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NOTES AND COMMENTS

LIBYA: A MULTILATERAL CONSTITUTIONAL MOMENT?

*By Catherine Powell**

The Libya intervention of 2011 marked the first time that the UN Security Council invoked the "responsibility to protect" principle (RtoP) to authorize use of force by UN member states.[1] In this comment I argue that the Security Council's invocation of RtoP in the midst of the Libyan crisis significantly deepens the broader, ongoing transformation[2] in the international law system's approach to sovereignty and civilian protection. This transformation away from the traditional Westphalian notion of sovereignty has been unfolding for decades, but the Libyan case represents a further normative shift from sovereignty as a right to sovereignty as a responsibility.[3] This significant normative moment demonstrates how far international law has traveled and also where it has not yet traveled.

The Libyan case was propelled by a mass movement[4] in Libya, in the region, and ultimately in the international community, which mobilized Security Council action, relying on RtoP, to protect civilians in the face of brutality. In response to Libyan leader Muammar Qaddafi's

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[1] The *responsibility to protect* can refer variously to a principle, a formal doctrine with three prongs (*see infra* notes 8–10 and accompanying text), and the associated moral claim(s) about the responsibilities of states. The expression *RtoP* will be used, depending upon context, to refer to any of these meanings, which are so interconnected that trying to distinguish them clearly in all contexts would be more confusing and diverting than useful. In certain circumstances, for precision, I will add some additional qualification to eliminate any possible confusion that some broader claim is at stake.

[2] *Cf.* 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 20, 26 (1998); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment,* 43 HARV. INT'L L.J. 1, 2 (2002) (adapting Ackerman's ideas on constitutional moments and constitutional transformation to international law).

[3] Of course, counterexamples—such as the Security Council's far less robust response, at least at the time of this writing, to Syrian authorities' brutal suppression of civilians—represent lingering resistance to this shift.

[4] I use the term *movement* to refer to a "distinctive form of contentious politics . . . a sustained, organized public effort making collective claims on targeted authorities." CHARLES TILLY & LESLEY J. WOOD, SOCIAL MOVEMENTS, 1768–2008, at 3 (2d ed. 2009). As demonstrated by the Arab Spring, in today's globalized, Twitter-ized world, "movements" are advanced not only on the town square and via op-eds, but through social media such as Facebook and blogs. The common goal is to mobilize consensus, whether in local parliaments, regional bodies (such as the Arab League), or international institutions (such as the United Nations).

threat to slaughter his own people amid the "Arab Spring" of 2011, the Security Council authorized, inter alia, a limited military intervention to protect Libyan civilians, invoking RtoP.[5] The assumption under RtoP is that individual states have primary responsibility for civilian protection and that, as a backstop, the international community has subsidiary responsibility for civilian protection by preventing and rapidly responding to genocide, war crimes, ethnic cleansing, and crimes against humanity. Military intervention pursuant to RtoP is, against that background, an option of last resort, when the other, more modest measures preferred as initial steps have failed (as discussed further in part II). Significantly, in the Libyan case, it was the Libyan people—as represented by an opposition movement (including numerous defecting government officials) that was demanding a more representative government—who called for Security Council intervention to mobilize an effective civilian-protection effort.

According to RtoP, *each state has primary responsibility to protect its own inhabitants*, but when a state is not willing or able to meet its own responsibility to protect,

> the principles of *collective* security mean that some portion of those responsibilities *should be taken up by the international community,* acting in accordance with the Charter of the United Nations and the Universal Declaration of Human Rights, to help build the necessary capacity or supply the necessary protection, as the case may be.[6]

As was the case in 1945, the world today is faced with a constitutional moment—this time one in which the international community can choose whether or not to adopt the collective component of RtoP. This component would require collective assistance or even collective action by the international community when individual states are unwilling or unable to meet their own responsibility to protect.[7]

The UN secretary-general's report on implementing RtoP refers to RtoP's "first pillar," or prong, as "the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement."[8] The report further discusses collective responsibility under RtoP as its second ("the commitment of the international community to assist States in meeting [their] obligations") and third ("the responsibility of Member States to respond collectively in a timely

[5] SC Res. 1973, pmbl., para. 4 (Mar. 17, 2011) (emphasis omitted) ("Reiterating the responsibility of the Libyan authorities to protect the Libyan population and reaffirming that parties to armed conflicts bear the primary responsibility to take all feasible steps to ensure the protection of civilians"). While not explicitly referring to the international community's responsibility to protect civilians when a state is unwilling or unable to do so itself, the Security Council implicitly invoked it in authorizing member states, pursuant to Chapter VII, "to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya" (op. para. 4); to establish a no-fly zone over Libyan airspace to help protect civilians from aerial bombardment (op. para. 6); and to enhance the arms embargo (op. paras. 13–16) and asset freeze (op. paras. 17–21) approved in Security Resolution 1970. *See also* SC Res. 1970, pmbl., para. 9 (Feb. 26, 2011) (invoking "the Libyan authorities' responsibility to protect its population" and authorizing an arms embargo, travel ban, asset freeze, and referral of the situation in Libya to the International Criminal Court).

[6] A More Secure World: Our Shared Responsibility: Report of the High-Level Panel on Threats, Challenges and Change, para. 29, UN Doc. A/59/565 (2004) [hereinafter High-Level Panel Report] (emphasis added).

[7] Regardless of whether such a requirement is adopted as new hard law or merely continues to be enhanced as soft law or a policy choice, collective action by the international community (or the threat of it) equips the multilateral system with a powerful tool to protect civilians in the context of twenty-first century conflicts.

[8] Implementing the Responsibility to Protect: Report of the Secretary-General, para. 11(a), UN Doc. A/63/677 (2009) (referring to what is considered the most authoritative text on RtoP, the 2005 World Summit Outcome document, GA Res. 60/1, paras. 138–39 (Oct. 24, 2005)).

and decisive manner when a State is manifestly failing to provide such protection") prongs.[9] Reflecting the concept of complementarity, collective responsibility is a safety net if the first prong is insufficient. Whereas the first prong restates the affirmative obligations of individual states that are now well established under human rights and humanitarian law,[10] consensus on the second (what I will call *collective assistance*) and third (what I will call *collective action*) prongs has not gelled; they do not represent established law.

In this comment I make three arguments. (1) The responsibility of each state to protect its own inhabitants (the first prong), while now firmly established, was realized as part of a wider transformative reinterpretation of the "original bargain" struck in the UN Charter[11]—a bargain that was deferential to state sovereignty, with weak, though important, references to human rights.[12] This paradigm shift—from sovereignty as a right to sovereignty as a responsibility—began at least as early as the 1960s with Security Council action on Rhodesia and South Africa, and continued through the rise of human rights in the latter half of the twentieth century.[13] The UN Charter itself—as the founding document that constituted (and acts as a constitution for) the United Nations—"reflects a hegemonic constitutional moment" and is an "invitation to struggle[.]"[14] Reinterpretation of its text is a creative tool for normative development[15] because the process of formally amending the Charter is arduous.[16] (2) While RtoP's second and third prongs—regarding collective assistance and collective action—are not established legal norms, the Libyan moment demonstrates their normative pull, regardless of their lack of formal legal status. (3) The Libyan case beckons us to recognize the critical role of local actors in calling for intervention—in this instance, in an effort to gain voice in or to eliminate a repressive political system—and adds complexity to our understanding of what sovereignty is, who bears sovereignty, and when sovereignty can be pierced. [17]

[9] *Id.*, paras. 11(b), (c).

