crimes against humanity.¹²⁹ In November alone, military and security forces had carried out armed operations in Homs, Dar'a, Hama, Dayr al-Zawr and Rif Damascus. These had targeted funeral processions and public assemblies. It was estimated that 260 people were killed in a three-week period until 13 November.¹³⁰ According to evidence provided to the Commission, '[s]tate forces shot indiscriminately at unarmed protesters'.¹³¹ At some demonstrations government forces had been ordered to shoot to kill.¹³² Security force members who had been ordered to fire at civilians and refused had themselves been killed by their colleagues.¹³³ Many forced disappearances had occurred.¹³⁴ Injured people had

¹²⁶ Alice Fordham, 'Arab League Team Goes to Syria', *The Washington Post* (Washington DC), 23 December 2011, A12.

¹²⁷ *Situation of Human Rights in the Syrian Arab Republic*, GA Res S-17/1, UN GAOR, 17th spec sess, UN Doc A/HRC/S-17/2 (18 October 2011, adopted 22 August 2011) para 13.

¹²⁸ *Commission Report*, UN Doc A/HRC/S-17/2/Add.1, 1.

¹²⁹ *Ibid* [100].

¹³⁰ *Ibid* [39].

¹³¹ *Ibid* [41].

¹³² *Ibid* [42].

¹³³ *Ibid* [48].

¹³⁴ *Ibid* [59].

been taken to hospital where they had been interrogated and tortured.¹³⁵ Thousands of people had been swept up during the course of military operations, arbitrarily detained and tortured. The conditions in which they had been detained were grave.¹³⁶ Children had been tortured, some to death.¹³⁷ Government forces had killed 256 children since the demonstrations had begun.¹³⁸ Rights to freedom of expression and assembly had been violated systematically and continuously. The Commission concluded grimly that

[t]he sheer scale and consistent pattern of attacks by military and security forces on civilians and civilian neighbourhoods and the widespread destruction of property could only be possible with the approval or complicity of the state.

... According to international law, when certain crimes are committed as part of a widespread or systematic attack against civilians and the perpetrators know that their conduct is part of this attack, such offences constitute crimes against humanity. The commission is thus gravely concerned that crimes against humanity of murder, torture, rape or other forms of sexual violence of comparable gravity, imprisonment or other severe deprivation of liberty, enforced disappearances of persons and other inhumane acts of a similar character have occurred ...¹³⁹

In response, the Human Rights Council adopted a second, condemnatory resolution: *Resolution S-18/1*.¹⁴⁰ It recommended that all main bodies of the UN, including the Security Council, urgently consider the report and take appropriate action.¹⁴¹ It commended the Arab League initiative and called upon the Syrian Government to implement the League's plan of action fully and without delay, and to admit the League's monitors at the earliest possible opportunity. Despite the sheer weight of adverse evidence that had been presented by the inquiry, *Resolution S-18/1* was not adopted unanimously. Russia and China again opposed it, as did Cuba and Ecuador. India, among others, abstained.¹⁴² Syria, in a letter addressed to the Commission of Inquiry six days before its report was published, remained defiant and, continuing the conspiratorial theme developed by the President in defence of Syrian actions, averred that

[p]olitical and other forms of pressure have been on-going to try and coerce Syria to reverse its stance towards policies of occupation and efforts by America and other countries to dominate the region and make it part of the sphere of influence of American policies. ... terrorist operations [have been] carried out by armed outlaws who are terrorizing our citizens and forcing them to abandon their homes

¹³⁵ Ibid [50].

¹³⁶ Ibid [58].

¹³⁷ Ibid [62].

¹³⁸ Ibid [70].

¹³⁹ Ibid [107].

¹⁴⁰ *The Human Rights Situation in the Syrian Arab Republic*, GA Res S-18/1, UN GAOR, 18th spec sess, 2nd mtg, UN Doc A/HRC/RES/S-18/1 (5 December 2011, adopted 2 December 2011) ('*The Human Rights Situation in the Syrian Arab Republic*').

¹⁴¹ Ibid para 8. Human Rights Watch published an extensive report reaching much the same conclusions in December 2011: Human Rights Watch, "'By All Means Necessary!': Individual and Command Responsibility for Crimes against Humanity in Syria' (Report, December 2011) 10 <http://www.hrw.org/sites/default/files/reports/syria1211webwcover_0.pdf>.

¹⁴² *The Human Rights Situation in the Syrian Arab Republic*, UN Doc A/HRC/RES/S-18/1, 4.