[10] For example, the responsibility of individual states to protect their own inhabitants is rooted in the 1949 Geneva Conventions and the Genocide Convention. For broader discussion, see Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?,* 101 AJIL 99, 111–15 (2007).

[11] For a more general conceptual discussion of reinterpreting the UN Charter's "original bargain" on sovereignty, see Anne-Marie Slaughter, *Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform*, 99 AJIL 619, 625 (2005).

[12] *See* Stahn, *supra* note 10, at 112; Jane E. Stromseth, *Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges, in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 77, 85–88 (Lori F. Damrosch ed., 1993) (discussing the Security Council's response to the repression of civilians under Saddam Hussein's regime as an example of this transformation).

[13] See part II below; Stahn, *supra* note 10, at 111–12.

[14] Michael W. Doyle, *Dialectics of a Global Constitution: The Struggle over the UN Charter*, EUR. J. INT'L REL. (epub ahead of print Oct. 17, 2011; quotations from pages 17 and 2, respectively) (noting that the UN Charter shares some characteristics of a constitution).

[15] *Cf.* Bruce Ackerman & David Golove, *Is NAFTA Constitutional?,* 108 HARV. L. REV. 799, 873–97 (1995) (analyzing significant *reinterpretation* of constitutional text on treaty-making power as a constitutional moment). José Alvarez notes that Rosalyn Higgins anticipated that the Security Council would play a role in reinterpreting the Charter. "Despite the sketchy nature of the relevant UN practice on which she could rely, Higgins was remarkably prescient in recognizing that the [Council] had enormous potential for amending, de facto, the Charter and even for more general forms of law-making." JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 185 (2005) (noting also Steve Ratner's distillation of the Council's legitimating "authority, including declarative, interpretative, promotion, and enforcement functions." *Id.* at 189).

[16] UN Charter, Art. 109.

[17] The Libyan opposition was not formally recognized as the government at the time. Traditionally, only recognized governments can consent to intervention, and the collective right to self-defense under Article 51 of the UN Charter can be exercised only on behalf of UN member states. But because the Libyan opposition group, the

Cass Sunstein has noted that norms are "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done."[18] Norms shape expectations to which conduct should conform. "Over time, such norms may develop into legal obligations" or "may remain non-legal, but nonetheless influential understandings that structure the expectations and behavior of actors in the international system."[19] The Libyan moment demonstrates that while RtoP's second and third prongs are not binding law, they represent emerging, influential norms around which diverse members of the international community are coalescing. For RtoP writ large (that is, all three prongs) to become a set of legal obligations, a "process of legalization"[20] would need to clarify how the RtoP principle goes beyond repackaging existing legal rules concerning obligations of individual states (RtoP's first prong) to address the specific obligations of states acting collectively *to assist* individual states in meeting their obligations (the second prong) and *to respond* to serious threats to citizens when individual states with primary responsibility are unwilling or unable (the third prong). This process of legalization would need to address the conceptual difficulties associated with the notion of collective responsibility, such as whom to hold accountable and how to establish and apportion accountability.[21] In view of RtoP's ability to engender compliance pull,[22] this process of legalization, despite its complications and challenges, is likely to continue. In the Libyan case, RtoP's normative pull was reinforced through the sustained political pressure of diplomatic elites and the bottom-up political movement in the country and region, which became a defining characteristic for the Arab Spring.

The international community's multifaceted response to the Libyan crisis—culminating in a military intervention aimed at protecting Libyan civilians—did not occur in a normative vacuum. It built on trends related to RtoP, especially trends toward enhancing the international legal recognition of nonstate actors, in general, and the protection of civilians, in particular.[23]

National Transitional Council, controlled at least some territory, had capacity to conduct some foreign relations, and embraced principles supporting democracy and humanitarian law rules, it was increasingly viewed as the legitimate voice of the Libyan people, even before being recognized as a government. I am grateful to José Alvarez, who helped me develop this point.

[18] Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996).

[19] William W. Burke-White, *Adoption of the Responsibility to Protect, in* JARED GENSER & IRWIN COTLER, THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME 17, 34 (2012).

[20] *Id.* at 30 (also noting that language in Security Council Resolution 1674 reaffirming the operative paragraphs of the 2005 World Summit Outcome Document "falls short of a formal decision requiring that member states implement the Responsibility to Protect," and that "[m]ere recommendations or affirmations of the Council are presumably not intended to create legal obligations").

[21] Stahn, *supra* note 10, at 118 (noting, for example, that "it is difficult to imagine what legal consequences noncompliance by a political body like the Security Council should entail").

[22] THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); *see also* Burke-White, *supra* note 19, at 34–35. Compliance scholars document how hard law (such as stop signs and rules regarding use of force) is often ignored, whereas soft law is often obeyed when viewed as legitimate and fair. *Cf.* CHRIS BRUMMER, *How Legitimate Is International Financial Law?, in* SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY 177 (2012); Dinah Shelton, *Law, Non-law and the Problem of 'Soft Law,' in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000).

[23] These trends include (1) the rise and institutionalization of human rights and humanitarian law, (2) the individuation of international responsibility, including criminal responsibility, and (3) the increasingly networked, global nature of nonstate actors, such as multinational corporations, norm entrepreneurs (for example, nongovernmental organizations and celebrity "diplomats"), and criminal actors (for example, terrorists, illicit traffickers, and modern-day pirates). *See, e.g.*, RUTI G. TEITEL, HUMANITY'S LAW (2011).

Within these trends, RtoP has interacted with concepts such as "the new sovereignty"[24] to test the normative underpinnings of the multilateral system, and has come into play amid increasing demands for political and economic reform in the Middle East and North Africa. Against this background, the United Nations and its member states had to decide whether to stand idly by while Qaddafi murdered his own people[25] or to exercise this new sovereignty by acting *collectively* to heed the calls of Libyans and other interested parties in the region to use military force—the tool of last resort in the civilian-protection tool kit—to protect Libyan civilians. With its embrace of RtoP, the Libyan case bolsters earlier Security Council efforts to address civilian protection, even while it leaves open significant questions regarding when and how the international community, acting collectively, can or should intervene, militarily or otherwise, to protect civilians. While the Council's Libyan resolutions reflected that the collective-responsibility aspects of RtoP represent a policy choice rather than a legal obligation, the Libyan case may yet be part of an ongoing process of legalization. At a minimum, the Libyan case indicates the normative salience underlying the "never again" claim—the assertion that the international community must act when individual states with primary responsibility to protect civilians are unable or unwilling. The Libyan moment has the potential to deepen either the broader, longer-term normative trends in civilian protection or the more discrete normative pull of the international community's collective "responsibility"[26] to protect. The ultimate result will depend, among other factors, on the military intervention's ultimate success in protecting Libyan civilians over the longer run. At the time of this writing, while Qaddafi has been forced from power, the Libyan moment is still a work in progress, and its eventual outcome may shape how RtoP (and military intervention in the name of RtoP) is ultimately viewed and understood. But even as this moment unfolds, it is worth pausing to ask what signs we should be examining to evaluate the significance and implications of the Libya intervention for the development of RtoP.