... resulting in their death and the mutilation of their bodies, in order to divide the country along sectarian lines and incite civil war.¹⁴³

The matter returned to the Security Council on 12 December 2011. On that day, the High Commissioner for Human Rights updated the Security Council in informal session on the state of the conflict. She told the Security Council that since March it was estimated that more than 5000 people had been killed. Tens of thousands had been arrested. Fourteen thousand were believed to have been arbitrarily detained. More than 12 000 had fled across the border and tens of thousands more had been internally displaced. The Syrian Government's ruthless repression could drive the country into a fully fledged civil war. She concluded that, in the light of the Syrian Government's manifest failure to exercise its responsibility to protect its citizens, the international community should take urgent and effective measures to protect the Syrian people.¹⁴⁴

Things were going nowhere — except in Syria. Civilians in their hundreds continued to be killed and President al-Assad, in a speech to supporters on 9 January 2012, flailed the Arab League and denounced international conspirators and domestic terrorists. 'We cannot relent in the battle against terrorism', he said. 'We strike with an iron fist against terrorists who have been brainwashed'.¹⁴⁵ The head of the Syrian National Council, the principal opposition group in exile, exclaimed somewhat plaintively that '[i]t is clear that the only solution is going to the UN security council to protect Syrian civilians and to find a way out of the crisis ... There is no other choice'.¹⁴⁶

Throughout January, Security Council members met again to engage in frantic negotiations towards the adoption of a new, consensus resolution. The foundation for the negotiations was a draft resolution that had been presented to the Security Council by the Arab League.¹⁴⁷ The League's draft was assertive and controversial. At its heart lay a plan for the transition of power in Syria. The plan called for the formation of a national unity government in Syria; for the delegation by the Syrian President to his Vice-President of the responsibility to form and then cooperate with the national unity government; and for the new government to hold transparent and free parliamentary and presidential elections under international and Arab supervision. The draft resolution also urged the Syrian Government to fully cooperate with the Arab League's observer mission; it encouraged all States in the region to impose economic sanctions upon the al-Assad regime; and it proposed that the regime's implementation of a Security Council resolution be reviewed within 15 days of its adoption. Should the Security Council determine that the government continued to be noncompliant,

¹⁴³ *Commission Report*, UN Doc A/HRC/S-17/2/Add.1, annex VII ('*Letter Dated 17 November 2011 from the Syrian Arab Republic to the International Independent Commission of Inquiry*').

¹⁴⁴ Office of the High Commissioner for Human Rights, 'Syria: Pillay Calls for Urgent Action to Halt Violence' (Press Release, 12 December 2011).

¹⁴⁵ Ian Black, 'Syrian President Assad Blames "Foreign Conspiracies" for Crisis', *The Guardian* (online), 10 January 2012 <<http://www.guardian.co.uk/world/2012/jan/10/syrian-president-assad-foreign-conspiracies>>.

¹⁴⁶ *Ibid.*

¹⁴⁷ 'UN Draft Resolution on Syria', *The Guardian* (online), 31 January 2012 <<http://www.guardian.co.uk/world/2012/jan/31/un-security-council-draft-resolution-syria>>.

the League proposed that the Security Council should consider the adoption of further measures to pressure it to halt the violence.

The Arab League draft ran across Russia's interests in two important respects.¹⁴⁸ First, it constituted an external demand for President al-Assad to stand aside. To Russian eyes, this would constitute a substantial incursion upon Syrian sovereignty. Secondly, Russia was wary of the idea that the Security Council might take further, unspecified, measures against the regime. For Russia this smacked of an invitation for external military intervention along the Libyan model. That was a red line that the Russian Government would not permit the international community to cross.

Throughout January, however, Russia's position was becoming increasingly isolated. In a report to the Security Council on 31 January 2012, the Secretary-General of the Arab League stated that the situation in Syria was 'spiralling dangerously'.¹⁴⁹ Government-sponsored violence had escalated and the government appeared to be locked into a military solution. The Security Council's first priority, therefore, should be to adopt a resolution demanding that all parties participate in a ceasefire, that civilians be protected and that all parties accept the League's plan for transition. By this stage, most Security Council members had accepted that a new resolution was urgently required. One founded upon the Arab League draft offered the best prospects for consensus.

The rapid deterioration in Syria prompted a cross-section of the Security Council's members to bring a new draft resolution forward for consideration.¹⁵⁰ Russia and China opposed the haste with which this was being done, but Russia, nevertheless, hinted that a draft modelled broadly on the Arab League initiative might just be acceptable.

The new resolution presented to the Security Council by Morocco, and supported by 18 other nations, went some considerable distance to allaying Russian and Chinese concerns. The detailed steps towards a transition of power in Syria, contained in the Arab League draft, were removed in favour of a general statement of support for the League's initiative. The reference to encouraging states to impose sanctions upon Syria disappeared. The resolution's Preamble stated explicitly that nothing in the resolution authorised coercive measures to be taken against Syria pursuant to art 42 of the *UN Charter*.¹⁵¹ In its final form, the resolution condemned the continuing violence and loss of life in Syria.¹⁵² It demanded that, in accordance with the Arab League's December plan of action, Syrian authorities withdraw all military and militia forces from cities and towns and allow full and unhindered access to League of Arab State institutions.¹⁵³ It insisted that Syria grant immediate access for international humanitarian assistance. It supported an inclusive, Syrian-led political process to

¹⁴⁸ Editorial, 'Soviet Hangover Turned Headache: Syria and Russia', *The Guardian* (London), 1 February 2012, 30.