Part I of this comment sets the stage by outlining the notion of *multilateral constitutional moment* as a thought experiment to analyze the role of international organizations in transforming sovereignty from a right—as enshrined in the UN Charter—into a responsibility. Part II builds upon the conceptual framework provided in part I by delving deeper into the broader transformation in the international law system's approach to sovereignty and civilian protection and into how this wider normative shift, which includes RtoP's first prong, reinterprets the UN Charter's original bargain. Part III describes the Libyan moment in further detail and explores how the Libyan case represents a further deepening of this normative transformation, even while it also exposes the limits of this shift, in which neither the collective assistance (second prong) nor collective action (third prong) component of RtoP has obtained binding legal status—despite their normal pull, as the Libyan moment well illustrates. Part IV looks briefly at the broader implications of the Libyan moment for the way in which the interaction of states in multilateral institutions can help shape the way that states perceive their interests and the

[24] ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) (defining "the new sovereignty" as the right and capacity of states to participate in international institutions that facilitate their members working in concert to achieve certain ends that individual states could once achieve alone).

[25] *See* Anne-Marie Slaughter, *Fiddling While Libya Burns*, N.Y. TIMES, Mar. 13, 2011, at A25.

[26] "Responsibility" is in quotes here to highlight the central dilemma of the failure to see the RtoP's collective-responsibility prongs as legally binding.

norms they are willing to accept. Part V presents concluding observations regarding the broader tectonic shift in the meaning of sovereignty and notes that within this context RtoP has the potential to shape state conduct and the international community's role in civilian protection.

I. CONCEPTUAL FRAMEWORK: A MULTILATERAL CONSTITUTIONAL MOMENT?

The United Nations' response to Libya was a *multilateral moment* as it demonstrated "a situation in which action is required on a particular problem that cannot be solved by any single country."[27] A multilateral *constitutional* moment, for the purposes of this Comment, denotes a multilateral moment that is transformative because "a rising political movement succeeds in placing a new problematic at the center of . . . political life,"[28] facilitating a normative shift with implications for the constitutional underpinnings of the multilateral system—specifically here, the UN Charter. Similarly, a multilateral *normative* moment is one that falls short of transforming the legal meaning of the multilateral system's foundational legal documents but that nonetheless facilitates normative change, as I will further explain in relation to the Libyan case.

During periods of ordinary politics, the people mainly focus on their private interests and use government to advance those interests. By contrast, during constitutional moments the public is deeply engaged in a question of public interest—often one that some mass movement has placed at the center of political life—and (though the translation into international law is less than perfect in this regard) takes a comparatively impartial view in reaching decisions regarding the question.[29] As Mark Tushnet notes, "decisions made during constitutional moments [are] better, in the relevant sense, than decisions made in the course of ordinary politics[, which] explain[s] their normative priority."[30]

If we consider the international law system's approach to sovereignty and civilian protection along a timeline, two transformations can be identified. The first was the UN Charter's transformation of the Westphalian system in the aftermath of World War II. The second, gradual transformation can be seen in the steady rise of the human rights movement and in the consolidation of humanitarian law during the latter half of the twentieth century. During this second stage the UN Charter's Article 39 requirement evolved so that the "threat to peace" trigger for coercive measures expanded to include human rights violations with cross-border implications (discussed further below). The emergence of RtoP's first prong as defining a legal obligation for individual states to protect their own inhabitants can be understood as congruent with, and part of, this broader trend. The Libyan case demonstrates both that this trend is continuing and deepening, and that the second and third prongs of RtoP have yet to be seen as legal obligations.

[27] Mark Quarterman, *Libya as a Multilateral Moment* (Mar. 3, 2011), http://csis.org/publication/libya-multilateral-moment); *see also* CHAYES & CHAYES, *supra* note 24.

[28] Bruce Ackerman, *A Generation of Betrayal?,* 65 FORDHAM L. REV. 1519, 1519 (1996–97) (using this characterization to describe constitutional moment in U.S. domestic constitutional context).

[29] Mark Tushnet, *Potentially Misleading Metaphors in Comparative Constitutionalism: Moments and Enthusiasm* 3, *in* ALTNEULAND: THE EU CONSTITUTION IN A CONTEXTUAL PERSPECTIVE, JEAN MONNET WORKING PAPER 5/04 (Weiler and Eisgruber eds.), *at* http://centers.law.nyu.edu/jeanmonnet/archive/papers/04/040501-04.rtf (characterizing Ackerman).

[30] *Id.*

Although the current temporal moment falls short of being considered a third transformative moment, the Libyan case does include central features associated with such moments. First, it represented part of a "a rising political movement"[31]—in Libya and across the Arab world—that bubbled up from below and drove normative change by demanding government by consent, not by force, and invoking the international community's responsibility to protect civilians who seek to exercise their basic human rights but are met with violent repression. Second, institutional elites—in the United Nations, Libyan foreign service, Arab League, and other key regional institutions—were deeply engaged by the potential normative change concerning RtoP and perceived it as a matter of public interest that went beyond, at least in part, their more narrowly defined, parochial national interests. Indeed, the Libyan moment involved struggle, crisis, and division among existing institutional actors, and ultimately resulted in the Security Council's adoption of Resolution 1973.[32] At the same time, the language used in the Libyan Security Council resolutions suggests that the international community did not view intervention in Libya as legally required; instead, the intervention was seen as permissible pursuant to Chapter VII of the UN Charter.

Even if the intervention is seen simply as reaffirming well-established norms concerning state responsibility, it demonstrates the benefits of maintaining, at least at this juncture, a soft law approach to the collective-responsibility elements of RtoP. As soft law hardens, it can lose its "purported advantages of consensus building through information sharing and persuasion."[33] The fact that Security Council members did not view collective intervention as legally required or as setting a legal precedent helped build consensus toward adopting the Libya resolutions. "It is not that soft law simply becomes hardened in the sense of becoming legally binding. . . . Rather, soft-law processes may become beset by hard, strategic bargaining, thus undermining deliberation, which in turn diminishes the prospects for cooperative outcomes through persuasion and learning—the attributes of soft law processes."[34]

II. Broader Transformation: World War II to the Millennium

The broader transformation in the international law system's approach to sovereignty and civilian protection from World War II through the turn of the century reinterpreted the constitutional underpinnings of the UN Charter, as demonstrated both by Security Council action on civilian protection generally and by the emergence of RtoP specifically.

[31] For the broader point, see Ackerman, *supra* note 28, at 1519.

[32] *Supra* note 5; *see* Ackerman & Golove, *supra* note 15, at 883–90 (discussing the importance of "triggering" votes or referenda in "shift[ing] the balance of perceived legitimacies . . . away from the constitutional status quo and toward the legitimation of a new question" during constitutional moments. *Id.* at 886). In the Libyan moment, RtoP was adopted over threatened vetoes by particular Security Council members who ultimately declined to exercise their vetoes and abstained in the final vote, leading to ten affirmative votes and five abstentions (Brazil, China, Germany, India, and Russia).