¹⁴⁹ UN SCOR, 67th sess, 6710th mtg, UN Doc S/PV.6710 (31 January 2012) 6.

¹⁵⁰ *Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution*, UN SCOR, 67th sess, UN Doc S/2012/77 (4 February 2012).

¹⁵¹ *Ibid* Preamble para 10.

¹⁵² *Ibid* para 3.

¹⁵³ *Ibid* paras 5(c), (e).

address the Syrian people's legitimate aspirations.¹⁵⁴ In that respect it called for active political dialogue and transition to a democratic and plural political system.¹⁵⁵

The vote on the resolution was scheduled for 4 February. On the evening of 3 February, the Syrian authorities launched the first of many rocket attacks upon the city of Homs. Rebel-held suburbs of the city were shelled relentlessly without regard for any distinction between rebel fighters and civilians. At least 210 people were killed and hundreds more were wounded in one weekend of shelling. It was the bloodiest weekend of violence in the 11 months since the uprising began. The total number of Syrian people killed climbed past 6000.

The draft Security Council resolution was put to the vote on the morning of 4 February. Thirteen Security Council members voted in favour of it. Russia and China vetoed it.

Immediately after the vote was taken, Security Council members engaged in perhaps the most acrimonious debate since the end of the Cold War. The French Ambassador summarised the mood amongst the resolution's backers:

This is a sad day for the Council; it is a sad day for the Syrians; and it is [a] sad day for all the friends of democracy. ... history has compounded our shame because today is the anniversary of the Hama massacre [in 1982] and falls only one day after another massacre in Homs. The father killed on a mass scale; the son has followed in his footsteps. Horror would seem to be hereditary in Damascus.¹⁵⁶

The American Ambassador described the US as 'disgusted' with the double veto.¹⁵⁷ The German Ambassador called the vetoes a 'scandal', particularly following the onslaught of violence unleashed the night before.¹⁵⁸ The Portuguese Ambassador asked how long the Security Council would tolerate the 'Syrian killing machine to continue to push the country into a bloody sectarian conflict'.¹⁵⁹ The Indian Ambassador noted that the resolution had enjoined the Syrian Government to protect its population. For that reason India had supported the Security Council resolution as a means of advancing the Arab League initiative.¹⁶⁰ The British Ambassador said that '[t]hose who blocked Council action today must ask themselves how many more deaths they are prepared to tolerate before they support even modest and measured action'.¹⁶¹

The Russian and Chinese delegations were unmoved. They described the resolution as unbalanced, because it failed to condemn both the Syrian authorities and the armed rebels in equal measure. They accused Western nations of masking, by means of the resolution, an intent to seek regime change in Damascus.

¹⁵⁴ Ibid para 6.

¹⁵⁵ Ibid para 7.

¹⁵⁶ UN SCOR, 67th sess, 6711th mtg, UN Doc S/PV.6711 (4 February 2012) 3 (Gérard Araud).

¹⁵⁷ Ibid 5 (Susan Rice).

¹⁵⁸ Ibid 4 (Peter Wittig).

¹⁵⁹ Ibid 6 (José Filipe Moraes Cabral).

¹⁶⁰ Ibid 8 (Hardeep Singh Puri).

¹⁶¹ Ibid 7 (Sir Mark Lyall Grant).

The Russian Ambassador counterattacked:

from the very beginning of the Syrian crisis some influential members of the international community, including some sitting at this table, have undermined any possibility of a political settlement, calling for regime change, encouraging the opposition towards power, indulging in provocation and nurturing the armed struggle. ... [no] account [has] been taken of our proposals that along with the withdrawal of the Syrian armed forces from the cities, there should be an end to attacks by armed groups on State institutions and neighbourhoods.¹⁶²

The Chinese delegate criticised the resolution as one designed to pressure the Syrian authorities into a prejudged result from a manipulated internal political dialogue.¹⁶³ The imposition of a predetermined solution, he remarked, would not assist in resolving the Syrian problem; it would instead further complicate it. Further, China, as on every other occasion during the current crises, reaffirmed its view that the 'sovereignty, independence and territorial integrity of Syria should be fully respected'.¹⁶⁴

The international community had arrived at an impasse. The Syrian death toll has since passed 8000.

IV LIBYA/SYRIA

The preceding account of the Libyan and Syrian rebellions and repressions suggests many different reasons why the membership of the Security Council may have chosen to act differently in response to the two crises. Plainly the two situations were not the same and differences of approach might quite reasonably have been expected. Yet the arguments presented by the principal Security Council antagonists only partly explain why rapid international military intervention was endorsed in Libya while the Security Council was in complete stalemate over Syria. Beneath the surface arguments of politics and principle, powerful and competing strategic interests were at work. In this concluding section, I examine these political, in-principle, and strategic considerations in turn.