[33] Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance,* 94 Minn. L. Rev. 706, 709 (2010).

[34] Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. Rev. 1147, 1149 (2011). I do not want to imply here that soft law agreements and norms never involve hard bargaining; the softness of the outcome sometimes reflects a process of hard bargaining that could not produce a clear consensus or an obligatory commitment.

The Security Council and Civilian Protection

The broader transformation regarding sovereignty and civilian protection in the Security Council dates back at least as early as the 1960s, with sanctions against Rhodesia and South Africa.[35] Subsequently, in the post–Cold War era of the 1990s, with fewer ideological divisions in the Security Council, the Council adopted a series of resolutions authorizing UN operations and coercive measures under Chapter VII to protect civilians in such places as Bosnia, East Timor, Haiti, Iraq, and Somalia. These interventions predated the full articulation of RtoP and represent vital antecedents. The Security Council failed, however, to authorize adequate, timely interventions into the 1994 Rwandan genocide, the mid-1990s ethnic cleansings in Bosnia, and the 1999 repression of Kosovo's ethnic Albanians—which betrayed the "never again" promise to prevent such mass atrocities from recurring. As if chastened by those failures, the Council has more recently authorized civilian protection in contexts such as the Côte d'Ivoire, Democratic Republic of the Congo, and Sudan, especially Darfur. Invoking RtoP in the Libyan moment, the Council built on and deepened the earlier precedents to intervene, while also authorizing measures of a different and more extensive scope than typical peace operations.

These trends represent a reinterpretation of the structure and interrelationships of key Charter provisions concerning human rights (Articles 1 and 55), sovereign equality (Article 2(1)) and independence/nonintervention (Article 2(7)), and Chapter VII powers concerning threats to peace (Articles 39–42). Through the resolutions it adopted over the years on civilian protection, the Security Council began to reinterpret "threat to peace," in particular, as encompassing gross human rights abuses that led to refugee crises and regional instability, and as thus justifying Chapter VII measures.[36] In the case of Libya, the Council invoked concern about refugees in the preambular paragraphs of Resolutions 1970 and 1973;[37] the underlying anxiety was that a massive refugee crisis on Libya's borders with Egypt and Tunisia would be destabilizing for those states' fragile democratic transitions and for regional stability more generally. In this sense, Libya marked an extension of the earlier trend of interpreting or broadening traditional peace and security concerns to encompass human rights and refugee protection concerns.

The United Nations and RtoP

The more discrete evolution of RtoP itself has occurred through a series of UN reports and resolutions, including the influential 2001 report, *The Responsibility to Protect*, issued by the

[35] For a discussion of Security Council action in response to apartheid in South Africa, see, for example, John Dugard, *Sanctions Against South Africa: An International Law Perspective, in* SANCTIONS AGAINST APARTHEID 113, 113–18 (Mark Orkin ed., 1989). Significantly, opposition to apartheid involved a mass (actually, global) political movement, a feature of transformative moments. The global anti-apartheid movement was an important counter to the South African government's claim that its treatment of black South Africans was an internal, domestic matter, rather than a matter of international concern. *Id.* On Rhodesia, see Security Council Resolutions 216 (Nov. 12, 1965) and 217 (Nov. 20, 1965).

[36] *See, e.g.,* Stromseth, *supra* note 12, at 85–88 (discussing how concerns typically thought of as human rights and humanitarian matters, such as "a massive flow of refugees towards and across international frontiers," were seen to be threats to international peace and regional security).

[37] *See supra* note 5.

International Commission on Intervention and State Sovereignty (ICISS).[38] The ICISS report acknowledged that the traditional core of sovereignty was control over "authoritative decisions with regard to the people and resources within the territory of the state."[39] The report also pointed out the UN Charter's commitment to the sovereign equality of states and the "corresponding obligation to respect every other state's sovereignty."[40]

The ICISS report recognized, however, that the state is no longer "the final symbol of independent sovereign statehood and thus the seal of acceptance into the community of nations."[41] A state that has signed the Charter must now "accept[] the *responsibilities* of membership flowing from that signature."[42] Noting that this change involves "no transfer or dilution of state sovereignty," the report saw the change as "a necessary re-characterization . . . : from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties."[43] Thus, the commission suggested that for today's states, "sovereignty implies a dual responsibility: externally, to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the state."[44]

This point is sharpened in the UN secretary-general's 2004 report by his High-Level Panel on Threats, Challenges and Change: *A More Secure World: Our Shared Responsibility*[45] (High-Level Panel Report). Noting the "different world" that we inhabit now (in contrast to the 1945 world that established the United Nations),[46] the report indicated that in "signing the Charter of the United Nations, States not only benefit from the privileges of sovereignty but also accept its responsibilities."[47] Driving home this transformation in the meaning of sovereignty, the report stated, "Whatever perceptions may have prevailed when the Westphalian system first gave rise to the notion of State sovereignty, today it clearly carries with it the obligation of a State to protect the welfare of its own peoples and meet its obligations to the wider international community."[48] While treating these responsibilities as "facts of contemporary life,"[49] the report lamented that "history teaches us all too clearly that it cannot be assumed that every State will always be able, or willing, to meet its responsibilities to protect its own people and avoid harming its neighbours."[50] Invoking what it means to be a UN member today in light of this experience, the report noted that for states unwilling or unable to meet their responsibility to protect, "the principles of collective security mean that some portion of those responsibilities *should be taken up by the international community, acting in accordance with the Charter of the*

[38] THE RESPONSIBILITY TO PROTECT: REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001), paras. 2.24–.27, *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf.

[39] *Id.,* para. 2.7.

[40] *Id.,* paras. 2.7–2.8.

[41] *Id.,* para. 2.11.

[42] *Id.,* para. 2.14 (emphasis added).

[43] *Id.*

[44] Gareth Evans, *The Responsibility to Protect: Rethinking Humanitarian Intervention*, 98 ASIL PROC. 78, 83 (2004) (discussing the ICISS report, as one of the commission's cochairs).

[45] High-Level Panel Report, *supra* note 6.

[46] *Id.*, paras. at 16.

[47] *Id.,* para. 29.

[48] *Id.*

[49] Slaughter, *supra* note 11, at 627.

[50] High-Level Panel Report, *supra* note 6, para. 29.

United Nations."[51] In other words, the report suggested that failure to live up to these responsibilities can subject a state to sanctions.[52]

Commenting on the dramatic shift that this view of sovereignty represents for signatories to the UN Charter, Anne-Marie Slaughter notes that "membership in the United Nations is no longer a validation of sovereign status and a shield against unwanted meddling in a state's domestic jurisdiction."[53] Instead, "states themselves have an instrumental rather than an intrinsic value."[54] As the High-Level Panel Report pointed out, "the Charter of the United Nations seeks to protect all States, not because they are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens."[55] Pursuing this line of argument, Slaughter asserts that "human security trumps state security," that "sovereignty attaches to a state as a *means* of ensuring the security of its citizens," and that "sovereignty misused, in the sense of failure to fulfill this responsibility, could become sovereignty denied."[56]

Security Council Resolution 1973 itself hints at a more contested situation involving what Mark Quarterman describes as "a fundamental disagreement." Voting against the resolution, some Security Council members saw sovereignty as "a firm divide, a wall that should prevent external actors from meddling in the internal affairs of states." Voting in favor of the resolution, other members saw sovereignty as "contingent on how a government treats its citizens." Still others, while abstaining, held the former view of sovereignty as a firm divide.[57] These abstentions (in lieu of a vote against or a veto) are telling, for they suggest that the resolution fits the model of a transformative moment in which resisting actors acquiesce or drop their objections in the face of a political groundswell.[58]

Slaughter presents a persuasive analysis that, in light of today's reality that sovereignty is a responsibility, the Charter itself becomes a dynamic document or "change agent, providing a collective instrument for holding all members to their word."[59] The High-Level Panel Report reflects, in Slaughter's view, "a new security consensus" that "rests on solidarity more than self-defense, an awareness of common threats, hence common responsibilities." In addition, however, the report "actually builds on the original bargain enshrined in [Article 2(7)]," which clarifies that "[n]othing in the Charter allows UN members to infringe on the domestic jurisdiction of their fellow states *except as authorized by the Security Council*."[60] Notably, Slaughter argues, though the High-Level Panel Report expands the substantive jurisdiction, so to speak, for intervention into countries to protect civilians, it arguably tightens the procedural requirement of requiring Security Council authorization.[61] In so doing, the report can be seen

[51] *Id.* (emphasis added).

[52] Slaughter, *supra* note 11, at 620.

[53] *Id.*

[54] *Id.* at 628.

[55] High-Level Panel Report, *supra* note 6, para. 30.

[56] Slaughter, *supra* note 11, at 628.

[57] Mark Quarterman, *What Libya Tells Us About the Future of Multilateralism, in* GLOBAL FORECAST 2011: INTERNATIONAL SECURITY IN A TIME OF UNCERTAINTY 64, 64 (Craig Cohen & Josiane Gabel eds., 2011).

[58] While this voting pattern does not necessarily imply that the abstainers agreed normatively with RtoP, it is typical of situations in which transformations occur; despite potential objections, it is difficult to resist the movement for change. *Cf.* Ackerman & Golove, *supra* note 15, at 885–86, 895–96.

[59] Slaughter, *supra* note 11, at 628.

[60] *Id.* at 625.

[61] *Id.* at 626.

as laying the groundwork for reconceiving core normative underpinnings of the UN Charter and, more broadly, the international legal system itself.[62]

Following the 2004 publication of the High-Level Panel Report, RtoP was repeatedly reaffirmed in a variety of additional UN reports, documents, and resolutions. In the run-up to the 2005 High-Level Plenary Meeting of the UN General Assembly (World Summit), the secretary-general's report *In Larger Freedom: Towards Development, Security and Human Rights for All,*[63] recommended that states embrace RtoP, at least in principle. Then, the 2005 World Summit Outcome Document—adopted at a historic gathering of heads of state and government—reached consensus on the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.[64]

While the Libya crisis was the first in which the Security Council invoked RtoP in authorizing military intervention *by UN member states*, the Council had referenced RtoP on at least two prior occasions. In a 2006 resolution on protecting civilians in armed conflict, the Council "*[r]eaffirm[ed]* the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[65] Later that year, in its resolution on the Darfur conflict in Sudan, the Council again affirmed those same two paragraphs.[66] While the Darfur resolution did not authorize *member states* to intervene or use force as Resolution 1973 on Libya does, the Darfur resolution did authorize the UN Mission in Sudan "to use all necessary means . . . to ensure the security and freedom of movement of United Nations personnel [and] humanitarian workers, to prevent disruption of the implementation of the Darfur Peace Agreement by armed groups, without prejudice to the responsibility of the Government of the Sudan, [and] to protect civilians under threat of physical violence."[67]

Even though these reports and resolutions are indicative of the normative shift under way in the meaning of sovereignty, there has been resistance by countries who have expressed concerns about infringements on state sovereignty.[68] Thus, legalization of RtoP has been limited to the first prong, which rearticulates the responsibility that each individual state already has under human rights law to protect its inhabitants.

Implicit within RtoP are certain subsidiary requirements—in particular, a state's responsibilities to prevent, react, and rebuild. First and foremost, the ICISS report suggested that

[62] *Id.* at 620. Although the report can surely be understood in this way, one should also note that the Security Council itself previously confronted numerous situations in which it could well have expanded, but did not expand, its normative reach by authorizing intervention.

[63] UN Doc. A/59/2005 & annex (2005).

[64] 2005 World Summit Outcome, *supra* note 8, paras. 138–39.

[65] SC Res. 1674, op. para. 4 (Apr. 28, 2006).

[66] SC Res. 1706, pmbl., para. 2 (Aug. 31, 2006).

[67] *Id.,* op. para. 12(a); *see also* Early Warning, Assessment and the Responsibility to Protect: Report of the Secretary-General, UN Doc. A/64/864 (2010).

[68] *See* Burke-White, *supra* note 19, at 32 (noting resistance from Cuba, Ecuador, Iran, Nicaragua, Sudan, Syria, and Venezuela). For a more in-depth discussion of various state views, see UN Press Release, More Than 40 Delegates Express Strong Skepticism, Full Support as General Assembly Continues Debate on Responsibility to Protect (July 24, 2009), *at* http://www.un.org/News/Press/docs/2009/ga10849.doc.htm. The very fact of this resistance makes it all the more significant that the Security Council invoked RtoP and authorized use of force in Libya. Since the Libya intervention, however, Brazil has introduced the notion of "responsibility while protecting," emphasizing, inter alia, military intervention as a last resort and the proportionate use of force if force is necessary. *See* Letter Dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations Addressed to the Secretary-General, UN Doc. A/66/551–S/2011/701.

RtoP includes a *responsibility to prevent* and that "[p]revention is the single most important dimension of the responsibility to protect."[69] Second, in exercising the *responsibility to react*, "[w]herever possible, coercive measures short of military intervention ought first to be examined, including in particular various types of political, economic and military sanctions."[70] Third, a *responsibility to rebuild* includes "provid[ing], particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert."[71]

Further, because "[m]ilitary intervention for human protection purposes must be regarded as an exceptional and extraordinary measure,"[72] the ICISS report indicated a *just cause threshold*, which limits military intervention to situations involving large-scale loss of life or "ethnic cleansing,"[73] and suggested that all interventions be conducted under the *right authority*, which it considered to be that of the UN Security Council. The report also presented four "precautionary principles":

> A. *Right intention:* The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned.
>
> B. *Last resort:* Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded.
>
> C. *Proportional means:* The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection objective.
>
> D. *Reasonable prospects:* There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.