A Politics

The first and most obvious political distinction to be drawn relates to the initial responses of the Libyan and Syrian authorities to the protests that had broken out. In Libya, Colonel Gaddafi in effect had declared war on the protest movement in Benghazi and threatened to hunt down and extinguish his enemies from 'house to house'.¹⁶⁵ Initial euphoria in Benghazi over the success of the protests soon turned to terrified anxiety in the face of the gains made by government forces. There appeared to be a real possibility that the citizenry of Benghazi might face annihilation. In Syria, the al-Assad regime made no similar threats. It accused the protesters of having fallen under extremist and external

¹⁶² Ibid 9 (Vitaly Churkin).

¹⁶³ Ibid (Li Baodong). See also Liu Xiaoming, 'Why China Voted No: Our Veto of the *UN Draft Resolution on Syria* Reflects a Desire to Calm, Not Inflammation, the Situation', *The Guardian* (London), 10 February 2012, 36.

¹⁶⁴ UN SCOR, 67th sess, 6711th mtg, UN Doc S/PV.6711 (4 February 2012) 9 (Li Baodong).

¹⁶⁵ Fahim and Kirkpatrick, above n 2.

influences and characterised the uprising as that of ‘armed gangs’.¹⁶⁶ But it combined its repression with promises of political and constitutional reform that gave some initial hope to protesters and the international community alike.

Defections from the regime in Libya began to occur rapidly. Government soldiers became Benghazi rebels in escalating numbers. Spectacularly, the Libyan Permanent Representative to the UN declared that he could no longer support Colonel Gaddafi and joined the opposition in exile. Few such defections occurred from the Syrian military and intelligence forces until quite recently. The regime held together and appeared more formidable for that. The scale of defections meant that a discernible and organised opposition soon became visible in Libya. It provided the international community with a distinct group with which to converse and negotiate. No cohesive Syrian opposition emerged in the same way. The uprising was organised from city to city in each of which government forces tracked leaders down, broke up their communications and put them down violently. Apart from a small exile group in Europe, there was no one to talk to.

There was less prospect of sectarian violence breaking out as a consequence of intervention in Libya than in Syria. Certainly in Libya there were tribal differences, particularly between east and west. With the establishment of the National Transitional Council, however, there was a reasonable prospect that these could be overcome in the interests of establishing an alternative, unity government. In Syria, it was exceptionally difficult to predict what might occur if the Alawite al-Assad regime, representing only 12 per cent of the population, fell to the rebels. Recriminations against the governing Alawites, sectarian conflict between Alawite Shi’a and the 75 per cent Sunni Muslim population, and an increased hostility towards the Christian population and other religious minorities, including Palestinian refugees, Kurds, Armenians, Circassians, Turkomans and Jews, were all distinct possibilities.

The principal regional organisation in the Middle East, the Arab League, became involved with the Libyan crisis almost from its commencement. It sought initially to mediate, sending Jacob Zuma to Tripoli to persuade Gaddafi to change course.¹⁶⁷ That having failed, it became progressively more critical of the actions of the regime and, in the end, pressed the Security Council to impose sanctions and then intervene in the interests of protecting Libya’s citizens from a regime it considered to have spiralled out of control. The League was more hesitant to intervene in Syria, not least because many of its members had close political, economic and personal ties with the al-Assad Government. It was not until November 2011 that the League condemned al-Assad outright, expelled Syria and insisted upon its monitors visiting Damascus. In the absence of a strong lead from the League, the Security Council had plainly been less willing to take adverse action.

The League’s intervention was illustrative of another significant political consideration. In the Middle East, the Gaddafi regime was quite isolated.

¹⁶⁶ Alice Fordham, ‘Still Determined to Oust Assad’, *The Washington Post* (Washington DC), 6 February 2012, A10.

¹⁶⁷ David Smith, ‘South African President, Jacob Zuma, to Visit Tripoli for Talks with Gaddafi’, *The Guardian* (online), 25 May 2011 <<http://www.guardian.co.uk/world/2011/may/25/gaddafi-talks-jacob-zuma>>.

Perceiving that Gaddafi's leadership was unstable, neighbouring Arab states had been reluctant to forge close ties with the regime. This meant that when the Libyan conflict broke out, support for Gaddafi's violent reaction to the uprising was almost non-existent amongst neighbouring governments. The isolation of the regime no doubt emboldened the League to intervene, since few if any of its members had much to lose were Gaddafi to fall. Syria, on the other hand is enmeshed in the region. Until, and even after, the protests began, the al-Assad Government was perceived by its neighbours as a strong and stable administration in the midst of a volatile region. Not all of its policies may have been endorsed but Middle Eastern governments regarded Syria as an important trading partner, an influential political force, and in many cases, an essential strategic ally. The Arab League's hesitancy to intervene until 10 months after the Syrian uprising began is plainly explicable in these terms. Syria's web of alliances in the Arab world similarly served a strong disincentive to Security Council condemnation and action, particularly amongst those of its members with direct military and economic interests in the region.