At the time that Security Council Resolution 1973 authorized military intervention in Libya, it appeared that the preceding conditions (six in all) were met. Particularly relevant in the Libyan case was that numerous Libyan officials and ambassadors to the United Nations and to various countries defected from Qaddafi or otherwise withdrew support, called for help, and stood on the side of the Libyan people against the regime (as discussed in greater detail in part III). This undercut any tendency to rely on more traditional, state-oriented conceptions of sovereignty, broke the inertia, and nudged various organizations—including the Arab League and the UN Security Council—into action.[74]

[69] THE RESPONSIBILITY TO PROTECT, *supra* note 38, at xi.

[70] *Id.,* para. 4.3.

[71] *Id.* at xi.

[72] *Id.,* para. 4.18.

[73] *Id.,* para. 4.19.

[74] This reality—along with the fact that at least two of the conditions identified above (Security Council authorization and arguably reasonable prospects) are not at present clearly met in Syria—may account, in part, for the different approach that the international community has taken so far to Syria and Libya. While a fuller comparison is beyond the scope of this comment, RtoP can be pursued through means other than military intervention.

III. THE LIBYAN MOMENT

The broader transformation in the international law system's approach to sovereignty and civilian protection described above—which included legal entrenchment of RtoP's first prong on individual state responsibility—helped set the stage for the Libyan case. I now examine how the Libyan moment deepened this normative trend, even though it also exposed the limits of this shift regarding the collective-assistance components of RtoP.

The Libyan moment has occurred against the backdrop of the Arab Spring of 2011, the wave of mass demonstrations of people insisting on their rights to political participation and economic opportunity, as asserted against dictatorships across the Middle East and North Africa. Similar to the way in which Rosa Parks ignited an important chapter in the U.S. civil rights movement, an ordinary person sparked the Arab Spring: in December 2010, the Tunisian street vendor Mohamed Bouazizi, following the confiscation of his produce cart, set himself on fire to protest the economic hardship, harassment, and humiliation inflicted on him by corrupt officials in a country ruled by a dictator.[75] His self-immolation triggered the "Jasmine Revolution" protests in Tunisia, which ultimately forced Tunisian President Zine El Abidine Ben Ali to step down, paving the way for protests in Egypt (leading to the ouster of Egyptian president Hosni Mubarak) and protests in other countries across the region, including in Libya beginning in February 2011.

Although the Libyan protests began peacefully, Qaddafi violently and ruthlessly suppressed the opposition, prompting the opposition to take up arms to oppose him. By mid-March 2011, after some initial gains, the rebels experienced a series of reversals. On March 17—with his army (including foreign mercenaries) perched on the outskirts of Benghazi, the Libyan rebel stronghold—Qaddafi asserted that he was determined to search for opponents there "house by house, room by room."[76] He said he would show "no mercy" for opponents who refused to put down their arms.[77]

In response to Qaddafi's brutal suppression of what began as peaceful protests, various senior Libyan officials—including cabinet officials, military officials, and diplomats—either resigned from their positions or otherwise renounced the Qaddafi regime.[78] And as the army

[75] As President Obama noted in his May 19, 2011, speech on the changes sweeping the Middle East and North Africa:

> There are times in the course of history when the actions of ordinary citizens spark movements for change because they speak to a longing for freedom that has been building up for years. In America, think of the defiance of those patriots in Boston who refused to pay taxes to a King, or the dignity of Rosa Parks as she sat courageously in her seat. So it was in Tunisia, as that vendor's act of desperation tapped into the frustration felt throughout the country.

Text: Obama's Mideast Speech, N.Y. TIMES, May 19, 2011, *at* http://www.nytimes.com/2011/05/20/world/middleeast/20prexy-text.html?.

[76] *Military Action Against Qaddafi Is Backed by U.N.*, N.Y. TIMES, Mar. 18, 2011, at A1.

[77] *Id.* Even assuming that Qaddafi had intended to distinguish armed combatants from civilians, "no mercy" for combatants violates common Article 3 of the 1949 Geneva Conventions. Thanks to Michael Doyle for helpful clarification in this context.

[78] The diplomats included the Libyan ambassadors to regional organizations such as the Arab League, European Union, and United Nations, and to Bangladesh, Belgium, China, France, India, Indonesia, Malaysia, Nigeria, Poland, Portugal, Sweden, and the United States. As regards Libya's ambassador to the United States, see Marc Fisher, *Diplomat Recalls the 'Strange' Gaddafi: Ambassador Aujali Worked Years for Dictator Until Denouncing His Cruelty*, WASH. POST., Dec. 25, 2011, at C1 (explaining that "five days after Libyans first took to the streets for a Day of Rage protest against the regime, [Libyan U.S. ambassador Ali] Aujali quit [and] went on TV

closed in on Benghazi, the Libyan opposition called for outside assistance, including a ban on flights (a no-fly zone) over Libyan airspace, in light of fears that Qaddafi would target civilians in air strikes, despite the resistance of at least some Libyan pilots to undertaking such strikes.[79] On February 25, 2011, in a volte-face at the Security Council, Libya's UN ambassador Mohamed Shalgham denounced Qaddafi, to whom he had referred only days earlier as "my friend." Shalgham explained that while he initially "could not believe" that Qaddafi's troops were firing on the protesters, he had then actually seen Qaddafi call for the protests to be put down by force. Shalgham was therefore urging that the United Nations impose sanctions. Justifying his change of heart, he noted that those in the opposition "are asking for their freedom" and "are asking for their rights." At a Security Council session in which his own deputy wept, Shalgham pointed out that initially the opposition "did not throw a single stone and they were killed," and then stated, "I tell my brother Gaddafi: Leave the Libyans alone."[80] Shalgham said that the United Nations must intervene by imposing sanctions against Qaddafi, members of his family, and the military.[81] By the end of the next day, February 26, in an extraordinary Saturday night session that was broadcast live, the Security Council adopted Resolution 1970 pursuant to Chapter VII of the Charter. In addition to imposing on Libya an arms embargo, travel ban, and asset freeze, the resolution authorized an International Criminal Court referral for the situation in Libya. While invoking RtoP, this resolution did not authorize use of force to protect civilians.

On the same day that the Libyan ambassador to the United Nations sided with the Libyan people over the Libyan regime and called for sanctions, the Libyan ambassador to the UN Human Rights Council (HRC) "emphasized that the Libyan mission had decided to represent and serve the Libyan people and not the regime."[82] Following pleas for help from the ambassador, the HRC voted to recommend that the UN General Assembly suspend Libya's membership in the HRC. The General Assembly did so on March 1, 2011. As noted earlier, the courage of senior Libyan diplomats in standing up against Qaddafi helped moved the normative focus from the conventional state-centered notion of sovereignty to the more fundamental, democratic question of who bears sovereignty.

to say he would no longer serve a government that used deadly force against people peacefully expressing their views").

[79] Christopher Scicluna & Diana Abdallah, *Two Libyan Fighter Pilots Defect, Fly to Malta,* Feb. 21, 2011, *at* http://www.reuters.com/article/2011/02/21/us-libya-protests-malta-idUSTRE71K52R20110221.

[80] Edith M. Lederer, *UN Agrees to Meet Saturday on Libya Sanctions*, Feb. 26, 2011, *at* http://www.guardian.co.uk/world/feedarticle/9519101.

[81] Bill Chappell, *Libyan Ambassador Denounces Gadhafi at U.N.* (Feb. 25, 2011), *at* http://www.npr.org/blogs/thetwo-way/2011/02/25/134069630/libyan-ambassador-denounces-gadhafi-at-u-n?ft=1&f=1001.

[82] Immediately before the Human Rights Council adopted a resolution criticizing Libya,

> [t]he delegation from Libya asked for a moment of silence for all those who had died in the country in the past weeks. Libya asked the members of the [Organisation of Islamic Cooperation] to stand for a moment to read from the Koran in memory of the martyrs that died in the 15 February revolution. Libya said that history had shown that the will of the people was invincible and the memory of people was stronger than those who bore hatchets. The Libyan people, the grandchildren of the heroes of the Italian fascist revolution, were now writing a new chapter in the struggle against oppression. The delegation emphasized that the Libyan mission had decided to represent and serve the Libyan people and not the regime.

UN Press Release, Human Rights Council Passes Resolution on Libya in Special Session (Feb. 25, 2011), *at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10768&LangID=E.

In the wake of Resolution 1970, a diverse array of regional and other multilateral organizations issued critical statements and resolutions on the situation in Libya—with many of the later ones relying on and citing earlier ones. The result was a nested, intermeshed, dialogic ferment that underscored the normative shift and created an echo effect among regional organizations. Significantly, statements or resolutions were issued by regional organizations geographically situated on all sides of Libya, as presented below in the rough sequence in which they were made. NATO's secretary general "call[ed] on the Libyan authorities to stop the repression of unarmed civilians."[83] The European Union's high representative for foreign affairs and security policy, Catherine Ashton, issued a declaration that "strongly condemn[ed] the violence and use of force against civilians, . . . deplor[ed] the repression against peaceful demonstrators which has resulted in the deaths of hundreds of civilians," and called for accountability regarding this "brutal aggression and violence against civilians."[84] The African Union "underscor[ed] the legitimacy of the aspirations of the Libyan people for democracy, political reform, justice, peace and security, as well as for socio-economic development."[85] The Gulf Cooperation Council "demanded that "the Security Council take the steps necessary to protect civilians, including a no-fly zone in Libya."[86] While not explicitly invoking RtoP, the secretary general of the Organisation of Islamic Cooperation (OIC) referred to the international community's responsibility to protect civilians by announcing that the organization "aligned with those calling for a no-fly zone over Libya with a view to *protecting civilians* from air strikes" and "*called on the Security Council to assume its responsibility in this regard*."[87]

The pronouncement that turned the tide was the historic resolution issued by the Arab League. While the league did not explicitly invoke RtoP, it unmistakably invoked the UN Security Council's "responsibilities" to protect Libyan civilians. Building on calls that were growing in the United Nations and in the OIC to protect civilians through a no-fly zone and other measures, the Arab League

> *call[ed] on the Security Council to bear its responsibilities* towards the deteriorating situation in Libya, and to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure that allows the *protection of the Libyan people* and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighboring States[.]"[88]

[83] Statement by the NATO Secretary General on Events in Libya (Feb. 21, 2011), *at* http://www.nato.int/cps/en/natolive/news_70731.htm?selectedLocale=en.

[84] European Union Declaration by High Representative for Foreign Affairs and Security Policy, Catherine Ashton, on Libya (Feb. 23, 2011), *at* http://www.eu-un.europa.eu/articles/fr/article_10704_fr.htm.

[85] Communique of the 265th Meeting of the Peace and Security Council of the African Union, AU DOC. PSC/PR/COMM.2(CCLXV) (Mar. 10, 2011), *at* http://www.au.int/en/sites/default/files/COMMUNIQUE_EN_10_MARCH_2011_PSD_THE_265TH_MEETING_OF_THE_PEACE_AND_SECURITY_COUNCIL_ADOPTED_FOLLOWING_DECISION_SITUATION_LIBYA.pdf.

[86] Kareem Shaheen, *GCC Wants No-Fly Zone over Libya* (Mar. 8, 2011) *at* http://www.thenational.ae/news/uae-news/politics/gcc-wants-no-fly-zone-over-libya.

[87] Organisation of the Islamic Conference [now Organisation of Islamic Cooperation], *Ihsanoglu Support No-Fly Decision at OIC Meeting on Libya, Calls for an Islamic Humanitarian Programme in and Outside Libya* (Mar. 8, 2011) (quoting Ekmeleddin Ihsanoglu, secretary general of the organization) (emphasis added) (on file with author).

[88] The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in Its Extraordinary Session on the Implications of the Current Events in Libya and the Arab Position, Res. No. 7360, op. para. 1 (Mar. 12, 2011) (emphasis added).

The Arab League resolution also asserted that the league would "*cooperate and communicate* with the Transitional National Council of Libya" as representing the Libyan opposition.[89] The resolution was a radical departure for the Arab League, which had never before sided with people over a regime in the region, much less called for military intervention to protect civilians in an Arab country. The league's action was also significant in that it explicitly took note "of the ongoing consultations and communications in the Security Council, the statements issued by the Gulf Cooperation Council, the European Union and the African Union,"[90] embraced the UN secretary-general's appointment of a high-level envoy to follow up on the humanitarian situation in Libya, and vowed to coordinate with those entities as well as with the OIC.[91]

Remarkably, as quoted above, the Arab League and OIC referred explicitly to the Security Council's responsibilities, including (in the case of the OIC statement) the Council's responsibility *to protect civilians*. While neither organization explicitly invoked RtoP, the reference to the Council's "responsibilities" reflected the normative appeal of collective responsibility under RtoP. Within days, the Council adopted Resolution 1973, which invoked RtoP and, under Chapter VII of the UN Charter, authorized limited military invention in Libya and measures to enhance those previously authorized by Resolution 1970. Following the Arab League's lead, in particular, Resolution 1973 authorized a no-fly zone over Libyan airspace to help protect civilians from aerial bombardment and authorized member states to take all necessary measures to protect civilians and civilian-populated areas under threat of attack in Libya.

In both Resolutions 1970 and 1973, the Security Council recalled the responsibility of the Libyan authorities to protect the country's population,[92] and Resolution 1973 authorized UN member states collectively to protect Libyan civilians insofar as Libya was failing to do.[93] Neither resolution, however, explicitly or implicitly indicated a legal obligation compelling the international community to protect civilians—which reflects the limits of RtoP's collective-responsibility prongs despite its obvious, widespread normative appeal. In addition to recalling the condemnations by the African Union, League of Arab States, and the OIC's secretary general,[94] Resolution 1973 specifically took note of the Arab League's call for imposing a no-fly zone and establishing safe areas.[95] It repeatedly recognized "the important role of the League of Arab States"—for example, "in matters relating to the maintenance of international peace and security in the region."[96] More generally, Arab states took a leadership role in supporting the passage and enforcement of Resolution 1973; Lebanon was a leading cosponsor of the Resolution; and Qatar and the United Arab Emirates participated in the NATO-led coalition that carried out the military intervention authorized by the resolution. This interwoven effort by a diverse set of states and international and regional organizations over a compressed time

[89] *Id.,* op. para. 2.
[90] *Id.*, pmbl., para. 3.
[91] *Id.,* pmbl., paras. 3, 4; *id.*, op. para. 4.
[92] SC Res. 1970, *supra* note 5, pmbl., para. 9; SC Res. 1973, *supra* note 5, pmbl., para. 4.
[93] SC Res. 1973, op. para. 4.
[94] *Id.,* pmbl., para. 10.
[95] *Id.,* pmbl., para. 12.
[96] *Id.,* op. para. 5.

frame underscored the normative shift in favor of both civilian protection, in general, and RtoP, in particular.[97]

IV. The Institutional Dimension of the Libyan Moment

The institutional dimension of the Libyan case concerns the central way that multilateral institutions—international and regional organizations working in tandem—shaped states' perceptions of their identities and interests, and ultimately of the norms that they were willing to accept.[98] In the Libyan moment, the interaction of multilateral institutions incentivized states to engage with a question of broad public interest, in lieu of a narrower focus on immediate national interests, with the Security Council merely advancing those interests.