B Principle

A key principle at stake in Security Council negotiations and debates was that of respect for the sovereignty, territorial integrity and independence of nations. This principle, and its related commitment to nonintervention in the domestic affairs of states, stand in stark contrast to the interventionist character of Pillar 3 R2P interventions by the international community. The tension between the two may legally be resolved when R2P interventions are endorsed by the Security Council acting in accordance with Chapter VII of the *UN Charter*. At the Security Council, however, it can always be expected that arguments concerning the relative weight to be given to the preservation of state sovereignty, and to the desirability of ending governmental atrocity, will play a critical role in determining what action, if any, the Security Council will endorse.

Both Security Council *Resolution 1970* and *Resolution 1973* reflected the desire of the Security Council to balance the two considerations appropriately. *Resolution 1970* sought to intervene in the Libyan crisis only indirectly, through the imposition of an arms embargo, asset freeze, travel ban and the referral of the leadership to the Prosecutor of the International Criminal Court. In the first instance, therefore, direct intervention and hence interference with national sovereignty, were eschewed. As the situation rapidly deteriorated, however, the Security Council was forced to consider more forceful intervention to stop violence against Libyan citizens. The no-fly zone was set in place and the Security Council endorsed 'all necessary measures' to protect civilians and civilian populated areas under attack. Despite the resolution's having been adopted, dissent on the ground that Libyan sovereignty would be undermined was plainly evident. The Permanent Representative of India put the matter plainly:

The Council has today adopted a resolution that authorizes far-reaching measures under Chapter VII of the *United Nations Charter*, with relatively little credible information on the situation on the ground in Libya. We also do not have clarity about details of enforcement measures, including who will participate and with what assets, and how these measures will exactly be carried out. It is of course

very important that there be full respect for the sovereignty, unity and territorial integrity of Libya.¹⁶⁸

In this debate, the strength of feeling on the Security Council in favour of intervention to protect Libyan civilians outweighed the profound reservations of members who remained committed to the principle of nonintervention in Libya's sovereign affairs. The urgency of the situation was sufficiently great, however, to persuade them to abstain rather than to oppose the resolution.

However, by the time the Security Council addressed the Syrian crisis in August 2011, the sentiment amongst opponents had substantially altered. This was primarily because in Libya, NATO had pushed the boundaries of *Resolution 1973* far beyond its primary objective, which had been to protect the civilian population from attacks by government forces.¹⁶⁹ China, Russia and the IBSA countries could swallow that objective. But committed as firmly as they were to the sovereignty principle, they could not abide the aim of regime change.¹⁷⁰

Thus, despite the fact that some 3000 deaths had already been recorded, China and Russia vetoed a draft resolution that would have imposed UN sanctions upon Syria. The two countries, together with influential abstainers such as India, were not willing to countenance support for a resolution that they believed may once again be illegitimately transformed into Western pressure for the overthrow of the al-Assad Government. Instead, they argued, the government should stay in place and international political pressure should be exerted to bring the warring parties to the negotiating table. The al-Assad Government had not until 2012 forfeited the confidence of many in the region and an influential minority on the Security Council. In that circumstance, the view amongst an influential minority on the Security Council was that the Syrian Government should be persuaded rather than beaten into tactical withdrawal and political compromise:

With the [sic] regard to the draft resolution (S/2011/612) before us, South Africa was concerned about the sponsors' intention to impose punitive measures that would have pre-judged the resolution's implementation. We believe that these were designed as a prelude to further actions. We are concerned that this draft resolution not be part of a hidden agenda aimed at once again instituting regime change, which has been an objective clearly stated by some. We are thus concerned about the fact that the sponsors of this draft resolution rejected language that clearly excluded the possibility of military intervention in the resolution of the Syrian crisis. We maintain that the Security Council should proceed with caution on Syria lest we exacerbate an already volatile situation.¹⁷¹

¹⁶⁸ UN SCOR, 66th sess, 6498th mtg, UN Doc S/PV.6498 (17 March 2011) 6 (Hardeep Singh Puri).

¹⁶⁹ Gareth Evans, 'Disquiet over Libyan "Win" Syria's Loss', *The Australian* (Sydney), 31 January 2012, 9.

¹⁷⁰ Alex J Bellamy, 'The Responsibility to Protect and the Problem of Regime Change' in *The Responsibility to Protect: Challenges and Opportunities in light of the Libyan Intervention* (e-International Relations, 2011) 20, 20–1 <<http://www.e-ir.info/wp-content/uploads/R2P.pdf>>; *Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General*, UN GAOR, 66th sess, Agenda Items 14 and 117; UN SCOR, 66th sess, UN Docs A/66/551 and S/2011/701 (11 November 2011) annex ('*Responsibility while Protecting: Elements for the Development and Promotion of a Concept*') [10].

¹⁷¹ UN SCOR, 66th sess, 6627th mtg, UN Doc S/PV/6627 (4 October 2011) 10 (Baso Sangqu).

The Libyan experience revealed another in-principle point of departure. At the time at which *Resolution 1973* was adopted, it was generally assumed that the protection of civilians in Libya would situate NATO forces in a position of relative neutrality as between the warring parties. The stated objective was to ensure that civilians were kept out of harm's way. Soon after their arrival, however, NATO forces were acting as partisans.¹⁷² They took sides with the rebels against the regime. The adoption of this position could well be understood if and when a strategic, military decision had been taken, on reasonable grounds, that the only way to secure the Libyan population was by the removal of the Gaddafi Government and the dismantling of its forces. Whether that point had been reached at the time NATO sided with the opposition, however, is an open question.

In the light of these events, it is important to ask whether a force sent by the Security Council to defend a country's citizens from gross and systematic human rights abuse should as a matter of course take the opposition side. In principle, the better position is that a strict neutrality should be the preferred position. Here again, one concern with respect to the August draft Security Council resolution on Syria was that it had the potential to situate the Security Council firmly in the rebel camp. The prospect of another partisan intervention no doubt increased the reservations of the resolution's opponents, adding a further reason for hesitancy in the Syrian case.

The debate on Syria at the Security Council in August disclosed another neglected issue of principle relevant to the Security Council's approach to R2P intervention. The Security Council was seemingly bereft of reasoned criteria on the basis of which to judge the appropriateness and form of Pillar 3 intervention.¹⁷³ Adherence to sovereignty was on one side. Prevention of atrocity was on the other. Nothing but circumstance was left in between. Crises, seemingly, were to be judged case by case, political configuration by political configuration. It would have been preferable if consistent criteria could have been applied across cases, criteria that placed the necessity to protect citizens from genocide and crimes against humanity at their core. One senior diplomat put the matter to me like this:

How are we to judge the level of massacre required before the Council intervenes? When do we cross the mental Rubicon — at the point at which the number dead in Syria exceeds those tens of thousands killed by al-Assad's father? We have to do better than that. We have to give much more thought to how to determine the ethics and justification for intervention or nonintervention.¹⁷⁴

In 2012, the UN's interactive dialogue on R2P will focus upon the lessons gleaned from Pillar 3 intervention and nonintervention during 2011. One question that might constructively be revived is that of the adoption by the Security Council of indicative intervention criteria — such as right intention, necessity, proportionality, last resort and reasonable prospects of success — which are commonly accepted and utilised in international law. The

¹⁷² Welsh, above n 73, 258–9.

¹⁷³ Evans, 'Disquiet over Libyan "Win" Syria's Loss', above n 169, 9.

¹⁷⁴ Interview with senior diplomat (New York, November 2011). See also Pattison, above n 58, 253.

Security Council's adoption of such criteria was recommended by the International Commission on Intervention and State Sovereignty and High-Level Panel reports as they elaborated R2P and should now be put back on the table.¹⁷⁵

C *Strategy*

Finally, it is clear that strategic concerns played an enormously important part in shaping the Libyan and Syrian Security Council debates. A full elaboration of these would require an article of its own. Here, therefore, I focus only on three matters of critical, strategic importance.

First, most obviously, a fundamental question that Council members will have addressed is whether or not a direct intervention of the kind undertaken in Libya and Syria was likely to achieve its protective objective without causing more harm to the civilian population than might otherwise have occurred. The likely answer to this question will have been 'yes' in the Libyan case and 'no' in the Syrian.

Strategically and militarily, the Libyan regime was in a considerably weaker position than its Syrian counterpart. It had relatively few military resources; its army was divided, which opened up the prospect of large scale defections; Gaddafi himself was haemorrhaging political support; opposition forces had already made significant gains particularly in the east; and, because the regime was effectively isolated in the region, there was little likelihood that neighbouring states would enter the fray to defend an erratic and discredited regime. None of these favourable conditions existed in Syria. It had substantial military resources; its military command and security intelligence services were cohesive and loyal to the government; the President retained the confidence of a substantial proportion of the population, particularly in its two major cities, Damascus and Aleppo; and, principally owing to the virulence of the repression, opposition victories had been sporadic.

Syria was enmeshed in and central to the political life and viability of the region. Reinforcement from Palestine, Lebanon and Iraq, therefore, could add significant strength to the Syrian defence. Iranian military advisers were already on the ground. Further, given the heavily urbanised character of the country, bombing or fighting would unavoidably result in heavy civilian casualties. A military intervention of the Libyan kind might have risked either failure or the exaction of too high a price for success.