While preventing mass atrocities had previously been seen as the morally "right" course of action, in this moment it was also seen as the hard-nosed, strategically smart course of action.[99] Even for those states whose immediate, vital national interests were not implicated, it was ultimately in their interests, more broadly construed, to prevent Qaddafi from slaughtering Libyan civilians. Intervention had the potential to avert a refugee crisis, particularly for Europe and bordering countries in North Africa; to prevent destabilizing the region, especially neighboring Egypt and Tunisia, where fragile transitions were under way; and to create disincentives for other states to follow the repressive, Libyan path of squelching reform, rather than the Egyptian/Tunisian path to democratic elections in the Arab Spring.

The Libyan moment suggests that states' identities and interests are not static or self-evident.[100] Their interests change in the course of their interactions with each other. For example, over a period of several days, Libyan officials themselves—notably, numerous ambassadors who represented Libya in other states and in multilateral forums—went from defending Qaddafi within international organizations to denouncing him and siding with the Libyan people who had risen up against him. Additionally, while the Arab League had rarely criticized its own members, Secretary General Amr Mousa (an Egyptian, whose own country was itself wrestling with and trying to justify its own approach to the Arab Spring) condemned Libya's human rights violations. "[I]n rare criticism of one of its members, [the Arab League] called

[97] Other related multilateral responses to the Libyan crisis include the appointment of a special envoy on Libya by the UN secretary-general, the establishment of an independent, international commission of inquiry by the UN Human Rights Council, and a probe undertaken by UN Special Rapporteur on Torture Juan Mendez to investigate allegations that Qaddafi's forces abducted, tortured, and executed opponents.

[98] There may be a tension between the understanding of a broader constitutional or transformative moment as one involving impartiality—that is, an ability to act without regard to one's own interests (discussed in part I above)—and the argument made here that the multilateral institutions help states understand their own (long-term) interests differently so as to incentivize collective action (for example, in the Libyan context). Thanks go to Vicki Jackson for noting this theoretical tension.

[99] This point draws on the notion of "smart power." *See, e.g.,* Suzanne Nossel, *Smart Power,* 83 FOREIGN AFF. 131, 131–41 (2004); JOSEPH S. NYE JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS xiii, 32, 147 (2004).

[100] Though nothing presented here depends upon a constructivist approach to international relations, that approach provides one potential way of understanding or interpreting the argument presented here. On a constructivist approach, states' interests "are not just 'out there' waiting to be discovered; they are constructed through social interaction." MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 2 (1996). In response to realist approaches, constructivists emphasize that "the fundamental structures of international politics are social rather than strictly material . . . and that these structures shape actors' identities and interests." Alexander Wendt, *Constructing International Politics*, 20 INT'L SECURITY 71, 71–72 (1995); *see also* John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855 (1998).

for an immediate halt to the violence in Libya, and said Gadhafi's government must respond to the 'legitimate' demands of the Libyan people."[101] This identification by the Arab League with the Libyan people's demands turned on a growing sense that Qaddafi was becoming increasingly isolated and that they, the Arab League members, wanted to be on what was gradually being viewed as the right side of history. As conditions on the ground were rapidly deteriorating in Libya, and in response to Libyans' pleas of assistance, the Arab League's call on a stalled UN Security Council to take action (in particular, by imposing a no-fly zone) prompted Council action. The Council acted, at least in part,[102] from a broader sense of what was in the collective interest of the Council, the region, and the world.

Because of the institutional dynamics at work in the Libyan moment, states were able to embrace the broader public interest as within their national interests, giving priority to the norm of civilian protection over Libya's claims to sovereignty. Thus, there is an important feedback loop between the normative and institutional dimensions of the Libyan moment.

V. Conclusion

The Libya intervention marked the first time that the Security Council invoked RtoP to approve the use of force by UN member states. The Council's embrace of RtoP—at least in relation to Libya's responsibility to protect its own population—reflects a deepening of the normative transformation already under way in the international law system's approach to sovereignty and civilian protection—a shift that reinterprets the UN Charter's original bargain. This broader, tectonic shift reinterprets the structure and relationship of key Charter provisions—and, in particular, of what constitutes a "threat to peace" in the context of Article 39. The Council's groundbreaking invocation of RtoP in approving the use of force in Libya represents a deepening of the earlier trend, though stops short of indicating that the international community is legally obligated to intervene when a state is unable or unwilling to protect its own citizens.

The Security Council's invocation of RtoP may be no more than one more normative development within the Council's own emerging jurisprudence on sovereignty and civilian protection—an overarching shift that has been in progress for some time. Alternatively, the Council's action may represent the beginning of a new and further normative shift that moves beyond questions concerning each individual state's obligation to protect its own population to questions that specifically concern the international community's broader obligation to protect civilians.[103] Regardless of whether the "responsibility to protect" is a smaller

[101] *Gadhafi Vows to Fight to "Last Drop of Blood,"* NPR, Feb. 22, 2011, *at* http://www.npr.org/2011/02/23/133958400/witnesses-report-bodies-in-streets-of-libyan-capital (referring to a February 22, 2011, Arab League statement).

[102] Because of the historical importance of this Libyan moment, I am trying to bring into focus one particular, core political dynamic. Other factors were at work. Of special note was that Qaddafi had fallen out of favor with Arab states several years earlier. Even so, African states, as well as the African Union, were more skeptical of intervention, partly in view of Qaddafi's longtime cultivation of African states. South Africa quickly backpedaled on its positive Security Council vote following Resolution 1973. Since then, China, India, and Russia have expressed concerns that the Libya intervention went beyond the mandate. As a result, some observers note that the aftermath of the Libyan moment and its invocation of RtoP have compromised efforts to find unity on Syria. Thanks to Michael Doyle for encouraging me to note this broader context.

[103] It is also possible that the case of Libya is an aberration, but such a claim seems implausible since it will be hard to put the genie of RtoP back in the bottle. Colum Lynch, *The U.N.'s Tough Stand on Qaddafi: Exception or*

normative shift within the broader, evolving meaning of sovereignty or a deeper, more existential shift that follows and builds on earlier trends, RtoP's normative weight has the potential to shape state conduct and the international community's role in civilian protection. In fact, for now its inchoate legal status may offer states greater ability to build support for collective assistance and collective action.[104]