Next, a military intervention on *Resolution 1973* lines might have had severe and adverse affects on the stability of the entire Middle East. That possible consequence arises in part from Syria's geographical position, bordering five other nations almost all of which are volatile. Western intervention would incite Hezbollah in Lebanon, many of whose members would be likely to cross the border to fight. It would also inflame sectarian tensions in Lebanon itself, risking the downfall of the already very fragile Lebanese Government. Syria's relations with Turkey have already worsened as a result of large cross-border refugee flows from Syria's north. Of all the Arab nations, Turkey has been the most

¹⁷⁵ Evans et al, above n 6, 32; *A More Secure World: Our Shared Responsibility*, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) 57–8.

critical of the regime.¹⁷⁶ Ankara's relations with Damascus would plunge further should it be seen, as is likely, to be supportive of a Security Council resolution that called for President al-Assad to step down and/or for direct action against Syria whether through the imposition of sanctions or military measures taken to protect its civilian population. Cross-border skirmishing could not be ruled out.

Syria is home to more than a million Iraqi refugees. An internationalisation of the fighting in Syria would complicate the refugee situation substantially with Iraqi refugees trapped between a conflict in Syria and the possibility of persecution upon return to Iraq. An increase in refugee flows from Syria to Jordan would similarly worsen relations between the two. Jordan is already home to almost three million Palestinian and Iraqi refugees and would be angered and stretched economically by a large increase in refugee numbers from its northern, Syrian neighbour. That could create further political instability in Jordan, whose ruling, royal family is widely criticised and increasingly unpopular.¹⁷⁷

Should there be an external Western led military intervention, the probability that Iran may engage, whether indirectly through its Lebanese and Palestinian allies, or directly would be high. The conflict could become a highly dangerous proxy war between Iran and its Western antagonists on Syrian soil.

Then there is Israel. The Golan Heights remains contested between Israel and Syria and resentments between the two run deep, arising from long-term contestation for influence in Lebanon. Should a Western-led intervention be perceived within Syria as providing a strategic advantage to Israel, strikes by Syrian forces against Israeli positions in the Golan Heights are a distinct possibility. A Western-led intervention, therefore, could have extensive adverse effects upon many countries and governments in the Middle East in a way that was not, and was never likely to be, replicated in the Libyan situation. Intervention there was an altogether less dangerous enterprise.

Finally, the self-interest of nations has also played its part in discouraging Security Council endorsed intervention in Syria. No member of the Security Council on either side of the debate will have neglected its strategic interests entirely to assume a purely humanitarian stance. This is not the way the game of international politics is played. To state the obvious, the closer a Security Council member's ties with the al-Assad regime, the less likely it is that that member will favour an external intervention into the country's domestic affairs, however grievous these may be. The clearest example in this instance is Russia, although I acknowledge that it is somewhat unfair to pick it out above some others.

Russia has been the principal opponent of any direct international action against Syria. Most often its arguments against an R2P intervention have been delivered at the level of principle. It is not difficult, however, to discern the country's significant political, economic and strategic investment in Syria. It is a heavy investment that will not be yielded lightly.¹⁷⁸

¹⁷⁶ Alexander Christie-Miller and Laura Pitel, 'Turkey Threatens to Cut Power as 70 Die in Syria Clashes', *The Times* (online), 16 November 2011 <<http://www.thetimes.co.uk/tto/news>>.

¹⁷⁷ Nicholas Pelham, 'Jordan Starts to Shake', *The New York Review of Books* (New York), 10 November 2011, 48.

¹⁷⁸ Barry, above n 74, 8.

Syria is a major purchaser of exports of Russian arms and defence equipment. The Syrian market is worth six per cent of the overall arms export industry. Future contracts for the sale of fighter jets and advanced missiles are estimated to be worth some US\$4 billion. Syria hosts a strategically positioned Russian naval base at Tartus on the west coast, its only one outside the former Soviet Union. This facility provides it with the capacity to maintain and repair Russian ships that cross the Mediterranean. Russia intends to upgrade the base for its nuclear-armed warships. It has continued to send weapons to Syria throughout the period of the recent crisis. It has major economic investments in Syria, principally in the business of natural gas extraction. These include a pipeline and a liquefied natural gas processing facility 200 kilometres east of Homs. It is unsurprising given these important connections that the Russians do not wish to see them disturbed by the replacement of the al-Assad regime. Its veto at the Security Council provides it with political power it needs to forestall any such possibility. A senior UN diplomat expressed the matter in this way:

The question we ask in dealing with Russia is whether a matter is a Medvedev issue or a Putin issue. Syria is a Putin issue. It has, therefore, to be approached with considerable care.¹⁷⁹

Russia's, of course, is not the only national self-interest at play. The US's substantial economic, political and strategic interests in Israel provide the most obvious counter-instance. It is clearly in the US's interests to ensure the stability and viability of the Israeli state and take such actions as may be opportune to alter the political configuration of the region so as best to ensure that that objective is achieved. The eventual removal of the al-Assad regime may play into that agenda. The fall of al-Assad would also constitute a huge setback for Iranian influence in the region.

The underlying point is the same. In the Middle East, Syria is of enormous strategic significance. Libya was not. The way was clearer and surer, then, for steps to be taken to displace Gaddafi in a way that is far more complex and dangerous in the case of al-Assad.¹⁸⁰

The moral problem, however, remains. In CNN's recent documentary, *72 Hours under Fire*, an unidentified Syrian man says: 'If there isn't outside intervention it will be an ocean of blood'.¹⁸¹

D *The Responsibility to Protect after Syria*

The Security Council's paralysis with respect to Syria has clouded R2P's future considerably. This is not to say that R2P interventions will not occur. They will, and successfully. It is to say, however, that the doctrine's implementation, particularly when coercive interventions are in contemplation, is likely to be more selective and circumstantially based than might have been thought in the wake of the Libyan action. By selective I do not mean, for

¹⁷⁹ Interview with senior UN diplomat (New York, November 2011).

¹⁸⁰ Rodger Shanahan, 'R2P: Seeking Perfection in an Imperfect World' in *The Responsibility to Protect: Challenges and Opportunities in light of the Libyan Intervention* (e-International Relations, 2011) 26, 27 <<http://www.e-ir.info/wp-content/uploads/R2P.pdf>>.

¹⁸¹ See also Michael Ignatieff, 'Are We Going to Sit Back and Let Homs Burn?', *Financial Times* (London), 29 February 2012.

example, that interventions will likely be endorsed in developing countries but not in developed ones. I mean rather that judgments as to whether and when to intervene are likely in the foreseeable future to be made case by case rather than according to predetermined, universally applicable principles.

Having said that, I think that some useful generalisations about the nature and standing of R2P in Syria's wake can be made. My caution, obviously, is that at the time of writing the Syrian crisis has by no means been resolved. Following therefore from the encapsulation of R2P's standing after Libya that I proposed earlier, I suggest, again preliminarily, that the following propositions may reasonably be advanced in relation to Pillar 3 interventions, following from the Syrian crisis:¹⁸²

- Prior to approving a coercive Pillar 3 intervention, the Security Council should be satisfied that every possible diplomatic solution to a crisis has been exhausted. Pillar 3 intervention should occur only as the last resort.
- Prior to approving a coercive Pillar 3 intervention, the Security Council is likely in future to insist that its objectives be made clear and that its mandate be spelt out with precision.
- As before, it is highly unlikely that the Security Council will approve a Pillar 3 intervention if its stated objective is regime change.
- A Security Council resolution mandating a coercive intervention may, in future, establish an independent monitoring mechanism to review the intervention's continuing implementation. The mechanism would be required to report to the Security Council on the consistency between actions on the ground and the mandate in relation to which they have been taken. If the mandate is exceeded, the conduct of the intervention would return to the Security Council for further discussion and review.
- Given that a Security Council mandate for a Pillar 3 intervention is likely to have as its principal objective the protection of civilians, it is probable that the Security Council will in future require that the position of an intervening force be one of strict neutrality as between the contending parties.
- A Pillar 3 intervention should, in all aspects, conform to the dictates of international law and in particular international humanitarian law.
- If conditions like these are imposed upon a Pillar 3 intervention, it is entirely possible that conflicts will arise between political imperatives as determined by the Security Council and military imperatives as determined by conditions on the ground. This is a difficulty that one hopes might be resolved by sensible recommendations to the Security Council from its designated military command and by a reasoned response. But given the persistence of entrenched ideological and strategic interests amongst

¹⁸² By way of comparison, see a comparable list of propositions set forth by the Permanent Mission of Brazil to the United Nations at: *Responsibility while Protecting: Elements for the Development and Promotion of a Concept*, UN Docs A/66/551 and S/2011/701, annex [11].

Security Council members, and in particular the P5, an effective resolution will by no means be guaranteed.

- Where a contemplated coercive intervention runs contrary to the core political or strategic interests of a member of the P5, it is highly unlikely to proceed. This is unless the crimes against humanity committed are so extensive and so grave that no reasoned member could resist the demand the crimes be fought. The failure of Russia and China to endorse even a very weak Security Council resolution against Syria in the face of clear evidence of the commission of mass atrocities, dispiritingly casts doubt on even that proposition.
- It may, in the end, need to be accepted that engagement in Pillar 3 interventions subject to these constraints may still be preferable to provoking Security Council gridlock, the outcome of which may be that nothing is done.
- In the alternative, coalitions of the willing may decide to take action outside the legal framework of the *UN Charter*. Should this become common, R2P may wither to the great detriment of the international rule of law.